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IOWA, NORTH DAKOTA, SOUTH DAKOTA

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AMENDMENT TO RULES

SUPREME COURT OF WISCONSIN *

Adopted January 11, 1913

Rules 17, 22, 23, 24, 39, 40, 41 and 62 of the Supreme Court are amended so as to read as follows:

RULE 17. At least twenty days before the time set for argument of the first assignment of cases on any calendar, the clerk shall send to every attorney appearing in the causes on the calendar for the term a list of such causes as arranged on the calendar.

RULE 22. On the August calendar shall be placed all causes in which the record shall have been filed before August 1st, and on the January calendar all causes in which the record shall have been filed before January 1st. Any case may be placed upon the calendar or advanced for hearing at any time in which it is shown that the interests of the state, the people at large, or of any municipality are affected, or an important constitutional question is seriously raised, or an extraordinary exigency is involved, and it is further shown that delay would be prejudicial to the accomplishment of justice. No appeal shall be placed upon the calendar unless the requirements of this rule be complied with, except as provided in rule 62.

RULE 23. Actions and proceedings brought under the original jurisdiction of this court, commenced prior to either of the dates fixed for the filing of records in the last preceding section, shall be placed upon the proper calendar.

RULE 24. Within ten days after each of the dates named in rule 22 for the filing of records the clerk shall prepare and cause to be printed a calendar, arranging all civil causes by circuits, and placing first in order the circuit next succeeding in number to the first on the previous calendar, and arranging the criminal causes in their order at the foot.

RULE 39. A motion for a rehearing shall not be argued orally, but shall be submitted on printed arguments, of which fifteen copies shall be furnished to the clerk.

RULE 40. The printed arguments in support of the motion shall be served and filed within forty days after the decision, and in default thereof the motion shall be deemed to have been waived.

RULE 41. The printed arguments in opposition to the motion shall be served and filed within fifty days after the decision, at which date the motion shall be deemed to have been submitted.

RULE 62. Where, through mistake, inadvertence, or excusable neglect the return upon appeal in any cause shall not be filed within the time limited by section 24 of these rules, the court may, upon motion noticed for hearing on the first day of the term, place the cause on the calendar, on such terms as may be just.

The amendments to rule 40 and 41 shall not take effect until July 1, 1913.

* For rules as previously adopted, see 108 N. W. vi.

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**COOK v. BOARD OF ELECTION COM'RS
OF CHEBOYGAN COUNTY.**

(Supreme Court of Michigan. Nov. 2, 1912.)

**1. ELECTIONS (§ 126*)—PRIMARY ELECTIONS—
QUALIFICATION OF CANDIDATES—ENROLLED
MEMBER OF POLITICAL PARTY—EFFECT.**

Under Primary Election Law (Pub. Acts 1911, No. 279) § 41, providing that all votes cast for any candidate on the ballots of one political party when such candidate is enrolled as a member of another party shall not be counted, and making it unlawful to print on the official election ballot the name of any candidate unless selected under authority of the act, one enrolled as a member of the Republican party may not be selected as a candidate of the National Progressive party, and votes cast for him may not be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

2. MANDAMUS (§ 10*)—RIGHT TO RELIEF.

Mandamus is not a writ of right, and is allowed only in furtherance of justice, and is not allowed unless relator shows a clear legal right thereto.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 37; Dec. Dig. § 10.*]

Certiorari to Circuit Court, Cheboygan County; Frank Shepherd, Judge.

Mandamus by Charles F. Cook against the Board of Election Commissioners of Cheboygan County. There was an order granting the writ, and defendant brings certiorari. Reversed, and petition for writ of mandamus dismissed.

Argued before MOORE, C. J., and STEERE, McALVAY, STONE, and OSTRANDER, JJ.

William N. Cross, of Cheboygan, for relator. Victor D. Sprague, of Cheboygan, for respondent.

STONE, J. The writ of certiorari was issued out of this court to review the action of the circuit court in granting a writ of mandamus against the board of election commissioners of Cheboygan county.

Charles F. Cook, the relator, was enrolled as a Republican in the city of Cheboygan under the Primary Election Law. At the recent primary election, he received eight votes on the National Progressive ticket for the office of judge of probate of Cheboygan county; that being the highest number of votes

cast for any person for that office on that ticket. The board of county canvassers declared him nominated, and certified his name to the board of election commissioners of said county. The board of election commissioners refused to place his name on the election ballot on the ground that, having been enrolled as a Republican, the votes cast for him on the National Progressive ticket could not be counted under section 41 of the Primary Election Law (section 41, Act 279, Pub. Acts of 1911), and that he is not entitled to have his name placed on the election ballot. Mandamus was brought in the circuit court against the board of election commissioners to compel such board to place the name of Charles F. Cook on the election ballot, and the circuit court granted the writ. In its order granting the writ of mandamus appears the following: "This matter comes on to be heard on petition and answer, and after hearing arguments for the respective parties by their counsel, it appears to the court, and the court determines that relator never was enrolled as a member of the National Progressive party, but was, and is, enrolled as a Republican." It is provided in section 41, supra, as follows: "All votes cast for any candidate upon the ballots of one political party, when such candidate is enrolled as a member of another party, shall not be counted. * * * It shall be unlawful for any board of election commissioners to print on any official election ballot prepared for the use of voters at any November, spring, charter or other election the name of any candidate, unless such candidate was selected under authority of this act."

[1] Upon the above statement of facts, and the finding of the circuit court, and in view of the statute just quoted, the important question is whether the relator was entitled to the writ of mandamus against the board of election commissioners. We must answer this question in the negative. It must be held that the relator was not selected as a candidate of the National Progressive party under authority of the act, because he was enrolled as a Republican, and votes cast for him could not be counted.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 138 N.W.—1

[2] It was held by this court at an early day that, to entitle a relator to the writ of mandamus, he must show a clear legal right thereto. *People v. Circuit Judge*, 19 Mich. 296-299. We have also held that the writ of mandamus is not a writ of right, and is not allowed to a party who is at fault or seeking to do an illegal thing. *Mabley v. Judge of Superior Court*, 41 Mich. 31, 1 N. W. 985. We have also said that the writ will be allowed only in furtherance of justice, and upon a proper case presented. *Hale v. Risley*, 69 Mich. 596, 37 N. W. 570. It has been held that the writ will not be granted to accomplish a confessedly illegal purpose, even though the officer against whom it is invoked is charged with an express duty under the statute. *Supervisors v. Tp. of Mentor*, 94 Mich. 386, 54 N. W. 169. We have held that the writ will not issue to enable a relator to accomplish a violation of the statute. *Life Insurance Co. v. Commissioner of Insurance*, 128 Mich. 85, 87 N. W. 126. In *MacKinnon v. Auditor General*, 130 Mich. 552, 90 N. W. 329, this court held that the writ will not issue unless it be made to appear that justice requires it. See, also, *Preferred Tontine Mercantile Co. v. Secretary of State*, 133 Mich. 395, 95 N. W. 417; *Rose v. Common Council of Ann Arbor*, 134 Mich. 102, 95 N. W. 1133; *Fletcher & Sons v. Circuit Judge*, 136 Mich. 511, 99 N. W. 748; *Fuchs v. Common Council of Grass Lake*, 166 Mich. 569-575, 132 N. W. 96. This rule is as applicable to the circuit court as to this court, as has been frequently held.

In view of the statute which we have quoted and of the fact that all votes cast for the relator upon the ticket indicated were illegal, and should not have been counted, can it be said that he has any legal right to the writ of mandamus? We think not. To issue the writ under such circumstances would be to offer a premium for a violation of this express provision of the statute. By the conceded facts in this case the relator has shown himself to be without legal right. The writ of mandamus should not have been issued.

The order and judgment of the circuit court is reversed, and the petition of the relator for the writ of mandamus is dismissed, with costs to the respondents against the relator.

STATE ex rel. NOGGLE v. CRAWFORD,
Judge.

(Supreme Court of North Dakota. Oct. 17, 1912.)

(Syllabus by the Court.)

1. CERTIORARI (§ 29*)—GROUNDS OF REMEDY—IRREGULARITIES.

The Supreme Court will not review by certiorari an order of the district court permitting claimants of a fund which had been deposited

with the clerk of court by a garnishee to intervene for the purpose of asserting rights therein. In making such order the court did not exceed its jurisdiction, and, at most, the order is erroneous merely, and may be corrected by appeal.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 42; Dec. Dig. § 29.*]

2. CERTIORARI (§§ 5, 29*)—GROUNDS—EXCESS OF JURISDICTION—ADEQUATE REMEDY BY APPEAL.

Certiorari will not lie to review alleged errors not going to the jurisdiction of the inferior court, nor will it lie where, as in this case, the party aggrieved has an adequate remedy by appeal.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 5, 6, 42; Dec. Dig. §§ 5, 29.*]

Original writ of certiorari on the petition of William J. Noggle to W. O. Crawford, judge of the district court of the county of Stark. Writ quashed.

Heffron & Baird, of Dickinson, for relator. Thos. H. Pugh, of Dickinson, for respondent.

FISK, J. On the application of petitioner supported by affidavit this court issued a writ of certiorari on July 24th last to review an order of the district court of Stark county, which order, in effect, permitted certain parties claiming an interest in funds which had been paid into court by a garnishee in certain garnishment proceedings pending in said court to intervene for the purpose of asserting their claim to such fund. Such order also directed the plaintiff in the garnishment action to restore said funds which had theretofore been paid to him under the directions of the court, to the custody of the clerk, there to abide the result and determination of the issues raised by the interveners.

Respondent has made due return to the writ, setting forth the following facts:

"(1) That on the 21st day of December, A. D. 1912, in an action pending in the said district court of Stark county, wherein the above-named petitioner was plaintiff and George W. McClellan was defendant, a final judgment was rendered and entered in favor of the plaintiff and against the defendant for the sum of \$673.03 and the costs of suit of \$35, making a total judgment of \$703.03, a true transcript of which is hereto attached and marked 'Exhibit 1.'

"(2) That in said above-entitled cause one T. F. Powers & Co. had been summoned as a garnishee of the above-named defendant, George W. McClellan, and on the 9th day of November, A. D. 1911, made answer thereto, which answer was filed in said cause with the clerk of said court on the 20th day of April, A. D. 1912, as appears by and from the files of the clerk of said court, a true transcript of which is hereto attached and is marked 'Exhibit 2.'

"(3) That thereafter, on or about the 17th

day of May, A. D. 1912, said garnishee, T. F. Powers & Co. brought into said court and deposited with the clerk thereof, under a written deposit, the sum of \$85.95 as appears from the files of the clerk of said court, a transcript of which written deposit is hereto attached and marked 'Exhibit 3.'

"(4) That thereafter, and on the 20th day of May, A. D. 1912, upon application of the plaintiff made ex parte, I made order herein directing the clerk of said court to pay to said plaintiff any and all sums of money which had been or thereafter might be deposited with him in said action. A true transcript of said order is hereto attached and marked 'Exhibit 4.'

"(5) That thereafter, and on the 3d day of June, A. D. 1912, the affidavit of Gus Anderson, one of the members of the firm of Anderson & Himmelsbach, a copartnership, wherein for said copartnership he claimed an interest in said money so deposited as aforesaid, and for the first time called the attention of the court to the answer and disclosure of garnishee, T. F. Powers & Co., and the terms thereof was presented to me, a true transcript of which is hereunto attached and marked 'Exhibit 5.' That upon said affidavit and on motion of Anderson & Himmelsbach that said Anderson & Himmelsbach be interpleaded, and that said money be returned to the deposit until the disposition of the issues which were by the answer of the garnishee, and which should be by the interpleader of the said Anderson & Himmelsbach raised, I issued an order to show cause why said Anderson & Himmelsbach should not be interpleaded and said money be returned to the deposit, a true transcript of which said order to show cause is hereunto attached, and is marked 'Exhibit 6.'

"(6) That the hearing on said order to show cause came on to be heard before me at my chambers at Dickinson, N. D., July 8, 1912. Thos. H. Pugh appeared as attorney for the motion, and Haffron & Baird, attorneys for the plaintiff, appeared in opposition thereto. After hearing said motion, which was based on the exhibits hereinbefore referred to, I thereupon, to wit, on the 10th day of July, A. D. 1912, made an order herein permitting the said Anderson & Himmelsbach, as claimants to the money aforesaid, to be interpleaded in the said garnishment proceedings, and that said money be returned to said deposit there to await determination of the matter, to the end that the equitable rights of the several parties claiming interest in said money might be adjudicated. A true copy of said order is hereto attached and is marked 'Exhibit 7.'

From the return, as well as from the order which it is sought to have reviewed, it appears that the learned district judge deemed the order theretofore made by him direct-

ing the clerk to pay to plaintiff the funds thus deposited, as improvidently made under misapprehension as to the facts, but, however this may be, we are agreed that petitioner is not entitled to the remedy by certiorari to review the order complained of for at least two obvious reasons:

[1] First, certiorari will not lie to review alleged errors not going to the jurisdiction of the inferior court. Under the plain language of section 7810, R. C. 1905, a writ of certiorari may be granted only in cases where such inferior courts, officers, boards, or tribunals have exceeded their jurisdiction. It cannot be correctly said that the court exceeded its jurisdiction in making the order. At most, such order was merely erroneous. The case of *State v. Rose*, 4 N. D. 319, 58 N. W. 514, which has been called to our attention, is not in point. The order there was not made in any pending action or proceeding, and, as the court held, was clearly void as being in excess of jurisdiction. Not so in the case at bar. By what we have above stated we do not mean to intimate that such order was even erroneous. That question is not before us, and cannot properly be here considered.

[2] The second reason why petitioner cannot invoke this remedy is that the order sought to be here reviewed is appealable. That such order is appealable under the provisions of section 7225, R. C. 1905, as construed by this court is, we think, beyond question. *Bolton v. Donavan*, 9 N. D. 575, 84 N. W. 357; *Northern Pacific R. Co. v. Barlow*, 20 N. D. 197, 128 N. W. 233, Ann. Cas. 1912C, 763, and authorities cited. See, also, cases cited in note to *Olson v. Mattison*, 16 N. D. 231.

For the above reasons the writ must be, and the same is hereby, quashed.

WANNEMACHER v. VANCE.

(Supreme Court of North Dakota. Oct. 4, 1912.)

(Syllabus by the Court.)

JUDGMENT (§ 143*)—VACATION—DISCRETION OF TRIAL COURT.

Defendant was personally served with a summons, complaint, and other papers in claim and delivery on March 5, 1908. On March 31st thereafter he caused an answer in due form to be served on plaintiff's attorney, but gave no further attention to the case until August 12, 1911, nearly one year after plaintiff had procured judgment. Defendant states as a reason for vacating the judgment that he believed said case was disposed of and settled, and that, when the answer was served, he was informed (by whom he fails to state) that there never would be any judgment entered. The undisputed facts disclose, however, that his attorney was served with a notice of trial in said cause in August, 1908, and in April, 1909, with a notice to produce at the trial certain exhibits. It also appears that, after judgment was ordered in plaintiff's favor in 1910, notices were

duly served on defendant's counsel of applications for the taxation and retaxation of the costs therein, and no application to be relieved from such judgment was made until about one year after its rendition.

Held that, while the granting or refusal to grant applications of this nature rests largely within the sound discretion of trial courts, under the facts disclosed in this record there was no room for the exercise of any discretion, and the order granting defendant's motion to vacate the judgment was therefore an abuse of judicial discretion, necessitating a reversal thereof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269-291; Dec. Dig. § 143.*]

Appeal from District Court, Stark County; W. C. Crawford, Judge.

Action by George R. Wannemacher against Otto Vance. From an order vacating a judgment for plaintiff and granting defendant leave to defend, plaintiff appeals. Reversed, with direction to reinstate the judgment.

Heffron & Baird, of Dickinson, for appellant. L. A. Simpson, of Dickinson, for respondent.

FISK, J. This is an appeal from an order of the district court of Stark county made on August 15, 1911, vacating a judgment rendered in said court on August 15, 1910, and granting defendant leave to defend in said action. We are asked to reverse such order upon the ground that the making thereof was an abuse of discretion. The facts necessary to an understanding of the controversy are as follows:

The action is in claim and delivery to recover the possession of two horses, and was commenced on March 5, 1908, by the service of the summons and complaint, together with the usual affidavit, notice, and undertaking in claim and delivery. The two horses in controversy were taken by the officer and retained until March 7th, when they were rebonded by defendant, and their possession returned to him. The defendant thereafter, and on March 31, 1908, served upon counsel for plaintiff an answer duly verified, and stating a good defense on the merits. Such answer, however, was not filed in the clerk's office until after the entry of the judgment by default as above stated. On August 28, 1908, notice of trial was served on defendant's counsel, and on April 29th a notice to produce certain notes at the trial was likewise served upon him and service admitted. The cause was placed on the trial calendar at a term which commenced on September 8, 1908, where it remained until the entry of judgment. On May 24, 1910, the cause was moved for trial before Hon. E. B. Goss, who was then judge of the Eighth judicial district, and who was presiding at said term by request of the Honorable W. C. Crawford, judge of the Tenth judicial district. Neither the defendant nor his counsel was present, but H. C.

Berry, a practicing attorney at Dickinson, appeared, and asked leave to defend at the request of one Krusee and one Merrill, whom he claimed were the real parties in interest, as they had sold the horses to defendant Vance, and were under obligations to defend his title. The application, however, was refused, a jury was impaneled, testimony introduced, a verdict returned in plaintiff's favor, and judgment entered on August 15, 1910, pursuant to an order of Judge Goss. Prior to entry of such judgment notices of taxation and retaxation of costs were duly served on defendant's attorney. On August 14, 1911, defendant's attorney applied for and procured an order from Judge Crawford returnable on the following day, requiring plaintiff to show cause why said judgment should not be vacated and the defendant permitted to defend said action on its merits.

Such order was based upon three affidavits which were served with the order upon plaintiff's counsel, as follows, omitting formal parts:

"Otto Vance, being first duly sworn, states: That he is the defendant in the above-entitled action, which action was begun by the issuance and service of a summons therein in March, 1908; that within the thirty days time specified in said summons the defendant duly appeared in said action and served his verified answer to the complaint therein upon Messrs. Heffron & Baird, the plaintiff's attorneys; that from the date said answer was served this affiant, until Saturday, August 12, 1911, believed that said case was disposed of and settled. He was informed at the time said answer was served that there never would be any judgment entered in said action, and relied thereon. That he is now informed and believes, and was first informed August 12, 1911, that a judgment in this action on August 15, 1910, was entered against him. Affiant states that the action was one in claim and delivery and that this affiant, the defendant in the action, was the sole and absolute owner of the property in question, and the plaintiff, G. R. Wannemacher, had no right, title, or interest therein. That affiant was in possession of the property at the time that action was commenced, had bought and paid for the same, and was the absolute and exclusive owner thereof. That the judgment entered in said action was entered by default of the defendant not being in court at the time said judgment was entered. That the judgment in said action was not entered until a period of over two years had elapsed since the case was first at issue, and over two years after defendant was informed that no judgment would ever be entered in the case. Affiant hereby makes reference to his verified answer for his defense to said action which answer is filed in the clerk of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

court's office. Affiant further states that he has stated all the facts of his case to Mr. L. A. Simpson, as attorney at law of Dickinson, N. D., and is advised by the said L. A. Simpson that this defendant has a full, complete, and absolute defense to plaintiff's cause of action and to each and every part thereof. Affiant makes this affidavit for the purpose of being relieved from the judgment entered in said case, and asks that the same on such terms as the court may deem just and reasonable, be set aside, canceled, and annulled, and that the case be set down for trial and the defendant be permitted to prove the allegations of his answer. That during all the time since the summons and complaint was served upon the defendant he has been a resident within the Tenth judicial district, and has frequently seen the plaintiff in this action and his attorneys, and never at any time or place has affiant been notified by either said plaintiff or his attorneys that any judgment in said action was entered. That affiant did not have his attorney of record, L. A. Simpson, appear at the trial of said case when said judgment was entered because affiant was acting under the belief and understanding that the case had been settled and that no judgment would ever be entered therein. Further affiant saith not. Otto Vance."

"H. C. Berry, being first duly sworn, states: That he is an attorney at law residing at Dickinson, N. D. That he is well acquainted with G. R. Wannemacher, the plaintiff in the above-entitled action. That he also is familiar with the pleadings in this case and with the facts and circumstances connected with this case. That he recalls the time when said case in the district court of Stark county was moved for trial at the April, 1910, term of said court, according to affiant's best recollection. That L. A. Simpson, the attorney of record for the defendant in the case, was absent from the city at said time and place, and that one R. A. Krusee, who is the real party in interest defendant in this case, and the person through whom the defendant derived his title to the horses in question in the litigation herein, requested this affiant when the case was called on the calendar to appear and defend the action in behalf of said defendant, Vance, the said R. A. Krusee claiming that he had the witnesses there on behalf of the defendant. Affiant further states that the Honorable E. B. Goss was the presiding judge at said trial sitting in the place of Hon. W. C. Crawford, and affiant states that the trial judge, Hon. E. B. Goss, refused to permit affiant to appear for the defendant in said action and based his refusal upon the ground that this affiant had no authority from the defendant, Vance, to appear in said case. Affiant states that he had no authority direct from said Vance and never had, but that he was requested to ap-

pear and defend the action in the name of Vance by the said R. A. Krusee. Affiant further states that the said R. A. Krusee stated that the defendant above named, Otto Vance, had been informed at the time the action was commenced that no judgment would be taken against him (Vance), and that the defense of the action would be attended to by him, R. A. Krusee. That upon the court's refusal to let this affiant defend the action at the trial thereof, judgment in default of the defendant was thereupon taken by the plaintiff as affiant is informed and believes. Affiant further states that he does not personally know the defendant, and that he never at any time communicated to him the fact of his undertaking to appear and defend the case, or any other fact or circumstance connected with the case. Further affiant saith not. H. C. Berry."

"L. A. Simpson, being first duly sworn, says: That he was the attorney of record for the defendant in said action, having been retained as such on or about the day said action was started in March, 1908. That within the statutory time he presented a duly verified answer for the defendant and due service of said answer was made upon plaintiff's attorneys. That more than two years elapsed from the time of the service of said summons and complaint before any judgment was ever entered in the case, and that said action was continued in court by the plaintiff over several terms to which continuance, as affiant is informed and believes, the defendant took no part in and had no notice of. That at the time of the entry of said judgment herein this affiant was absent from the state of North Dakota and had been absent for about one year. Affiant understood about the time that the answer of the defendant was interposed in this case the said action had been settled and adjusted by G. R. Wannemacher, the plaintiff herein, and one R. A. Krusee, who, as affiant was informed and believes, was the real party defendant in interest, and affiant was informed by said G. R. Wannemacher in March or April, 1908, that said action would not be tried, but that the same would be settled and adjusted between the said Wannemacher and said R. A. Krusee, who at that time, as affiant is informed, or had lately been in partnership, and that the litigation was the result over the dispute of the ownership of partnership property. Affiant further states that he never notified the said Otto Vance at any time that said case would be brought on for trial because affiant was acting in the belief that the said action would not be brought to trial, and affiant never had any personal notice of the entry of judgment against the defendant herein until recently and got notice thereof to the defendant Otto Vance as speedily as possible after said notice. That the entry of said judgment, as far as this affiant or the defendant is con-

cerned, is a result of a mistake of the facts and a misunderstanding concerning the settlement of the case. L. A. Simpson."

At the hearing of such order to show cause plaintiff's counsel submitted the following affidavit, omitting formal parts: "F. C. Heffron, being duly sworn, says: That a number of months ago L. A. Simpson, Esq., attorney for defendant, came into the office of Heffron & Baird, and made inquiries of affiant in reference to the judgment in favor of plaintiff and against defendant in this action, and several times since then has made inquiries in reference to said judgment. That affiant has conversed with H. C. Berry, Esq., and L. A. Simpson, Esq., many times since said judgment with regard to appealing from the same, some of which conversations were more than a year ago. That said case of G. R. Wannemacher versus Otto Vance was regularly on the calendar for the May, 1910, term of the district court of Stark county, as was also the case entitled G. R. Wannemacher against Krusee; both of said actions being actions in claim and delivery. That from the affiant's knowledge of said action the defense in this case was much weaker than it was in said case against R. A. Krusee. That, when said case of G. R. Wannemacher versus R. A. Krusee was called, said R. A. Krusee was present in court with his attorney, H. C. Berry, and others reported to be witnesses for defense. That in said case against R. A. Krusee said R. A. Krusee interposed no defense whatever. That this affiant is informed and believes and from his knowledge of both cases states it to be a fact that the alleged defense in the R. A. Krusee case and this case would have been the same. That this case when called on the calendar was regularly tried before the court, Hon. E. B. Goss presiding, and a jury and verdict rendered thereon in favor of plaintiff. That plaintiff, G. R. Wannemacher, now resides in Columbus, Ohio, and has done so practically since time of said trial, and of which fact the defendants are well aware, and have been aware ever since the removal of said G. R. Wannemacher from the state of North Dakota. That affiant verily believes said G. R. Wannemacher, if possible to have him present or get an affidavit from him, would testify or make affidavit to the fact that he never informed the defendant's attorney or any one else that he expected to settle this action with said R. A. Krusee. That since March, 1908, to August, 1911, affiant has not known of the whereabouts of said Otto Vance, though making repeated inquiries in regard to him. Affiant verily believes from his knowledge of said case that neither plaintiff nor any of his attorneys have known of the whereabouts of said Otto Vance since March, 1908. F. C. Heffron."

And defendant's counsel submitted two rebuttal affidavits which were considered by the court as follows:

"L. A. Simpson, being first duly sworn, states that he has read the affidavit of F. C. Heffron made herein and sworn to on August 15, 1911, before Thos. H. Pugh, notary public. He further states that the statements made by Mr. Heffron in his affidavit that 'L. A. Simpson, attorney for defendant, came into the office of Heffron & Baird and made inquiries of affiant in reference to the judgment in favor of the plaintiff and against the defendant in this action, * * * and conversed with L. A. Simpson many times since said judgment with regard to appealing from the same, some of which conversations were more than a year ago,' is a misstatement of the fact inadvertently made by Mr. Heffron. Affiant states that on or about July 7, 1911, an action was begun in the district court by Heffron & Baird entitled G. R. Wannemacher v. Otto Vance and Others, and that when affiant was retained by T. N. Hartung, one of the defendants in said last case, he made an examination of the records and files in said case, and then went to the office of Heffron & Baird, and talked with Mr. Heffron, but not with respect to the appealing of the case, but only concerning the setting aside of the judgment entered therein by default. That affiant then stated to Mr. Heffron that no notice of the entry of judgment had been served upon this affiant to his best recollection. Affiant further states that he then told Mr. Heffron that he would endeavor to communicate with Mr. Vance, and advise the said Vance of the condition of the case, and affiant states that he did communicate with Mr. Vance and that immediately upon said Vance calling upon this affiant the application to set aside the judgment was made. Further affiant saith not. L. A. Simpson. Subscribed and sworn to before me this 15th day of August, 1911. C. M. Coleman, Notary Public, Stark Co., N. D."

"H. C. Berry, being first duly sworn, states that he is the identical H. C. Berry mentioned in the affidavit of F. C. Heffron made in said case and sworn to on the 15th day of August, 1911. Affiant further says that he respectfully hereby calls the attention of the court to the transcript of the things occurring in the court on the 24th day of May, 1910, at the time the above-entitled action was called for trial as on default. Affiant further states that Mr. Heffron in his said affidavit is in error when he says that he has talked with this affiant many times or at all since August 15, 1910, about the judgment in favor of the plaintiff and against the defendant, Otto Vance, save and except that at one time this affiant stated to F. C. Heffron and others that he believed the defendant, Vance, had a good defense to said action, and that the order of his honor, Judge Goss, was arbitrary and unjust, and also in error when he states that affiant has talked with Mr. Heffron with regard to appealing from the said judgment. Affiant states that he has talked with Mr. Heffron during the times re-

ferred to in his affidavit concerning the judgment in favor of the plaintiff that was entered against R. A. Krusee. Further affiant saith not. H. C. Berry."

And there was also submitted at said time a transcript of the proceedings had at the time the case was called for trial before Judge Goss. This transcript merely shows what took place with reference to the application of Mr. Berry to be permitted to defend said action in the interest of Krusee and Merrill, and we do not deem it of sufficient importance to incorporate into this opinion. At the conclusion of the hearing on such order to show cause, Judge Crawford made an order from which this appeal is prosecuted. Respondent's counsel filed no brief in this court, but did file an amended abstract.

From the above facts we are required to decide whether in vacating such judgment the lower court abused its discretion. It is, of course, elementary, and this court has repeatedly held, that in such matters trial courts are vested with a sound judicial discretion and the exercise thereof by such courts will not be interfered with by the Supreme Court, except in cases of manifest abuse of such discretion, and we are especially loath to interfere with orders of the district court where such orders as in this case vacate the default and permit a trial on the merits. We have considered the appeal in the light of such rule, and we are agreed that in granting the motion to vacate the judgment the trial court clearly abused its discretion. There was no valid excuse shown for defendant's neglect to appear and defend such action. On the contrary, the record convicts him and his attorney, not only of gross and inexcusable negligence in failing to thus defend the cause, but it also convicts them of gross laches in applying for relief after the judgment was rendered. The only excuse offered by defendant for permitting such default is that "he was informed at the time said answer was served that there never would be any judgment taken against him and relented thereon." He does not state that such information came from a source that would bind the plaintiff, or that he was justified in relying thereon. In this the case at bar differs radically from the case of *Minnesota Thresher Mfg. Co. v. Holz*, 10 N. D. 16, 84 N. W. 581. Furthermore, he does not contend that there was any valid or lawful agreement entered into to that effect, and when on August 28, 1908, a notice of trial was served on his attorney, and when on April 29, 1909, a notice to produce at the trial certain exhibits was served on his attorney, he was definitely apprised of plaintiff's intention to prosecute such action to a final determination. Defendant and his counsel, however, apparent-

ly ignored such notices, and paid no further attention to the litigation. This, under the circumstances, was, we think, gross and inexcusable negligence. Again, after plaintiff had submitted proof of his cause of action and obtained an order for judgment in 1910, notices of taxation and retaxation of the costs were served upon defendant's counsel in July and August of said year, and yet no steps were taken to be relieved from the judgment until more than one year after such notices were served. This was gross laches for which defendant does not offer any adequate excuse. True, he states in his affidavit "that from the date said answer was served this affiant, until Saturday August 12, 1911, believed that said case was disposed of and settled," but he shows no basis which authorized any such belief on his part, and the undisputed facts disclose that he was not justified in such belief. The fact that Mr. Berry appeared when the case was called for trial and requested leave to defend in behalf of persons not parties to the record, and asked leave to intervene and was denied such requests, affords no excuse to defendant, in the light of the record facts, for his palpable negligence and laches aforesaid.

For the above reasons, the order appealed from is reversed, and the district court is directed to reinstate such judgment. Appellant will recover costs on the appeal.

GOSS, J., being disqualified, did not participate.

SMITH v. WILLOUGHBY.

(Supreme Court of North Dakota. Oct. 31, 1912.)

(Syllabus by the Court.)

1. REPLEVIN (§§ 95, 103*)—CLAIM AND DELIVERY—ALTERNATIVE JUDGMENT—VERDICT.

In a claim and delivery proceeding brought under sections 7036 and 7075, R. C. 1905, and in which the defendant is shown to be entitled to a return of the property seized and where, although it is shown that the plaintiff offered the said property for sale at public auction before the trial, it is also shown that he himself purchased the greater part thereof at such sale, the judgment should be in the alternative for a return of the property or for the value thereof, and a judgment for the value only is erroneous. Under such a state of facts, it cannot be said that the proof discloses "that a return cannot be had," which must be shown under the statute before a judgment for the value alone can be rendered. In such a case, also, the verdict should specifically describe the several articles of property and the value of each of said articles.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 370, 398-411; Dec. Dig. §§ 95, 103.*]

2. BAILMENT (§ 35*)—ACTION AGAINST THIRD PERSON—DAMAGES.

Where chattels are wrongfully taken from a bailee, but are afterwards, and before suit by such bailee, replevied from the wrongdoer

and returned to the possession of the true owners or bailors, such bailee in a suit against such wrongdoer can merely recover damages based upon the injury to his special interest, and cannot recover for the full value of the articles taken from him. The verdict also and judgment should specifically describe the articles for which a recovery is allowed, or a return of which is ordered, and the value of each of the said articles.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. § 132; Dec. Dig. § 35.*]

3. APPEAL AND ERROR (§ 1177*)—DISPOSITION OF CAUSE—RENDITION OF JUDGMENT.

Where, however, there is no dispute in the evidence as to the value of the property not so held as a bailment, but wrongfully disposed of or still held by the plaintiff, and no point whatever is made on the trial as to the value of the bailed property, but of the property owned by the defendant in the claim and delivery proceeding, and wrongfully sold or withheld by the plaintiff alone, a new trial need not necessarily be ordered, but the judgment may be made to conform to the facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4620; Dec. Dig. § 1177.*]

4. REPLEVIN (§ 104*)—ALTERNATIVE JUDGMENT—SPECIFYING VALUE OF ARTICLES.

In such proceeding, a judgment in the alternative for the return of the property or for the value thereof, and for damages for the detention thereof, should specifically describe the items of property and the value thereof. Such specification of the value of each article, however, need not be made in the absence of a demand therefor on the trial, and, in the absence of such demand, a verdict and judgment in the aggregate can be given.

[Ed. Note.—For other cases, see Replevin Cent. Dig. § 392; Dec. Dig. § 104.*]

Appeal from District Court, Foster County; Burke, Judge.

Action by E. Delafield Smith against Ellis Willoughby. From a judgment for defendant, plaintiff appeals. Reversed on condition.

The plaintiff and appellant in a claim and delivery proceeding under the statute seized certain personal property of the defendant upon which he claimed to hold certain chattel mortgages. The plaintiff filed a complaint in the action, setting up his alleged special interest under said chattel mortgages, describing the property to be seized, and demanding judgment for immediate possession. Defendant answered by pleading payment and certain other defenses, and in his turn prayed "for judgment against said plaintiff for the immediate return and possession of the property described in said complaint, or the sum of \$5,000, the value thereof in case a delivery cannot be had, and \$1,000 damages for the detention thereof, and costs." The verdict was: "We, the jury, find that at the time of the commencement of this action the defendant was entitled to the possession of said property, and that its value was \$1,878." On this verdict the trial court entered judgment "that the defendant have and be awarded, and the defendant is awarded,

judgment against the plaintiff in the above-entitled action for the sum of \$1,878, the same being the value of the property so taken by the plaintiff, and not returned to the said defendant in the above-entitled action." From this judgment this appeal was taken. The evidence showed that, after the seizure by the plaintiff and before the trial the said plaintiff had sold at public auction the machinery and 21 or 22 horses seized by him, and that 21 more of said horses had been replevied by the wife and children of the defendant, and that at the time of the seizure of such property by the plaintiff they had belonged to such wife and children, though they were in the barn of the defendant. It also showed that after such sale plaintiff settled with other parties for 5 more of the horses. Nearly all of the property sold at the public auction, however, was bid in by the plaintiff himself.

Guy C. H. Corliss, of Portland, Or., for appellant. W. O. Lowden, of McHenry, for respondent.

BRUCE, J. (after stating the facts as above). [1] Plaintiff and appellant contends as grounds for reversal of the judgment herein (1) that under the provisions of our statute (sections 7036 and 7075, R. O. 1905) a plaintiff who has wrongfully taken property in claim and delivery proceedings has an absolute right to the judgment against him being in the alternative for the return of the property or its value in case a return cannot be had, and that no such alternative was given in this case; (2) that the verdict nowhere describes the personal property for which the compensation is required to be made, but merely speaks of it as "said property"; (3) even if the words "said property" can be regarded as a description of the property described in the complaint, plaintiff and appellant contends that such verdict is unwarranted and unsustained by the evidence, as the testimony shows that at least 21 of the horses described in the complaint did not belong to the defendant at all, but to his wife and children, and were replevied by them, and, as far as the evidence discloses, are now in their possession.

There appears to be some doubt in the authorities as to whether in an action between the original parties and where the property which is put up at public auction or otherwise sold is conveyed to a third party the judgment should be in the alternative. See *Larson v. Hanson*, 21 N. D. 411, 131 N. W. 231; *Sherman v. Clarke*, 24 Minn. 37; *Faulkner v. First National Bank*, 130 Cal. 258, 62 Pac. 463; *Park v. Robinson*, 15 S. D. 551, 91 N. W. 344; *McNamara v. Eisenleff*, 14 Abb. Prac. (N. S. N. Y.) 25. There can be no doubt, however, that a judgment in the alternative should have been rendered in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the case at bar. Although the plaintiff sold at public auction the horses and machinery which were not replevied from him, the proof is uncontradicted that he himself was the purchaser of by far the greater part thereof, and the presumption, in the absence of proof to the contrary, of course, must be that he was in the possession thereof at the time of the trial. The statutes (sections 7036 and 7075 of the Code of 1905) require a judgment to be in the alternative, except when it is shown that a delivery cannot be had, and the proof in the case at bar falls very far short of showing such impossibility of delivery.

The general rule seems to be that, "where several articles are embraced in an action of replevin, the judgment following the verdict should show the separate value of each article so that, by the return of any one or more articles, the judgment may be satisfied pro tanto. 18 Encyc. Pl. & Pr. p. 602. The rule it is said is for the purpose of enabling the court by its judgment to afford the party entitled to the property a complete remedy in case the property cannot be obtained on execution, and is also evidently for the purpose of enabling the wrongdoer to return what he can of the property and reduce the judgment pro tanto by a return of a portion thereof. This rule necessarily involves a finding by the jury of the value of each specific article. It is argued indeed that if there is no such finding and judgment, and a portion only is or can be returned, another lawsuit may be necessary in order to decide the value of, or the loss to the owner on account of the failure to return the, missing articles. It does not seem, however, that, under our peculiar statute, such specific valuation is necessary, except where it is demanded upon the trial, and the jury are instructed to ascertain the same. Section 7036 of the Revised Codes of 1905 provides, among other things, that: "(3) In case they find against the plaintiff and the property has been delivered to him, and the defendant in his answer claims a return of the property, they must find the value thereof or of the defendant's interest therein if less than its full value at the time of the taking, and they must assess the damages if any are claimed in the answer, which the defendant has sustained by reason of the taking and detention of such property. * * * Whenever the jury are so instructed, they must find the value of specific portions of the property in controversy, or of the interest of either party therein, if less than its true value, at the time of the taking, and shall also assess damages if any are claimed by the party in whose favor they find sustained by reason of the taking and detention of such property." Section 7075 provides that: "In an action to recover the possession of personal property the judgment for the plaintiff may be for the possession or for the

recovery of possession, or the value thereof in case a delivery cannot be had, and for damages for the taking and detention thereof. If the property has been delivered to the plaintiff and the defendant claims a return thereof judgment for the defendant may be for a return of the property or the value thereof in case a return cannot be had and damages for the taking and detention thereof." These statutes seem to have had their origin in sections 5063 and 5099 of the Compiled Laws of the Territory of Dakota of 1887, and have been considered by the Supreme Court of South Dakota in the case of First National Bank of Custer City v. Calkins, 16 S. D. 445, 93 N. W. 646. In this case it was held that a verdict which found the value of the property in the aggregate was not erroneous, in the absence of an instruction to find the value of each item separately, or demand therefor. See, also, *Stevenson v. Lord*, 15 Colo. 131, 25 Pac. 313; *Caldwell v. Bruggerman*, 4 Minn. 270 (Gil. 190). There was no such demand or instruction in the case at bar, and it would seem, therefore, that there was no error in returning the value in the aggregate.

[2] The second and third propositions raised by the appellant are technically correct, but by no means fundamental. It is undisputed that even at the time of the seizure by the plaintiff a number of the horses, though in the barn of the defendant and presumably in his custody and possession as a bailee, belonged in fact to his wife and children, and that they were afterwards, and before the trial, replevied by such owners from the plaintiff. In these horses the defendant had but a special or qualified interest, and since the bailors or owners have now recovered the possession thereof, and the defendant is no longer responsible therefor, the damages in relation thereto can be based upon that special interest and upon that special interest alone. 18 Enc. Pl. & Pr. p. 601. If, therefore, the words "said property" as found in the verdict necessarily include these horses, the verdict is erroneous. The same is also true of the five horses which the evidence shows were seized by the plaintiff and bid in by him at the sheriff's sale, but which were afterwards settled for by him with the true owners, the son of the defendant and Horn & Anderson. So, too, the general rule seems to be that a verdict and judgment in such a case should specifically describe the property which is ordered to be returned or for which compensation is required to be made. See 34 Cyc. 1530; *Guille v. Wong Fook*, 13 Or. 577, 11 Pac. 277.

[3] If, indeed, the evidence in this case were not exactly as it is, we would be absolutely compelled to order a new trial. In it, however, there is no dispute as to the value of the property and horses not so held by the defendant as a bailee and for the full value of which recovery can be had, and

no point whatever is made as to the value of the bailed property, but of the property and horses owned by the defendant in the claim and delivery proceeding and wrongfully seized and sold by the plaintiff alone. The evidence, in fact, with one minor exception, relates almost entirely to the value of such property, and there is no controversy in relation thereto. The only difficulty which is to be found in the case, therefore, lies in the fact that the value as found by the jury is not supported by the evidence. The jury did not find the value of these specific articles, but the value in the aggregate, and that value they set at \$1,878. There is, as we have said, however, no dispute as to the value of the horses to a recovery of which, or to compensation for the value of which, the defendant is entitled. The value of all of the horses and machinery sold at the sheriff's sale was put by the plaintiff himself at \$1,928, while the value of the horses bid in by him at the sheriff's sale, but for which he was afterwards compelled to settle with the true owners, was set by him at \$600. This is the only positive evidence on the subject. It is true that the record of the sheriff's sale shows that the goods and articles were sold in the aggregate for some \$2,000—that is to say, for \$81 more than the plaintiff's estimate—and that the five horses settled for were all bid in by him for about \$427, but there is no pretense that the amounts for which the horses were bid in at such sale represented the real value thereof.

[4] The same considerations apply to the failure to specifically describe the property. It is true that as a general rule the verdict should describe the property involved with such definiteness and certainty that it may be clearly identified (34 Cyc. 1530), and that such was not done in the case at bar. There is, however, no question as to the description of such property, or as to the articles and horses to a return of which the defendant was entitled. The description, indeed, is given in the sheriff's report of sale to a return of all of the articles mentioned in which the defendant is entitled, except the five horses afterwards settled for with the defendant's son and Horn & Anderson, and described in the evidence and report of sale as "One black colt with a silver mane and tail, one black mare, one bay mare colt, one bay horse colt two years old, and one steel-grey colt."

Such being the state of the evidence it would be a travesty on justice for this court to reverse the judgment and to order a new trial, subjecting both the county and litigants to unnecessary expense, if the same result can be accomplished by a modification of the judgment. If, therefore, the defendant will consent to the entry of a judgment for the return of the horses and machinery

described in the sheriff's certificate of sale, with the exception of the five horses last mentioned, and in the case of a failure of such return, for the sum of \$1,828, the trial court is directed to enter such a judgment. Otherwise, the judgment of the district court will be reversed and a new trial ordered.

BURKE, J., being disqualified, did not participate, and Hon. SAMUEL L. NUCHOLS, judge of the Twelfth judicial district, sat in his stead.

GOETZ et ux. v. MERCHANTS' BANK OF RUGBY.

(Supreme Court of North Dakota. Oct. 4, 1912.)

(Syllabus by the Court.)

1. CONTRACTS (§ 348*)—ACTIONS FOR BREACH—BURDEN OF PROOF.

Plaintiff's cause of action is based on defendant's refusal to pay to him the sum of \$800, the proceeds of a loan which it is alleged defendant promised to pay to him in cash. The answer puts in issue the allegation of a promise by it to pay plaintiff in cash, and alleges that the agreement was that it should apply the proceeds of the loan in paying and discharging certain indebtedness owing by plaintiff, and that it applied such proceeds accordingly.

Held, that the burden of proof was on plaintiff to establish the truth of his contention as alleged, and that it was prejudicial error not to instruct the jury to this effect.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1754-1780; Dec. Dig. § 348.*]

2. ADMISSIBILITY OF EVIDENCE.

Certain rulings in the admission and exclusion of testimony at the trial examined, and *held* erroneous.

(Additional Syllabus by Editorial Staff.)

3. CONTRACTS (§ 349*)—ACTIONS FOR BREACH—ADMISSIBILITY OF EVIDENCE.

In an action against a bank based on defendant's refusal to pay to plaintiff the proceeds of a loan which it is alleged defendant promised to pay to him in cash, where plaintiff on direct examination testified that defendant had not advanced any money, it was error on cross-examination to exclude testimony that since the making of the note plaintiff had drawn checks on the bank which were paid by it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1781-1818; Dec. Dig. § 349.*]

4. CONTRACTS (§ 349*)—ACTIONS FOR BREACH—ADMISSIBILITY OF EVIDENCE.

In an action against a bank based on its refusal to pay plaintiff the proceeds of a loan in cash as promised, where the bank alleged that the agreement was that it should apply the proceeds in discharging indebtedness of the plaintiff, the exclusion of a question to the president of defendant bank whether he had in his possession any of the notes which plaintiff authorized him to deduct from the loan was error.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1781-1818; Dec. Dig. § 349.*]

5. EVIDENCE (§ 121*)—RES GESTÆ.

In an action against a bank based on its refusal to pay to plaintiff the proceeds of a loan in cash as promised, the exclusion of a memorandum, made by the president of the bank at the time of making the loan, on which

he figured up the amount due on old notes of plaintiff, and of testimony as to the figures, was error.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303, 307-338, 1117, 1119; Dec. Dig. § 121.*]

6. CONTRACTS (§ 346*)—ACTIONS FOR BREACH—ADMISSIBILITY OF EVIDENCE.

In an action against a bank based on its refusal to pay to plaintiff the proceeds of a loan in cash, as promised, where the complaint alleged a demand for accounting, the exclusion of testimony of a witness for defendant that plaintiff had never asked for any accounting was error.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1718-1753; Dec. Dig. § 346.*]

7. CONTRACTS (§ 349*)—ACTIONS FOR BREACH—ADMISSIBILITY OF EVIDENCE.

In an action against a bank based on refusal to pay to plaintiff the proceeds of a loan in cash, the exclusion of a question whether plaintiff ever asked to have notes discharged by the bank with the proceeds of the loan turned over to him was error.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1781-1818; Dec. Dig. § 349.*]

8. CONTRACTS (§ 349*)—EVIDENCE—ADMISSIBILITY.

In an action against a bank based on its refusal to pay to plaintiff the proceeds of a loan in cash as promised, where defendant alleged that the agreement was that indebtedness of plaintiff was to be discharged, the exclusion of one of the notes which defendant contends was to be satisfied was error.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1781-1818; Dec. Dig. § 349.*]

Appeal from District Court, Pierce County; John F. Cowan, Special Judge.

Action by George Goetz, Sr., and wife, against the Merchants' Bank of Rugby. From an order denying a motion for new trial, defendant appeals. Reversed, and new trial ordered.

Paul Campbell, of Rugby, for appellant. H. S. Kline, of Anamoose, J. K. Murray, of Mott, and L. J. Palda, Jr., of Minot, for respondents.

FISK, J. This is an appeal from a judgment of the district court of Pierce county and also from an order denying defendant's motion in the alternative for judgment notwithstanding the verdict or for a new trial. The record discloses that the appeal from the judgment was taken more than a year after notice of the entry of the judgment, and such appeal is therefore ineffectual. This point is not raised, however, by respondent's counsel, and is not material in view of the fact that the appeal from the order raises all the questions which could have been raised on the appeal from the judgment had it been taken in time.

Appellant's counsel has exhibited great industry in the preparation of his appeal papers, his printed brief and argument containing 87 pages in which he has assigned no less than 37 alleged errors, many of which we deem insufficient in form and substance to require notice. We shall not attempt to

notice more than a few of such assignments as the conclusion to which we have arrived renders it unnecessary to do so. We are agreed that for certain errors of law occurring at the trial the order appealed from must be reversed, and a new trial ordered. Before noticing these errors a brief statement of the facts will be made.

The action was brought by George Goetz and his wife, Barbara Goetz, and the complaint, as originally drawn, contained two separate and distinct causes of action; but at the trial the complaint was, on motion of plaintiff's counsel, amended by striking out the name of Barbara Goetz as one of the plaintiffs, and the second cause of action was dismissed. In brief, the first cause of action alleges that on or about December 8, 1905, defendant bank agreed to loan to plaintiff and to pay and to deliver to him the sum of \$800 in consideration of plaintiff executing and delivering to it his promissory note for such sum, together with a mortgage on certain real property securing the payment of said note, and that, pursuant to such agreement, plaintiff executed and delivered to defendant said note and mortgage, and defendant accepted the same, but has wholly failed to pay or deliver to plaintiff the said sum of \$800 or any part thereof, though requested so to do, and the complaint alleges that plaintiff has been damaged thereby in the sum of \$800, and he prays for judgment for said amount, together with interest at the rate of 7 per cent. per annum from said date. The answer to this cause of action in effect denies the contract as alleged in the complaint, but admits the execution and delivery of the note and mortgage, and alleges that the agreement was that the proceeds of said loan should be applied by it in the payment of certain designated expenses, and in satisfying certain indebtedness in the form of notes held by defendant against the plaintiffs, which notes with interest amounted to \$746.75, and that the proceeds of such loan were by defendant applied in such manner, leaving a balance of only \$36 to be paid to plaintiff, which amount, it is alleged, was paid to him. These are the issues, the trial of which resulted in a verdict in plaintiff's favor for the sum of \$267.25, with interest. In due time a statement of the case was settled containing specifications of error on which a motion for judgment in the alternative or for a new trial was made and denied.

The principal assignments and the only ones which we shall notice relate to the instruction as to the burden of proof and to certain rulings upon the admission and exclusion of testimony.

[1] The court charged the jury, in effect, that the defense interposed was that of payment, and that payment under the law is an affirmative defense, and the burden of

proof is upon the defendant to establish, by a fair preponderance of the evidence, that it made such payment. We think this was prejudicial error. The defense, strictly speaking, was not that of payment. The answer squarely puts in issue the allegations of the complaint as to the nature of the agreement, and such answer, as we have seen, sets up an altogether different agreement from that alleged, under which it is claimed that the note and mortgage were given to pay and discharge certain specified indebtedness owing by plaintiff. It was therefore incumbent on plaintiff to establish his cause of action as pleaded. It would be otherwise if defendant's answer admitted that the transaction was as alleged in the complaint and merely pleaded payment of such money, but, according to its answer and its contention at the trial, the agreement was that it should pay the defendant no money except the small balance of \$36 which remained after satisfying the various claims owing by plaintiff. In other words, if the answer had admitted that the proceeds of such loan were to be paid to plaintiff in cash, but that afterwards it applied such proceeds pursuant to directions of plaintiff, the defense would be that of payment and the general rule that the burden of proof would be on a person claiming to have made such payments would apply. We think the rule announced in *Anderson Mercantile Co. v. Anderson*, 134 N. W. 36, is applicable and controlling on this point in appellant's favor. This conclusion compels us to order a new trial, and, in view of such disposition of the appeal, we will briefly notice such other rulings as are likely to arise on another trial.

[3] On the direct examination of plaintiff, he testified in effect that the bank had not advanced to or paid him any money for this note and mortgage, and on cross-examination defendant sought to show that since the making of such note plaintiff had drawn checks on the bank which were paid by it. We think the ruling excluding such testimony was erroneous. It was certainly proper cross-examination to show that plaintiff had received money from defendant bank if followed by proof showing that such receipts were from the proceeds of the so-called loan. Whether such ruling was prejudicial we cannot determine from the record, as it does not appear what the answer to the question objected to would have been; there being no offer of proof.

[4] It was also error to sustain plaintiff's objection to the following question asked the witness McClintock, president of defendant bank, as follows: "Have you in your possession any of the notes which the plaintiff Goetz authorized you to deduct from this loan?" It was certainly competent for defendant to show that these notes had been paid and satisfied by the bank in accordance

with the agreement as contended for by it, and which was testified to by this witness just prior to the above question; and this was, no doubt, the object in view in asking such question.

[5] This witness, after testifying that at the time of making the loan he figured up on a memorandum the amount due on these old notes and told plaintiff the amount, was not permitted to give such figures, nor was such memorandum admitted in evidence. We think these rulings also constituted error. This testimony was clearly competent, relevant, and material. The memorandum under the facts testified to was a part of the *res gestae* of the transaction.

[6] Defendant was not permitted to prove by such witness that plaintiff had never asked for any accounting as to the proceeds of such loan. We are unable to perceive why such offered proof was not proper. Even though a demand for an accounting was not a prerequisite to plaintiff's cause of action, his counsel alleged such a demand in the complaint, and certainly a failure for several years to request such accounting would be an important and material circumstance proper for the jury to consider.

[7] The same may be said of the next ruling sustaining an objection to the question: "Has he [plaintiff] ever asked you to turn over to him these notes?" Such question was, we think, clearly proper.

[8] It was also error to sustain plaintiff's objection to Exhibit D. This is a note for \$325 stipulated to have been executed by plaintiff, and is one of the notes owned by the bank at the time the transaction in question took place, and which defendant contends was to be satisfied out of the \$800 loan.

The foregoing are the chief errors disclosed by the record, and are the only ones deemed worthy of mention in this opinion. The rulings denying the motions for a directed verdict were entirely proper in the light of the testimony which was squarely in conflict upon the material facts in dispute.

The order appealed from is reversed, and a new trial ordered.

JENKINS v. HALLSTROM et al, Board of County Com'rs.

(Supreme Court of South Dakota. Oct. 25, 1912.)

1. GAME (§ 6*)—GAME WARDENS—COMPENSATION—VOUCHERS.

Under Sess. Laws 1909, c. 240, providing that county game wardens shall receive such compensation as the state game warden shall determine to be paid upon vouchers approved by the county commissioners, it was not intended that the county commissioners should not have power to reject a voucher for any month exceeding the statute limit, or to reject or correct any item where to their knowledge

the service had not been rendered or the expense incurred.

[Ed. Note.—For other cases, see Game, Cent. Dig. § 5; Dec. Dig. § 6.*]

2. GAME (§ 6*)—GAME WARDENS—"COMPENSATION."

The word "compensation," as used in Sess. Laws 1909, c. 240, providing that county game wardens shall receive such compensation as the state game warden shall determine not to exceed \$50 per month, includes pay for expenses incurred as well as for services rendered, and such compensation cannot in any one month exceed \$50.

[Ed. Note.—For other cases, see Game, Cent. Dig. § 5; Dec. Dig. § 6.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1352-1357.

Appeal from Circuit Court, Day County; Frank McNulty, Judge.

Mandamus by C. C. Jenkins against S. G. Hallstrom and others, composing the board of county commissioners of Day county, to compel the approval of certain vouchers for claims against the game fund. From an order sustaining a demurrer to his petition, plaintiff appeals. Affirmed.

C. C. Bush, of Waubay, for appellant. Frank Anderson, State's Atty., of Webster, for respondents.

WHITING, J. The appellant as plaintiff brought a proceeding in mandamus asking the circuit court to compel the defendants, as county commissioners of Day county, to approve certain vouchers for claims against the game fund of said county, which claims he had presented to them, and they had either rejected in toto or approved in part only. The defendants demurred to the affidavit and petition for mandamus, and for grounds of demurrer set forth "that said affidavit and petition fail to state facts sufficient to entitle the plaintiff to the relief demanded or any relief." The circuit court sustained the demurrer, and it is from the order sustaining such demurrer that this appeal was taken.

Such demurrer admits the following facts: During the time covered by such vouchers, the plaintiff was the duly appointed and qualified county game warden in and for Day county, and performed the duties of such position. From time to time, while he was such game warden, the plaintiff submitted to the state game warden a sworn itemized "statement of the costs and expenses, and of the compensation then due to plaintiff as such officer, and which costs and expenses had been incurred in the necessary expenses of the office of county game warden. * * * Such compensation was determined by the state game warden and such costs and expenses were approved by the state game warden, and were certified to by the state game warden, and the state game warden from time to time * * * did issue to plaintiff * * * a regular and formal order or warrant upon the county game fund

of Day county for the amount then due, which warrants were * * * signed and certified to by W. F. Bancroft, state game warden, and were executed all except the approval of the county commissioners." Such certified vouchers or warrants were presented to the defendants for approval, and the defendants wholly failed and neglected and refused to approve such vouchers and warrants. Defendants assumed to pass upon the correctness of plaintiff's claims, and allowed some at a less amount than claimed by plaintiff and wholly rejected some. The amounts claimed and for which plaintiff had vouchers certified by the state game warden were in various sums ranging from less than \$50 a month up to greatly in excess of \$50 for some months. At the times the vouchers were presented for approval of defendants, and at the time this proceeding was initiated there was money sufficient in the county game fund of Day county to pay the amount of said vouchers in full. The petition and affidavit wholly failed to show what part of the amount of each voucher was for services, and what part for expenses. This action is based entirely upon chapter 240 of the Session Laws of 1909, the part of said chapter material for our consideration reading as follows: "Each county game warden shall receive such compensation as the state game warden shall determine, not to exceed fifty dollars (\$50.00) per month, to be paid upon vouchers to be certified to by the state game warden and approved by the county commissioners, from the county game fund; provided, that no charge for any salary or expense connected with the enforcement of the provisions of this chapter except the fees of sheriffs, constables and other regular court costs, shall be at any time any charge upon any county or upon the state, but all such expenses shall be paid from the county game fund as herein provided; and provided further, that whenever the total of all such fees, salaries, per diems, shall exceed the total sum in the county game fund remaining after the payment of the necessary expenses of the office of the county game warden, such fee, salaries and per diems shall be paid pro rata to each lawful claimant. County game wardens shall be nominated by the boards of county commissioners of each county and appointed by the state game warden."

Appellant contends that there is no authority vested in the county commissioners empowering them to pass upon the correctness of the certified voucher presented to them under this law—that they can but approve the same as presented, and that it is their bounden duty so to do. Respondents contend that it is within their power and it is their duty to pass upon the correctness of the claims presented, and also that many of the vouchers were invalid upon their faces as the amounts thereof were in sums exceed-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing \$50 a month for the months covered thereby, and also that they did not show how much was allowed for each month when they purported to cover more than a month.

[1] We think respondents are right in both of their contentions. It surely cannot be presumed that the Legislature intended to impose upon the county commissioners of a county the mere formal act of approving a claim. What possible purpose could such an act serve? The county commissioners are in a much better position to know or ascertain whether the county game warden has performed the services and incurred the expenses set forth in his statement than is the state game warden; and, while it was undoubtedly contemplated that the state game warden should fix the compensation to be allowed for a certain service or for an expense incurred thus leading to uniformity throughout the state for like service and like expense, it certainly was not intended that the county commissioners should not have power to reject a voucher when the total for any month exceeded the amount fixed by statute, or to reject or correct any item where, to their knowledge, the service had not been rendered or the expense incurred.

[2] Can the amount allowed a county game warden under this law for services and expenses lawfully exceed the sum of \$50 for any one month? The answer to this question depends largely upon the meaning to be given the word "compensation" as used in the section from which we have quoted. Appellant contends that by "compensation" is meant salary, and that this only is limited to \$50 a month; while respondents contend that the word "compensation," as here used, is broader than the word "salary," and covers both what one is to receive for his services and also what he is to receive to compensate him for expenses incurred. An examination of the cases involving a construction of the term "compensation" will reveal that such construction is invariably controlled by the context of the provision, wherein such word is used. It is well, then, to consider carefully the statute as quoted. What is it the game warden is to determine and to give a certified voucher for? The "compensation" of the county game warden. If, then, the word "compensation" includes only salary or pay for services rendered and does not include remuneration for expenses incurred, the state game warden has no power whatsoever to certify and approve expenses, and any attempt to include expenses in a voucher or warrant would invalidate such voucher or warrant and justify its rejection by the commissioners. Furthermore, unless the word "compensation" does include remuneration for expenses incurred, there is absolutely no provision of this statute under which a claim for such expenses can be audited and allowed. It would follow that, if

a county game warden had rendered services for which he was entitled to and the state game warden was willing to allow \$25 and also had incurred necessary expenses to the amount of \$25, he could only get a certified voucher for \$25, the amount allowed for services, and would lose the balance. It is clear to us that the term "compensation," as used, includes pay for expenses incurred as well as for services rendered; that the amount of such compensation cannot in any one month exceed \$50; that the bill therefor must, in the first place, be passed upon by the state game warden, and, after he has certified to the correctness thereof and given a certified voucher therefor, it must be presented to the county commissioners and be by them passed upon; that such commissioners have power to reject it in whole or in part if they find it incorrect, subject to the right of the county game warden to appeal from their decision or bring an action to recover the amount claimed.

It follows that the demurrer was rightfully sustained, and the order sustaining same is affirmed.

STATE v. PRIOR

(Supreme Court of South Dakota. Oct. 25, 1912.)

1. CRIMINAL LAW (§ 1144*)—RECORD—REVIEW—INSTRUCTIONS.

Where, on appeal from an order denying accused's motion for a new trial, the evidence and instructions are not brought up, it will be presumed that the evidence is sufficient to support the verdict reached.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. § 1144.*]

2. CRIMINAL LAW (§ 835*)—TRIAL—INSTRUCTIONS—COERCION OF JURY.

The jury in a prosecution for assault with intent to kill, having been out all night, returned into court, and asked for instructions regarding the punishment. The court instructed on that question, and then said it was the jury's duty to return a verdict; that while the court did not intimate in the slightest degree what their verdict should be, and did not say what kind of a verdict they should return, it was not right for the jurors to disagree; that, while every man had a right to his opinion, he also should consider that he might be mistaken one way or the other; that the court expected verdicts, and had been in the habit of getting them. *Held*, that such instruction did not amount to coercion or to advice that it was the duty of the minority to unite with the majority.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2069; Dec. Dig. § 835.*]

Appeal from Circuit Court, Meade County; William G. Rice, Judge.

George Price was convicted of assault, and from an order denying a motion for a new trial he appeals. Affirmed.

See, also, 136 N. W. 1087.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Harry P. Atwater, of Sturgis, for appellant. Royal C. Johnson and M. Harry O'Brien, both of Pierre, and Claude C. Gray, of Sturgis, for the State.

WHITING, J. This is an appeal from a judgment and an order refusing a new trial. It appears that the jury were instructed and retired in the afternoon and the next morning returned into court and asked for instructions regarding the punishment in cases of the character of that on trial. The court proceeded to instruct the jury upon the question of punishment and then instructed them further, as follows: "It is the duty of jurors to return a verdict. The court does not intimate to you in the slightest degree what your verdict shall be. I have submitted four verdicts to you—one of assault with intent to kill; one of assault with intent to do bodily harm; one of assault and battery, and one of not guilty. It will be your duty to return one of those verdicts. I do not say what kind of verdict; that is for you. This thing of jurors sitting in a case and going out and can't agree is not right. Every man has a right to his opinion, but he has the right to consider that he might be mistaken one way or the other, and I expect verdicts in this court, and I have been in the habit of getting verdicts. All I expect is a verdict." This instruction was excepted to, "for the reason that the same amounted to coercion and amounted to telling the jury, or those who had not agreed upon a verdict, that it was their duty to unite with the majority of the members of the jury in returning a verdict, and amounted to a coercion of the jury upon the part of the court." It is owing to the giving of this instruction that appellant seeks a reversal of the judgment and order.

[1] The instructions given upon the preceding day and the evidence received upon the trial are not before us, and we must presume that the evidence was sufficient to support the verdict reached. Certainly an appellate court should decline to reverse a cause for even a clear error, where, from the whole record, it is apparent that the jury could not fairly have reached a different verdict. Furthermore, without the evidence before us, we certainly should presume that the record was so clear as to warrant the trial court in making the statements it did if such statements could ever be warranted. *State v. Kinney*, 21 S. D. 390, 113 N. W. 77.

[2] We are unable to agree with appellant in his contention that the instructions amounted to coercion or to the advising of the jury that it was the duty of a minority to unite with the majority. We fail to see

any element of threat. It is far different from a case where a court instructs a jury that it will be kept out until it agrees. At the very most, the court merely intimated that it believed the evidence of such a nature that the jury ought to be able to agree, and advised it that the judge expected a verdict. There was no intimation of what the verdict should be, in fact, the court expressly advised the jury that it "does not intimate to you in the slightest degree what your verdict shall be." Is it not the duty of a jury to reach a verdict in a clear case, and has not the court a right to expect a verdict in such a case? Undoubtedly this was such a case. Presumably the instructions in relation to punishment removed all differences that had arisen in the minds of the several jurors. The following from the opinion in *Odette v. State*, 90 Wis. 258, 62 N. W. 1054, is directly applicable to the instruction complained of: "After the jury had been out for some time and failed to agree, they were brought into court and informed by the court, in effect, that they ought not to stand out in an unruly and obstinate way, but should reason together and talk over the existing differences, if any, and harmonize the same, if possible; that it was their duty to meet the testimony in a spirit of fairness and candor with each other, and not to stand back obstinately, but to reason together and apply the law as given by the courts to the facts in the case, and arrive at some kind of a verdict; that, if they wanted no enlightenment upon the law in the case, then they might return to their room and continue to deliberate upon the issues until they had arrived at a verdict. We do not think this can be fairly construed as a threat that the jury would not be discharged until they had agreed. It was merely expressing the usual expectation that they would agree. It was for that purpose that the jury returned to their room. The mere failure of the court to discharge the jury when they thus came in, or telling them that it was their duty to use every reasonable effort to come to an agreement, as indicated, was not error." In *Moore v. Platteville*, 78 Wis. 644, 47 N. W. 1055, the same court sustained an instruction containing the following: "The court expected them, when they again returned to the courtroom, to have agreed upon a verdict." See, also, *Johnson v. State*, 60 Ark. 45, 28 S. W. 792; *People v. Stock*, 1 Idaho, 218; *German Sav. Bk. v. Citizens' Nat. Bk.*, 101 Iowa, 530, 70 N. W. 769, 63 Am. St. Rep. 399.

The judgment and order appealed from are sustained.

SHEAFE v. ZASTROW.

(Supreme Court of South Dakota. Oct. 25, 1912.)

1. SALES (§ 445*)—ACTION FOR PURCHASE PRICE—DIRECTION OF VERDICT—COUNTERCLAIM.

Where, in an action for the price of a heating plant sold under express warranty, there was evidence to support the allegation of defendant's counterclaim that the heating plant was of no value, and it appeared that he had paid the part of the price which he sought in his counterclaim to recover back, it was error to direct a verdict for plaintiff, though defendant had not pleaded or proved a rescission of the contract; the defendant, without having rescinded, being entitled to have the jury pass on his right to recover the payment made, regardless of whether he had any right to recover on the other elements of damage claimed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1303-1308; Dec. Dig. § 445.*]

2. SALES (§ 435*)—ACTION FOR PURCHASE PRICE—COUNTERCLAIM—SUFFICIENCY.

Where the counterclaim in an action for the price of a heating plant alleged damages because the plant was not as warranted and set out the contract price, it was not insufficient in failing to specifically allege that such price was the value of the plant.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1239-1245; Dec. Dig. § 435.*]

3. SALES (§ 262½*)—CONTRACTS — WARRANTIES.

Where a contract for the sale of a heating plant contained written warranties, there could be no implied warranties.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 736-739; Dec. Dig. § 262½.*]

Appeal from Circuit Court, Day County; Frank McNulty, Judge.

Action by M. W. Sheafe against August Zastrow. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed, and new trial ordered.

Anderson & Waddel, of Webster, for appellant. Sears & Potter, of Webster, and Mark W. Sheafe, Jr., of Watertown, for respondent.

SMITH, J. This is an appeal by defendant from a directed verdict in favor of plaintiff, and from an order denying a new trial. The complaint alleges, in substance: That the defendant requested the plaintiff to install a certain heating plant in the defendant's house in the town of Waubay. That, upon such request, the plaintiff did the work and furnished the material as agreed, and that the heating plant was of the reasonable value of \$320. That the plaintiff has paid \$150 upon the purchase price of the same, and demands recovery of the balance due upon the purchase price.

The contract under which the heating plant was furnished is not fully set out or alleged in the complaint, but was introduced by the plaintiff in evidence, and is as follows: "Watertown, S. D. October 18, 1909. For and in consideration of the sum of \$ three hundred and twenty, I, M. W. Sheafe,

do hereby agree to sell, deliver and install, ready for use to August Zastrow of Waubay, S. D., one smoke consumer heater and ventilator. It is expressly understood that all work is guaranteed to be done in a workmanlike manner. We guarantee material used against all defects, and agree to replace any or all parts within five years, with the exception of the grate bars and gas generator, and should these for any reason give out, we agree to replace the same at actual cost price to us. All hot air pipes are to be properly covered with asbestos paper and the furnace is to be of sufficient size to heat the house in which it is installed to a temperature of 70 degrees in all weather, where the thermometer does not register more than 25 degrees below zero, providing sufficient fuel and proper management of the furnace is used. It is expressly understood that the second floor be heated by the vent system and we do not agree to heat same to more than 60 degrees. I, August Zastrow, purchaser, agree to the above conditions in buying one smoke consumer heater and ventilator, one furnace and hereby agree to pay the sum of \$320.00 for the same as follows: \$—— to be paid when the furnace is delivered and riser pipes put in place, the balance \$320.00 to be paid when the furnace is installed and tested. August Zastrow."

The answer is somewhat lengthy, and we need only state so much thereof as will enable us to determine the theory upon which it appears to have been framed. The introductory sentence is: "Comes now the above-named defendant, and, for his answer to plaintiff's complaint herein, respectfully admits, denies, alleges, and shows to the court as follows:" "Admits the installation of the heating plant and the payment of \$150 thereon, and alleges that the plant was furnished under a written contract which guaranteed that the same should be built in a good and workmanlike manner, that the material therein was to be of the best quality, free from defects, and that the plant when installed should be of sufficient size to heat the house to not less than 70 degrees, provided the thermometer did not register more than 25 degrees below zero. The answer further alleges that, after entering into said contract, plaintiff did pretend to install in defendant's house a heating plant, but that the same has entirely failed to heat said house in accordance with the provisions of said contract, and that in truth and in fact it has been impossible to live in said house during the fall and winter of 1909 by reason of the plant failing to furnish sufficient heat; that the upstairs in said house during all of said time has been uninhabitable by reason of such failure, and that the downstairs during a great portion of said time has been uncomfortable, notwithstanding the fact that during all of said time said heating plant has

been furnished with abundance of fuel and has been as well managed as could be; that at no time during said period while the thermometer was not to exceed 15 degrees below zero has it been possible to heat the upstairs in said house to a degree to exceed 30 degrees, and at no time has it been possible, with the thermometer not to exceed 15 degrees below zero, to heat the downstairs of said house to a degree to exceed 60 degrees; that said heating plant was not built in a workmanlike manner, but was so poorly and defectively constructed that it is entirely useless and of no value; * * * that the steam tank placed between the furnace and the brickwork in what is known as the hot air chamber is so poorly and defectively constructed that the same will not hold water, but will leak the same out nearly as fast as it can be put in, and will partially put out the fire, and that all the water fixtures connected with said furnace and heating plant are so defectively constructed that they are leaky and of no value; that the arrangement connected with said furnace for the circulation of hot and cold air is so unskillfully and defectively constructed; that the same does not properly operate, and does not cause the hot and cold air to properly circulate; that said plant is further so defectively and unskillfully constructed that during a great portion of the time certain obnoxious gases form in the hot air chamber, and come into the room through the hot air pipes, to the great discomfort of defendant and his family, and to the detriment of their health; that the smoke consumer is so unskillfully and defectively constructed that it does not consume the smoke or any part thereof, specifically denies that said heating plant was of the value of \$320 or any other sum whatsoever, and alleges that the same was totally and entirely worthless." The answer then proceeds: "And for a counterclaim and set-off to the pretended cause of action set out in plaintiff's complaint defendant alleges that by reason of said *unskillful and unworkmanlike and faulty construction of said heating plant, as heretofore specifically stated and alleged*, he has been damaged by reason of his inability to rent any portion of his upstairs for a period of two months in the sum of \$70; that by reason of the discomfort and loss of health suffered during said time by defendant and his family, on account of the failure of said heating plant to furnish sufficient heat, and by reason of the obnoxious gases thrown into the rooms by reason of the faulty construction thereof he has been damaged in the further sum of \$500; that by reason of cutting holes in the floors of defendant's house by plaintiff in installing of said heating plant defendant has been further damaged in the sum of \$100; that, by reason of the payment of defendant to plaintiff for and on account of said contract as

aforesaid, defendant was damaged in the sum of \$150, making defendant's counterclaim in the aggregate the sum of \$820. Wherefore, defendant prays judgment that the plaintiff take nothing by this action, and that defendant have and recover of plaintiff the sum of \$820 besides his costs and disbursements in this action." At the trial plaintiff introduced evidence that he sold to the defendant and installed in his house the heating plant described in the complaint, and he had not been paid for the same, except the sum of \$150, and rested his case.

The defendant, under the allegations of the answer, offered a large amount of evidence tending to prove that the heating plant did not fulfill the requirements of the contract; that it failed to heat the lower part of the house to exceed 62 degrees above zero when the thermometer was above 25 degrees below zero; and that the heating plant was not constructed in a good and workmanlike manner, and that it failed in every respect to comply with the terms of the contract. Most of this evidence appears to have been admitted over the objections of plaintiff.

[1] At the close of all the evidence, plaintiff moved the court to direct the jury to return a verdict for the plaintiff upon the grounds: "That there is no evidence showing, or tending to show, the rescission of the contract in this: that the evidence conclusively shows that the defendant has retained possession of the article sold, and is still retaining the same, and has never offered to return it, and that there was no evidence excusing or tending to excuse such offer of return." In support of this ruling, the plaintiff contends that the defendant failed to plead any breach of the warranties contained in the contract, and had failed to rescind or offer to rescind the contract, and had failed to plead any sufficient counterclaim under which he could recover damages in the action. It is defendant's contention that the facts alleged in the counterclaim and supported by the evidence entitle him to recover damages by reason of the plaintiff's failure to comply with the terms of the warranty, and that the court erred in directing a verdict for the plaintiff. A considerable portion of the briefs of counsel of both appellant and respondent is devoted to a discussion of the law of rescission, but we fail to see that the doctrine of rescission has any application whatever to the questions presented by the record upon this appeal. No attempted rescission is pleaded in the answer, nor is any such attempt disclosed by the evidence in the record. It seems plain to us, therefore, that the specific grounds upon which the plaintiff moved for direction of a verdict at the close of the evidence were wholly irrelevant to any issue before the court, and the ruling of the court seems to have been wholly upon the fact that there

had been no rescission alleged or proved, and that defendant still retained the heating plant, and had not offered to return it, and had offered no evidence excusing or tending to excuse such offer of return. It seems to us perfectly clear that defendant neither in his answer nor in his evidence attempted to rely upon the doctrine of rescission. It seems equally plain to our minds that the defendant's answer seeks to plead the warranties contained in the contract, and to allege a breach thereof to the defendant's damage. It is true the answer in its introductory paragraph merely "admits, denies, alleges and shows the court as follows," and thereupon proceeds to allege the contract with warranties and the breach thereof, alleges the contract price to be \$320, and specifically alleges that the heating plant was not of the value of \$320 but was totally and entirely worthless, and for a counterclaim and set-off alleges that by reason of said unskillful and unworkmanlike construction of said heating plant, "as hereinbefore specifically stated and alleged," he has been damaged in certain specific sums, among which is the payment of \$150 on the contract price of the plant, and at the conclusion of the answer prays judgment that plaintiff take nothing by his action, and that defendant have and recover of plaintiff his damages in the sum of \$820, with costs and disbursements. But that this answer, although drawn in a somewhat unusual and peculiar manner, was sufficient as pleading a counterclaim for damages, we have no doubt. We are not called upon at this time to determine whether defendant might be entitled to recover all the items of damage alleged. It is sufficient for the purposes of this appeal to note that if the allegations of the defendant's counterclaim were proved, and there is evidence in the record tending to sustain it, namely, that the heating plant as such was absolutely of no value whatever, the defendant would be entitled to recover at least the amount paid by him on the purchase price. *Thresher Co. v. Shirmer*, 122 Iowa, 699, 98 N. W. 504; *McConnell v. Lewis*, 58 Neb. 188, 73 N. W. 518.

[2] It is respondent's further contention that defendant's counterclaim should be held insufficient under the ruling of this court in *Acme Harvesting Mach. Co. v. Barkley*, 22 S. D. 453, 118 N. W. 690, for the reason that the counterclaim does not allege what the value of the heating plant would have been if as warranted. We do not regard that case as controlling. In that case there appears to have been no allegation in the answer, either of the contract price of the machinery warranted, or of the value of the property, if as warranted. In the case at bar the counterclaim alleges the contract price of the heating plant, and the contract price thus pleaded may well be deemed a

sufficient allegation of the value of the heating plant if as warranted. And this allegation is not only conceded by the ruling of the court on the motion to direct a verdict, but is sustained by the plaintiff's own evidence that the plant was worth the sum of \$320.

[3] Appellant further alleges error in refusing defendant's motion for leave to amend his answer so as to plead an implied warranty under the statute and a breach thereof. It is conclusively shown that the contract itself contained written warranties, and, under the well-settled rule of law, there could be no implied warranties. The court, therefore, did not err in refusing the amendment. And, in any event, under the circumstances of the case, we are of opinion that the court committed no abuse of discretion in denying the proposed amendment, even though competent. Other matters are discussed in appellant's brief, but we deem it unnecessary to consider them.

We are clearly of the opinion that the trial court erred in sustaining plaintiff's motion for a directed verdict. The order and judgment appealed from are therefore reversed, and a new trial ordered.

SMITH v. JOHNSON.

(Supreme Court of South Dakota. Oct. 25, 1912.)

1. APPEAL AND ERROR (§ 696*) — RECORD — SUFFICIENCY OF EVIDENCE.

Where the trial judge did not certify that the evidence to support a finding was in the record, the sufficiency of such evidence could not be reviewed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2916, 2917; Dec. Dig. § 696.*]

2. EVIDENCE (§ 450*) — PAROL EVIDENCE — MEANING OF CONTRACT.

In a vendor's action for specific performance of a contract providing that the price should be paid in cash or by accepted mortgage, parol evidence of conversations and circumstances attending the execution of the contract was admissible to show the intent of the parties in the use of the ambiguous phrase "accepted mortgage."

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 450.*]

3. SPECIFIC PERFORMANCE (§ 121*) — EVIDENCE—SUFFICIENCY—SALE CONTRACT.

Evidence in a vendor's action for specific performance of the sale contract, which provided that the land should be paid for in cash or by accepted mortgage, held to sustain a finding that the term "accepted mortgage" was intended by the parties to refer to a mortgage which was then on the land and was to be assumed by the purchaser, unless he should choose to pay the entire price in cash, and receive the land clear of mortgage.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 387-395; Dec. Dig. § 121.*]

4. SPECIFIC PERFORMANCE (§ 96*)—TENDER OF DEED—SUFFICIENCY OF DESCRIPTION.

The fact that a deed tendered in performance of a sale contract described the land by lots according to the government survey, while the contract described it by sectional subdivisions "according to government survey," did not render the tender insufficient where the description in the deed was sufficient to identify the land as that described in the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 278-285; Dec. Dig. § 96.*]

5. SPECIFIC PERFORMANCE (§ 119*)—ACTION BY VENDOR—BURDEN OF PROOF.

Where, in a vendor's action for specific performance of the sale contract which described the land by sectional subdivisions, and as containing a certain number of acres, more or less, according to the government survey, the plaintiff relied upon the tender of a deed describing the land by lots, as it was actually described in the government survey, and it appeared that the acreage was about 6 per cent. less than that mentioned in the contract, the burden was on plaintiff to show that the defendant understood the words "more or less" to relate to such variations of quantity as occur in lots on the north and west township lines under the system of government surveys, and not merely to those variations which occur in sections, especially where it did not appear that the contracting parties knew that the government survey described the land by lots.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 382, 383; Dec. Dig. § 119.*]

6. EVIDENCE (§ 23*)—JUDICIAL NOTICE—GOVERNMENT SURVEYS—PRIVATE SALE CONTRACT.

The rule that the court may take judicial notice that under the system of government surveys each sectional subdivision except those adjoining the north and west township lines is presumed theoretically to contain the quantity of land called for by the description, and that the lands adjacent to said township lines and described as lots may vary greatly in quantity, has no application to parties to a private contract for the sale of land, but in such case the knowledge of the actual facts must be shown to enable the court to apply the proper rule of construction to ascertain the intent of the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 29, 30; Dec. Dig. § 23.*]

7. INTEREST (§ 37*)—RATE OF INTEREST.

Under Civ. Code, § 2294, providing that the detriment caused by the breach of an obligation to pay money only is the amount due by the terms of the obligation with interest thereon, it was error, in a vendor's action for specific performance of the sale contract to award him interest on the purchase money in excess of the legal rate; the rule of damages for failure to pay money being the same in equity as in law.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 77, 78; Dec. Dig. § 37.*]

8. SPECIFIC PERFORMANCE (§ 120*)—ACTION BY VENDOR—EVIDENCE.

In a vendor's action for specific performance of the sale contract, it was improper to permit him to testify as to the amount of his loss from not having obtained any use or profits of the land.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 384-386; Dec. Dig. § 120.*]

Appeal from Circuit Court, Custer County; Levi H. McGee, Judge.

Action by William M. Smith against Erland H. Johnson. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed, and new trial granted.

Null & Royhl, of Huron, for appellant. Lawrence H. Hedrick, of Hot Springs, for respondent.

SMITH, J. Appeal from the circuit court of Custer county. Action for specific performance of a contract for the sale of real property and to recover damages. Trial to the court. Findings and judgment in favor of plaintiff. Defendant appeals from the judgment and from an order overruling motion for a new trial.

The following portions of the written contract are material to the questions presented on this appeal: "Witnesseth: That the party of the first part (Smith) for the consideration of \$500.00 to him in hand paid, hereby agrees to sell to, deliver and convey to the party of the second part (Johnson) his assigns or heirs, a warranty deed, duly signed and executed, upon full settlement of the full purchase price, being \$9,600 less \$500.00, the following-described premises, to wit: Northeast $\frac{1}{4}$ of section 30, south $\frac{1}{2}$ of the northwest $\frac{1}{4}$, the southwest $\frac{1}{4}$ and west $\frac{1}{2}$ of the southeast $\frac{1}{4}$, all in section 30, township 5, south of range 8, east B. H. M. containing 480 acres, more or less according to the government survey. Also 80 acres of water right desert filing, with water right of same, and one water right made to Harry M. Sprague. And the second party hereby agrees to pay in cash or by accepted mortgage said purchase price to the party of the first part on or before May 1st, A. D. 1910." The motion for a new trial and the assignments of error question the sufficiency of the evidence to sustain certain of the findings and the competency of the evidence upon which these findings are based. The findings in question are numbered 5, 6, 7, 11, and 14.

[1] The sufficiency of the evidence to support No. 19, discussed in appellant's brief, cannot be raised upon this appeal, for the reason that the trial judge has certified to this court that the testimony in the record is only such as was received in support of findings Nos. 5, 6, 7, 11, and 14, and fails to certify that the evidence in support of finding No. 19 is in the record. This omission, however, is not material, because the competency of the evidence offered to sustain the allegations of the complaint upon which finding No. 19 is based is presented by the specifications of errors occurring at the trial, and the sufficiency of the evidence is determined by the objections to its competency. But the sufficiency of the evidence to sus-

tain findings of fact 5, 6, 7, 11, and 14 is presented, as well as the competency of the evidence offered in support of these findings. The findings are as follows:

"(5) That by the words 'accepted mortgage,' used in said agreement, defendant and plaintiff meant that defendant could assume the mortgage as mentioned above in paragraph 2, and pay the balance in cash.

"(6) That, if defendant did not choose to assume said mortgage, the same should be paid out of the purchase price.

"(7) That by the terms of the said agreement the plaintiff was to transfer the real estate particularly described therein by warranty deed, and was to transfer the desert filing and the water right filings mentioned therein by such instruments of conveyance or assignment as is usual in the transferring or assigning of such interests. * * *

"(11) That plaintiff has at all times since the execution of said agreement, and now is, ready and willing, and able, to perform said agreement on his part. * * *

"(14) That real estate described in paragraph one (1) was at the time of the execution of said agreement, and now is, of the reasonable value of ten thousand dollars (\$10,000). That the desert filing and the water right filings mentioned in said agreement were of trifling value."

[2] Appellant in the assignments of error contends that the testimony is insufficient to sustain findings 5 and 6, because the contract of sale was in writing, and the phrase "accepted mortgage" is not ambiguous or uncertain, and should be interpreted by the court, and that certain evidence offered and received to aid in ascertaining the meaning and intent of the parties to the contract was therefore incompetent. The general rules for the construction of contracts and ascertaining the intent of the parties are thus stated in 9 Cyc. (A): "The law furnishes certain rules for the construction of written contracts for the purpose of ascertaining from the language the manner and extent to which the parties intended to be bound, and those rules should be applied with consistency and uniformity, and it is not proper for a court to vary, change, or withhold their application. * * *

The first and main rule of construction is that the intent of the parties as expressed in the words they have used must govern. Greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. If the words used clearly show the intent, there is no need for applying any technical rules of construction, for, where there is no doubt, there is no room for construction." Id. 587 (H). "To determine the intention of the parties if the meaning is not clear, it is necessary that regard shall be had to the nature of the instrument itself, the condi-

tion of the parties executing it, and the objects which they had in view, for which purpose parol evidence is admissible. This rule does not apply, however, where the language of the contract leaves no doubt as to the meaning of the parties, but in such a case the contract is to be construed without regard to extraneous facts." Id. 591 (K). "The question of the meaning of a written contract is ordinarily one of law for the court, and not one of fact for the jury; but, where the construction of a written contract depends upon extrinsic facts as to which there is a dispute, its construction is a mixed question of law and fact, and is for the jury under proper instructions from the court."

In the application of these elementary rules to the case before us, the first question is whether the language used is clear, and leaves no doubt as to the meaning and intent of the parties. By the contract the grantee agrees to pay for the land in "cash or by accepted mortgage." It is to be assumed from the contract that the plaintiff intended to sell, and the defendant intended to buy, the lands described, and that defendant intended to pay for the lands in some manner. The contract says, "in cash or by accepted mortgage." What did the parties mean or intend when they used the words "accepted mortgage"? Was it intended that the grantee might pay the whole purchase price of the land by giving the vendor a mortgage upon the land? Was it the intention that the vendee might pay part of the purchase price in cash and the balance by mortgage? Was it the intention of the parties that the vendee might pay the whole purchase price in mortgage securities if accepted by the vendor in lieu of cash? It is obvious that the meaning and intent of the parties as expressed in the words "accepted mortgage" is not clear, and cannot be ascertained with any reasonable certainty by a construction of the language used. The case therefore falls clearly within the rule that resort may be had to conversations showing the intent and understanding of the parties, together with surrounding circumstances existing at the time the contract was entered into. The rule permitting such testimony is recognized by section 1256, Civil Code, which provides: "A contract may be explained by reference to the circumstances under which it was made." Miller v. Way, 5 S. D. 468, 59 N. W. 467; Small v. Elliott, 12 S. D. 570, 82 N. W. 92, 76 Am. St. Rep. 630; Grimsrud Shoe Co. v. Jackson, 22 S. D. 114, 115 N. W. 656. There was no error in receiving the evidence complained of.

[3] The next question is whether the evidence received in connection with the words used in the contract is sufficient to sustain the finding of the trial court as to the intention of the parties. The evidence tends to show, and the court found in the second finding of fact, that on March 7, 1910, when

the contract was entered into, there was a mortgage on the land on which there was due \$4,875, with interest at 7 per cent. from March 1, 1910. The plaintiff testified, in substance, that at the time the contract was entered into he had a conversation with defendant, Johnson, about this mortgage, in which he told Johnson that, if he did not want to pay all the money on the land, he could assume the mortgage and let the same run; and that the words "accepted mortgage" had reference to this mortgage. Defendant in his testimony admitted this conversation and understanding. The court in findings 5 and 6 found that by the words, "accepted mortgage," both parties understood and meant that the defendant might assume the mortgage then on the land, and pay the balance in cash, or pay the entire purchase price in cash out of which the mortgage should be paid in full, giving the purchaser a clear title. In finding No. 7 the court found that it was the intent of the parties to transfer the desert land filing, and the two water right filings, by such instruments of conveyance or assignment as were usual in transferring or assigning such interests. We are of opinion this interpretation of the contract is correct. Findings Nos. 8 and 9 show the instruments of conveyance and assignments which were tendered as conveyances of the desert filing and water rights, and as a conclusion of law the court finds that the plaintiff performed all the requirements of the agreement incumbent upon him in the manner and within the time prescribed. No assignments of error as to the sufficiency of the evidence to sustain findings 8 and 9 are in the record, nor does the trial court purport to certify the evidence upon which they are based. This court will therefore presume there was sufficient evidence before the trial court to show that such instruments were usually employed to effect the transfer of such interests, and therefore the tender was a sufficient compliance with the terms of the contract.

Appellant's next contention is that the description of the land in the contract is indefinite and uncertain because the lands are described in the contract as the W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 30, "according to the government survey." Appellant's real contention appears to be that there is no government survey of lands along the west line of section 30 showing sectional subdivisions; that in such surveys lands along the west line of townships are described as lots and not otherwise. The trial court (finding No. 13) finds that the land lying along the east side of township lines is designated on the plat books of the United States government as lots, said lots being numbered, the numbers beginning in the northwest corner of each section and numbering south, lots 1, 2, 3, 4; that it is the usual and common thing to

describe such lots by half and quarter section numbers; and that, when so described, the lands numbered as lots are definitely known and readily ascertained, and that the land described in the contract lies along the eastern side of the township line. The evidence upon which this finding is based is not certified in the record, and we must presume was sufficient to sustain the finding. There is no evidence in the record tending to show that divisional lines of section 30 are not identical with the lot lines.

[4] Appellant's further contention is that the deed tendered by plaintiff in performance of the contract, in which the lands are described by lots, does not show a compliance with the contract, in which the lands are described by sectional subdivisions, and thus falls to show a tender in compliance with the contract. In the case of *Ford v. Ford*, 24 S. D. 644, 124 N. W. 1108, this court held that a description in a deed, which conveyed "all the right, title and interest in and to all ranches, lands, houses, barns, stables and corrals belonging to Hugh Ford, situated on Belle Fourche River, Butte County, D. T. commonly known as the headquarters of Ford Bros. Cattle Co.," was sufficient, saying: "We are of opinion that this description was sufficient to convey the lands in question. The office of a description in a deed is not to identify the lands, but to furnish the means of identification, and that a description is considered sufficiently certain which can be made certain, and that a description in a deed would be deemed sufficient if a person of ordinary prudence, acting in good faith and making inquiries suggested by the description given in such deed, would be enabled to identify the property." We hold, therefore, that a tender of a deed describing the property by lots from which the property can be identified as the same property described in the contract is a sufficient compliance with the terms of the written contract in which the same property is described by sectional subdivisions, and that the accompanying words, "according to government survey," make that survey a part of the description for the purpose of identifying the land. *Heffelman v. Otsego W. P. Co.*, 78 Mich. 121, 43 N. W. 1096, 44 N. W. 1151; 13 Cyc. 633 (II).

[6] Appellant argues at some length the proposition that the land described in the deed by lots is 30.87 acres less than the land described by sectional subdivisions in the contract. There is absolutely nothing in the findings of fact or the evidence in the record on which to found this argument; the only allusion in the record to the quantity of land being found in "conclusion of law" No. 8, where it is said, "The deficiency less than four hundred and eighty (480) acres being only thirty and eighty-seven one-hundredths (30.87) acres or about six per cent. (6 per cent.), is not so great but that it is fully covered by the words 'more or less, accord-

ing to the government survey,' and the defendant is not entitled to any reduction in the purchase price by reason of such deficiency, he having taken the risk." The only question, then, is whether a deficiency of about 6 per cent. in the quantity of land would be covered by the words, "more or less" in the contract. Plaintiff was permitted to testify over defendant's objection that at the time the contract was signed he informed defendant "that the land laid right along this township line and it might be a little long or a little short, and I don't know." But this evidence is of little value in the solution of the precise question presented, which is whether or not it was known and understood by the parties that the identical land described by sectional subdivisions in the contract was, in fact, described as lots in the government survey. This evidence goes only so far as to disclose that defendant knew the land was on the west line of the township. Are the parties presumed to know that land so situated is surveyed into lots, and to have entered into the contract on the basis of that fact? Upon this question the evidence is entirely silent, and the question can only be solved by an assumption that the parties did, or did not, know that the property purchased and sold was described in the government survey as lots, and not by sectional subdivisions. If both parties knew and understood this fact, they would be presumed to have contracted on that basis. No element of fraud, misrepresentation, or mistake as to the quantity of land enters into this case. The only question involved is the proper interpretation of the language used by the parties. It is contended by appellant that, because the description in the contract was by sectional subdivisions, he had a right to assume that the words "more or less" contemplated only such variations in quantity of land as might ordinarily occur in surveys of sectional subdivisions, and not to variations in quantity which might result from accumulations or deficiencies on north or west township lines under the system of government survey. It is contended that appellant might have been willing to risk a variation of quantity such as might exist in the usual sectional surveys, but not the greater uncertainty as to quantity where the land is described as lots.

The real question urged by appellant is whether the words, "more or less," should be held to relate to variations of quantity which occur in sections or to variations in quantity which occur in lots. We have already held that the description by sectional subdivisions in the contract is sufficient to identify the land as the same land described as lots in the deed tendered by plaintiff in performance of the contract. The last contention, however, presents a different question; and that is whether at the time of entering into the contract it was understood by the parties

that the land described in the contract in fact embraced lots, and not sectional subdivisions. No other rule for the solution of this question occurs to us than such as may be found in the application of the rule as to the burden of proof. The burden of proof as to every fact essential to sustain his theory of the case rests upon the plaintiff. Plaintiff's contention is that the assumption of risk as to the quantity of land related to lots, and he should assume the burden of proof. The contract itself describes the land by sectional subdivisions, and in the absence of evidence tending to show that the parties knew and understood as a fact that the property intended to be conveyed consisted of lots, and not of sectional subdivisions, we think defendant's contention must prevail, and that we should hold that the words "more or less" were understood and intended by the parties as an assumption of risk of variations in quantity, such as ordinarily occur in sectional subdivisions. But again, from lack of evidence, the court is left without actual knowledge as to what such variations in quantity of land ordinarily are in fact.

[5] The court may take judicial notice that under the system of government surveys each sectional subdivision, except those which adjoin the north and west township lines, is presumed theoretically to contain the quantity of land called for by the description, and that lands adjacent to said township lines and described as lots may, in fact, vary greatly in quantity. But this rule has no application to parties to a private contract for the sale of lands, where knowledge of the actual facts must be shown to enable the court to apply the proper rule of construction to ascertain the intent of the parties. We think, however, the court may take judicial notice of material facts connected with the subject-matter of the contract, and should, therefore, construe the contract upon the assumption that both parties were ignorant of the fact that the property described in the contract consisted of lots, and not the usual sectional subdivisions. It follows that we should assume both parties intended to risk only such variation of quantity as might occur in sectional subdivisions, and not the variation of quantity which occurs in lots. It then becomes necessary to consider whether a deficiency of 30.87 acres in the total of 480 acres is greater than was within the contemplation of the parties, when each assumed the risk more or less than 480 acres by the contract. It will be observed that the contract price of the land averaged \$20 per acre, and this deficiency in quantity would represent a deficiency in value of substantially \$600. Had the description in the contract been by lots, it might be presumed that the parties intended to assume the risk of the greater variations in quantity and value which may occur under such descriptions, and that a sale in gross was intended. But,

as the description in the contract was by quarter sectional subdivisions, the court may not presume that the parties intended to assume the risk of the greater variations which are known to occur in surveys where the description of sectional subdivisions is by lots; at least, in the absence of evidence to show that the parties knew as a fact that the government survey described the land by lots. There is some evidence that the plaintiff informed defendant orally that there might be "more or less" land, but that statement would apply to the description given in the contract by sectional subdivision, and is not equivalent to a statement that the government survey described the land by lots. Why did plaintiff cause the land to be described in the contract by quarter sectional subdivisions and not by lots? If plaintiff, being the owner of the land, did not know the actual government descriptions, still less can we presume, in the absence of evidence, that the defendant knew it. Respondent's counsel cites a large number of decided cases in which variations in quantity of land were deemed immaterial, because contemplated and covered by the words "more or less" in the conveyance. None of the cases cited cover the precise point under discussion. The question in this case is whether the words "more or less" in the contract were understood and intended by the parties to apply to a description by government quarter sectional subdivisions, or to a description by government sectional subdivisions in lots. Clearly, the burden of proof was upon plaintiff to show at least the fact that defendant knew the land was not in quarter sectional subdivisions but in lots; that he might ask the court to draw the conclusion of fact therefrom; that defendant intended to assume the risk of variation in quantity existing in such cases. This the plaintiff has utterly failed to do, and for that reason the findings and judgment of the trial court are not sustained by the record.

[7] Another question is presented in the record which becomes material in view of the fact that a new trial must be granted, which will be briefly noticed here. While this action is for specific performance of a contract, the only relief which the plaintiff seeks or to which he could be entitled is a judgment awarding him that which would be due him under the terms of the contract if fully performed. Under the contract, plaintiff could in no event receive anything other or further than the purchase price of the land in money, according to the terms of the contract, with interest thereon, at the legal rate from the time of default in payment. The rule of damages for failure to pay money is the same in an equity as in a law action. Under the contract in ques-

tion, the only obligation assumed by defendant was for the payment of money, namely, the purchase price of the land. Section 2294 of the Civil Code provides: "The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereupon."

Respondent's counsel in his brief concedes that legal interest on the purchase price of the land to the date of the judgment and decree amounts only to \$375.58. The court found that "the plaintiff has sustained damages by reason of the defendant's failure to perform said agreement in the sum of at least one thousand dollars (\$1,000), with interest on the purchase price from May 1, A. D. 1910, the date when said money should have been paid, will not reimburse plaintiff for his damages by seven hundred and fifty dollars (\$750)," while the judgment and decree of the court is "that plaintiff have and recover of defendant the sum of five hundred dollars (\$500) for his damages in this action." Whatever meaning may attach to this finding, it is clear that the judgment is for a recovery of damages in excess of the amount of legal interest on the purchase price of the land, and it is clear that the court erred in both the finding of fact and the judgment.

[8] Upon the trial the plaintiff, testifying in his own behalf, was permitted, over proper objections, to answer the following question: "In your opinion what was a reasonable amount to fix your loss by reason of not having obtained any use or profits of this land? Answer: I think that a thousand dollars is a very light loss for me from the 1st day of May to the present time." The ruling of the court was plainly erroneous, and the answer insufficient to sustain the finding referred to. In the certificate settling and allowing the bill of exceptions the trial judge certifies "that the testimony set forth in the foregoing bill of exceptions is all the testimony received at the trial in support of findings of fact Nos. 5, 6, 7, 14, and 11." As the record does not purport to contain the testimony received in support of other findings of fact, we shall not consider them. But in view of the fact that upon the record before us the trial court appears to have adopted an erroneous view as to the effect of certain material portions of the evidence, as well as of the measure of damages, and because of the fact that we are unable to direct a proper judgment upon the record before us, the judgment of the trial court is reversed, and a new trial granted.

The cause is remanded for further proceedings in accordance with the views expressed in this opinion.

GIEB v. MORRISON COUNTY.

(Supreme Court of Minnesota. Nov. 1, 1912.)

*(Syllabus by the Court.)***1. DRAINS (§ 82*) — ASSESSMENTS — SETTING ASIDE—PUBLISHING OR POSTING NOTICE.**

A finding that the proceedings to establish a drain under chapter 230, G. L. 1905 (Rev. Laws Supp. 1909, §§ 2651—44 to 2651—106), were regular, is not impugned by another finding that certain proof of the publishing or posting of a required notice is lacking or insufficient, for the statute does not require proof of the publication, mailing, or posting of the notices therein specified to be filed or preserved in the records of the proceedings.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 84—87; Dec. Dig. § 82.*]

2. DRAINS (§ 74*) — PROCEEDINGS TO ESTABLISH—IRREGULARITIES—WAIVER.

A person who, with knowledge of the proceedings to establish a public drain which benefits his lands, stands by while such drain is being constructed, knowing that the expense thereof must be assessed against the lands benefited, cannot, after the lapse of more than three years, invoke the equity powers of the court to remove the cloud cast upon his said lands by the assessment made in the proceedings, on the ground that these were without jurisdiction.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 82; Dec. Dig. § 74.*]

Appeal from District Court, Morrison County; C. A. Nye, Judge.

Action by Josephine Gieb against the County of Morrison. Judgment for defendant, and plaintiff appeals. Affirmed.

A. H. Vernon, of Little Falls, for appellant. D. M. Cameron, of Little Falls, for respondent.

HOLT, J. The action was brought to remove the apparent lien cast upon plaintiff's land by the spreading upon the records of the auditor's tabular statement of benefits assessed against the land in an alleged invalid ditch proceeding under chapter 230, G. L. 1905 (Rev. Laws Supp. 1909, §§ 2651—44 to 2651—106). Findings were made and judgment entered pursuant thereto, denying plaintiff relief. She appeals from the judgment.

The return does not contain a settled case or bill of exceptions, so that the correctness of the judgment must be determined by reference to the pleadings and findings alone. It appears therefrom that in February, 1909, proceedings were instituted before the board of county commissioners of Morrison county to establish county ditch No. 17. In September following the order was made establishing the ditch, and in December thereafter, pursuant to the order, the auditor made and recorded the tabular statement charging the land of plaintiff and other lands with the assessments for the construction of the ditch. Plaintiff has been at all times in question a nonresident. The answer alleged that the ditch was actually constructed under the

proceedings; that plaintiff's lands were thereby benefited; that the then owner of the land described in the complaint knew that the ditch was being constructed, and made no protest until long after the work had been performed, except by protesting to the payment of the ditch assessment after it had been levied. There was no reply, hence the allegations as to benefit to plaintiff's lands from the construction of the ditch, her knowledge of the work while being done, and her failure to object till long after its completion, stand admitted.

The only basis for an attack on the ditch proceedings results from the irregularities found by the court, as appears from the first of these two paragraphs of the finding:

"III. That the proceedings so had and taken by said board of county commissioners were in certain respects irregular in this: That the printer's affidavit of publication of notice of hearing upon said petition does not show that the same was sworn to by the person purported to have made and signed the same; that the proof of posting of notice of hearing to consider the engineer's and viewer's reports is defective, in that it fails to show that such notice was posted in township 39, range 28, in which township a part of said ditch was located; that the notice of the meeting of the county commissioners to act upon said engineer's and viewer's reports was in fact posted at the courthouse door not more than 20 days before the date of said meeting; that the notice of such meeting was in fact posted in township 39, range 29, in which township a part of said ditch was located, not more than 11 days before the day of such meeting; but in all other respects the proceedings had and taken by said board of county commissioners in reference to the establishment, laying out, and construction of said ditch were in accordance with law.

"IV. That the ditch heretofore referred to was in fact constructed under the proceedings instituted therefor; that the plaintiff's land was in fact benefited thereby; and that no objection to such proceedings was made by the plaintiff prior to the bringing of this action, nor was any action taken at any time, either by injunction, certiorari, or otherwise, to test the validity of said proceedings, or the taxes attempted to be collected thereunder prior to the bringing of this action."

[1] The two irregularities first specified by the court cannot be material. The finding that all the proceedings were in accordance with law amounts to a finding that the notice of hearing was duly published and posted. Undoubtedly it is commendable practice to preserve proof of such publication by filing an affidavit of the printer as to the paper and issues thereof in which the notice was published, and also proof as to mailing and posting. Where the law so prescribes,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

it must be done. But it is to be observed that the statutes relating to these proceedings are silent on the matter. The county commissioners are required to satisfy themselves that the prerequisite notice has been given, and their order establishing the ditch is *prima facie* proof thereof. Section 48, c. 230, G. L. 1905 (Rev. Laws Supp. 1909, § 2651—91). So, also, the finding that the proof of posting the notice of hearing to consider the engineer's and viewer's reports is defective, in that it fails to show that such notice was posted in town 39, range 28, in which township a part of the ditch is located, is not material, for it is not a finding to the effect that such notice was not in fact posted.

[2] The court, however, does find that the notice on the engineer's and viewer's reports was not posted for the requisite number of days before the hearing at the courthouse, and in the township where is plaintiff's land and part of the ditch. Whether the failure so to do ousted the commissioners' jurisdiction, if they had acquired it by the due notice of the hearing on a proper petition for the ditch, or whether they could not obtain any jurisdiction because the notice was not posted in the places mentioned in the findings the length of time required, or whether, plaintiff being a nonresident, the service of the notice by mail, as required by the statute, was sufficient to give jurisdiction as to her interest in the land, we need not stop to consider in this case, for we are of opinion that the record shows that plaintiff is not in position to invoke the aid of the court. Her knowledge of the construction of the ditch is established by failure to reply to the answer alleging such knowledge. The ditch benefited her lands. She permitted the county and persons interested to incur the expense of the enterprise, knowing that the same would be assessed against lands benefited. No objection was made by her in the ditch proceeding, and no appeal taken from the order therein. She waited almost four years after the work was done before bringing the present action. Her conduct has been such that her suit at this time ought not to move the court of equity to her aid. In *State v. Johnson*, 111 Minn. 255, 128 N. W. 1074, the court intimates that, where a property owner stands by and witnesses the expenditure of public funds in improvements which confer special benefits upon his property, and where the character of the improvement is such that it must be paid for by an assessment upon the land benefited, he ought not to be permitted to question the validity of an assessment for improvements made under color of law. This rule is firmly established in Indiana, as appears from *Board of Com'rs of Cass County v. Plotner*, 149 Ind. 116, 48 N. E. 635, and the cases therein cited. In *Atwell v. Barnes*, 109

Mich. 10, 66 N. W. 583, a case to enjoin the collection of a drainage tax, the contention was made that the defects in the drain proceeding were jurisdictional. The court says: "Where this is the case, no waiver can cut off the rights of the party, or interfere with his right to complain. We need not determine what would be the right of complainant at law. The cases above cited (*Byram v. City of Detroit*, 50 Mich. 56, 12 N. W. 912, 14 N. W. 698; *Lundbom v. City of Manistee*, 93 Mich. 170, 53 N. W. 161; *Goodwillie v. City of Detroit*, 103 Mich. 283, 61 N. W. 526) do not turn on the principle of waiver, but hold that where a party stands by and sees work of this kind go on, with full knowledge that he is to be assessed therefor, and knowing that those who do the work can be compensated in no other way than by an assessment for benefits, and when, as in the present case, the complaining party actually receives a benefit from such work, equity will not interpose to relieve him." *Kellogg v. Ely*, 15 Ohio St. 64.

We therefore hold that, plaintiff having stood by while a ditch was constructed which benefited her land, with full knowledge of the proceedings and that the expense thereof would necessarily be assessed against lands benefited, she cannot now, after a lapse of more than three years after completion of the enterprise, invoke equitable relief.

The judgment is affirmed.

KANNE v. KANNE et al.

(Supreme Court of Minnesota. Nov. 1, 1912.)

(Syllabus by the Court.)

1. PLEADING (§ 343*)—MOTIONS—JUDGMENT ON PLEADING—RIGHT TO PARTIAL RELIEF.

Plaintiff's motion for judgment on the pleadings *held* properly denied, even though he were entitled to partial relief, where the motion does not so limit the recovery sought.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1048-1051; Dec. Dig. § 343.*]

2. WITNESSES (§ 52*)—ADMISSIONS—HUSBAND AND WIFE.

Admissions against interest are admissible against the one making them, although the spouse of such person is a party to the action, and do not come within the inhibition of section 4660, R. L. 1905, which prohibits one spouse from testifying in a case where the other spouse is a party without the latter's consent.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 124, 126-136, 165; Dec. Dig. § 52.*]

3. TRIAL (§ 388*)—TRIAL BY COURT—FINDINGS—NECESSITY.

The evidence and issues examined, and *held*, that it was error to dismiss the case on the merits when the parties rested, without making findings of fact and conclusions of law.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 908-911, 915; Dec. Dig. § 388.*]

4. PARTIES (§ 75*)—OBJECTIONS—PLEADING.

A party who has neither demurred because of defect of parties nor set up such defect by answer is not entitled to a dismissal of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

action on the merits on the ground of defect of parties.

[Ed. Note.—For other cases, see Parties. Cent. Dig. §§ 115, 116, 667; Dec. Dig. § 75.*]

5. BANKRUPTCY (§ 304*)—ADMINISTRATION OF ESTATE—ACTION BY TRUSTEE.

Under the pleadings and the admitted facts, plaintiff was entitled to some relief, even if he failed to establish that the contract between the defendants was a fraudulent transfer as to the then existing creditors of one of the parties to the contract.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 463; Dec. Dig. § 304.*]

6. GIFTS (§ 16*)—INTER VIVOS—REQUISITES.

Under the contract involved here, the vendors agreed to convey the land in consideration of the vendees' agreement to pay \$150 annually to the vendors and the survivor during life, and \$5,000 to their legal heirs at the death of the survivor of the vendors, with a provision that the vendees had the right at any time prior thereto to pay the vendors \$5,500 and obtain a deed and terminate the contract, *held*, that there was no executed gift to the heirs of the vendors.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 3; Dec. Dig. § 16.*]

Appeal from District Court, Waseca County; Arthur B. Childress, Judge.

Action by Paul Kanne, as trustee in bankruptcy of Frederick F. Kanne, against Frederick F. Kanne and others. From an order denying plaintiff's motion for a new trial, he appeals. Reversed.

F. B. Andrews, of San Diego, Cal., Moonan & Moonan, of Waseca, and H. L. Schmitt, of Mankato, for appellant. Frederick F. Kanne, of Waterville, pro se. Morgan & Melghen, of Albert Lea, for other respondents.

HOLT, J. For ten years prior to 1907 the defendant Frederick F. Kanne conducted a private bank in partnership with his son, Albert J.; the latter having the active management thereof. For some years prior to March 21, 1905, Frederick F. Kanne had been the owner of a farm near Waterville, Minn., worth between \$5,000 and \$6,000. On that date he and his wife entered into a contract to convey this farm to their daughter and son-in-law, the two other defendants herein, in consideration of certain covenants therein contained. No money consideration was paid. The covenants or agreements in the contract here material are to the effect that the vendees agree to pay to the vendors, beginning February 1, 1906, the sum of \$150 annually during the lives of the vendors and the survivor of them. Immediately after the decease of the survivor, the vendees shall pay to the legal heirs of the vendors the sum of \$5,000, to be distributed as provided by law. It is provided that, should the vendors, during the life of the vendees, desire to obtain a deed of the farm for the purpose of selling it, then the vendors, upon payment to them of \$5,500, agree to execute a good and sufficient warranty deed, there-

after the contract to be of no force or effect. The vendees were to have possession, pay all taxes, and were not to cut any green timber till \$500 worth of permanent improvements had been placed on the farm by the vendees. Upon default by the vendees to perform, the vendors reserved the usual right to terminate the contract, which by its terms extended to and bound the heirs, administrators, and assigns of the respective parties. In November, 1905, the defendants Kanne made similar contracts with two other children to convey to each 120 acres of land in Otter Tail county; the annual payments and the payments to the legal heirs being, however, in different amounts. The record is silent as to the existence of other children, or children of deceased children, except Albert J. Kanne. In 1907 Albert J. Kanne, who was also in the mercantile business, with his wife as partner, went into bankruptcy. His individual creditors, the major portion of which were depositors in the bank, have received 44 per cent. in dividends upon their claims. In 1909 the defendant Frederick F. Kanne entered the United States bankruptcy courts, and plaintiff was duly appointed trustee. No assets have come into the hands of the trustee, and a large amount of claims were filed and allowed against the estate. A great many of these claims are for money deposited prior to March 21, 1905, in the bank conducted by defendant Kanne and son.

The trustee brought this action, alleging the adjudication of Frederick F. Kanne as a bankrupt, plaintiff's appointment and qualification as trustee, the relationship of defendants, Frederick F. Kanne's operation of the bank as above stated, that while so engaged with his son they became indebted to divers parties in a sum exceeding \$17,000, and became and were insolvent during all the time, and while so insolvent the defendant Frederick F. Kanne, for the purpose of placing the said farm beyond the reach of his creditors, being then the owner thereof, executed with his wife the contract above mentioned to defendants Broadbent, setting it out in full. It further alleged that said contract was made and entered into by and between the defendants for the sole purpose of placing the farm, worth \$10,000, beyond the reach of creditors, and with an attempt and for the purpose of reserving to the said defendants Kanne an annuity during their natural life, and that no consideration was paid for the contract. It also stated that the estate of said bankrupt, Frederick F. Kanne, is insufficient to pay the creditors that were such at the time the contract was made, and that it is necessary to sell the said farm to pay such creditors. Plaintiff asked that the contract be declared null, and the farm be decreed subject to sale to pay the debts

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the bankrupt, and for such further relief as to the court shall seem proper. The answer admitted the adjudication of defendant Kanne a bankrupt and the relationship of defendants, the partnership of the father and son in the banking business mentioned for more than 10 years prior to the bankruptcy proceeding, also the contract set out in the complaint. It alleged that the contract in question was made for a valuable consideration, in good faith, and without intent to defraud creditors. The insolvency of Frederick F. Kanne at the time the contract was made is denied. A trial was had to the court, at the conclusion of which, the parties having rested, the court dismissed the action without making any findings. Plaintiff's motion for a new trial was denied, and he appeals.

The assignments of error relate to the refusal of the court to grant plaintiff's motion for judgment on the pleadings, to the exclusion of certain evidence, to the order dismissing the action after the parties rested without filing findings of fact and conclusions of law, and to the refusal of the court to grant relief upon the evidence adduced.

[1] It is clear that the court was right in denying the motion for judgment on the pleadings, for plaintiff did not, in that motion, limit his right to relief to the interest Frederick F. Kanne derived through the contract. That being so, the insolvency of Kanne at the time of making the contract and the then existence of the creditors now represented by plaintiff stood denied, as well as the averment that such contract was a fraudulent conveyance. Even if the contract be a voluntary conveyance on its face, its fraudulent character is not thereby established, so as to give plaintiff the right to have it set aside.

[2] The court also rightly rejected the testimony taken against the objection of Mrs. Kanne, when her husband was called by plaintiff for cross-examination, because section 4660, R. L. 1905, does not permit a spouse to testify in a cause where the other spouse is a party without the latter's consent. But we think the trial court misconstrued the scope of the decisions in *Halbert v. Pranke*, 91 Minn. 204, 97 N. W. 976, and *Bank v. Lawrence*, 77 Minn. 282, 79 N. W. 1016, 80 N. W. 363, in making the ruling evidenced by the memorandum order stating "the petition and schedule in bankruptcy of both the Kannes and all evidence relating to insolvency proceedings have been disregarded by the court as they were inadmissible," citing *Halbert v. Pranke*, *supra*. If a spouse has, to third parties, made an admission against the interest claimed by such spouse in the suit, such an admission, oral or in writing, is clearly admissible as to such spouse, although the other spouse is a party to the action. Of course, as to the latter's position or rights, such admissions have no

force or effect. The statute prohibiting one spouse from testifying without the consent of the other was not intended to exclude voluntary statements made to the world from being used against the spouse making them, no matter who the other parties litigant may be. The schedules were not offered; but under the ruling the court erroneously excluded everything in the bankruptcy proceedings, even the duly proved adjudication of claims.

[3] In this case one of the ultimate facts, viz., whether the contract was a fraudulent conveyance, involves inferences and conclusions to be drawn from the existence of other facts in issue; therefore findings should have been made. *Merritt v. Joyce*, 135 N. W. 820. This is not a case where the failure to establish a simple issue of fact determines the lawsuit, and where it may be said that the court, in a trial without a jury, in dismissing the case, determined that the evidence adduced did not establish such fact.

[5] But we are also of the opinion that plaintiff was entitled to substantial relief, even if the contract be not void. Frederick F. Kanne, under the contract, had the legal title to the land, and also rights therein to which plaintiff is entitled, and which this suit should properly define and determine. It is virtually conceded that the right to the annual payments has vested in the plaintiff herein. But defendants contend that no suit is needed to reach these; also that no other relief may be granted herein than canceling the contract, if it be found a fraudulent transfer; and, further, that the legal heirs of the Kannes are necessary parties. We may concede that, if the plaintiff herein is not entitled to reach more than the annual payments, his right thereto is so clear that no action is necessary to define it in order to realize the proper amount for the bankruptcy estate. But, measuring plaintiff's rights as an assign under the contract, we think he is entitled to more, as will be presently stated.

[4] The objection that under the pleadings no relief may be granted, unless the contract is void as to creditors, is not tenable. The contract in question is set out in the complaint, and the prayer is for its cancellation, and such further relief as to the court may seem meet and proper. Whatever interest plaintiff has in the land or the contract may properly be determined under the pleadings, notwithstanding some allegations in the complaint become superfluous, if the contract be held not void. If the legal heirs were necessary parties, the court could have directed them to be made parties, or perhaps had the authority to dismiss on that ground (*Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069), but should not have dismissed on the merits without an opportunity to plaintiff to bring them in.

The defendants could not take advantage of defect of parties, except by answer or demurrer, neither of which was done. *Budds v. Frey*, 104 Minn. 481, 117 N. W. 158, 15 Ann. Cas. 24, and cases there cited. Of course, if the legal heirs of the Kannes have no present interest in the land or the contract, it is evident that they are neither necessary nor proper parties. And that brings us to an important matter in the litigation.

[6] It is evident that F. F. Kanne and wife attempted to dispose of their farms to some of the children under contracts, so that the children should not be required to pay the purchase price till after the death of both parents, such price to be shared equally by their heirs. Whether this was for the purpose of defrauding creditors, or for the legitimate end of securing an annual income for their needs without being troubled with the active management of the property, we need not consider. The question is this: Is the purchase price stipulated to be paid under the contract the property of Kanne, or the heirs of the Kannes? Defendants earnestly contend that it is an executed gift to the heirs, beyond the power of Kanne to revoke, or, in other words, a gift *inter vivos*. It may be proper to remark here that if that be so, it goes far to prove the transfer a voluntary conveyance, *prima facie* void as to creditors under the decision in *McCord v. Knowlton*, 79 Minn. 299, 82 N. W. 589. The plaintiff, on the other hand, maintains that it is an attempted testamentary gift, and revocable, and of no effect. Hence the heirs have no interest whatever based on the contract.

It is to be observed that great uncertainty is found as to who is meant by the legal heirs. Is it the heirs of the survivor, or of both, or of the one in whom stands the legal title? Does it mean the heirs at the time of the contract or the time of death? This very uncertainty militates against a holding that here was a gift *inter vivos*. Further, how can this be said to be an executed gift; for the day after the contract was made the vendees could have tendered the purchase price to the vendors, and who of the heirs of the Kannes could have disputed their right to the whole of it? And we also fail to see why the vendors and vendees could not at any time, by mutual consent, have canceled the contract. If defendants' contention be true, the Broadbents could have at any time tendered \$5,500, less the share which would go to Mrs. Broadbent as a legal heir of her parents, and demanded a deed, or they could have paid the full sum, and at once compelled Kanne to repay her share or be holden for the amount as her trustee. Such a result does not appeal to us as reasonable. It seems to us that the legal effect of the

contract must necessarily be that no present interest or right to the purchase price therein agreed to be paid by the vendee vested in "the legal heirs" of the vendors, and hence the legal title to the land and to the purchase price stipulated in the contract remained in Frederick F. Kanne, and, unless he shall otherwise dispose of the same, it will pass at his death to his legal heirs, subject to the rights of the vendees and the creditors of his estate.

Defendants rely on *Love v. Francis*, 63 Mich. 181, 29 N. W. 843, 6 Am. St. Rep. 290; but it will be noticed in that case that no contingency permitted payment of the gift to the donor; the note and mortgage were payable to the donor's heirs four years after his death, but the interest to him as long as he lived. The court in *McFerrin v. Templeman*, 102 Tex. 530, 120 S. W. 167, though cited to the Michigan decision, holds, upon very similar facts, that the transaction did not amount to an executed gift *inter vivos*.

Our conclusion is that there should be a new trial, so that, upon proper findings of fact, the right conclusion of law may be reached. The order denying a new trial is reversed.

LINDQUIST v. YOUNG et al. (BRUCE-EDGERTON LUMBER CO., Intervener).

(Supreme Court of Minnesota. Oct. 25, 1912.)

(Syllabus by the Court.)

1. CONTRACTS (§ 354*)—ACTIONS—FINDINGS—SUBSTANTIAL PERFORMANCE.

In the erection of a flat building, plaintiff agreed to do all the carpenter work for \$1,400, the owner to furnish the material. The court found a substantial performance, although there were omissions in the work which would require \$37.25 to complete. *Held* that, considering the contract price and the character and detail of the work performed, the finding that defects and omissions amounted to \$37.25 is not contradictory of the finding of substantial performance, which finding is amply sustained by the evidence.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 354.*]

2. MECHANICS' LIENS (§§ 35, 38*)—RIGHT TO LIEN—NATURE OF SERVICES.

Where the owner of premises, upon which improvement is to be erected for which the statute gives a right to a mechanic's lien, contracts with the mechanic for personal supervision and temporary store or tool houses in connection with the work he undertakes, the mechanic is entitled to claim a lien for the whole contract price.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 40, 42; Dec. Dig. §§ 35, 38.*]

3. CONSTITUTIONAL LAW (§ 208*)—MECHANICS' LIENS (§ 310*)—FORECLOSURE—ATTORNEY'S FEES.

The allowance of \$50 for attorney's fees as costs by the court is reasonable, and the statute permitting such allowance is constitutional.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 649-677; Dec. Dig. § 208.* *Mechanics' Liens*, Cent. Dig. §§ 651-654; Dec. Dig. § 310.*]

4. APPEAL AND ERROR (§ 1036*)—ENFORCEMENT—PARTIES—INTERVENTION.

No prejudice resulted to the owner from the order compelling another lien claimant to intervene after plaintiff's cause was tried and before entry of judgment, for it was open to the owner to suggest to the court at the trial of plaintiff's action that such lien claimant ought to be made a party as contemplated by section 3517, R. L. 1905.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4069-4074; Dec. Dig. § 1036.*]

5. MECHANICS' LIENS (§ 281*)—ENFORCEMENT—SUFFICIENCY OF EVIDENCE.

The evidence sustains the findings as to the right of the intervener to a lien for the amount therein stated.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 565-572; Dec. Dig. § 281.*]

6. MECHANICS' LIENS (§ 277*)—PROCEEDINGS TO ESTABLISH.

A statement in a lien filed as to a matter not required to be stated does not prevent the lien claimant from pleading and proving the facts, where no one has been misled by such statement.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 546-554; Dec. Dig. § 277.*]

7. ADMISSIBILITY OF EVIDENCE—NO ERROR.

Rulings on admission and exclusion of evidence examined, and *held* to show no reversible error.

Appeal from District Court, Hennepin County; Wilbur F. Booth, Judge.

Action by Carl Lindquist against Margaret A. Young and others, in which the Bruce-Edgerton Lumber Company intervened. From an order denying a motion for new trial, defendant Margaret A. Young appeals. Affirmed.

Margaret A. Young and E. P. Evans, both of Minneapolis, for appellant. John N. Berg and Adolph E. L. Johnson, both of Minneapolis, for respondent Lindquist. John A. Sweeney, of Minneapolis, for respondent Bruce-Edgerton Lumber Co.

HOLT, J. Judgment was entered for plaintiff and intervener in this action to foreclose mechanics' liens. The defendant owner of the property appeals from the order denying her motion for a new trial.

For the sum of \$1,400 plaintiff agreed to perform all the carpenter work required in the construction of an apartment house, which appellant, as owner, was building; she to furnish all material. She let to various persons other parts of the construction, and procured the materials needed from different sources. During the progress of the work disputes arose between plaintiff and the appellant as to the manner of doing it; appellant finally refusing to make the last payments, on the claim that plaintiff had not fulfilled the contract. After an exhaustive trial, the court found that there had been a substantial performance of the contract, but allowed appellant \$37.25 for certain omis-

sions, and plaintiff \$15.55 for work in addition to that called for by the contract.

[1] Appellant insists that plaintiff failed to prove his case; therefore the court erred in refusing to dismiss when plaintiff rested, and erred in finding that there had been a substantial performance of the contract. No useful purpose would be served by a discussion of the evidence. A careful examination thereof leads to the conclusion that the finding of substantial performance is abundantly sustained. Appellant argues that, because the court finds that the reasonable value of completing those parts of the contract which plaintiff had omitted was \$37.25, there was not a substantial performance. She says \$37.25 is a substantial sum; hence a substantial omission. To this we cannot assent. Thirty-seven dollars is relatively a small amount, when the contract price, extent, and detail of the work in question is considered. *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309; *Hankee v. Arundel Realty Co.*, 98 Minn. 219, 108 N. W. 842. The finding of substantial performance disposes, also, of the technical objections raised that plaintiff failed to prove that he had a competent foreman on the job, that he did not guard the material delivered on the premises day and night from being stolen, and some other stipulations contained in the contract.

[2] It is also said the motion to dismiss should have been granted, because plaintiff was not entitled to a lien on account of non-lienable items included in the claim. This, if true, would not justify a dismissal; for plaintiff would in any event be entitled to a personal judgment against her for the amount due upon proof of substantial performance. That aside, appellant's contention is not sound that, because it appears that plaintiff was to give personal supervision to the work and was to erect a temporary toolhouse, a right to a lien is thereby destroyed. No attempt was made to place a value on these items, for the purpose of separating them from the admittedly lienable work. But we are of opinion that the personal supervision appellant required of plaintiff or of his foreman is lienable, as well as the work required in the erection of the toolhouse. From the owner's viewpoint, both were necessary items in the improvement contracted for. Few liens could ever be enforced, if appellant's theory of the law prevails. Every mechanic must spend some time in sharpening his tools, scaffolds must be provided, etc.; but it ought not to be successfully argued that these matters, which are necessary, but are not incorporated in the structure itself, are to be excluded from the lien given by a statute enacted for the purpose of assisting those who would otherwise lose the labor or material contributed to the improvement. Such a statute must be liberally and reasonably construed in fur-

therance of the remedy intended. *Coughlan v. Longini*, 77 Minn. 514, 80 N. W. 695; *Howes v. Reliance Wire-Works Co.*, 46 Minn. 45, 48 N. W. 448.

[3] The allowance of \$50 for attorney's fees to plaintiff in the costs fixed is challenged as unreasonable, and as being granted under the provision of a statute which is unconstitutional, because it is class legislation. The statute sanctions an agreement for \$50 attorney's fees for the foreclosure of a mortgage of no greater amount than plaintiff's lien. And we venture to say that no lawyer of any standing will say that \$50 is more than a reasonable fee for foreclosing a lien of \$578, where there is a vigorous defense put up, necessitating several days trial. The argument that, since the intervenor was allowed only \$10 for attorney's fees, wherein the trial consumed almost as much time, therefore \$50 to plaintiff is unreasonable, is not convincing. We think no one will pretend that the \$10 is reasonable or adequate for the services rendered by the attorney in intervenor's case. This being so, appellant has not the proper premise for her conclusion. The court undoubtedly took into consideration the fact that the intervenor's lien was only \$148, and that it, perhaps, ought to have spared appellant some inconvenience by coming into the action before plaintiff went to trial. No extended argument is made on the unconstitutionality of the act, section 3517, R. L. 1905, authorizing the court to fix costs and disbursements. That this statute permits the allowance of expenses for attorney's services by way of costs has been held in *Schmoll v. Lucht*, 106 Minn. 188, 118 N. W. 555, and, as at the present advised, the constitutional objection raised by appellant is answered by the decision in *Cameron v. C., M. & St. P. Ry. Co.*, 63 Minn. 384, 65 N. W. 652, 81 L. R. A. 553.

[4] We find no prejudicial error in the order permitting the intervenor to come in after plaintiff had tried his case, but before entry of judgment. True, the *lis pendens* was on record when the intervenor filed its lien. It ought to have intervened at once. But appellant had also the right to bring the intervenor into the action, and undoubtedly, upon her mere request, the court would have declined to try plaintiff's action until those who had filed liens were made parties. The law contemplates that all lien claimants should be parties to the final judgment. Section 3517, R. L. 1905.

[5] The intervenor sold the lumber for which the lien is claimed directly to appellant. One estimate had been delivered on the premises before plaintiff took the contract to do the carpenter work. At appellant's request he furnished an estimate as to the lumber needed. Appellant claims that it was agreed, when she bought the lumber of intervenor specified in this second esti-

mate, that what it had delivered under the first estimate should be checked off from the second. The intervenor contends that only part was to be taken out. Appellant admits ordering some lumber from intervenor in addition to the estimates. Plaintiff had authority to direct intervenor when to deliver the lumber in the second estimate. He was also, for a time, delegated by appellant to order certain extra lumber; but, after some disputes arose between them in regard to his work, this authority was revoked. All these matters presented pure questions of fact, bearing upon the amount and value of the lumber sold and delivered to appellant by the intervenor for the erection of her building. And the record furnishes no reasonable basis for any claim that the court allowed any amount whatever in the lien for lumber not proven to have been actually sold and furnished for the erection of appellant's building.

[6] There is nothing in the contention that there is a fatal variance between intervenor's lien statement, which states that the amount therein specified was the reasonable value of the materials, and the findings of the court that as to the main part the sale was for an agreed price; for the law does not require the lien statement to indicate either that the lien is claimed under a contract price or that it is based upon an implied contract for the reasonable value.

[7] A mere inspection of the record will show that the errors assigned upon the rulings of the court in receiving or excluding evidence, as well in the trial of plaintiff's as in intervenor's case, are either entirely without merit or could not possibly prejudice. The appeal presents 31 assignments of error, and in the discussion of these appellant's 228-page brief suggests numerous technical points upon which prejudicial error is predicated. To discuss or even mention all would give undue length to this opinion. We have attentively examined them, and find nothing therein calling for a reversal of the learned trial court's conclusions.

The order appealed from is therefore affirmed.

REYNOLDS v. GREAT NORTHERN RY. CO.
(Supreme Court of Minnesota. Nov. 1, 1912.)

(Syllabus by the Court.)

1. NATURE OF PROPERTY—REALTY OR PERSONALTY.

Quære: as between a landowner and a tort-feasor, and in the absence of any act of severance on the part of the owner, is timber which has been felled by the act of God to be considered realty or personality?

2. DAMAGES (§ 112*)—MEASURE—INJURIES TO PROPERTY—FIRES.

The true measure of the damages for the injury to and destruction of standing forest

trees by fire is the diminution in the value of the land caused by such injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 281-283; Dec. Dig. § 112.*]

3. DAMAGES (§ 217*)—ACTIONS—INSTRUCTIONS.

Instructions in an action based upon injury to and destruction of standing forest trees and fallen timber by fire set by the defendant's negligence considered, and *held* to give the plaintiff full benefit of his contention that he was entitled to recover for the destruction of the fallen timber in its condition as it then lay on the ground, as well as for the injury to the standing trees.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 556-559; Dec. Dig. § 217.*]

4. DAMAGES (§ 174*)—EVIDENCE—ADMISSIBILITY.

In an action based upon the destruction of standing forest timber by fire, evidence of the value of the timber itself is admissible, not as defining the measure of damages, which is the diminution of the value of the land, but as being proper to be considered by the jury in applying the true measure and ascertaining the amount of the damages suffered.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 462-467; Dec. Dig. § 174.*]

5. INSUFFICIENCY OF DAMAGES.

Damages for the destruction by fire of standing and fallen timber *held* not so manifestly insufficient as to require interference with the verdict awarding the same.

(Additional Syllabus by Editorial Staff.)

6. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS.

In an action for the destruction of standing forest timber by fire, where the court stated the correct rule of damages and subsequently stated the rule of damages in a more restricted form, it was the plaintiff's duty, if he considered that the latter instruction improperly limited his recovery, to call the court's attention thereto and request an addition to the instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

Appeal from District Court, Itasca County; C. W. Stanton, Judge.

Action by Joseph W. Reynolds against the Great Northern Railway Company. From an order denying an application to set aside a verdict for plaintiff and for a new trial, plaintiff appeals. Affirmed.

S. F. White, of Duluth, for appellant. Baldwin & Baldwin, of Duluth, for respondent.

PHILIP E. BROWN, J. Action to recover damages for the destruction by fire, set by the defendant, of standing and fallen timber on 13 40's of the plaintiff's 2,000-acre farm in Itasca county. The cause was tried to a jury, who returned a verdict in favor of the plaintiff, and this is an appeal by him from an order denying his application to set aside the verdict and for a new trial.

It is undisputed that the plaintiff owned the land referred to, and had on the 40's mentioned a considerable quantity of standing and uncut fallen forest timber, consisting of birch, maple, cedar, basswood, tamarack, etc., trees, which were injured and

destroyed by fire negligently set by the defendant, all of which timber, both standing and down, was then valuable and marketable, if it had been cut, for various uses, and had an established market value.

The questions involved on this appeal relate wholly to damages. "The one dominant question," says the plaintiff in his brief, "arises upon the rule of damages adopted by the court." Before considering this question, however, we deem it necessary to advert to the proceedings had upon the trial, and to some questions raised thereby, prior to the instructions.

The court permitted the plaintiff to introduce evidence, without limitation, tending to show the kinds, quality, amount, and value, both of his standing and down timber, separately and together, and also the extent of the injury to all of his timber which the plaintiff claimed was destroyed, and also the further fact that, if such timber had been cut when the fire occurred it would have had a market at an established, stated cash price. The plaintiff contends, furthermore, that the trial was conducted on his part upon the theory that his timber, whether standing or lying, was all convertible into commodities for which there was an established market value; that his damages consisted of such market value, less the cost of marketing; and that all the evidence on his part was introduced upon such theory, and no evidence was offered as to the injury to the land, and that in no instance did any witness testify as to the value of the land before and after the fire.

The record is somewhat obscure; but, as we read it, the plaintiff's counsel is mistaken concerning the facts last stated. At folio 34 of the paper book we find the following testimony, introduced, as we understand it, by the plaintiff: "Q. Mr. Anderson, are you acquainted with the value of lands in the neighborhood where you reside, independent of timber—lands that have no timber on, for instance? A. Yes, sir. Q. Are you acquainted with the value of timber also? A. Yes, sir. Q. Now, what would be the value of these lands, on the average—I think there are 14 40's—considered entirely independent of any timber at the time this fire occurred? A. Six or seven dollars an acre. Q. And with the timber, Mr. Anderson, would those lands be worth six or seven dollars an acre, plus the net profit which you have mentioned for the various products? A. Yes, sir; you mean—yes."

But, assuming that the record is as claimed by the plaintiff in this regard, we will say, in passing, that if it should subsequently develop, in the course of our consideration that the court, in its instructions, gave the correct rule of damages, the only possible objection thereto in this connection would be that the instruction did not conform to the

evidence, and this would not be available to the plaintiff, for it would simply amount to a failure on his part to prove an essential element of his cause of action, namely, his damages, which, of course, would be no ground for granting him a new trial.

The plaintiff, in logically following his stated theory, made no particular distinction in his proofs between the separate values of the standing and the down timber; the proofs concerning the value of each shading into that of the other, and the plaintiff's effort evidently being to prove the gross amount of his damages occasioned by the destruction of both the standing and the down timber, irrespective of the precise and separate value of either. On the other hand, the defendant claimed, to state it in the language of his counsel, used on the trial, that "the measure of damage is the difference between the value of that land as it stood before the fire and the value of the land as it stood after the fire, and in whatever way that be arrived at by evidence, is the true basis of damages."

[1] The defendant further insists, in support of his contentions, that timber severed from the land by an act of God remains realty as between grantor and grantee, and passes by a conveyance of the land, which proposition seems to be sustained by the authorities. See *Elwell on Fixtures*, 457; *Duff v. Bindley* (D. C.) 16 Fed. 178. The rule is well stated in *Ledy v. Proctor*, 97 Pa. 486, 492, quoting from *Rogers v. Gilinger*, 30 Pa. 185, 72 Am. Dec. 694, as follows: "What, then, is the criterion by which we are to determine whether that which was once part of the realty has become personalty on being detached? Not capability of restoration to the former connection with the freehold, as is contended; for the tree prostrated by the tempest is incapable of reannexation to the soil, and yet it remains realty. The true rule would rather seem to be that that which was real shall continue real until the owner of the freehold shall, by his election, give it a different character."

The defendant contends that this same rule should control in assessing the damages for the down timber destroyed in the present action. In our view of the case, we do not deem it necessary to determine whether this rule would be applicable as between the owner of fallen timber and one through whose negligence it has been destroyed—that is, as between the owner and a tort-feasor; for the determination of such question is not necessary to the decision of this case.

[2] This brings us to the main questions involved. The plaintiff requested instructions in accordance with his theory of the case as above stated, namely, that the measure of his damages was the difference between the value of the timber as it was at the time of the fire and its value thereafter. The court properly refused this request, and

upon the question of damages instructed the jury, in part, as follows: "The difference in the value of the premises before the fire, including the timber thereon, and its value after the fire in the condition that it then was, would be the damages, if any, sustained by the plaintiff in this case. In other words—and I want to be sure that I make myself plain in this regard—in determining plaintiff's damages, if any, you will compare the actual value of plaintiff's land with the trees and timber thereon just before the fire and before the trees were burned with the actual value of the same premises after the fire and after the trees were burned. The difference in value will be the amount that plaintiff is entitled to recover in this action, if anything. Considerable evidence has been introduced during the trial of this case with reference to the condition of the tracts of land involved, the condition of the timber, and the value of the particular kinds of timber on these tracts. This evidence was admitted as tending to aid you in reaching a conclusion upon the question as I have stated it to you, upon the question of the condition and value of the tracts before the fire and the condition and value of the tracts after the fire, and you will take into consideration all of the evidence in the case in reaching a conclusion in this regard."

This instruction states, we think, the true measure of damages which obtains where standing forest trees are destroyed or injured by fire. *Carner v. Chicago, etc., R. Co.*, 43 Minn. 375, 45 N. W. 713; *Hayes v. Chicago, etc., R. Co.*, 45 Minn. 17, 47 N. W. 260; *Hoye v. Chicago, etc., R. Co.*, 46 Minn. 269, 48 N. W. 1117, approved in *Ward v. Chicago, etc., R. Co.*, 61 Minn. 449, 63 N. W. 1104; *Hueston v. Mississippi & Rum River Boom Co.*, 76 Minn. 251, 79 N. W. 92, applying the doctrine in an action for the overflowing of lands; *Joyce on Damages*, § 2134, and cases cited; *Sedgwick on Damages*, § 933, and cases cited; *Müller v. Neale*, 137 Wis. 426, 119 N. W. 94, 129 Am. St. Rep. 1077; *Mahaffey v. New York, etc., R. Co.*, 229 Pa. 285, 78 Atl. 143, 140 Am. St. Rep. 730—the two cases last cited being very recent ones and likewise well considered.

[3] Furthermore, this instruction, we think, gives the plaintiff in full measure the benefit of his contention that he was entitled to recover for the destruction of the down timber in its then condition as it lay on the ground, as well as for the standing trees. *Joyce on Damages*, § 2134.

[4] It is true that the court subsequently in its charge stated the rule of damages in a more restricted form than as above quoted, and in language which, if taken literally and alone—that is, not in connection with the portion which we have quoted—might, perhaps, be considered as ignoring the fact that the evidence established that there was fallen timber on the land, of value at the

time of the fire. If, however, such should be deemed to be its effect, it was the plaintiff's duty promptly to call the court's attention thereto, and to request a clarifying addition; and, in the absence of such a request, there was no reversible error in this regard. *Dunnell's Minn. Dig. § 9798.*

[4] There was no error in the action of the trial court in admitting evidence as to the damage to and the value of the timber itself, as above indicated, and such action was not inconsistent with the rule of damages given in the instructions. "In its last analysis," said Mr. Justice Mitchell, in *Hueston v. Mississippi, etc., Boom Co.*, 76 Minn. 251, 255, 79 N. W. 92, 93, "the measure of plaintiff's damages was the difference between the value of the premises immediately before and immediately after the infliction of the injury. Upon the trial evidence was introduced of this ultimate fact, and also as to the nature and amount of the particular items of damage; as, for example, the nature and extent of the injury to the mill machinery by the mud and water, the value of the use of the mill during the time it was shut down, the injury to the wall of the tail race, and what it would cost to repair or restore the same, the extent and duration of the injury to the pasture land, and what the pasture in its former condition was reasonably worth. It is urged that this was admitting evidence under two different and separate methods or rules for the assessment of damages; that the plaintiff should have been compelled to adopt one or the other. On the contrary, we think the evidence was all admissible as tending to prove the same thing, viz., the damages to the premises by reason of the trespass. It is the most common thing in the world, in the trial of actions of this and analogous classes, to ask a witness how much less, in his opinion, the premises were worth after the injury than they were before, and then to particularize by introducing evidence as to the nature and extent of the different items which go to make up this estimated total diminution of value; and we never before heard this method of proving damages objected to." To the same effect, see *Miller v. Neale*, 137 Wis. 426, 119 N. W. 94, 129 Am. St. Rep. 1077, which was an action for injury to standing timber by fire. "Nor was it error to admit proof of the damage to the timber itself," said the court. "While such proof does not determine the measure of the damages, it was entirely legitimate proof, and entitled to be considered by the jury in fixing the diminished value of the land."

That the trial court in the instant case admitted the evidence of the value of the timber itself upon the theory and for the purpose upon and for which such evidence was held admissible in the two cases last

above referred to is manifest from the latter part of the above-quoted instruction.

[5] The plaintiff finally insists that the damages allowed were so manifestly insufficient that it is apparent that they were awarded under the influence of passion or prejudice, and that the trial court erred in not granting him a new trial on this ground. We cannot so hold. The trial court's opportunity to correctly pass upon this contention equals ours at least, and we cannot disturb his determination.

Order affirmed.

VILLS v. CITY OF CLOQUET.

(Supreme Court of Minnesota. Nov. 1, 1912.)

(Syllabus by the Court.)

1. EXPLOSIVES (§ 8*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

Defendant kept a quantity of explosive fuse caps in a toolhouse on a lot in the city. Boys went into the toolhouse through an opening in the loose stones used as a foundation, took the caps, and threw them on the ground outside of the house. Plaintiff's six year old son, in playing about the premises, found one of the caps, and was injured by its explosion while he was playing with it. It is held the evidence sustains a finding that the defendant was negligent in storing the fuse caps in the toolhouse without sufficient precautions to prevent children from entering and taking them.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.*]

2. EXPLOSIVES (§ 8*)—ACTIONS FOR INJURIES—QUESTION FOR JURY.

It was a question for the jury whether such negligence was the proximate cause of the injury, and the evidence sustains the verdict on this point.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.*]

3. PLEADING (§ 127*)—ACTIONS FOR INJURIES—PLEADING.

Allegations of the pleadings construed, and held, that the answer admitted that plaintiff had caused due service of a notice of the time, place, and circumstances of the accident to be served upon the proper city officers.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 264-268; Dec. Dig. § 127.*]

Appeal from District Court, Carlton County; H. A. Dancer, Judge.

Action by John Villis, as father and natural guardian, against the City of Cloquet. From an order overruling defendant's motion for judgment notwithstanding the verdict and granting a new trial solely upon the issue as to whether due notice of the time, place, and circumstances of the plaintiff's injury was served upon the defendant city, defendant appeals. Affirmed. From that part of the order granting a new trial on the issue named, plaintiff appeals. Reversed, with directions.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

John A. Keyes and Bert W. Forbes, both of Duluth, for plaintiff. J. A. Fesenbeck, of Cloquet, and Baldwin & Baldwin, of Duluth, for defendant.

BUNN, J. This action was brought by plaintiff, as the father and natural guardian of his six year old son, to recover for personal injuries received by the latter through the explosion of a fuse cap with which he was playing. The trial resulted in a verdict of \$2,250 in favor of plaintiff. Defendant moved for judgment notwithstanding the verdict or for a new trial. The motion for judgment was denied, and the motion for a new trial granted solely upon the issue as to whether due notice of the time, place, and circumstances of the injury was served upon the defendant city, as required by statute. Defendant appealed from the whole of this order, and plaintiff appealed from that part of the order which granted a new trial on the issue named.

[1] The chief question, on defendant's appeal, is whether a case was made for the jury, and, if so, whether the evidence sustains the verdict. The evidence justified a finding that the following facts were true: In April, 1910, defendant, the city of Cloquet, set up a stone crusher and toolhouse near a stone quarry on a vacant lot near the city for the purpose of quarrying and crushing stone for street improvements. The crusher stood near the road, and was supplied with stone from the quarry by means of a miniature railway track and cars. The toolhouse stood about 40 feet back from the road. A wire fence surrounded the lot, but part of the wires were down at a point near where the crusher was, and access to the lot and toolhouse through this opening was easy. The toolhouse was about 14 feet square and 9 feet high, and had a door and two windows. It rested on stones placed under the corners. Loose stones were also placed under the sides and ends of the shed. There was no floor to the toolhouse, and the stones were for the purpose of guarding against theft of the tools. The city of Cloquet completed its work about July 1, 1910, and abandoned the premises, leaving the toolhouse locked and the windows fastened. In September, 1910, the Cloquet Lumber Company, by permission of the city and under its supervision, used the crusher and toolhouse. This work was completed in October. After this no use was made of the crusher or toolhouse; but they remained on the premises, with no supervision save one or two visits by employes of the city. In the spring of 1911 boys occasionally visited the premises, and played with whatever pleased their fancy. About a month prior to the accident some boys entered the toolhouse by going through a hole between the stones under it, and carried away lubricating oil found in a barrel. Two or three days before the accident two boys

entered through the hole and took some fuse caps from a box that stood on a shelf under one of the windows. This box of caps, with wires protruding from them, had been left in this position in the toolhouse by defendant. The boys brought out the caps they had taken, and threw them at a companion, who had climbed a tree near the house. Two days after this John Villa, son of plaintiff, with other boys, was playing around the house. He found one of the caps on the ground. It was bright and attractive, and he proceeded to hammer it with a stone, to "flatten it out," as he testified. The result was that the cap exploded and a piece struck him in the eye, causing the injuries for which damages were claimed in this action.

The evidence showed that it was customary for small boys to play about the crusher, tracks, and shed. The Villa boy had been a visitor to the premises on one or two prior occasions. It did not appear that defendant took any steps, other than as stated, to keep boys from playing around the premises, or from entering the house through the hole between the stones, though the evidence was sufficient to make it probable that this way of entrance had existed for several months. Was the evidence, an outline of which is given above, sufficient to sustain a verdict that defendant was negligent, and that its negligence was the proximate cause of the injury?

Upon the question of defendant's negligence, or rather as to the liability of defendant to an infant trespasser who is injured, defendant seeks to bring the case within the rule that the owner or occupant of land owes no duty of care to a trespasser, be he infant or adult, except the duty to refrain from willfully or wantonly injuring him. But the case, in our opinion, falls within a well-established exception to this rule. The doctrine of the so-called "turntable cases" is applicable, as was held by this court in the dynamite case of *Mattson v. M. & N. Ry. Co.*, 95 Minn. 477, 104 N. W. 443, 70 L. R. A. 503, 111 Am. St. Rep. 483, 5 Ann. Cas. 498. The rule has been stated so many times, and was stated so clearly in the *Mattson Case*, that it is unnecessary to repeat it here.

Several reasons are urged to support defendant's argument that this doctrine does not apply to the facts in the case at bar. It is urged that the evidence does not justify a conclusion that defendant left the fuse caps in the shed; but we think it does. It is argued that defendant used due care to conceal and guard the fuse caps, when it locked the tool shed and fastened the windows. But in this we cannot concur, considering the high degree of care required of defendant respecting the care and custody of such a dangerous explosive, and the easy access to the box of caps through the hole under the shed. It is sought to make a distinction be-

tween sticks of dynamite and these fuse caps. But undoubtedly the latter were highly explosive and very dangerous to children playing with them. They were clearly highly attractive, and it was natural to expect that young children, whose curiosity or mischievous propensities led them into the shed, would seize upon the caps as fine things to make a noise with, or as pretty playthings. It is true that the six year old plaintiff had no idea that the cap was explosive, and merely tried to flatten it out; but this does not seem an important feature. It was something new, bright, and alluring, and something that was very dangerous in the hands of a six year old boy. We think the evidence fully justified the jury in finding that defendant ought to have anticipated that children might enter the shed, get into the box of caps left exposed on a shelf, leave some of them around where they might be found by other children, and that injury might result. In other words, the finding that defendant was negligent is sustained by the evidence. While the facts are different, we think the case is not to be distinguished from the Mattson Case.

[2] The claim that defendant's negligence was not the proximate cause of the injury rests upon the proposition that there was an intervening, independent cause, to wit, the act of the boys other than plaintiff in bringing the caps out of the toolhouse and scattering them on the ground. We think this question is disposed of adversely to defendant's contention by what we have already said as to the duty of defendant to anticipate an accident such as happened. The negligence of defendant in leaving the fuse caps where it did was not a remote cause; at least it was a question for the jury, and properly submitted to it. The cases have been so many times reviewed that we need do no more than state our conclusion, which we think is amply sustained by many decisions of this court. The principle is that where several concurring acts or conditions, one of them a wrongful act or omission, produce an injury, such wrongful act or omission is to be regarded as the proximate cause of the injury, if it be one which might reasonably have been anticipated from such act or omission, and which would not have occurred without it. *McDowell v. Village of Preston*, 104 Minn. 263, 116 N. W. 470, 18 L. R. A. (N. S.) 190; *Anderson v. Settergren*, 100 Minn. 294, 111 N. W. 279. The instruction on the question of probable cause, which is assigned as error, was correct.

We find no error in the other instructions complained of. Our conclusion is that the order denying judgment notwithstanding the verdict, and denying a new trial, must be affirmed.

[3] This brings us to the appeal of plaintiff from that part of the order granting a

new trial on the issue of whether due notice had been given the city. The trial court held that there had been no proof of the due service of such notice on the proper city officials, and no waiver of such proof by defendant. But we think that under the pleadings it was not necessary to offer evidence of the giving of notice. The complaint alleged: "That on June 12, 1911, plaintiff caused due notice of the time, place, manner, and circumstances of the injury to said John W. Vills to be given to the city council, and to the clerk and mayor of said city, pursuant to the provisions of law in such case made and provided." The answer "admits that the plaintiff caused a purported notice of injury, stating the time, place, manner, and circumstances of said injury, to be given to the city council of the city of Cloquet, and to the clerk and mayor of said city."

It seems to us that this admission must be construed as admitting the service of notice on the day alleged in the complaint. Perhaps it put in issue the sufficiency of the notice as to its contents, but it surely admitted its service on the council, clerk, and mayor, and, in the absence of words to indicate that the time of the service was called in question, we must hold that the admission dispensed with the necessity of proof of the due service of the notice. As to its contents, it was offered in evidence, received without objection, and was clearly sufficient. No point was made at any stage of the proceedings that the notice was not served as alleged in the complaint. We are satisfied that there was no good reason for granting a new trial on this issue, and the order granting such new trial must be reversed.

The order denying judgment notwithstanding the verdict and denying a new trial is affirmed. The order granting a new trial on the issue of notice to the city is reversed, with directions to the trial court to enter judgment on the verdict.

McLOONE et al. v. BRUSCH

(Supreme Court of Minnesota. Nov. 1, 1912.)

(Syllabus by the Court.)

EVIDENCE (§ 442*)—PAROL EVIDENCE—ADMISSIBILITY.

The written executory order for the shipment of goods to defendant, set out in the opinion, held not on its face a complete expression of the contract between the parties, and that evidence of a contemporaneous parol warranty of the goods was admissible. *Aultman Miller Co. v. Clifford*, 55 Minn. 159, 58 N. W. 593, 43 Am. St. Rep. 478, *Phoenix Pub. Co. v. Riverside Clothing Co.*, 54 Minn. 206, 55 N. W. 912, and *Boynton Furnace Co. v. Clark*, 42 Minn. 335, 44 N. W. 121, followed and applied.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1897; Dec. Dig. § 442.*]

Appeal from District Court, Waseca County; Arthur B. Childress, Judge.

Action by John McLoone and others against Charles J. H. Bruschi. From an order denying a new trial, plaintiffs appeal. **Affirmed.**

Moonan & Moonan, of Waseca, for appellants. Fred W. Senn, of Waseca, for respondent.

BROWN, J. Action to recover the purchase price of a corn shredder, in which defendant had a verdict, and plaintiffs appealed from an order denying a new trial.

The action was founded upon an instrument in the following language, namely: "Waseca, Minn. Oct. 14th, 1910. The undersigned orders of McLoone, Priebe & Co. one two-roll Adams corn shredder complete, with cutter head, for the sum of one hundred sixty dollars (\$160.00), terms thirty (30) days, this shredder to be f. o. b. factory. [Signed] Charles J. H. Bruschi." Defendant interposed in defense an oral warranty of the soundness of the shredder, made at the time the order therefor was given, a breach thereof, and resulting damages. When the cause came on for trial in the court below, the parties entered into a stipulation to the effect that if evidence of the alleged parol warranty was admissible, over plaintiffs' objection that it would vary and add to the written contract, a verdict should be by the court directed in defendant's favor and that if such evidence was held inadmissible a verdict should be directed for plaintiffs for the purchase price of the machine. The trial court held the evidence admissible, and, in harmony with the stipulation, directed a verdict for defendant. Plaintiffs appealed from an order denying a new trial.

The only question presented on this appeal is the correctness of the ruling of the trial court under the stipulation. In other words, whether the order, set out in full above, is a complete contract between the parties, to which the rule excluding parol evidence modifying or adding to its provisions applies. The question is not, from the standpoint of previous decisions of the court, entirely free from doubt. Within the rule applied in *Wemple v. Knopf*, 15 Minn. 440 (Gil. 355), 2 Am. Rep. 147, *Kessler v. Smith*, 42 Minn. 494, 44 N. W. 794, and *Am. Mfg. Co. v. Klarquist*, 47 Minn. 344, 50 N. W. 243, the evidence would be inadmissible. In each of those cases the court had before it a written order for the shipment of the goods, which was either formally accepted in writing or by the shipment of the property ordered, and it was held that the order constituted a complete contract, which could not be added to by parol. On the other hand, in *Boynton Furnace Co. v. Clark*, 42 Minn. 335, 44 N. W. 121; *Phoenix Pub. Co. v. Riverside Clothing Co.*, 54 Minn. 206, 55 N. W. 912; *Aultman Miller & Co. v. Clifford*, 55 Minn. 159, 56 N. W. 593, 43 Am. St. Rep. 478; *Pot-*

ter v. Easton, 82 Minn. 247, 84 N. W. 1011, and *Hand v. Ryan Drug Co.*, 63 Minn. 539, 65 N. W. 1081, a parol modification was permitted.

The first three of the cases just referred to involved an order for goods for all practical purposes identical with the order in the case at bar, and it was held that the orders were not complete upon their face, and a parol warranty was admitted. The other two citations involved the same question, and parol evidence in modification was held properly admitted by the trial court. No attempt has been made to distinguish the cases referred to, and we make no effort in that direction at this time. We follow and apply the rule of the later decisions, and hold, in the language of the Chief Justice in *Potter v. Easton*, *supra*, that it is manifest that the parties did not intend the order in question as a complete expression of their contract, and evidence of the parol warranty was admissible. Of course the negotiations, facts, and circumstances surrounding the giving of an order of this kind might lead to the conclusion that the whole contract was intended by the parties to be expressed in the order. But the negotiations leading up to this order are not disclosed by the record. The evidence, if any was taken on the trial below, is not returned.

Order affirmed.

MEIER v. NORTHWEST THRESHER CO.

(Supreme Court of Minnesota. Nov. 1, 1912.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§ 129*)—CONSTRUCTION—SUBJECT-MATTER.

A provision of a mortgage, executed to secure the purchase price of threshing machinery, that the gross earnings of the machinery should be paid to the mortgagee, free from operation liens, but that 40 per cent. of the earnings so received by the mortgagee should by it be paid to the mortgagor for operation expenses, construed, and held to give the mortgagor an immediate and absolute right to 40 per cent. of the proceeds, less expense of collection, of certain threshing accounts assigned by him, pursuant to the terms of the mortgage, to the mortgagee, and by it collected.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 216; Dec. Dig. § 129.*]

2. ASSIGNMENTS (§ 108*)—SUBJECT-MATTER—TRANSFER.

Transaction in which the said claims were assigned to the mortgagee considered, and held to import a direction from the mortgagor to the mortgagee to pay certain debts due, at the time of such assignment, from the mortgagor to the plaintiff and his assignors for labor performed in connection with the operation of the said machinery, so that the plaintiff had the right to recover from the mortgagee that proportion of the proceeds of the assigned accounts which, by the terms of the mortgage,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

belonged to the mortgagor for operating expenses.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 185; Dec. Dig. § 108.*]

Appeal from District Court, Waseca County; Arthur B. Childress, Judge.

Action by Fred Meier against the Northwest Thresher Company. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, plaintiff appeals. Reversed, and new trial granted.

Moonan & Moonan, of Waseca, for appellant. P. McGovern, of Waseca, and S. B. McBeath, of Stillwater, for respondent.

PHILIP E. BROWN, J. Action to recover \$113.50, with interest, for labor performed by the plaintiff and others, whose claims have been assigned to him, in the operation of threshing machinery owned and operated by one Lawrence Walter. On the trial of the cause to a jury, both parties having moved for a verdict, by the court's direction the jury returned a verdict for the defendant. This is an appeal by the plaintiff from an order denying his alternative motion for judgment or for a new trial.

It appears that in the year 1906 the said Walter, in order to secure the payment of a part of the purchase price, namely, \$2,583.75, of a threshing rig bought by him from the defendant, executed to the latter a chattel mortgage thereon, and for further security all of the gross earnings of the machinery during the years 1906, 1907, and 1908, and until the purchase price was paid, were by the terms of the said mortgage assigned and mortgaged to the defendant, and it was thereby agreed that such gross earnings should include the earnings, and proceeds of the earnings, of all persons, teams, and vehicles necessary as an entire complement of labor employed in the operation of threshing done by the mortgagor during the said years, in the township wherein he then resided or elsewhere in this state. The defendant agreed therein to deliver to the mortgagor, or to his order, upon request, 40 per cent. of the said gross earnings received by it, for the use of the mortgagor in defraying the operating expenses of the machinery, and it was further stipulated that the defendant, at its option, should "select, in whatever form said gross earnings may be received or held by it, said proportion to be so delivered" to the mortgagor. Finally, the mortgagor covenanted that the gross earnings so mortgaged to the defendant should be exempt from all liens, charges, and expenses incident to the operations of threshing, and that all such liens, etc., should be paid by him, and, further, that he would keep a written statement containing the name and address of each person for whom threshing was done, the date thereof, and the amount earned, and subject to the defendant's inspection, and

also that settlement of the gross earnings mortgaged should be made by him for each threshing job done, and that the mortgagor would procure signed acceptances thereof, and would turn the same over to the defendant or its agent for collection, upon the condition that all moneys so collected were to be applied on the mortgage indebtedness, less the cost of collection, the defendant not to be liable, however, for any accepted settlements so long as the same remained unpaid. The mortgage contained other stipulations not here material.

Walter operated the machinery under this agreement in the years 1906 and 1907, turning over the threshing accounts to the defendant from time to time thereunder, to be applied on his mortgage indebtedness, and continued to operate the rig up to September 14, 1908, when the separator of the machinery was destroyed by fire. He was then indebted to the plaintiff and to other persons named in the complaint, for labor performed in operating the rig, in the sum of \$113.50. Shortly thereafter Walter assigned to the defendant, at the instance of one Eustice, the defendant's collector, without any consideration, further than those specified by the mortgage, threshing accounts earned with the machinery in 1908, to the amount of \$268.21, of which the defendant collected and retained the sum of \$248.89. Walter did not turn over to the defendant all the accounts for the earnings of the machinery for threshing done in 1908.

The plaintiff claims that when Walter assigned the accounts mentioned to the defendant in 1908, as a consideration therefor it was agreed between Eustice and Walter that the defendant would pay all the claims for operating expenses of the threshing machinery, and there is in the record sufficient evidence of the actual making of the agreement between Eustice and Walter to make this question one of fact for the jury. It is further claimed by the plaintiff that, under the doctrine of implied or apparent authority, and also of ratification, this agreement was binding upon the defendant. It is also claimed by the plaintiff that the chattel mortgage as to the earnings of the machinery was void. All of these claims are controverted by the defendant.

1. In order to determine the questions as to the authority of the defendant's collector, Eustice, and the binding effect of his alleged agreement upon the defendant, it is necessary briefly to consider the relevant relations between Walter and the defendant under and by virtue of the mortgage. As stated, the plaintiff claims, or, to be more exact, suggests, the invalidity of the mortgage of the earnings as to the plaintiff and his assignors. The defendant, on the other hand, insists upon the validity of the mortgage. In view, however, of the fact that this question has,

notwithstanding its general importance, been left by the parties to this appeal practically without argument, and, furthermore, because it is by no means clear that the upholding of this plaintiff's contention could affect the conclusions reached, we will, for the purposes of this case, both now and hereafter, sustain the defendant's contention on this point, and hold that the mortgage is valid as between the parties thereto, and also as against this plaintiff and his assignors described in the complaint.

[1, 2] 2. This brings us to the consideration of the rights of the parties to the mortgage. The instrument is ambiguous in its terms, and of such a nature that, so far as the defendant is concerned, the latter is not entitled to any other than a strict construction thereof, and its purpose must be held to be primarily to secure Walter's obligations to the defendant, but with such stipulated allowance of the earnings of the machinery to Walter as would enable him to carry on the business of threshing. Accordingly, under the familiar rule that equity regards as done what ought to be done, as soon as a threshing account was earned, the lien of the mortgage attached thereto, and under a fair construction of the instrument 40 per cent. of such account when collected, less the expense, perhaps, of its collection incurred by the defendant, became the absolute property of Walter, and this amount the defendant was, by the terms of the mortgage, obligated to pay to Walter or to his order. And from this it follows that the trial court erred in directing a verdict for the defendant; for, though we cannot sustain the plaintiff's contention that Eustice had implied or apparent authority to bind the defendant by the agreement alleged to have been made at the time of the assignment of \$268.21 in accounts to the defendant as above mentioned, Walter being charged with knowledge of the terms of the mortgage, and there being nothing in the evidence or in the record to indicate that Eustice was authorized to do more than to proceed to take assignments of the accounts pursuant to the provisions of the mortgage, or that he had any authority other than might be inferred from such provisions in the instrument under which the parties had been acting for two seasons, and though it cannot be held that the defendant ratified the said agreement between Eustice and Walter by collecting the accounts in connection with the assignment of which such agreement is alleged to have been made, or by retaining their proceeds, there being nothing in the record to show that the defendant had any knowledge of the alleged agreement prior to the bringing of this action, yet, in view of the construction which we have above placed upon the mortgage, the transaction between Eustice and Walter, in which the said accounts were assigned to the defendant, must

be considered to import at least a direction by Walter to the defendant to pay the former's 40 per cent. of the accounts collected by the latter to the plaintiff and the other laborers mentioned in the complaint. This direction was binding upon the defendant, and for its failure to comply therewith the defendant is answerable to the plaintiff in this action.

If this case be tried again, it should be remembered that this is not an action between the company and Walter, and that no consideration of any general indebtedness from the latter to the former is material, and, furthermore, that the plaintiff can recover in this action only the amount of the labor claims set out in the complaint, less any sums which may have been paid upon any of such claims, and that in no event can he, in this action, recover more than 40 per cent. of the assigned accounts, unless he should establish a valid agreement by the defendant to pay more.

Order reversed, and a new trial granted.

PRATT v. QUIRK et al.
(Supreme Court of Minnesota. Nov. 8, 1912.)

(Syllabus by the Court.)

1. EJECTMENT (§ 95*)—EVIDENCE (§ 460*)—SUFFICIENCY OF EVIDENCE—PAROL EVIDENCE AFFECTING WRITINGS.

Action to recover possession of a strip of land over which a public highway originally ran. The plaintiff, or those through whom she claims, conveyed, by several deeds, all of the land abutting on the highway before it was vacated, and after it was vacated this action was brought. The trial court found that the plaintiff had not proven the allegations of her complaint as to her ownership of the land. Evidence, including the deeds, construed, and held, that it sustains the finding. The trial court did not err in excluding evidence as to the subsequent acts of the parties to the deeds.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 280-295; Dec. Dig. § 95;* Evidence, Cent. Dig. §§ 2115-2128; Dec. Dig. § 460.*]

(Additional Syllabus by Editorial Staff.)

2. BOUNDARIES (§ 20*)—DESCRIPTION—HIGHWAYS.

If a deed bounds land upon a street or highway, title passes to the center thereof, subject to the public easement, if there be nothing in the deed, or the location of the land, or the relation of the parties, showing a different intention; but where a deed expressly makes the nearer external line of the highway the boundary line, and no other language is used indicating a contrary intention, no title to the highway passes.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 123-130, 132; Dec. Dig. § 20.*]

Appeal from District Court, Hennepin County; John H. Steele and Andrew Holt, Judges.

Action by Lydia A. Pratt against Minnie Quirk and others. From an order denying plaintiff's motion for a new trial, plaintiff appeals. Affirmed.

Lane & Malmberg, of Minneapolis, for appellant. Charles J. Williams, of Minneapolis, for respondents Quirk. J. H. Green, of Minneapolis, for respondents Engdahl.

START, C. J. Appeal from an order of the district court of the county of Hennepin denying the plaintiff's motion for a new trial in an action of ejectment for the recovery of land originally embraced within the boundaries of a public highway, 66 feet wide, and known as the Wayzata county road. The cause was tried by the court without a jury. The evidence was sufficient to establish the evidentiary facts following:

Lot 1 in Auditor's subdivision No. 46, of the county of Hennepin, was, on and previous to 1902, owned by plaintiff's husband, since deceased, Rufus L. Pratt. The highway ran from a point 100 feet westerly from the southeast corner northwesterly across the lot. On April 21, 1902, Rufus L. Pratt, by warranty deed, his wife, the plaintiff, joining therein, conveyed a part of lot 1 to the defendant John F. Quirk, which was described as follows: "That part lying south of county road of lot one (1) in Auditor's subdivision No. 46, Hennepin county, Minn., according to the record plat thereof on file and of record in the office of the register of deeds in the county of Hennepin and state of Minnesota." The tract of land so conveyed to John F. Quirk was, on July 13, 1904, duly conveyed to his wife, the defendant Minnie Quirk.

On June 13, 1903, Rufus L. Pratt, by warranty deed, his wife, the plaintiff, joining therein, conveyed a part of lot 1 to John S. Calder. The part or tract so conveyed was described in metes and bounds, and the call in the description relating to the southerly boundary of the tract conveyed was, so far as here material, in these words: "Thence south at right angles to the northerly line of the Wayzata county road; thence southeasterly along said county road." The tract of land so conveyed to John S. Calder was, on May 20, 1907, conveyed by him to the defendant herein, John Engdahl.

On February 8, 1905, Rufus L. Pratt died intestate. His estate was duly probated, and a decree of distribution made, assigning to his heirs, with other land not here in question, a tract of land described as follows: "Commencing at a point on the west boundary line of lot one (1), Auditor's subdivision No. 46, three hundred thirty-four and $\frac{95}{100}$ feet south of the northwest corner of said lot one (1); thence east at right angles to a point one hundred and thirty-five feet west of the east line of said lot one (1); thence south at right angles to county road; thence northwesterly along north line of county road to west boundary line of said lot one (1); thence north to point of beginning."

On December 20, 1906, the heirs, other

than the plaintiff, Lydia A. Pratt, conveyed to her this last described tract, by the identical description and boundaries contained in the decree of distribution; then followed these words: "Meaning to convey the residue of lot one (1) not conveyed by Rufus L. Pratt during his lifetime." The plaintiff, on March 14, 1907, conveyed this tract to William E. Stevens by deed containing the same description and boundaries as those in the deed from the heirs to her. Thereafter William E. Stevens conveyed the same tract to Minnie Quirk, one of the defendants herein. The highway in question was duly vacated in November, 1908.

The trial court, upon a consideration of the evidence, found as a fact that the allegations of the complaint as to the land therein described by the plaintiff had not been proven, and as a conclusion of law therefrom that plaintiff take nothing by her action.

[1] It is the contention of the appellant that the finding and decision of the trial court are not sustained by the evidence and are contrary to law. This involves the question of the construction of the several deeds herein referred to, and whether the court erred in excluding oral evidence of the alleged intention of the parties to the deeds.

[2] The general rule applicable to the question is this: If a deed bounds the land upon a street or highway, title passes to the center thereof, subject to the public easement, if there be nothing in the deed, or the location of the land, or the relation of the parties showing a different intention; but where a deed expressly makes the nearer external line of the highway or street the boundary line of the tract conveyed, and no other language is used indicating a contrary intention, no title to the street passes to the grantee. So construing the description in the deed from Pratt and wife to Quirk, it is clear that the deed conveyed the fee to the southerly half of the highway subject to the public easement, for the tract conveyed was the part of the lot lying south of the highway. The part so conveyed abutted on the highway, which was necessarily the northerly boundary thereof. In like manner the deed from Pratt and wife to Calder, through which the defendant Engdahl claims, bounds the tract conveyed by the highway, and the deed conveyed the fee to the center of the highway upon which the tract conveyed abutted. It is true that the line runs to the northerly line of the highway; but the highway, and not its northerly line, is expressly made the boundary of the land conveyed. See *Kneeland v. Van Valkenburgh*, 46 Wis. 434, 1 N. W. 63, 32 Am. Rep. 719.

This leaves for consideration only the northerly half of so much of the highway, upon which the tract, conveyed by the plain-

tiff to Stevens and by him to defendant Minnie Quirk, abutted. The record shows that the plaintiff on the trial attempted to show her title thereto by introducing in evidence the decree of distribution, the deed of the heirs to her, and the deed to Stevens. It may be conceded, for the purposes of this appeal, that none of the deeds conveyed the fee of the land to the center of the highway upon which the tract abutted; but if the fee to the center of the highway was excluded from the boundaries described in the deeds, so also was it from the decree of distribution, for the boundaries were identical in all of the instruments.

The plaintiff, to avoid this conclusion, relies upon the words in the deed from the heirs to her, "meaning to convey the residue of lot one (1) not conveyed by Rufus L. Pratt during his lifetime." These words cannot be fairly construed as conveying any land in addition to that described in the deed, which does not purport by its terms to convey any other land except that therein described. The added words were evidently inserted for the purpose only of identifying the premises conveyed, if perchance there was any uncertainty in any of the calls in the description of the land.

The case of *Sanders v. Townshend*, 89 N. Y. 623, cited by plaintiff, is not here in point, for the reason that the deed in that case conveyed by number a large number of lots in Harlem Commons, "and also all other lands contained within the limits of said commons * * * not heretofore conveyed by the parties of the first part." It was correctly held that two such lots not designated by numbers were conveyed by the deed.

We hold that the findings and decision of the trial court are sustained by the evidence, and are not contrary to law.

The plaintiff further urges that the trial court erred in excluding evidence of the subsequent acts and conduct of the parties to the deed, for the reason that the deeds were ambiguous. An examination of the record satisfies us that the trial court did not err in excluding the evidence.

Order affirmed.

HOLT, J., took no part.

COVELLI v. COOPER UNDERWEAR CO.
(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. MASTER AND SERVANT (§ 155*)—LIABILITY FOR INJURIES—DUTY TO WARN.

A master is not required to give warning of visible and obvious dangers to a servant who possesses the intelligence, understanding, and experience to comprehend and appreciate them.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 310; Dec. Dig. § 155.*]

2. MASTER AND SERVANT (§ 286*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an employee's action for injuries, evidence held to present a question for the jury

whether the danger in the performance of the employee's duty was obvious, and whether his knowledge, information, and experience in respect thereto were so limited as to render it necessary that the foreman directing him to perform such duty should have instructed him before setting him at work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1008, 1010-1050; Dec. Dig. § 286.*]

3. MASTER AND SERVANT (§§ 150, 297*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

A master is not negligent in failing to warn a servant of the dangers connected with the performance of his duties, unless he knows of such danger and knows or should know that the servant is excusably ignorant of the danger, and by reason of such ignorance is exposed to an abnormal hazard, and hence where a special verdict found that a servant did not understand a danger, was not warned thereof, and that failure to warn was the proximate cause of the injury, but did not find that the master knew or should have known that the servant was ignorant of the danger, it was insufficient to sustain a judgment for plaintiff.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 297, 299-301, 305-307, 1195-1196; Dec. Dig. §§ 150, 297.*]

Appeal from Circuit Court, Kenosha County; E. B. Belden, Judge.

Action by Charles Covelli against the Cooper Underwear Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

This is an action to recover damages for personal injuries received by the plaintiff while employed by the defendant in operating a "mixing picker." Cotton or wool, or both, are fed into the mixing picker, and, after being worked upon in the machine, the product is blown by air through a spout into a lint room. The cotton or wool, or the two mixed, are thus prepared for carding and spinning. For the purposes of this case the essential parts of the machine are the spout referred to and the "doffer fan." The doffer fan is a cylinder about 18 inches in diameter, studded with straight steel teeth or pins about an inch in length, set 2 inches apart, and having attached strips of leather that operate as fans. When in operation, the doffer fan revolves very rapidly; the direction of the revolution being upward where the fan crosses the spout through which the lint is carried from the machine. The nearest part of the revolving teeth on the doffer fan is 25½ inches from the opening of the spout. The doffer fan and the other operative parts of the machine are incased and hidden from the view of the operator.

The plaintiff is a laborer. He is a foreigner, and could speak but little English. When injured, he was between 23 and 24 years of age. Previous to the time when he came to work for the defendant, October 16, 1909, he had worked as a ditch digger and upon railroad work while in this country. Before immigrating to this country he resided and worked on a farm in Italy. For five weeks he worked for the defendant on a

cotton carding machine, feeding rough cotton into one side and pulling carded cotton from the other side. During this time he worked off and on for 15 or 20 minutes at a time, for a total time of an hour or two, at a rag picker machine, which stood in the same room as the mixing picker. On November 22, 1909, the plaintiff was put at work on the mixing picker, feeding the material into the machine and keeping the spout clear. He was shown how to feed, and was directed to keep the spout clear, without, however, being shown, and without inquiring how to stop the machine. The cleaning of the spout was to be performed while the machine was in motion. About five minutes after he had been left to operate the machine, he went into the lint room, and, finding the spout clogged, he reached into the spout to clear it. His fingers were caught by the teeth of the doffer fan, the ends of two of the fingers were chewed off, and a third finger was broken, and as a consequence of the injury the plaintiff suffered from tetanus.

The defendant requested that the special verdict contain the following question: "Was defendant guilty of any want of ordinary care in failing to inform plaintiff of the danger of reaching in too far into the spout, in order to clean out the spout, which want of ordinary care was the proximate cause of the injury?" This request was refused. Among others the following instruction was asked by the defendant and refused by the court: "You are instructed that defendant was not guilty of any want of ordinary care in failing to inform plaintiff that it was dangerous to reach in too far into the spout in order to remove clogged material, unless defendant knew or ought to have known that such warning and instruction was necessary." The jury returned a verdict finding that the defendant had not warned the plaintiff of the danger; that the failure to warn was the proximate cause of the injury; that the plaintiff, before the injury, did not understand the danger of reaching his arm and hand into the spout to remove the clogging material; that, considering the age, intelligence, and experience of the plaintiff, he ought not to have understood and appreciated the danger; and that there was no contributory negligence on his part.

This is an appeal from the judgment in plaintiff's favor in accordance with the verdict.

Harper & McMynn, of Milwaukee, for appellant. Robert Verne Baker, of Kenosha, for respondent.

SIEBECKER, J. (after stating the facts as above). The jury found that the defendant's foreman who set plaintiff at work at the mixing picker did not warn the plaintiff of the dangers incident to his duty of removing the clogging material from the spout while the machine was in motion, and

that such failure to warn plaintiff was the proximate cause of plaintiff's injury. The inquiry, "Ought the plaintiff, considering his age, intelligence and experience, in the exercise of ordinary care, to have understood and appreciated, * * * dangers attending placing his hand and arm too far in the spout in order to remove clogging material while the machine was running," the jury answered in the negative.

[1] It is well known that a master is not required to give warning of visible and obvious dangers to a servant who possesses the intelligence, understanding, and experience to comprehend and appreciate them. The rule of liability was aptly stated in *Jones v. Florence Mining Co.*, 66 Wis. 268, 28 N. W. 207, 57 Am. Rep. 269: "We think it is now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do the work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first give him such instructions or cautions as will enable him to comprehend them, and do his work safely, with proper care on his part."

[2] The evidence tends to show that the plaintiff was ignorant of the construction of the mixing picker, that he had very little, if any, knowledge of machinery, and had had practically no experience in operating it, and that his experience in a factory was limited to the five weeks he had worked for the defendant before the accident. He testified that the defendant's foreman set him to operate this mixing picker without showing or explaining to him the parts, how the machine operated on the material, or the relation of the doffer fan to the opening in the spout from which he was directed to clear the clogging material while the machine was in operation. A study of the facts in evidence has convinced us that it was a question for the jury as to whether or not the danger to the plaintiff in the performance of this duty was so obvious and his knowledge, information, and experience in respect thereto so limited as to render it necessary that the foreman who directed him to perform this service should have instructed him of such dangers before setting him at this work, and that the court properly submitted this question to the jury.

[3] The contention is also made that the special verdict is insufficient to sustain the judgment in favor of the plaintiff, in that there is no finding that the defendant was negligent in not warning the plaintiff of the dangers complained of and which caused the

injury. The master's liability to his servant for failure to warn as alleged in this case rests upon the facts: "(1) That the master was chargeable with knowledge, actual or constructive, of the existence of the risk; (2) that the servant himself did not appreciate the risk, and that his nonappreciation thereof was excusable; (3) that the master knew, or ought to have known; that the plaintiff was thus excusably ignorant of the risk, and was by reason of such ignorance, exposed to an abnormal hazard, over and above those which he was presumed to contemplate as incidents of the employment." *Labatt, Master and Servant*, § 235. The last proposition includes the principle that a master cannot be held liable in such a case, unless he is charged with actual or constructive knowledge that the servant was excusably ignorant of the risk. "Before an employer can be held liable for a failure to warn, there must be something to suggest to him that a warning is necessary. Unless this necessity was or ought to have been known to him, he is considered to be justified in acting upon the assumption that the servant understood the dangers to which he was exposed, and would take appropriate precautions to safeguard himself." *Labatt, Master and Servant*, § 241. "Failure to instruct or warn an employé as to risks and hazards attending the employment is not negligence, unless the employer knew, or ought to have known, that such warning and instruction was necessary." *Sladky v. Marinette L. Co.*, 107 Wis. 250, 83 N. W. 514; approved in *Rahles v. J. Thompson & Sons Mfg. Co.*, 137 Wis. 506, 118 N. W. 350, 119 N. W. 289, 23 L. R. A. (N. S.) 296.

The appellant brought this question to the attention of the court by a request that the question be incorporated in the special verdict, and by the following requested instruction: "You are instructed that the defendant was not guilty of any want of ordinary care in failing to inform the plaintiff that it was dangerous to reach in too far into the spout in order to remove clogged material, unless defendant knew or ought to have known that such warning and instruction was necessary." We are not clear from the state of the record whether or not the court, upon rejection of these requests, held that the evidence as matter of law showed that the defendant's foreman had actual or constructive knowledge that the plaintiff was excusably ignorant of the dangers complained of and incident to his employment. The state of the evidence is not sufficiently clear to show as matter of law that the defendant was negligent in this respect. The evidence is meager on the subject. We find no direct evidence showing that anything was said on the subject by the parties at the time plaintiff was employed or afterwards. Whether or not the defendant failed to exercise or-

inary care at the time of engaging plaintiff, or before setting him to operate the mixing picker, to ascertain plaintiff's experience and knowledge, or whether or not under the facts and circumstances defendant ought to have known that he was excusably ignorant of the risk, were questions under the evidence in the case which should have been submitted for determination to the jury. We are of opinion that the court erred in not submitting this issue to the jury for their decision, and that the verdict rendered is not sufficient in law to sustain a judgment against the defendant. This condition of the record, and the rights of the parties, call for a reversal of the judgment and a retrial of the case.

The judgment appealed from is reversed, and the cause remanded to the circuit court for Kenosha county for a new trial.

DEPOW v. CHICAGO & N. W. RY. CO. (Supreme Court of Wisconsin. Oct. 29, 1912.)

1. DAMAGES (§ 180*)—EXCESSIVENESS—PERSONAL INJURIES.

A person suing for personal injuries suffered from nervousness, shortness of breath, excessive and irregular heart action, and a tendency to perspiration. It was also asserted that he had enlargement of the heart. Aside from this he possessed a very excellent physique and fine muscular development and had no visible wounds, bruises, or injuries. *Held*, that a recovery of \$9,500 was at least double what it should be.

[*Ed. Note.*—For other cases, see *Damages*. Cent. Dig. §§ 357-367, 370, 371; Dec. Dig. § 180.*]

2. EVIDENCE (§ 571*)—IMPROPER EVIDENCE—WEIGHT AND CONCLUSIVENESS.

Expert testimony as to the cause and extent of personal injuries is not absolutely binding on the court.

[*Ed. Note.*—For other cases, see *Evidence*. Cent. Dig. §§ 2395-2398; Dec. Dig. § 571.*]

3. APPEAL AND ERROR (§ 1178*)—DISPOSITION ON APPEAL—REVERSAL—AMOUNT OF RECOVERY.

Ordinarily, the holding on appeal that a verdict for personal injuries is excessive would result in reversing the judgment and naming a sum which plaintiff might accept and terminate the litigation; but, where the evidence to establish defendant's claim is unsatisfactory, the cause will be remanded for a new trial.

[*Ed. Note.*—For other cases, see *Appeal and Error*. Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.*]

4. RAILROADS (§ 304*)—USE OF HIGHWAYS—NATURE AND EXTENT OF RIGHT.

A railway company has a right to use the street on which its tracks are lawfully laid for legitimate purposes, but has no right to leave its cars standing on the street for an unnecessary and unreasonable length of time.

[*Ed. Note.*—For other cases, see *Railroads*. Cent. Dig. § 964; Dec. Dig. § 304.*]

5. RAILROADS (§ 246*)—USE OF HIGHWAYS—NATURE AND EXTENT OF RIGHT.

A city ordinance prohibiting railroads from obstructing the streets with their engines or cars should not be construed as prohibiting freight trains from stopping at all on a cross-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing within the switching precinct, but should be construed to only prohibit unnecessary stops or stops for an unreasonable or unnecessary length of time.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 758-760; Dec. Dig. § 246.*]

6. APPEAL AND ERROR (§ 1178*)—DISPOSITION ON APPEAL—REVERSAL—AMOUNT OF RECOVERY.

Where the only negligence of a railroad company relied on consisted of the obstruction of a highway crossing in violation of a city ordinance, the crossing was within the switching precinct, the evidence on the one hand showed that the train was stopped for five minutes on the crossing, and on the other hand that it was not stopped for over two minutes, and there was no evidence to show that the stop was unnecessary, unusual, or different from the ordinary mode of operating railroad trains, the proof of defendant's negligence was so unsatisfactory that, upon determining that the recovery was excessive, the cause would be remanded for a new trial instead of reducing the recovery.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.*]

Appeal from Circuit Court, Oconto County; Samuel D. Hastings, Judge.

Action by Charles Depow against the Chicago & Northwestern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Edward M. Smart, of Milwaukee, for appellant. Clason & O'Kellher, of Oconto, for respondent.

TIMLIN, J. The plaintiff, traveling at night on the street, drove his horses against the side of a train of flat cars standing on a railroad crossing and was thereby injured. He was riding with his wife in a sleigh drawn by a team of horses and going west. There were several railroad tracks on this crossing and switches north and south of the crossing. The crossing was in a depression in the street of 3½ feet in a distance of 183 feet. A flagman was kept at this crossing in the daytime and an electric light at night. This electric light was maintained by an electric light company by contract with the city and paid for by the railroad company. On the night in question the electric lights in the city of Oconto were out by unavoidable accident. An ordinance of the city of Oconto was introduced in evidence, the first section of which is as follows: "Section 1. All railroads are hereby prohibited from obstructing the streets of the city of Oconto with their engines or cars, but the standing of cars or engines of a passenger train on the street during the usual and necessary stoppage of the train at a station, shall not be deemed an obstruction within the meaning of this ordinance." The scope and meaning of this ordinance was not discussed by counsel or explained to the jury. There are no exceptions to the instructions given to the jury and no requests for instructions. But there was a motion to set aside

the verdict on the ground of excessive damages which was denied and an exception taken.

[1] The jury awarded damages in the sum of \$9,500. The plaintiff has no visible wounds, bruises, or injuries. He suffers from nervousness, shortness of breath, excessive and irregular heart action, and a tendency to perspiration. It is undisputed that, aside from this, he possesses a very excellent physique and fine muscular development. It is asserted that he has enlargement of the heart.

[2] The fact that his present condition was caused by the collision with the car standing on the crossing and the extent of his disability rests upon the opinions of experts. Such opinions are not absolutely binding upon the court. *Bucher v. Wis. Cent. Ry. Co.*, 139 Wis. 597, 120 N. W. 518. We are satisfied that the damages awarded are at least double what they ought to be on the evidence.

[3] Ordinarily this would result in reversing the judgment and naming a sum which the plaintiff may accept and terminate the litigation. *Lehman v. Amsterdam Coffee Co.*, 148 Wis. 213, 131 N. W. 362; *Beach v. Bird & Wells L. Co.*, 135 Wis. 550, 116 N. W. 245. But in the instant case the evidence tending to establish defendant's negligence is so uncertain and insufficient that we have decided to remand the cause for a new trial on the merits. The usual statute or ordinance relating to the obstruction of the highway crossings by trains fixes a time beyond which the crossing shall not be obstructed, usually five minutes. There is considerable variety of expression, of course; but the nature of the subject almost requires that a time be fixed if the statute or ordinance make any change in what we may call the common law.

[4] Under our statutes a railway company has a right to use the street on which its tracks are lawfully laid for legitimate purposes, but it has no right to leave its cars standing upon the street for an unnecessary and unreasonable length of time. *Fay v. Ry. Co.*, 131 Wis. 639, 111 N. W. 683; *Evans v. Railway Co.*, 86 Wis. 597, 57 N. W. 354, 39 Am. St. Rep. 908; *Bussian v. Railway Co.*, 56 Wis. 325, 14 N. W. 452; *Janesville v. Railway Co.*, 7 Wis. 484 marg.; *Crowley v. Railway Co.*, 122 Wis. 287, 99 N. W. 1016. This is a very general form of statute which fixes the time beyond which the crossing must not be obstructed at five minutes. *Hinchman v. Railway Co.*, 136 Mich. 341, 99 N. W. 277, 65 L. R. A. 553; *Commonwealth v. Railroad Co.*, 135 Mass. 550; *Railroad Co. v. State*, 71 Miss. 253, 14 South. 459.

[5] It may have been that the jury understood from the ordinance in question that a freight train could not stop upon a crossing

at all. The proper construction of the ordinance in question is that the obstruction therein mentioned relates to an unnecessary stop upon a highway crossing or a necessary stop prolonged for an unreasonable or unnecessary length of time.

[6] It cannot be presumed that the ordinance was intended to interfere with or prevent the ordinary usual and careful operation of railroad trains. There is no proof in the case that this stop was unnecessary, or that it continued for an unreasonable time. The utmost limit of time fixed by the plaintiff's proof is five minutes, although he does say, once or twice, "Five or six minutes." The substance of his testimony, however, is to the effect that a certain church is about a quarter of a mile east of this crossing, and that he could see the crossing from the time he arrived at that church until he reached the crossing, and that no locomotive passed over it during that time. He drove his horses part of the way on a walk and part of the way on a trot, and estimates that in this way he proceeded at the rate of three miles an hour or a quarter of a mile in five minutes. The distance of a quarter of a mile is estimated, the rate of speed is estimated, and the time is estimated. The estimate of the rate of speed is very low and conflicts with common experience. On the other hand, the members of the railroad crew testify that the stop was made for the purpose of sending a man ahead to ascertain whether a certain side track upon which they intended to go was clear of cars. To ascertain this the messenger had to travel about 150 feet and return. Some of the persons in the cab saw the collision, and it occurred before this messenger reached his destination and within two minutes from the time the train stopped. So we have, on one hand, a claim that the train was stopped on the crossing for five minutes, and, on the other hand, a claim that it was stopped on the crossing for two minutes, and no evidence tending to show that, whatever the time was, it was unnecessary or unusual or different from the ordinary mode of operating railroad trains. The fact that this crossing was within the switching precinct must be taken into consideration. It may be that ordinary care would require the defendant's employes in charge of the train to notice that the electric light was out at the crossing and to send back one of their number with a lantern to stand on the flat car which was on the highway crossing. But this aspect of the case was not submitted to the jury or tried. The train consisted of a locomotive and tender, a string of flat cars, and a caboose at the end. The operating crew consisted of a fireman, engineer, two brakemen, and a switchman or foreman. The latter was at the rear of the train, the fireman and engineer in the cab, the other brakeman

was sent ahead for the purpose mentioned, and the whereabouts of one is not accounted for. The train was pulled across this street crossing so that the rear of the tender was about two car lengths south of the crossing and the third car stood on the crossing. Whether ordinary care would have required the stoppage of the train on the north side of the crossing and sending the brakeman a further distance ahead we cannot say. This aspect of the case was not tried. Much (but not all) would depend upon proof of the usual and ordinary mode of operation under like circumstances. It seems to us clear, from the construction of the crossing with reference to the location of switches and side tracks, that it was intended that switching should be carried on over and upon this crossing, and switching cars requires stopping and also back and forward movement.

Nothing that is said in this opinion is to be taken as suggesting that there was or was not in fact negligence on the part of either the plaintiff or defendant, but merely as pointing out the unsatisfactory manner in which the case was tried and giving reasons for the departure from the usual disposition in this court of like cases.

Judgment reversed, and the cause remanded for a new trial.

WALBRIDGE v. BERLIN PUBLIC SERVICE CO.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. STEAM (§ 5*)—REGULATION OF HEATING COMPANY—"THERMOSTAT."

A rule of a heating company requiring the installation of a thermostat, i. e., an automatic regulator of heat, was reasonable, and, where it appeared that there was no contract with the heating company to furnish heat for any definite time, and that the Railroad Commission was to be appealed to as to whether a thermostat should be put in, the heating company could not be enjoined from disconnecting its pipes on the plaintiff's refusal to install a thermostat.

[Ed. Note.—For other cases, see Steam, Dec. Dig. § 5.*]

2. EVIDENCE (§ 5*)—PRESUMPTIONS—COMMON KNOWLEDGE.

There can be no presumption, in the face of common knowledge on the subject, that the cost would be great or that the time necessary for installation of a thermostat would be so long as to materially interfere with either the comfort or the health of the occupants of the plaintiff's house.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. § 5.*]

Appeal from Circuit Court, Green Lake County; Chester A. Fowler, Judge.

Action by John S. Walbridge against the Berlin Public Service Company. From an order denying its motion to vacate a preliminary injunction, the defendant appeals. Reversed and remanded, with directions.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

This is an appeal from an order denying a motion to vacate a preliminary injunctional order. The injunctional order was obtained from a court commissioner at the commencement of the action, February 12, 1912, upon the complaint alone, and enjoined the defendant (a public utility corporation supplying hot water for heating purposes) from disconnecting the pipes in the plaintiff's house in Berlin from the defendant's mains, and from discontinuing its service of hot water to the house during the pendency of the action.

The complaint alleged that plaintiff's house had been heated by hot water furnished by defendant through its mains since September 1, 1905; that plaintiff contracted with defendant September 1, 1910, for heat for the season ending May 15, 1911, for the sum of \$107.20 to be paid in certain monthly installments; that the heat was furnished and the installments regularly paid for that season, and in September, 1911, the contract was renewed for another season; that the heat was furnished by the defendant under the renewed contract and the installments paid up to and including the installment due February 1, 1912; that defendant in January 1912, pretended to adopt and establish certain rates and rules, and on February 5, 1912, served a copy of the rules on the plaintiff with a notice that unless he complied with rules 5, 6, and 14 by February 10th the service of heat would be discontinued. The rules so referred to are as follows:

"(5) Discontinuance of Service. The company reserves the right, upon five days' notice to cut off its service for nonpayment of bills, for failure to comply with its rules and regulations, or to guard against fraud or loss. In case the service has to be discontinued under this clause, a charge will be made for turning on the water of an amount equal to the actual cost of shutting off and turning on the water.

"(6) Equipment Paid by Consumer. All service mains, radiators, thermostats, valves, piping and fitting are to be paid for and maintained by the consumer."

"(14) Thermostats. The company reserves the right to furnish and install all thermostats connected to its heating system at or as near cost to the consumer as they can be installed, and to adjust and maintain the same at all times, other than breakage by the consumer or worn out parts which supplies and repairs shall be made by the company at cost to the consumer."

The complaint further charged that the pipes and valves in the plaintiff's house, including the thermostat therein, were in the same condition at the time the notice was served as in previous years; that his aged mother-in-law, suffering from severe illness, lived with him; that his house could not be properly heated in any other way than by the hot water from the main; that in

case of discontinuance of service the necessary changes could not be made except with long delay; and that he would suffer irreparable injury thereby during the cold winter months.

By the answer it was alleged that the rules aforesaid were adopted and filed with the Railroad Commission in December, 1911, and have been effective since January 1, 1912, and that no action had ever been brought to change the same as provided by chapter 499 of the Laws of 1907; that the plaintiff refused and still refuses to allow the defendant to install a proper thermostat in his home; and that the notice of discontinuance was given for that reason.

The motion to vacate the injunction was based upon the answer and certain affidavits, as well as upon the examination of the plaintiff taken under section 4096, Stats. It appeared by the plaintiff's own testimony taken upon this examination that there was "no agreement between the company and myself in September, 1911," and none since that time; that there were several conversations in October and November, 1911, in which the parties wrangled over the question of whether plaintiff should put in a thermostat, and the final result was that it was understood the company would go on and furnish heat and the plaintiff would put in a thermostat if the Railroad Commission said he had to do so; that the plaintiff had in his house a contrivance which he considered was a sufficient thermostat, namely, a very sensitive thermometer, hung in the warmest room in the house, which rings a bell when 74 degrees is reached, which bell continues to ring until some person goes to the common room of the house and turns a wheel valve handle controlling the shut-off valve in the basement; that heat was furnished by the defendant; and that the plaintiff paid the monthly installments up to and including the installment of February 1st, when the notice of discontinuance was served. It also appeared by the affidavits of experts that the apparatus called a thermostat by the plaintiff was not a thermostat in fact, because it did not automatically control the heat; that the rules aforesaid were filed with the Railroad Commission and became effective January 12, 1912; but that no formal order had been made by the Commission approving the rules before the commencement of the action. Upon this showing the circuit court declined to vacate the temporary injunction, and the defendant appeals.

John J. Wood, Jr., of Berlin, and McCabe & Dahlman, of Milwaukee, for appellant. Perry Niskern, of Berlin, for respondent.

WINSLOW, C. J. (after stating the facts as above). The principal contention of the appellant is that under the public utilities law (chapter 499, Session Laws of 1907 and the subsequent amendments thereto), by which

all public utilities are placed under the control of the Railroad Commission, the trial court had no jurisdiction to make the temporary injunctive order in question or entertain this action, because by that law the circuit court of Dane county alone can entertain such action, and it must be brought against the Railroad Commission itself.

The law provides for the filing with the Commission of rates and rules by every public utility. Sections 1797m27, 1797m28. It also provides that certain specified corporate bodies and 25 individuals, firms, or corporations may make complaint to the Commission against either the rates or rules, and that the Commission shall thereupon make investigation as to the subject-matter of the complaint. Section 1797m43. It also provides that a summary investigation as to the reasonableness of rates, adequacy of service, or any matter relating to the utility, may at any time be made by the Commission of its own motion. Section 1797m49. Notice of hearing in either case is to be given, and at the conclusion the Commission is given power to substitute new rates or change the existing rules, or require proper service by order which must thereafter be obeyed by the utility. Sections 1797m46, 1797m60, 1797m61.

The law then provides that the public utility itself or any person or corporation in interest dissatisfied with "any order of the Commission fixing any rate or rates, tolls, charges, schedules, joint rate or rates, or any order fixing regulations, practices, act or service" may sue the Commission in the circuit court of Dane county to vacate the order within 90 days after the rendition of the order, and that all right of action or recourse to the courts shall cease absolutely at the end of the 90-day period; further, that no injunction staying such order shall issue except on application to the circuit court or presiding judge thereof upon notice to the Commission. Sections 1797m64, 1797m65, 1797m66.

The law does not in express terms provide that any formal order shall be made by the Commission approving the schedules of rates or the rules filed by the public utility upon the filing of the same; nor does it provide in express terms that the Commission shall be required to investigate into the reasonableness of the rates or rules adopted by any utility and filed upon the complaint of a single citizen. Hence the plaintiff in the present case argues that the circuit court of Green Lake county had not been deprived of jurisdiction because no order had yet been made which could be reviewed in an action brought against the Commission under the provisions of the law in the circuit court of Dane county.

The question is not free from difficulty, and we express no opinion upon it either way,

because we find it entirely possible to decide this appeal upon other grounds. We have stated the contention here for the reason that it would seem that it is a matter which may well be brought to the attention of the legislative branch of the government, to the end that by proper amendment of the law the doubt may be cleared up.

Upon the merits of the case we think the temporary injunctive order should have been vacated.

[1] On the face of it the rule requiring the installation of a thermostat seems entirely reasonable. A thermostat means an automatic regulator of heat (Murphey v. Well, 92 Wis. 467, 66 N. W. 532), and this the plaintiff did not have. By his own affirmative testimony it appears that he had no entire contract with the defendant company to furnish heat for the season, but simply an arrangement that the defendant would go on and furnish heat for a time not fixed, and that the Railroad Commission was to be appealed to to decide whether a thermostat should be put in. The cost of putting in a thermostat nowhere appears, nor the time required to install it.

[2] There can be no presumption, in the face of common knowledge on the subject, that the cost would be great or the time necessary for installation would be so long as to materially interfere with either the comfort or the health of the occupants of the plaintiff's house. When it appeared by the plaintiff's admission that he had no season contract with the defendant, there remained no ground upon which a court of equity could be called upon to interfere, and the preliminary injunctive order should have been at once vacated.

Order reversed, and action remanded, with directions to vacate the preliminary injunctive order.

ELWELL v. BOSSHARD.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. ASSAULT AND BATTERY (§ 40*)—DAMAGES—VERDICT—EXCESSIVENESS.

Defendant assaulted plaintiff on a public street and in the presence of several persons, striking him on the nose, chin, and cheek, and causing him to faint and suffer severe pain in his left temple and left eye. Plaintiff's cheek and mouth were cut, his nose was cut, his false teeth broken, and his gums severely injured. Held, that a recovery for \$300 as compensatory damages was not excessive.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 55; Dec. Dig. § 40.*]

2. ASSAULT AND BATTERY (§ 38*)—ELEMENTS—INDIGNITY AND HUMILIATION.

Where an assault is made on a public street and in the presence of several persons, the injury to plaintiff's feelings resulting from the indignity and public exposure are to be considered by the jury in determining the amount of damages.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 53; Dec. Dig. § 38.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. TRIAL (§ 281*)—INSTRUCTIONS—EXCEPTIONS—SUFFICIENCY.

A general exception to the entire charge, much of which was concededly good, was insufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 694; Dec. Dig. § 281.*]

4. TRIAL (§ 282*)—INSTRUCTIONS—EXCEPTIONS—SUFFICIENCY.

A general exception to the refusal to charge several distinct requests embraced in separate and distinct propositions, some of which should not have been given, was insufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 695, 696; Dec. Dig. § 282.*]

Appeal from Circuit Court, Juneau County; James O'Neill, Judge.

Action by Fred O. Elwell against William Bosshard. From a judgment for plaintiff, defendant appeals. Affirmed.

Naylor & McCaul, of Tomah, for appellant. Daniel H. Grady, of Portage, for respondent.

KERWIN, J. This is an appeal from a judgment for damages in an action for assault and battery. The jury returned a verdict for the plaintiff for \$300 compensatory damages and awarded no punitive damages. Error is assigned upon the charge to the jury, refusal to charge as requested, and because the damages are excessive.

[1, 2] On the question of excessiveness of damages little need be said. There is evidence that the assault was committed on a public street, and that the defendant struck plaintiff on the nose, chin, and cheek with his fist, and that shortly after plaintiff was struck he fainted; that he suffered severe pain in his left temple and left eye; that his cheek and mouth were cut; that his nose was cut, and his false teeth broken, and his gums severely injured. There is an abundance of evidence that defendant struck plaintiff repeatedly with considerable force. Moreover, the attack was made upon a public street, and was witnessed by several persons; therefore injury to feelings resulting from the indignity and public exposure was properly to be considered by the jury. *Draper v. Baker*, 61 Wis. 450, 21 N. W. 527, 50 Am. Rep. 143. There was also testimony of physicians as to seriousness of the injuries. It is wholly unnecessary to review the evidence. It is ample to support the verdict for the amount of damages awarded.

[3, 4] The errors assigned on the charge and refusal to charge cannot be reviewed for want of proper exceptions. The appellant filed a general exception to the entire charge. Much of the charge is concededly good, and so admitted by appellant. Therefore the exception was not sufficient. A general exception was also filed to the refusal to charge. Counsel for appellant made several distinct requests, embraced in separate and distinct propositions, some of which, at least, should

not have been given; therefore the general exception to refusal to charge as requested was not sufficient. *Kersten v. Welchman*, 135 Wis. 1, 114 N. W. 499; *Bouck v. Enos*, 61 Wis. 660, 21 N. W. 825; *Luedtke v. Jeffery*, 89 Wis. 136, 61 N. W. 292; *Sheppard v. Rosenkrans*, 109 Wis. 58, 85 N. W. 199, 83 Am. St. Rep. 886.

The judgment of the court below is affirmed.

VOTE-BERGER CO. v. CARTER-WABENO TELEPHONE CO.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

APPEAL AND ERROR (§ 1010*)—EVIDENCE—FINDINGS—REVIEW.

Great weight will be given to the findings of fact made by the trial court, and reasonable doubts resolved in favor thereof, and unless the evidence so strongly preponderates against the same as to indicate clearly that they are wrong, they will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

Appeal from Circuit Court, Forest County; John Goodland, Judge.

Action by the Vote-Berger Company against the Carter-Wabeno Telephone Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Action to recover on a promissory note which, by inadvertence, as alleged, had been canceled and returned to the maker as paid, contrary to the facts. The defendant, by answer, insisted that the note was duly paid and canceled according to a memorandum thereon.

The evidence was to the effect that the note was given by defendant December 1, 1908, and returned to the maker March 12, 1909. The memorandum on the paper was as follows: "Paid. Vote-Berger Company by C. S. Boley." Mr. Boley was the bookkeeper, cashier and auditor for plaintiff and possessed authority to receive payment on the note and cancel it. He returned it by mail, with a letter calling attention thereto, as canceled. There was conflicting testimony, independent of the circumstances aforesaid, respecting payment of the note.

The trial was by the court and resulted in findings in favor of defendant. Judgment was rendered accordingly.

Mills Tourtellotte, of La Crosse, and W. A. Wescott, of Crandon, for appellant. J. F. Hooper, of Crandon, for respondent.

MARSHALL, J. (after stating the facts as above). The sole complaint by appellant is that the findings are not warranted by the evidence. The case is presented in anticipation of this court carefully weighing such evidence and noting, efficiently, preponderating weight without regard to the persuasive

effect of the trial opinion. This court has no very nicely balanced scale with which to weigh evidence. Such are afforded only in trial jurisdictions. It follows that great weight in favor of findings of fact made there must be accorded thereto and reasonable doubts resolved in favor thereof. Unless the evidence so strongly preponderates against the same as to indicate, clearly, that they are wrong notwithstanding the presumption in their favor, they cannot be disturbed. Tested thereby, we are constrained to hold that the findings here give the correct state of case.

Judgment affirmed.

ZUWODNICEK v. HIGGINS SPRING & AXLE CO.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. MASTER AND SERVANT (§ 276*)—PERSONAL INJURIES—EVIDENCE—SUFFICIENCY.

In an action for personal injuries, plaintiff's case cannot rest in conjecture, or in a weight of mere possibilities; so, to warrant a recovery, the cause of the injury must be established to a reasonable certainty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

2. MASTER AND SERVANT (§ 278*)—PERSONAL INJURIES—EVIDENCE.

In an action by a servant for personal injuries by being struck in the eye by a flying iron scrap, alleged to have been knocked upward from the floor by a knife falling down from the top of a machine, evidence held to warrant a finding that the knife was placed on the machine by plaintiff's foreman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972; Dec. Dig. § 278.*]

3. MASTER AND SERVANT (§ 276*)—PERSONAL INJURIES—EVIDENCE.

In an action by a servant for personal injuries, evidence held to warrant a finding that a knife, alleged to have caused the injury, fell from the top of the machine at which plaintiff was working.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

4. MASTER AND SERVANT (§ 276*)—PERSONAL INJURIES—EVIDENCE.

In an action by a servant for personal injuries, evidence held sufficient to warrant a finding that a scrap of steel, which hit plaintiff in the eye, cutting the crystalline lens directly back of and opposite to the place it cut the cornea, without cutting the lids, was caused to be thrown from the floor, near his toe, by the fall of a heavy knife.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

Appeal from Municipal Court of Racine; William Smieding, Judge.

Action by Wawyrn Zuwodnicek against the Higgins Spring & Axle Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Action to recover damages for personal injuries. The defendant owns a machine

shop, and is engaged in the manufacture of steel springs and axles, at the city of Racine. The plaintiff, at the time of the injury, was about 31 years of age, a blacksmith by occupation, and had been in the employ of the defendant, in the capacity of a general workman, for about nine years. On the 11th day of September, 1911, the plaintiff was directed by the defendant to operate a certain machine in its plant, known as a "spring trimmer." The machine is an upright iron frame, is equipped with stationary lower, and movable upper, knives, is run by belt power, and is used for cutting iron and steel and shearing and trimming off the ends of metal springs. Its dimensions are 31 inches deep, 41 inches wide, and about 30 inches from the ground to the top of the frame, from which the knife, hereinafter referred to, is claimed to have fallen. The knife in question was a piece of steel $4\frac{7}{8} \times 5\frac{1}{8} \times 1\frac{1}{2}$ inches, and weighed seven pounds. The surfaces, $1\frac{1}{2}$ inches in width, were practically level, so that the cutting surface of the knife formed nearly a right angle with the perpendicular surfaces. The complaint alleges that while plaintiff was operating this machine "a heavy edged tool or knife, designed for use in another trimming machine in said plant, having been taken therefrom for the purpose of being sharpened, and having been theretofore carelessly and negligently placed on the machine which the plaintiff was operating, fell from the said frame of said machine to the floor below, a distance of about 2½ feet, striking said floor where plaintiff was working, with considerable force, and causing a splinter or piece of steel then and there being upon said floor to fly with sufficient force to pierce or penetrate the right eye of the plaintiff and destroy the sight thereof; * * * that the machine upon which plaintiff was working was insecurely fastened to the floor, and was loose on the foundation, and while being operated at the time of said injury, and a long time prior thereto, to the knowledge of the defendant, moved back and forth, shook, and vibrated; * * * that the floor at the place where said heavy edged tool or knife fell was an uneven brick surface, and at all times was littered with large and fine particles and pieces of steel similar to that which was driven into plaintiff's eye; * * * that said defendant was careless and negligent in placing said heavy edged tool or knife upon the frame of said machine, in view of the fact that said machine was insecurely fastened to the floor, and that such careless and negligent act rendered the place where plaintiff was working unsafe, under the circumstances stated; and that by reason of the alleged carelessness and negligence of the defendant plaintiff suffered the loss of his right eye." The answer

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

admitted the formal, but denied the material, allegations of the complaint.

A special verdict was returned, finding (1) that plaintiff was injured by being struck in the right eye by a piece of steel or iron, caused to be thrown from the floor by the fall of a heavy knife from the framework of the machine at which he was working; (2) that plaintiff had no knowledge of the knife being on his machine before it fell to the floor; (3) that plaintiff's foreman, Martin Christensen, placed the knife on the framework of plaintiff's machine; (4) that said Martin Christensen was guilty of a want of ordinary care in placing said knife on said machine; (5) that the placing of the knife on said machine was the proximate cause of plaintiff's injury; (6) that plaintiff was not guilty of any want of ordinary care which contributed to produce his injury; and (7) damages, \$2,500.

On the coming in of the verdict, the usual motions were made by the respective parties, and from a judgment entered in favor of plaintiff on the verdict the defendant appealed.

L. A. Olwell and Burr J. Scott, both of Milwaukee, for appellant. Wallace Ingalls, of Racine, for respondent.

VINJE, J. (after stating the facts as above). Defendant claims that plaintiff's evidence does not establish an issue for the jury, because (1) it fails to show that Christensen, its foreman, placed the knife on the machine, and that it fell therefrom; (2) because it would be impossible for the knife to fall from the machine if it was placed thereon; and (3) because it would be impossible for plaintiff to be injured as he was by a flying scrap of iron starting from a place on the ground near the toe of his foot.

[1] If plaintiff's case rests in conjecture, or in a weight of mere possibilities, then the verdict in his favor cannot be sustained. To warrant a recovery, the cause of the injury must be established to a reasonable certainty. *Hyer v. City of Janesville*, 101 Wis. 371, 77 N. W. 729; *Hamann v. Milwaukee Bridge Co.*, 127 Wis. 550, 106 N. W. 1081, 7 Ann. Cas. 458; *Schell v. C. & N. W. R. Co.*, 134 Wis. 142, 113 N. W. 657; *Hart v. Neillsville*, 141 Wis. 3, 123 N. W. 125, 135 Am. St. Rep. 17; *Stock v. Kern*, 142 Wis. 219, 125 N. W. 447; *Houg v. Girard Lumber Co.*, 144 Wis. 337, 129 N. W. 633, 140 Am. St. Rep. 1012; *Samulski v. Menasha Paper Co.*, 147 Wis. 283, 133 N. W. 142. Plaintiff's testimony as to how the injury occurred is as follows: "I was about 1½ feet away from the machine. I did not measure the distance. As I turned, the iron fell to the floor and knocked my eye out. The piece of iron was 5"x7", and more than an inch thick. It was a knife from the machine like the one I was working on. The foreman brought it from the machine shop. I know, because

he took them out and went to sharpen them. I know, because I saw him loosen and take them out. I saw him coming back from the east, toward the machine, with them. He was coming between my machine and the bench. He had two knives, one in each hand. Q. Now, do you know how that knife happened to fall from that machine? A. I know that when it fell and knocked my eye out, and I saw it lying on the floor. I know it is the knife the foreman had, because there are no other kind of knives. Later on I looked it over, and it was freshly sharpened. When it fell, the foreman was fastening the other knife to the machine. The knife that fell belonged in the other machine, the one the foreman was working on; that is, the machine to the north. I did not see the knife on my machine before I was injured. As I turned around, it was just falling. There was no one around there at the time except the foreman. * * * The knife that fell to the floor weighed about six or eight pounds. I know that the piece that cut my eye came from the floor, because when the knife fell it immediately struck me in the eye. There was no other machine operating in the vicinity. So far as I know, it could have come from no other place. The piece of iron fell from the bed of the machine to the floor, a distance of 2½ feet. * * * My foot was so injured that it pained me frequently for about two weeks. The knife struck me on the very end of the large toe. It fell on the floor as the lower end hit my toe. It fell first on the floor, and then on the toe. * * * I did not see the iron strike my toe, but I felt it. That was after it knocked my eye out. When my eye was struck, I jumped and was frightened, and moved away from the place. I do not know whether the knife fell lengthwise or flat. I do not know whether it hit the ground at the same time that it hit my foot. If it had struck my foot before it struck the ground, I think it would have cut off my toe. That is the best answer I can make as to whether it hit my foot or the ground first. * * * I did not see this iron as it was falling. When it fell, it made a big noise, and immediately something struck me in the eye. I heard this iron strike the scrap. It was a very big noise. Something hit me in the eye right away. * * * I saw the knife or die later, when it was lying on the floor. I saw it right after I was hit in the eye. It is a fact that both eyes closed immediately, and the water was running from both. I wiped my eyes twice right there at the machine. Later on I held a handkerchief over my right eye, and I could see with the other one. At that time I saw the knife. * * * I want to be understood as saying that I stopped to look at the knives. I saw the knife, because I was looking at it later on. I just wiped my eye, and then I looked at the knife immediately. I did not pick it

up; I just looked it over. I saw that it was freshly sharpened."

Christensen, defendant's foreman, testified on behalf of the plaintiff as follows: "I was on the other side of the machine, to the east, at the time of the accident. I do not remember whether I had taken the knives out to sharpen them. I will not swear that I did not. I do not remember. It is possible that I did so. * * * These are the only two similar machines in the factory. They are called trimmers. I do not remember that just before the plaintiff was hurt that I was bringing a couple of these knives from the sharpening room. I could not swear that I was not doing so, because I do not remember. I do not remember that one of these knives was there on the floor after the plaintiff was injured. I do not remember seeing any knife on the floor. I will not swear that there was not one there. * * * There was nothing to prevent my having seen a knife on the floor, if it had been there; but I did not pay any attention to the floor, and even if it had been there it could be there and I might not notice."

[2] The testimony of the same witness, given in behalf of the defendant, does not materially vary or modify that given in behalf of the plaintiff, in so far as it relates to the placing of the knife on the frame of the machine. Defendant offered no other evidence to show that the knife was not in fact placed on the machine by Christensen at the time of the accident. Upon such testimony, it seems clear that the jury was warranted in finding that the knife was placed on the frame of the machine by defendant's foreman. While plaintiff did not see it lying on the frame of the machine, he does testify that he heard it fall; that it struck his toe and injured it; that he saw it lying on the floor, immediately after the accident, below the frame of the machine, where he claimed it was placed; and if it be true, as the jury had a right to believe, that the knife fell upon the floor and upon plaintiff's toe, as he testifies, then the only legitimate inference that can be drawn from the testimony is that it fell from the frame of the machine, as the evidence fails to disclose that there was any other place from which it might have fallen and struck plaintiff's toe, in view of the position he was in at the time of the injury. Plaintiff testifies that he saw the foreman, shortly before the injury, with two knives in his hands. The foreman and plaintiff both unite in saying that there were only two machines in the factory having knives similar to this, namely, the one plaintiff was operating and the one the knives of which the foreman was engaged in inserting at the time of the accident. It therefore seems reasonably certain that the knife was placed on the frame of the machine by defend-

ant's foreman, and the jury was warranted upon the testimony in so finding.

[3] The next claim is that if the knife was placed on the frame of the machine by defendant's foreman it could not have fallen therefrom. This is based on the testimony given on behalf of the defendant, to the effect that there was little or no vibration to the machine when in operation; that tests were made by placing a knife on the frame of the machine in various positions when it was in operation, and that it did not fall; that it was also placed just far enough in on the frame of the machine so that it would lie thereon, but be dislodged by a very slight jar; and that the machine was operated when the knife was so placed, and yet it did not fall. On the part of the plaintiff, there is considerable evidence to show that the machine, at the time of the accident, was not securely fastened to the floor; that it vibrated considerably when in operation; and that it shook more or less from side to side when springs were being trimmed or unusually heavy material was being cut. It is a matter of common knowledge that almost all machines driven by belting and shafting vibrate more or less when in motion. Such fact, taken in connection with the direct testimony produced on behalf of the plaintiff that the machine did vibrate and shake when operated, is sufficient to support the verdict that the knife fell from the machine.

[4] The last point urged by defendant is that it was not possible for a scrap of steel, starting from a position near plaintiff's toe, to strike plaintiff's eye and inflict the injury to which the doctor testified. This is based chiefly upon the theory that if the flying piece of steel started from a place near plaintiff's toe it could not have cut the eye itself without cutting the lids, and plaintiff's eyelids were not injured. Both the cornea and the crystalline lens of plaintiff's right eye were cut. The cut into the crystalline lens was directly opposite the outside cut, so that the cuts in the two membranes were directly back of each other. From this fact it is argued that the piece which struck the eye must have come in a horizontal direction, if the plaintiff was looking straight forward, or substantially so, and that the only way in which he could have been injured as he was by an object starting from a place near his toe would be by his looking down and forward at an angle of about 45 degrees. While there is some testimony on behalf of plaintiff to the effect that his head was in a downward and forward position at the time of the injury, yet such testimony is vague and unsatisfactory. It seems, however, as the fact probably was, that plaintiff could not tell accurately just in what direction he was looking at the time he was injured. He may have been looking downward and for-

ward. But if he was not, it cannot be assumed that when a knife, such as the one in question, struck a steel scrap, which may have been slightly curved or of an irregular outline, that it would fly in a straight direction towards his eye. It is practically impossible to foretell or ascertain the path that such a moving object will take, or did take. If set in motion through the air, it may describe a course which is neither a straight line nor a uniform curve of any known description, so that it is possible that plaintiff's eye may have been injured as it was by a scrap of steel starting from a point near his toe, even though he was not looking downward and forward. We conclude, therefore, that if plaintiff's evidence is to be believed—and that was a question for the jury—there is nothing conjectural or improbable, either in the fact that the knife was placed where it is claimed it was placed by the defendant's foreman, or, if so placed, that it fell from the machine owing to the vibration thereof, or in the manner in which the eye was injured from the scrap of steel flying from near plaintiff's toe; and the judgment must therefore be affirmed.

As this injury happened after the workman's compensation act went into effect, the question of the negligence of a fellow servant is not in the case.

Judgment affirmed.

DONAHUE v. GUNTER.

(Supreme Court of Wisconsin. Oct. 29, 1912.)
RAIL (§ 17*)—ARREST OF JUDGMENT DEBTOR—
DISCHARGE ON STIPULATION.

Plaintiff, having been cast in a tort action, was arrested on an execution. He deposited with defendant, as sheriff, \$325 to obtain a release, on a stipulation that the deposit should remain 60 days, for plaintiff to file a satisfactory undertaking on appeal to the Supreme Court, and that in case such undertaking was not filed the deposit should be applied on the judgment, so far as necessary to satisfy the same, unless for any cause shown, satisfactory to the court, the time for filing the undertaking should be extended. Three days before the expiration of the 60 days, plaintiff's attorney served a copy of the undertaking on the attorney for the adverse party, exhibited the original to him, and after he had expressed satisfaction therewith, and admitted service thereon, the adverse party's attorney requested that the original be left with him, in order that he might show it to his client, whereupon plaintiff, acting in good faith, and intending to perfect the appeal and seasonably file the undertaking, consented to the request, and in due time called at the adverse attorney's office to obtain the paper and file it, and on the last day for so doing again called at the office, and, finding it locked, made other ineffectual attempts to obtain it until 8 o'clock in the evening of that day, when it was too late to file it, and then, obtaining the original, he placed it on file as soon as practicable the following morning. Held, that the judgment creditor was estopped to claim that the undertaking on appeal was not filed with-

in the stipulated 60 days, and was not entitled to have the money deposited applied to the judgment.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 49-51; Dec. Dig. § 17.*]

Appeal from Circuit Court, Kenosha County; John K. Parish, Judge.

Action by Edward Donahue against William H. Gunter. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

See, also, 142 Wis. 470, 125 N. W. 950.

Michael G. O'Donnell obtained judgment against plaintiff in a tort action. In due course, the latter was arrested on an execution issued upon such judgment. In such circumstances, he deposited with defendant, as sheriff, \$325 to obtain a release, it being stipulated by the attorneys that the deposit should remain 60 days for plaintiff to file a satisfactory undertaking upon appeal to this court, and that, in case of such undertaking not being so filed, the deposit should be applied on the judgment, so far as necessary to satisfy it, unless, for cause shown, satisfactorily to the court the time for filing the undertaking should be extended. An undertaking, executed in due form, was served upon O'Donnell's attorney and the original exhibited to him, several days before expiration of the 60 day period. He then expressed satisfaction therewith and admitted service thereon. Plaintiff's attorney intended to forthwith file such original but left it with O'Donnell's attorney, at his request, so he could show it to his client. Plaintiff acted in good faith, intending to perfect the appeal and seasonably file the undertaking. After it was left with O'Donnell's attorney, as stated, plaintiff's attorney, as claimed, within due time called several times at the former's office to get and file it. The latter was out of the office and the door was locked. The last ineffectual call was March 9, 1909,—the last of the 60 day period. He called, again, in the evening of that day, about 8 o'clock, and obtained the paper. It was then too late to file it that day; but it was placed on file as soon as practicable the following morning. In such circumstances, the sheriff used the deposit to discharge the judgment, refusing any of it to plaintiff. He sued to recover the same,—admitting that the undertaking was not filed within the 60 day period, but alleging the delay was caused by refusal or negligence of O'Donnell's attorney in respect to seasonably returning the paper, and to the knowledge of defendant before appropriating the deposit. The latter answered, alleging failure to duly file the undertaking or secure extension of time therefor. The cause was dismissed on the pleadings. Upon appeal, 142 Wis. 470, 125 N. W. 950, the judgment of dismissal was reversed and cause remanded for a new trial, the court holding that, under the circum-

stances, there was no neglect or refusal, within the meaning of the deposit agreement, to file the undertaking within the 60 day period; that the conduct of O'Donnell's attorney precluded the defense of failure to file being effective; that the seasonable service of the paper on such attorney and his approval thereof and the omission to thereafter file it within such period by reason of indulging such attorney, did not warrant appropriation of the deposit.

Upon the trial, the claim that the undertaking was seasonably served on O'Donnell's attorney and was satisfactory to him, but the original was not immediately filed because the attorney asked time to exhibit it to O'Donnell, was established without dispute. There was some controversy about what thereafter occurred between such attorney and plaintiff's attorney. However, that the latter tried to obtain possession of the undertaking for the purpose of filing it, that he failed till too late on January 9, 1909, that the paper was promptly filed the next morning and that, nevertheless, defendant, with knowledge of the facts, or reasonable means thereof, appropriated the deposit, were very satisfactorily established.

Plaintiff's attorney testified that he relied upon O'Donnell's attorney returning the undertaking in time for filing within the 60 days; that he visited such attorney's office twice to obtain it, March 9, 1909,—each time finding the door locked; and that he visited it again about 8 o'clock in the evening and obtained the paper. O'Donnell's attorney admitted the latter circumstance and did not deny, positively, that his office was locked at the time plaintiff's attorney called thereat, as he stated, or told such attorney at the last visit, he did not think the time for filing had expired. The amount due on the judgment, including fees claimed for collecting it, was \$304.01, or \$20.99 less than the deposit.

At the close of the evidence, defendant's counsel asked for a directed verdict in plaintiff's favor for \$20.99. The motion was denied. The cause was submitted by instructions, not excepted to nor appearing in the record. The cause was made to turn on whether plaintiff's attorney failed to file the undertaking because of fault of O'Donnell's attorney. The jury rendered a verdict in plaintiff's favor for \$20.99. Judgment was entered accordingly, a motion having been made and denied, in the meantime, to set the verdict aside and for judgment for the amount claimed in the complaint.

John C. Slater, of Kenosha, for appellant.
Calvin Stewart, of Kenosha, for respondent.

MARSHALL, J. (after stating the facts as above). This appeal is ruled in favor of the appellant on elementary principles of estoppel in pais and by the decision upon the former appeal. 142 Wis. 465, 125 N. W. 950.

The condition upon which respondent was authorized to use the deposit in discharge of the judgment, instead of returning it to appellant, was "neglect or refusal" of the latter to file the undertaking within the stipulated "60 days." It was respondent's duty, as said upon the former occasion, before applying the money upon the judgment, to ascertain whether such contingency had happened. It was further said before: "It cannot be held that he (appellant) refused to do so, although he may have been guilty of some negligence in either not insisting upon its earlier return or moving the court for an extension of time within which to file." Adding,

"When service was made three days before the time within which to file would expire, and the party on whom service was made retained the document for his own convenience, and neglected or refused to return it, he should not be heard to say that the other party had 'neglected' or 'refused' to comply with the stipulation, until he had placed such party in a position where he could do so."

The purport of the quoted language is, that, in the circumstances, which are undisputed, appellant was entitled to opportunity to file the undertaking after coming into possession of it from O'Donnell's attorney; that to have put appellant in default such attorney should have returned the undertaking in reasonable time for filing it. A neglect to return the paper, or offer to do so, whether appellant's counsel demanded it or not, was neglect to return it within the meaning of the former opinion. It was not essential for plaintiff, in order to protect his rights, to hunt out O'Donnell's attorney and demand back the paper in time for filing within the 60 days. The latter, under the circumstances, should have been the actor to the extent, at least, of offering to return the paper within the time.

The case was evidently submitted to the jury upon the theory that appellant was in default in not filing the papers within the 60 days, even if it happened because he did not go to the office of O'Donnell's attorney, when such attorney was in, and make demand for the paper in time for filing. There is no satisfactory impeachment of appellant's evidence that he called at such office during the ordinary business hours, for the purpose of obtaining the paper, twice on the last day for filing and that the door was locked. That excused making demand, even if such were necessary, in order to prevent happening of the event upon which the deposit could be used as it was. So, in any view of the case, the court should have taken the case from the jury in appellant's favor.

Judgment reversed, and cause remanded for judgment in accordance with the prayer of the complaint.

SZYMANSKI v. SZYMANSKI.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. DIVORCE (§ 197*)—COUNSEL FEES OF WIFE—LIABILITY OF DEFENDANT.

Where defendant, in a divorce action, as soon as he learned of the suit, made sincere efforts to settle it with his wife and her attorney, and he and his wife effected a reconciliation within two days after service of summons and complaint, and defendant offered his wife's attorney a reasonable attorney's fee, and the wife ordered the attorney to discontinue the suit, there was an abuse of discretion in continuing the divorce suit, at the attorney's request, for the purpose of compelling payment of an excessive sum for his services.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 582, 583; Dec. Dig. § 197.*]

2. DIVORCE (§ 197*)—ACTION—ATTORNEY'S FEES.

The law favors the reconciliation of marital contentions and the resumption of the marital relation; and counsel in divorce actions should promote reconciliation between the parties, when possible, even at the sacrifice of his fees.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 582, 583; Dec. Dig. § 197.*]

3. DIVORCE (§ 227*)—ATTORNEY'S FEES—REASONABLENESS.

An attorney's fee of \$150 for merely instituting a divorce action, which was compromised by the parties, would be excessive, when claimed by a young attorney, who had only practiced three years; \$75 being ample.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 653, 654; Dec. Dig. § 227.*]

4. DIVORCE (§ 227*)—SUIT MONEY.

The suit money contemplated by St. 1898, § 2361, providing for orders during the pendency of a divorce action for suit money to enable the wife "to carry on the action," might include reimbursement to the wife of moneys theretofore paid by her for that purpose, or to discharge liabilities incurred by her therefor, if just and equitable.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 653, 654; Dec. Dig. § 227.*]

Appeal from Circuit Court, Milwaukee County; J. C. Ludwig, Judge.

Divorce action by Annie Szymanski against Max E. Szymanski. From an order requiring defendant to pay plaintiff's attorney a certain sum for his services, defendant appeals. Reversed and remanded, with directions to enter order of discontinuance.

Lorenz & Lorenz, of Milwaukee, for appellant. Walter Schinz, of Milwaukee, for respondent.

TIMLIN, J. A summons, complaint, affidavit, and order to show cause returnable November 11, 1910, in this suit for divorce were served upon defendant at 4:30 o'clock p. m. on November 7, 1910. The attorney for plaintiff was Mr. Peter S. Brzonkala. The defendant attempted to find his wife's attorney, for the purpose of making a settlement, on the evening of November 7th, but failed to find him, and was at his office for the same purpose at 7:30 or 8 o'clock the next morning. To quote from the brief of

counsel opposed to him in this court, he "begged that a reconciliation be effected, and asked Mr. Brzonkala to call the plaintiff and explain that the defendant was ready to take everything back and apologize for his conduct, so that a reconciliation could be effected." The testimony of Mr. Brzonkala differs very materially from that of plaintiff and defendant in several important particulars, and we do not intend to pass upon any question of credibility. But it may be safely set down that the efforts of the defendant to effect a reconciliation with his wife were immediate, earnest, and constant, and that Mr. Brzonkala either opposed or gave no aid to such reconciliation, and that husband and wife settled their differences and became reconciled on the 9th or 10th of November, 1910. The defendant offered Brzonkala \$75 for attorney's fees, which the latter refused. Brzonkala had been a lawyer for three years, and seemed to think his services were worth \$50 per day. Unable to come to any settlement with Mr. Brzonkala, the husband and wife resumed their marital relations, and she notified Brzonkala to dismiss her divorce suit. He refused to do this, but instead filed the papers, against her wish, in the circuit court, paid the clerk's fees and suit tax out of his own funds, and on January 3, 1911, applied for and obtained, on January 30, 1911, against the objection and exception of the defendant, an order requiring the defendant to pay him the sum of \$150 "in full payment for services rendered to him in the above-entitled action as attorney for the above-named plaintiff." From this order, defendant appeals.

[1] In a divorce case, as in other cases, the circuit court has no doubt jurisdiction to refuse to allow a plaintiff to arbitrarily discontinue his action. *Linden L. Co. v. Milwaukee, etc., Co.*, 107 Wis. 493, 83 N. W. 851. To thwart an attempt to defraud an attorney by a collusive settlement might be a very good reason for exercising this jurisdiction, even in a divorce case. *Clarke v. Burke*, 65 Wis. 359, 361, 27 N. W. 22, 56 Am. Rep. 631. But there is no such case here. Where the husband, as plaintiff, sought leave of court to discontinue a divorce case which he had been carrying on against the wife and she, opposing the discontinuance, showed that she had, in defending this action, paid out some attorney's fees and incurred others, and that there was alimony in arrears from him, an order of discontinuance was properly conditioned upon the payment of such alimony and a reasonable amount of suit money. *Schulz v. Schulz*, 128 Wis. 28, 107 N. W. 302. Again, there is no such case here. This case is one in which the defendant, as soon as he learned of the divorce suit, made constant efforts to settle it, not surreptitiously or collusively, but with his

wife and her attorney. The husband and wife effected a settlement and reconciliation within two days after the service of the summons and complaint, and before the domestic broil had been made public by filing the papers in court. The defendant offered to the attorney for his wife a reasonable attorney's fee, and the wife ordered this attorney to discontinue the suit. Under such circumstances, it was an abuse of discretion on the part of the trial court to continue the divorce suit, at request of the attorney for plaintiff therein, for the purpose of collecting or compelling payment of his attorney's fees.

[2, 3] The policy of the law favors the reconciliation of the contending spouses, the confidential and private character of transactions and communications between them, the resumption and continuance of the marriage relation, the solidarity of the family, and the end of litigation, especially divorce litigation. These are weighty matters when thrown in the scale against mere attorney's fees. There is some indication in the record that Mr. Brzonkala does not yet quite fully understand the duties of counsel in a divorce case. This must be attributed to his youth and inexperience, not to any fault of character. Such counsel should promote settlement and reconciliation of parties wherever possible, even at the sacrifice of his fees, when necessary. He should not unnecessarily make public the domestic discords which are condoned by the settlement. There seems to be apparent in this case, as well as in some others which have come before us, a notion that any young gentleman two or three years out of the law school has a right to charge at the rate of \$50 per day for his services, because men of age, experience, and established reputation and capacity to perform much legal work in one day sometimes, or ordinarily, receive that much. But this is not correct. It does not require long time or great skill to hear the story of cruel and inhuman treatment which forms the basis of a divorce suit, nor to draft a summons, complaint, affidavit, and order to show cause in such an action. The amount asked for such services by Mr. Brzonkala was exorbitant; the amount allowed by the circuit court was excessive; the amount offered by the defendant (\$75) ample.

[4] Our divorce statute (section 2361) speaks of orders made during the pendency of the action for suit money to enable the wife to carry on the action. The pendency of the action, it is true, may be prolonged by a refusal to permit its discontinuance based upon sufficient cause. To prevent wrong or to do equity, the words "to enable her to carry on the action" may include reimbursement to her of moneys theretofore paid by her for the purpose mentioned, or might include liabilities incurred by her for

a like purpose, as in *Schulz v. Schulz*, *supra*. But these are exceptional situations. When the parties litigant in a divorce action have become reconciled, and they have effectually settled the litigation as between themselves within two days after the suit was begun and before any matter in the action was presented to the court, and before the papers were filed in court, and the defendant (husband) has offered to pay his wife's attorney all that the latter was reasonably entitled to for the services performed, it will be held an abuse of discretion to continue the divorce case merely for the purpose of enforcing payment of attorney's fees. The following cases may be consulted, compared with those heretofore cited, and distinguished: *Reynolds v. Reynolds*, 67 Cal. 176, 7 Pac. 480; *McCulloch v. Murphy*, 45 Ill. 256; *Beaulieu v. Beaulieu*, 114 Minn. 511, 131 N. W. 481.

Order reversed and the cause remanded, with directions to enter an order of discontinuance.

KASZUBOWSKI v. JOHNSON SERVICE CO.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. MASTER AND SERVANT (§ 286*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an employe's action for injuries, claimed to have been caused by the oily, greasy, and filthy condition of the floor of the room in which he was working, evidence *held* to present a question for the jury whether the floor was reasonably clean and the room adequately lighted.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1038-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 273*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an employe's action for injuries caused by his slipping, claimed to be due to grease on his shoes, evidence *held* insufficient, as a matter of law, to show that the grease came from the floor of the room in which he was working, or, if it did, that it had been there sufficiently long to show negligence on the part of the employer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

3. MASTER AND SERVANT (§ 217*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

A person employed in a garage, with knowledge that the character of the work carried on therein makes the floor wet, greasy, or dirty at times, assumes any risk incident to grease becoming attached to his shoes by reason of walking over the floor.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

4. MASTER AND SERVANT (§ 265*)—ACTIONS FOR INJURIES—BURDEN OF PROOF.

A person suing for personal injuries has the burden of showing to a reasonable certainty that defendant was negligent, and that such negligence was the proximate cause of the injury; and he does not meet this burden by

showing two or more causes, some actionable and some not, and permitting the jury to speculate as to which caused the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 285.*]

Appeal from Circuit Court, Milwaukee County; John C. Ludwig, Judge.

Action by August Kaszubowski, alias Smith, against the Johnson Service Company. From a judgment on a directed verdict for defendant, plaintiff appeals. Affirmed.

Action for personal injuries. The complaint alleges: That on the 30th day of June, 1910, and for some time prior thereto, the plaintiff was employed by the defendant as a bench carpenter and cabinet maker. That on said day he was ordered to remove a ventilating fan from the south window to the north window of the engine room of the building occupied by the defendant. The engine room was located in the basement of the building, and was about three or four feet below the level of the basement floor of the building, and about five or six steps led from the basement floor to the engine room. It is further alleged that on said 30th day of June, 1910, and for a long time prior thereto, the defendant carelessly and negligently caused and permitted the floor of the engine room to be and remain in a greasy, wet, oily, and filthy condition, and that the engine room was inadequately lighted by reason of the fact that the windows were covered by a thick wire screen, which prevented sufficient light from entering the engine room; that by reason of such darkness the floor of the engine room could not be seen by a person in the exercise of due care, and was not, and could not have been, seen by plaintiff; and that plaintiff did not know the condition of the floor of the engine room. It is further alleged that, in order to reach the fan to be removed, it was necessary for plaintiff to walk across the floor of the engine room; that he did so in the exercise of ordinary care, and upon reaching the place where the fan was located, and which he was ordered to remove, he ascended a ladder that was resting on the floor of the engine room, and against the window sill, to inspect the fan preparatory to removing the same, when, by reason of grease and oil which had accumulated on the soles of his shoes, unknown to him, he slipped, and his right hand was caught in the sharp blades of the revolving fan, and the first three fingers thereof were cut off. It is further alleged that plaintiff, by reason of the carelessness and negligence of the defendant in causing or permitting the aforesaid engine room and the entrance thereto to be and remain in a dark and dangerous condition, and by causing and permitting the floor of said engine room to be and remain in a dirty, greasy, and oily condition, and in not pro-

viding plaintiff with a reasonably safe place in which to work, was and is permanently disabled from pursuing his occupation as a bench carpenter, to his damage in the sum of \$10,000.

The answer admitted the formal allegations of the complaint, and that plaintiff was injured while in defendant's employ, but denied that such injury was caused by reason of any negligence on the part of the defendant, and alleged that such injuries as plaintiff may have suffered were caused by his own negligence, and also alleged that the risk and danger from which the plaintiff suffered were open, obvious, and well known to and assumed by him.

At the close of the testimony, the court granted defendant's motion to direct a verdict in its favor. From a judgment entered thereon, the plaintiff appealed.

Kronsage, Goff, Fritz & Hannan, of Milwaukee, for appellant. Quarles, Spence & Quarles, of Milwaukee (Irving A. Fish, of Milwaukee, of counsel), for respondent.

VINJE, J. (after stating the facts as above). [1] The evidence as to the condition of the floor of the engine room, and as to whether or not the engine room was sufficiently lighted, is conflicting. The plaintiff's testimony shows that the engine room was in an oily, greasy, and filthy condition; that oil dripped from the engine almost constantly; and that the floor was not kept clean. His testimony also is to the effect that the engine room was dark by reason of the fact that wire screens were placed over the windows, and the windows were not kept clean. On behalf of the defendant, the testimony is that, while more or less oil and grease dripped from the engine, the engine room was cleaned twice a week, and there was ample light coming through the windows for observing the floor of the engine room. It is conceded that it was necessary for plaintiff, in order to reach the fan, to walk across the engine room floor. If the correctness of the court's ruling depended upon the questions as to whether or not the engine room floor was reasonably clean, or the engine room was adequately lighted, then the judgment would have to be set aside, because those were, under the evidence, questions for the jury. *Harris v. Cameron*, 81 Wis. 239, 247, 51 N. W. 437, 29 Am. St. Rep. 891. But in view of the evidence, as to which there is no conflict, we have reached the conclusion that the judgment must be affirmed.

[2] The basement floor, not including the engine room, was known as the garage, and was used by the defendant for repairing automobiles. The evidence shows that plaintiff was familiar with the use to which this floor was put and with the operations there carried on. In the west side of the garage there was a wash rack, and at the northeast cor-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ner there was a bench, where a steam pipe came out from the boiler room, which was used in blowing grease and dirt out of differential and gear casings. Water was also used on the wash rack for the same purpose. On the morning in question some gear casings were blown out, which deposited a great deal of dirt and grease on the floor. To the knowledge of plaintiff, the character of the work carried on in this room made the floor wet, greasy, or dirty at all times. In order to reach the engine room, plaintiff crossed the garage diagonally from the southwest corner to the northwest corner, passing the wash rack and the bench where the grease was deposited on the floor in cleaning the differential and gear casings, and entered the engine room by descending the flight of steps in the northeast corner of the garage. He then went around the engine and generator, which stood in the center of the room, and came to the ladder. He went up to about the sixth rung to look at the fan, when his foot slipped on the rung, and his hand was involuntarily thrown into the fan and injured. After the accident he went back through the engine room, recrossed the garage floor substantially the same way he crossed it upon entering, and was taken to a hospital. When he reached the hospital, he found his shoes were greasy along the sole, the ball of the foot, and heel. He testified that he found a crease on the grease on the sole of his shoe, indicating where his shoe slipped on the rung. The ladder was selected by a fellow servant from a number of ladders owned by the defendant, and there is some testimony to show that the ladder itself was greasy. Assuming that the evidence would warrant the jury in finding to a reasonable certainty that there was grease on the plaintiff's shoe at the time he mounted the ladder, and assuming, further, that a finding to the effect that the grease on his shoe caused plaintiff to slip, still there is no evidence in the case from which the jury could find that the grease on plaintiff's shoe became attached thereto on the engine room floor. It is a mere guess as to whether it became attached there or on the garage floor.

[3] The evidence is conflicting as to whether or not there was grease on the engine room floor; but there is no dispute about the fact that the garage floor was greasy and oily at and over the place where plaintiff walked just previous to his injury; and the trial court correctly held that plaintiff was chargeable with knowledge of the condition of the garage floor and assumed the risk from walking thereon and any risk incident to grease becoming attached to his shoes by rea-

son of walking over such floor. Moreover, if it be conceded that the grease became attached to his shoe on the engine room floor, it does not appear from the evidence, and it would be a mere guess to infer, that it came from grease, oil, or filth deposited there a sufficient length of time to constitute negligence on the part of the defendant in not having it removed. It is a matter of common knowledge that oil is constantly used in an engine room, and that more or less oil does or may drip from an engine in operation. For aught that appears, if the oil or grease became attached to the shoe in the engine room, it may have been oil or grease deposited there but a few moments. So it is evident that it would be impossible to determine with reasonable certainty whether or not the grease became attached to the shoe on the garage floor, or, if in the engine room, that it was grease negligently allowed to remain there.

[4] In treating the case we have assumed that the grease was on plaintiff's shoe at the time he slipped; that there was no grease on the ladder; and that the grease caused him to slip. These assumptions are, perhaps, more favorable to plaintiff than the evidence would warrant, especially as to the grease on the ladder. But, even indulging in these presumptions in favor of the plaintiff, the fact remains that it would be impossible to trace the grease on plaintiff's shoe with reasonable certainty to an actionable cause for which defendant was responsible. This burden is placed upon every plaintiff in a personal injury action. It is incumbent upon him to show to a reasonable certainty that the defendant was negligent, and that such negligence was the proximate cause of his injury. It is not sufficient to show two or more causes, some of which are actionable and some of which are not, and from such evidence permit the jury to guess or speculate as to which one of the two occasioned the injury. *Hyer v. City of Janesville*, 101 Wis. 371, 77 N. W. 729; *Hamann v. Milwaukee Bridge Co.*, 127 Wis. 550, 106 N. W. 1081, 7 Ann. Cas. 458; *Schell v. C. & N. Ry. Co.*, 134 Wis. 142, 113 N. W. 657; *Hart v. Neillsville*, 141 Wis. 3, 123 N. W. 125, 135 Am. St. Rep. 17; *Stock v. Kern*, 142 Wis. 219, 125 N. W. 447; *Houg v. Girard Lumber Co.*, 144 Wis. 337, 129 N. W. 633, 140 Am. St. Rep. 1012; *Samulski v. Menasha Paper Co.*, 147 Wis. 285, 133 N. W. 142. The trial court, therefore, properly directed a verdict for the defendant, because the evidence failed to disclose that defendant's negligence, if any there was, constituted the proximate cause of plaintiff's injury.

Judgment affirmed.

UBER et al. v. CHICAGO, M. & ST. P.
RY. CO.†

(Supreme Court of Wisconsin. Oct. 8, 1912.)

1. CARRIERS (§ 177*)—LIABILITY OF TERMINAL CARRIER—INTERSTATE SHIPMENTS.

The rule that a recovery for loss of or injury to an interstate shipment may be had against the terminal carrier is not abrogated by the Carmack amendment to the Hepburn Act (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. Supp. 1911, p. 1307]), making the initial carrier liable, but providing that nothing in the act shall deprive any holder of a bill of lading of any right of action which he has under existing law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775-789, 791-803; Dec. Dig. § 177.*]

2. CARRIERS (§ 132*)—INJURY TO FREIGHT—LIABILITY OF CARRIER—EVIDENCE.

Where goods were in good condition when received by a carrier for transportation, and were damaged when they reached their destination, the carrier was liable, unless it proved that the damage was through some cause for which it was not responsible.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 578-582, 605; Dec. Dig. § 132.*]

3. CARRIERS (§ 94*)—CARRIAGE OF FREIGHT—FAILURE OF CARRIER TO GIVE NOTICE OF ARRIVAL OF SHIPMENT—EVIDENCE.

Where a bill of lading required the carrier to notify a person named, and the carrier's counsel admitted that it was the carrier's duty to give notice of the arrival of the goods, a finding that it was the carrier's duty to give notice to the person named of the arrival of the goods was justified.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. § 94.*]

4. CARRIERS (§ 94*)—CARRIERS OF FREIGHT—NOTICE OF ARRIVAL—FAILURE TO GIVE—QUESTION FOR JURY.

Whether a carrier exercised reasonable care in giving notice of the arrival of perishable freight held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. § 94.*]

5. CARRIERS (§ 123*)—CARRIAGE OF FREIGHT—FAILURE TO GIVE NOTICE OF ARRIVAL—PROXIMATE CAUSE.

Where perishable freight would remain in good condition for 8 or 10 days in warm and longer in cool weather, and notice of arrival of the freight at an intermediate point, as required by the bill of lading was not given until 10 days after shipment, and the freight did not reach its destination until 13 days after shipment, and the consignee was not notified of the arrival until the following day, and the freight was damaged when tendered to the consignee, and there was evidence that the freight was not damaged until after its arrival at the intermediate point, the negligent failure of the carrier to exercise reasonable care in giving notice of the arrival of the freight at the intermediate point was the proximate cause of the injury to the freight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 506, 507, 539-543; Dec. Dig. § 123.*]

6. CARRIERS (§ 121*)—CARRIAGE OF FREIGHT—CONTRIBUTORY NEGLIGENCE OF SHIPPERS.

A shipper who in routing a shipment of perishable freight selected a longer route than he could have taken was not guilty of contributory negligence causing injury to the shipment,

where the carrier in the exercise of ordinary care could have transported the shipment without damage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 531-536; Dec. Dig. § 121.*]

Timlin, J., dissenting.

Appeal from Circuit Court, Washington County; Martin L. Lueck, Judge.

Action by Charles G. Uber and others against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

This action was brought to recover damages occasioned by the loss of a car load of sheep pelts shipped from Monroe, Mich., consigned to the "order of Mainzinger Bros., Milwaukee, Wisconsin, notify Uber Bros., at Hartford, Wisconsin." The pelts were shipped September 10 or 11, 1909, over the Lake Shore & Michigan Southern Railway, and received by defendant as connecting carrier at Franklin Park Junction, Ill., on the 14th day of September, 1909, at 2:35 p. m. The car went forward from Franklin Park Junction September 14, 1909, at 6:10 p. m. From Franklin Park Junction to Milwaukee is less than a 10-hour run. The evidence tends to show that the car arrived in Milwaukee early on the morning of September 15th, and Uber Bros. were not notified until the morning of September 20th. The notification was by mailgram which is a message sent by train. It was admitted upon the trial by counsel for defendant that, upon the arrival of the car at Milwaukee, it was the duty of the agent to notify Uber Bros. of the arrival of the goods. The agent of defendant at Milwaukee knew who the car was for, and that it contained perishable property. To insure prompt delivery of the car a tracer was ordered put to the car. The pelts were in good condition when loaded, and would remain so for 8 or 10 days in warm weather.

At the close of the evidence a motion was made by defendant for directed verdict, which was denied, and the jury returned the following verdict:

"Were the pelts in question spoiled while in transit from Monroe, Mich., to Hartford, Wis.? Answer: Yes. (By the Court.)

"Did the defendant exercise reasonable care and diligence in notifying plaintiffs of the arrival of said shipment of pelts in Milwaukee? Answer: No.

"If you answer the second question 'No,' then answer this question: Was such failure to exercise reasonable care and diligence in giving notice the proximate cause of the spoiling of said pelts? Answer: Yes.

"Did the act of the shippers in routing the shipment to Milwaukee, instead of Hartford, contribute proximately to the spoiling of the pelts? Answer: Yes.

"Were the shippers guilty of any negligence on their part in loading the pelts which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied January 7, 1913.

contributed proximately to the spoiling thereof? Answer: No.

"What sum of money will compensate plaintiffs for the damages suffered in consequence of the spoiling of said pelts? Answer: Twelve hundred fifty-one and 35/100 dollars. (By the Court)."

Motions of defendant to change the answer of the second question from "No" to "Yes," and for judgment upon the verdict as corrected, also for judgment based upon the verdict and the minutes of the court, were denied and due exception taken. Judgment was entered in favor of the plaintiffs, from which this appeal was taken.

C. H. Van Alstine, H. J. Killilea, and Rodger M. Trump, all of Milwaukee, for appellant. John C. Russell, of Hartford, for respondents.

KERWIN, J. (after stating the facts as above). [1] It is first insisted by counsel for appellant that this action cannot be maintained because of the Carmack amendment to the Hepburn Act (34 U. S. Stats. at Large, 595), which makes the initial carrier liable; hence the action in this case should have been commenced against the initial carrier, the Lake Shore & Michigan Southern Railway Company. This question was considered in *Tradewell v. Chicago & N. W. Ry. Co.*, 136 N. W. 794, and this court said: "We think the rule established by this court that action may be maintained against the last carrier is still in force, and not abrogated by the Carmack amendment." We are asked by counsel for appellant to reconsider this statement, and it is urged that it is not the law, but, on the contrary, it is insisted that the action cannot be maintained against the last carrier since the passage of the Carmack amendment. The contention of counsel upon this point is, in substance, that the contract of shipment from Monroe, Mich., to Milwaukee, Wis., was an interstate commerce contract under which the initial carrier was made liable under the Carmack amendment; the connecting carrier, the defendant here, being merely the agent of the initial carrier, therefore not liable to the plaintiffs. That Congress having legislated respecting the matter, such act superseded all state laws, statutory and common, covering the same field. Whether this contention would be sound in the absence of the proviso in the Carmack act, namely, "provided that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law," we need not consider. We think it clear from the whole act that the purpose of Congress was to give a remedy absolutely in all cases against the initial carrier, but at the same time preserve all remedies existing before the passage of such act. Now, before the passage of the Carmack act, the plain-

tiffs in this state clearly would have a remedy against the last carrier, and, as we held in the *Tradewell Case*, we do not think that remedy was abrogated. We have carefully considered the argument of counsel and the authorities cited upon this proposition, and are still of the opinion that the action in this case was properly brought against the last carrier. *Tradewell v. C. & N. W. Ry. Co.*, supra; *Struebing Co. v. Merchants' D. T. Co.*, 142 Wis. 657, 126 N. W. 21; *Lamb v. C. & M. & St. P. Ry. Co.*, 101 Wis. 138, 76 N. W. 1123; *Langhlin et al. v. C. & N. W. Ry. Co.*, 28 Wis. 204, 9 Am. Rep. 493; *Stolze v. Ann Arbor R. Co.*, 148 Wis. 205, 134 N. W. 376.

[2] The evidence in this case is ample to support a finding that the goods were in good condition when received by the defendant and were damaged when they reached Hartford, Wis. The defendant, therefore, is liable unless it appears that the damage was through some cause for which it is not responsible.

[3] The negligence relied upon here by plaintiffs is the failure of defendant to seasonably give notice of the arrival of the shipment of pelts in Milwaukee. It is claimed by counsel that the second and third questions of the special verdict on the giving of notice, and whether failure of defendant to exercise reasonable care in giving notice was the proximate cause of the damage, are contrary to the evidence, and in this behalf it is insisted that the defendant owed no duty to give notice to the plaintiffs. It appears, however, that the bill of lading contained the words "notify Uber Bros. at Hartford, Wisconsin," and the plaintiffs offered evidence of custom existing to that effect, which evidence was ruled out. Counsel for defendant on the trial, however, admitted that it was the duty of the defendant to give the notice. So we think it was fairly established in the case that the defendant's duty as a common carrier required it to give notice to plaintiffs of the arrival of the car at Milwaukee.

[4] The question, therefore, arises whether there is sufficient evidence to support the answer of the jury to the second question of the special verdict. It appears from the evidence that the car arrived in Milwaukee on the morning of the 15th of September, and that plaintiffs were not notified of such arrival until September 20th. In view of the fact that the goods were perishable, and that defendant knew it, and that notice could have been given in a much shorter time, and also in view of the evidence tending to show that the delay was sufficient to cause the damage because the pelts would remain in good condition for at least 8 or 10 days in warm and longer in cool weather, it was a question for the jury to say whether or not the defendant exercised reasonable care and diligence in notifying plaintiffs. So we think it cannot be said that the second question of

the special verdict is not supported by the evidence.

[5] We also think that the third question as to whether or not the failure to exercise care in giving notice was the proximate cause of the spoiling of the pelts is supported by the evidence.

It is argued that, unless the pelts became damaged between the 16th and 20th of September, the failure to give notice of the arrival in Milwaukee was not the proximate cause of such damage, and that there is not a scintilla of evidence tending to show that the pelts were damaged between those dates. We do not think it necessary, in order to entitle plaintiffs to recover, to show that the pelts were damaged between the 16th and 20th, although we think the jury would be warranted, from the evidence, in finding that the damage occurred during that period, in view of the fact that the proof tends to show that the pelts were shipped on the 10th or 11th of September and would remain in good condition for 8 or 10 days in warm and longer in cool weather, and that notice was not given until the 20th. The evidence also tends to show that the car did not reach Hartford until September 23d, and that plaintiffs were not notified of such arrival until the 24th. This evidence shows that the pelts were not damaged until after they arrived in Milwaukee.

[6] It is further insisted that the evidence shows contributory negligence on the part of the plaintiffs. There is no finding of contributory negligence, but in the fourth question of the special verdict the jury found that the act of the shippers in routing the shipment to Milwaukee, instead of Hartford, contributed proximately to the spoiling of the pelts. It will be observed, however, that the answer to the fourth question does not find that the shippers were negligent in routing the shipment to Milwaukee instead of Hartford, but that it only contributed to the spoiling of the pelts. This obviously is based upon the idea that it took a longer time to ship to Milwaukee and then to Hartford than direct to Hartford; but it by no means follows that this established contributory negligence on the part of the shippers, because they had a right to select the route if shipment by the route selected could be made in the exercise of ordinary care without damage to the pelts. There was ample time to route by Milwaukee without injuring the pelts if proper care had been exercised on the part of the defendant. It was not established, therefore, that the plaintiffs were guilty of contributory negligence. *Stucke v. Milwaukee & M. R. Co.*, 9 Wis. 202; *Valin v. Milwaukee & N. R. Co.*, 82 Wis. 1, 51 N. W. 1064, 33 Am. St. Rep. 17; *Lamb v. C., M. & St. P. Ry. Co.*, 101 Wis. 138, 76 N. W. 1123; *Shearman & R. on Negligence*, 90.

We are convinced that no error was com-

mitted on the trial, and that the findings of the jury are supported by the evidence.

The judgment is affirmed.

TIMLIN, J., dissenting.

MONK v. HURLBURT.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. PLEADING (§ 237*)—COMPLAINT—AMENDMENT AFTER VERDICT.

Under St. 1898, § 2830, which authorizes amendment of pleading to conform to the proof, it is not error to permit the complaint to be amended after verdict to conform to the questions litigated at the trial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*]

2. PARENT AND CHILD (§ 3*)—MEDICAL SERVICES TO CHILD—LIABILITY OF STEPFATHER.

Defendant is liable to physicians for services rendered to his stepchild who lived with defendant, though the child's father was alive, and, on divorce from the child's mother, had been ordered to pay her \$5 monthly during the child's minority for his support; defendant having assumed the obligation of providing the child with necessities, and having permitted the services to be rendered without objection.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33-62; Dec. Dig. § 3.*]

3. APPEAL AND ERROR (§ 1062*)—HARMLESS ERROR—SPECIAL QUESTIONS—REFUSAL.

It was not error to refuse to incorporate defendant's requested questions in a special verdict, where the verdict fully covered all the inquiries suggested by the questions, and all the litigated issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.*]

Appeal from Circuit Court, Clark County; James O'Neil, Judge.

Action by R. W. Monk against William Hurlburt. Judgment for plaintiff, and defendant appeals. Affirmed.

In February, 1910, John Murray, then 17 years of age, while attending school at Neillsville, became ill. The plaintiff, a practicing physician and surgeon at Neillsville, was called by Murray's roommate to treat him. In 1901 Murray's mother was divorced from his father. The decree of divorce gave the custody of the child to the mother, and ordered the father to pay to her \$5 per month during the minority of the child for his support. Murray's father has not made these payments. Five years before Murray became ill, the defendant, who is a farmer residing some miles from Neillsville, married Murray's mother. A couple of weeks after his mother's marriage to the defendant, Murray, then 12 years of age, came to the home of the defendant to live. At the time of her marriage to the defendant Murray's mother had between \$300 and \$400. She has since received about \$100 from her father's estate. Murray was never legally adopted by the defendant. On the day after Murray became ill, he went to the home of a married

sister in Neillsville, and while he was there he was treated by the plaintiff. Shortly after Murray became ill, the defendant brought his mother to her daughter's home, and she remained there to nurse him. Early in March, 1910, a necessary operation was performed on Murray. Another physician assisted the plaintiff in operating. Supplies and medicines for Murray were procured from a drug store and charged to the defendant. Several times during Murray's illness the defendant came from his farm to see him. During these visits he met the plaintiff, but did not direct him to care for Murray, or to perform the operation; nor did he object to such treatment of Murray by the plaintiff. When Murray had recovered sufficiently so that his mother's attendance was no longer necessary, she returned to the farm, and, when Murray was able, he also went there. While he was at the farm the plaintiff called to treat him, and Murray called at the plaintiff's office for treatment. The plaintiff last treated Murray in the month of July, 1910.

The claim of the physician who assisted the plaintiff in the operation on Murray and the claim for medicines and drugs have been assigned to the plaintiff, and he seeks to recover for them and for his own services, on the ground that the defendant stood in the place of a parent to Murray and had occupied the position of a lawful parent to him, particularly with reference to supporting and maintaining him and supplying him with necessities. The plaintiff kept his account in Murray's name. Some credits on the account were paid by Murray and others, but the plaintiff has made no payment on any of these accounts. Judgment was rendered in justice court in plaintiff's favor, and an appeal was taken by the defendant to the circuit court.

In addition to the facts above set out, the evidence tends to show that the defendant advised with his wife concerning Murray and his education; that he kept no account of the cost of his board and lodging, or of any of the articles furnished him; that he permitted him to remain upon the farm and to attend school; that, when Murray attended high school at Neillsville, he paid grocery bills contracted by him and charged to the defendant; and that he permitted Murray to retain and spend any moneys he earned during vacations. Later he paid Murray for work he did on the farm when he could have earned money elsewhere. The defendant testified that he never asserted or had control of Murray. The jury returned a special verdict finding that the services and the medicines furnished Murray were necessities; that the defendant, after Murray came to his home to live with him, treated him as a son with reference to accepting his services and providing for his support and maintenance up to and including the time when the services were rendered by the plaintiff

and the medicines were furnished; and that the plaintiff and the druggist had reasonable grounds for believing that the defendant stood in the position of a parent to Murray and had assumed the obligation of supporting him. After the rendition of the verdict, the court denied defendant's motion to change answers to the questions of the special verdict, and allowed and permitted an amendment to the complaint, alleging that for more than two years before the services were rendered by the plaintiff and the medicines furnished the defendant had stood in the place of a parent to Murray; that he had during that time furnished him with board, clothing, and schooling; that he had permitted Murray to obtain goods upon defendant's credit; that he had allowed Murray to make his home with him during school vacations, and had accepted Murray's services without compensating him therefor and without keeping account of board, clothing, and other necessities furnished him; that the rendition of the services and the furnishing of medicines to Murray were necessities; that the defendant had notice within a few days of the rendering of the services and the furnishing of the medicines, and had knowledge that the services were being rendered and the medicines furnished; that the defendant knew that the operation was to be performed; that the defendant furnished Murray with a horse to go from the farm to Neillsville to receive treatment from the plaintiff and to obtain medicines; and that the defendant had never objected to the services being rendered, or the medicines furnished, and had not then denied liability therefor. This is an appeal from the judgment on the verdict.

Emery W. Crosby, of Neillsville (R. J. MacBride, of Neillsville, of counsel), for appellant. S. M. Marsh, of Neillsville, for respondent.

SIEBECKER, J. (after stating the facts as above). [1] The objection to the amendment of the complaint after verdict, upon the ground that it operated to defendant's injury, is not sustained. It appears that the parties litigated the questions embraced in this amendment at the trial, both before the justice and in the circuit court. By allowing the amendment the court did no more than to conform the pleadings to the proof, pursuant to the provisions of section 2830, Stats. All the facts embraced in this pleading were before the court. Under such a state of the case, the action of the court in no way injured the appellant, was promotive of justice, and is abundantly supported by the adjudications. See the following cases and those referred to therein: *Gates v. Paul*, 117 Wis. 170, 94 N. W. 55; *Kleimenhagen v. Dixon*, 122 Wis. 526, 100 N. W. 826; *Hopkins v. C., M. & St. P. R. Co.*, 128 Wis. 403, 107 N. W. 330.

[2] The contention is made that the facts and circumstances shown do not establish defendant's liability for the professional services plaintiff rendered for Murray, defendant's stepson. The facts of the case sufficiently appear in the foregoing statement, and need not be repeated. The jury found that the defendant stood in the position of parent to his stepson; that plaintiff had reasonable grounds for believing that this relation existed; that the defendant had assumed the obligation of providing the boy with necessities; and that a special exigency as to the boy's health existed requiring medical and surgical treatment. It is manifest that the defendant was fully apprised of the boy's sick condition; that he understood such treatment was necessary; that he knew it was being furnished by the plaintiff; that he interposed no objection thereto; and that he so acted throughout the period of the boy's illness as to show approval of plaintiff's course in rendering the services. Under this state of the facts, the defendant's liability for the value of the services rendered by the plaintiff is fully established within the principle that the law implies a promise where a parent with full knowledge of the facts and without objection allows and approves of his child being furnished with necessities. We consider the instant case to be within the rule approved in *McGoon v. Irvin*, 1 Pin. 526, 44 Am. Dec. 409, and *Zelley v. Dunwiddle*, 98 Wis. 428, 74 N. W. 126, 40 L. R. A. 579, 67 Am. St. Rep. 820.

[3] The claim that the court erred in not incorporating defendant's requested questions in the special verdict is not supported. The court practically adopted defendant's question relating to the existence of a special exigency for furnishing medical services. The verdict fully covers all the inquiries suggested by the rejected questions and embraces the litigated issues in the case.

We have examined the exceptions cited to our attention to rulings on evidence and to instructions given the jury. They are not of sufficient importance to require restatement here. No prejudicial error was committed as regards them.

The judgment appealed from is affirmed.

LOEHR v. DICKSON.†

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. APPEAL AND ERROR (§ 1001*)—REVIEW—VERDICTS OBTAINED BY PERJURED EVIDENCE.

Where a verdict was clearly obtained by the perjury of one of the litigants, the court should exercise the broad discretion vested in it, and set aside the verdict on the ground that the promotion of justice demands such action.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

2. VENDOR AND PURCHASER (§ 350*)—FORECLOSURE—REDEMPTION—DAMAGES FOR CONCEALMENT—EVIDENCE.

In an action to recover damages resulting from the defendant's concealing himself, so that the plaintiff could not redeem from a judgment of foreclosure within the time set therefor, evidence held insufficient to sustain findings that the plaintiff made a reasonable effort to make or tender payment, and that the defendant so concealed himself.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 1043-1046; Dec. Dig. § 350.*]

3. VENDOR AND PURCHASER (§ 350*)—FORECLOSURE—REDEMPTION—DAMAGES FOR CONCEALMENT—EVIDENCE.

In an action for damages from the defendant's alleged concealing of himself to prevent the plaintiff's redemption from a foreclosure decree, evidence held insufficient to sustain a finding that the defendant on or about the day upon which the time for redemption expired extended the time of redemption for a few days.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 1043-1046; Dec. Dig. § 350.*]

4. COSTS (§ 256*)—APPEAL—PRINTING CASES—VIOLATION OF COURT RULE.

Where a case containing 909 pages, not including the index, embraced immaterial and trivial matter, and could have been printed in 250 pages, was accompanied by a brief of 219 pages, giving no orderly presentation of the issues or of the matters relied on by appellant to support his contentions, the appellant is not entitled to the costs of printing under Supreme Court rule 44 (108 N. W. viii), providing that no costs shall be taxed for printing any case or brief, unless the rules shall be complied with.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 968-971; Dec. Dig. § 256.*]

Appeal from Circuit Court, Milwaukee County; J. C. Ludwig, Judge.

Action by Oscar Loehr against David Dickson. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions to dismiss.

See, also, 126 Wis. 641, 106 N. W. 793, 4 L. R. A. (N. S.) 986; 141 Wis. 332, 124 N. W. 293, 30 L. R. A. (N. S.) 495.

In the year 1902 plaintiff contracted to buy certain property of the defendant, designated as Spring Bank, for \$53,000. Plaintiff paid \$2,000 in cash on the contract, and later made other payments. To secure another payment he conveyed to the defendant certain land in Nebraska, valued at \$2,000, as collateral security, and also deeded outright to the defendant certain other real estate. Plaintiff was unable to meet his payments as they fell due under the contract of sale, and the defendant commenced a foreclosure action, in which judgment of strict foreclosure was rendered in February, 1905, which judgment was reversed by this court January 9, 1906. This action was brought by the plaintiff to recover damages from the defendant, resulting from the defendant's concealing himself, so that plaintiff within the time limited could not comply with the terms of the judgment entered in accordance with the mandate of this court.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† For opinion for judgment on counterclaim, see 138 N. W. 1123.

On the trial of the case the jury returned the following verdict:

"First question: Did Clarence R. Smith pay and turn over to plaintiff, Oscar Loehr, on or before August 23, 1906, \$70,000 in purchase of the rights and interest of plaintiff in the Spring Bank property? Answer: Yes.

"Second question: Was plaintiff on and before August 23, 1906, able, ready, and willing to pay defendant the amount due to redeem Spring Bank, according to the judgment of the circuit court of Waukesha county, entered February 23, 1906? Answer: Yes.

"Third question: If you answer the second question, 'Yes,' then did plaintiff make reasonable effort to make or tender payment of the amount due to defendant on and before August 23, 1906? Answer: Yes.

"Fourth question: If you answer the second and third questions, 'Yes,' did David Dickson conceal himself from plaintiff so as to render such payment or tender by, or on behalf of, the plaintiff, Oscar Loehr, impossible to be made on and before August 23, 1906? Answer: Yes.

"Fifth question: Was the time for payment of the proper amount extended by David Dickson on or about August 23, 1906, for a few days? Answer: Yes.

"Sixth question: If you answer the fifth question, 'Yes,' was payment of the proper amount tendered by Oscar Loehr and refused by David Dickson within such extended time? Answer: Yes.

"Seventh question: If you answer the fifth question, 'Yes,' and the sixth question, 'No,' than was plaintiff, during such extended time and down to and including August 28, 1906, able, ready, and willing to pay defendant the said amount due the defendant? Answer: Yes.

"Eighth question: If you answer the seventh question, 'Yes,' then did plaintiff, during such extended time and down to and including August 28, 1906, make reasonable effort to make or tender payment of the said amount to defendant? Answer: Yes.

"Ninth question: If you answer the seventh and eighth questions, 'Yes,' then did David Dickson conceal himself from plaintiff so as to render such payment or tender impossible to be made by, or on behalf of, the plaintiff, Oscar Loehr, during such extended time and down to and including August 28, 1906? Answer: Yes.

"Tenth question: Did defendant, David Dickson, on August 23, 1906, agree with Richard Hedrick, acting for plaintiff, Oscar Loehr, to come to the office of the plaintiff on August 26, 1906, and to close the transaction at that time and place? Answer: Yes.

"Eleventh question: Did J. E. Wildish for and in behalf of the defendant on August 24, 1906, offer to the plaintiff to perform the contract on the part of the defendant? Answer: No.

"Twelfth question: If you answer the eleventh question, 'Yes,' did the plaintiff, upon such offer, state to said Wildish that he was not ready? Answer: No."

The parties stipulated that the court should determine from the evidence and assess the amount of damages which the plaintiff was entitled to recover, if entitled to recover anything on the verdict, and accordingly the court made the assessment of damages, the amount awarded being \$12,872.15 damages, together with the costs in the action, amounting in all to \$13,005.80. The defendant was further directed by the judgment to reconvey to the plaintiff, by good and sufficient deed containing covenants of warranty against the acts of the defendant, the Nebraska lands which had been theretofore conveyed to said defendant as collateral security for the payment of one of the installments due upon the contract. From this judgment the defendant appeals.

J. E. Wildish, of Milwaukee, for appellant.
Harper & McMynn, of Milwaukee, for respondent.

BARNES, J. (after stating the facts as above). The defendant in this action brought an action against the present plaintiff in the year 1904 to foreclose a land contract. A judgment of foreclosure was entered in the circuit court, by the terms of which the defendant was allowed but ten days from the entry of the judgment in which to redeem. On an appeal from such judgment this court held that the time for redemption was unreasonably short, and reversed the judgment, with direction to enter a new judgment allowing the defendant six months from the date of entry thereof in which to redeem. This case is reported in 126 Wis. 641, 106 N. W. 793, 4 L. R. A. (N. S.) 986. On February 23, 1906, judgment was perfected in accordance with the mandate of this court. Redemption was not made within six months from February 23d. After the period of redemption had expired, the present action was brought to recover damages against the defendant because the latter had fraudulently concealed himself, so that it was impossible for the plaintiff to find him and make the necessary tender of the amount which the judgment required should be paid in order to entitle the plaintiff to a conveyance of the premises and personal property covered by the land contract. The amended complaint alleged ability, readiness, and willingness to pay, the fraudulent concealment of the defendant so that payment was impossible, and a sale of the premises by the plaintiff for \$9,868.76 more than was necessary to pay to redeem from the judgment, and demanded judgment for damages in the sum of \$12,068.76 in the aggregate. A demurrer was interposed to this complaint which was sustained by the circuit court. The order sustaining the de-

murrer was reversed on an appeal to this court, and this appeal is reported in 141 Wis. 332, 124 N. W. 293, 30 L. R. A. (N. S.) 495. This court held, in substance, that it was plainly the intention of the pleader to state a cause of action in tort, and that the complaint did not state a good cause of action in tort. It further held, however, that the defendant was under a contractual obligation not to secrete himself so as to render it impossible for the plaintiff to find him and make the necessary tender, and that, inasmuch as the complaint contained sufficient averments to show such obligation and a breach thereof, the complaint stated a good cause of action on contract. After the reversal of the order in question, a jury trial was had which resulted in a judgment against the defendant for \$13,005.30.

The issues tendered by the amended complaint which was before this court on demurrer were much narrower than those litigated on the trial. That complaint set forth that Dickson kept in concealment until the last day on which redemption could be made, when he was found by an agent of the plaintiff who was searching for him, and that defendant thereupon agreed to call at plaintiff's office on the following day to settle the matter up, but that, instead of doing so, he went into hiding, so that plaintiff could not find him during the remainder of the month. It was further set forth that the purchaser from the plaintiff thereupon demanded back the \$70,000 which he had paid plaintiff on account of the purchase, and thereafter plaintiff was unable to secure the \$60,131.24 necessary to redeem. On the trial plaintiff testified that he and the purchaser, one Clarence R. Smith, did, in fact, find the defendant on August 28th in one of the railway depots in Milwaukee, and that he tendered the necessary amount to redeem, and defendant refused to accept the tender on the ground that it came too late, and that immediately thereafter Smith demanded and received back the \$70,000 he had paid plaintiff for a good title to the property, and departed from Milwaukee, and had not been heard from since. It is also claimed that there was testimony tending to show that the defendant extended the time for making the tender for a few days from August 23d, and the complaint was amended after the parties had rested to conform to the proofs above referred to.

The material issues in the case were: (1) Was plaintiff able and willing to pay the amount necessary to redeem prior to August 24, 1906? (2) Did defendant conceal himself so as to render tender or payment impossible? (3) Was the period of redemption extended beyond August 23? (4) If so, was a tender made within the period covered by the extension? (5) Did defendant conceal himself so as to prevent a tender within the period covered by the extension? The jury

found that there was such a person as Clarence R. Smith, and that he had paid plaintiff \$70,000 for the property covered by the land contract referred to, and that plaintiff was ready, willing, and able to pay the \$60,131.24 necessary to redeem on and before August 23, 1906. These findings are supported by the evidence of the plaintiff and by that of the witnesses Scharel, Mueller, and Hedrick, and there is some corroboration of their evidence by other witnesses. Notwithstanding this array of witnesses, it is seldom that a case comes to this court which presents so many earmarks of having been established by perjured testimony as does the one before us. It requires an abiding faith in the integrity of witnesses to believe that the mysterious and elusive Dr. Clarence R. Smith was not a myth invented to meet the necessities of the case if plaintiff was to stand any show of recovery. The record in *H. H. Hayward v. Dorwin v. Hagerty*, 137 Wis. 161, 118 N. W. 799, seems to have found a counterpart in Dr. Smith. It is not our purpose to enumerate with much detail the various considerations which tend to show that Smith was a dummy rigged up for the occasion. We do not find it necessary, in order to do substantial justice in this case, to say that he did not exist, or that he did not pay \$70,000 to the plaintiff.

[1] The plaintiff testified that in 1901 he met Dr. Smith several times in the lobby of a hotel at Vancouver, B. C., and that they rode together on a train from there to St. Paul, and that Dr. Smith seemed to be very much interested in sanitariums. Plaintiff did not make his contract with defendant until 1902. He further testified that Smith came to Milwaukee and called on him in 1902 and again in 1903, and went out to see the property covered by the contract with defendant. Smith was next accidentally and opportunely met on the streets of New York about February 21, 1906, when the plaintiff was returning from a six-month trip to Europe. In New York they talked about the sanitarium, and then came to Chicago together. Smith stayed over one night in Chicago and came to Milwaukee the next morning, and apparently returned to Chicago the next night, and made a pilgrimage back to Milwaukee the following day. He seemed to have had a great aversion to Milwaukee hotels, because, even as early as 1903, on the occasion of his visit to Milwaukee, he apparently went to Chicago to spend the night, returning the following day. Plaintiff testified that during the visit to Milwaukee in February, 1906, Smith took an option on the property for \$70,000, paying \$1,000 therefor. Some time in June he wrote plaintiff that he would come to close the deal. Plaintiff thinks this letter was written from Winnipeg, but the letter was not preserved. The option which plaintiff gave Smith was drafted by the latter, and he apparently forgot that

he was a Canadian, and gave his place of residence as the "state of Manitoba." In his examination under section 4096, plaintiff said that this option was given in July, instead of in February. On the same examination plaintiff testified that on July 5th Smith paid him something over \$60,000 on the purchase, taking back as security a note secured by a trust mortgage. On the trial he said the money was paid on July 16th. During none of these important negotiations was any lawyer consulted or employed by either of the parties. Then the search for Dickson was prosecuted with unremitting vigor, but was confined to looking for him where he did not happen to be. According to the evidence, Smith was in Milwaukee most of the time between July 5th and August 28th, but his aversion to Milwaukee hostilities continued. He apparently preferred to spend his summer nights in Chicago or at or near Racine, and it was plaintiff's belief that he did not favor Milwaukee to the extent of spending a single night there. Neither did plaintiff know of a single hotel any place where Smith had registered, unless it might be at the Waldorf Astoria in New York, and he did not know whether Smith ever registered there or not. The alleged search for Dickson continued down to August 21st, but he had apparently vanished. Notwithstanding this and the fact that the time to redeem would expire on August 23d, Smith paid to plaintiff the balance of the \$70,000, or nearly \$9,000 in excess of the amount theretofore paid. Although plaintiff kept a bank account, he neither deposited the first payment of over \$60,000 or the second one of about \$9,000. It was not claimed that there was any necessity for keeping the second amount handy so as to be prepared to tender it to Dickson. Plaintiff testified on his examination under section 4096 that he kept the first payment in a satchel from July 5th until August 28th, which was in his office during the day and at his home at night, and that he had the money with him all the time. On the trial he testified that the first payment was not made until July 16th, and that most of the time he kept the money in a safe in the house of the witness Scharel. Plaintiff further testified that both payments were made in currency. No real attempt was made to find Dickson, although, according to plaintiff's evidence, he was interested in finding him to the extent of about \$9,000. The evidence on this point will be discussed later. After August 28, 1906, Dr. Smith vanished as completely as Charlie Ross. It would seem that a doctor who had a penchant for sanitariums and who had enough of this world's goods to carry \$70,000 around with him ought to be easily located even in such a city as Winnipeg or Vancouver. If the doctor had passed away or had removed, others should have been found who knew him or knew of him. The story was so ex-

traordinary that the court might well look to the plaintiff to furnish this proof. It would be difficult to establish the negative, because plaintiff was either unfortunate in not knowing more about his friend or cautious in not committing himself as to any particular place where the doctor resided. Then, too, the doctor, for a man of means, was as careless about intrusting a large sum of money to a stranger as that stranger was about handling and caring for it after he got it. Just why the doctor advanced \$60,000 before Dickson was found, so that a tender could be made to him, and why he advanced plaintiff \$9,000 more practically without security on August 21st, two days before the period of redemption expired, when he and plaintiff had been diligently looking for the defendant without success since July 5th, are circumstances that call for some better explanation than has been attempted. We have given but a brief outline of the evidence tending to show the mythical character of Smith, and do not find it necessary to pursue this subject farther, as we do not hold that the first and second findings of the jury should be set aside because not supported by any credible evidence. We think the case was one where the trial court might well have exercised the broad discretion vested in it and set aside the verdict on the ground that the promotion of justice demanded such action, even though no other reason was apparent to the court for taking such course. Courts sit for the purpose of seeing that justice is secured by litigants. In carrying out this important function they should see to it so far as they can that litigants are not rewarded for committing the crime of perjury by favorable judgments.

[2] We now come to the question whether other findings of the jury essential to sustain the judgment rendered are supported by any evidence whatever. The fourth finding will first be considered. By it the jury found that the defendant concealed himself so as to render tender or payment by the plaintiff impossible. The character of the evidence offered to support this finding and which it is claimed does support it may be briefly summed up:

The defendant's home was in Milwaukee. The plaintiff testified that during the months of July and August, 1906, he wrote numerous letters properly addressed to the defendant at his street number, that they were properly mailed, and that in them he informed the defendant that he was ready to pay up the amount required by the judgment, and asked the defendant to meet him for that purpose and that none of these letters were returned; that plaintiff also drafted a number of notices to the same effect, and either carried them personally or sent them by messenger to defendant's house, and that the same were pushed under the door of the house; that plaintiff made some 16 trips

to the house during the time stated for the purpose of seeing him and arranging a settlement; that Smith made numerous trips for the same purpose, as did Scharel, Mueller, and Hedrick; that inquiries were made of a woman who lived near Dickson's house as to his whereabouts, and that she was unable to give the desired information; that inquiry was also made of a saloon keeper in the vicinity, and he replied that he did not know Dickson; that plaintiff attempted to call Dickson by telephone at his house a number of times; that some one in the interest of plaintiff made inquiry at the Pabst building, where defendant formerly had an office; that an attempt was made to get Wildish, the defendant's attorney, by telephone, but the party seeking to communicate with him was unable to do so because Wildish was out at the time of the inquiry; that a representative of the plaintiff called at Wildish's office on the 21st or 22d of August for the same purpose, and again found that he was out, and finally that plaintiff on the 3d of July offered a messenger boy two dollars if he would find Dickson for him. It was further testified that no answer was received to the various letters or notices and that none of the letters were returned, although there were directions thereon for return in case of nondelivery. It was also testified that one night when the plaintiff attempted to locate Dickson a light was observed in the house, and that it was turned out when plaintiff attempted to get in.

Notwithstanding this testimony, we do not think there was a scintilla of evidence in the case which either showed, or tended to show, that Dickson was in hiding, or that he concealed himself so as to make a tender impossible. It is rather strange that these frequent visits should be made to a house that was closed, and to a house that was obviously unoccupied. It is established beyond dispute that Dickson closed his house in May or the forepart of June, and kept the same closed until October, except as he occasionally might have visited it when he came to Milwaukee; that he with his family moved out on the Spring Bank property near Okauchee, 27 miles from Milwaukee, and lived there continuously and openly from June to October; that Dickson had occasion to go to Milwaukee frequently to attend to his business, and did go as frequently as twice a week; that he collected rents from some 30 tenants during his trips there, and regularly made deposits in the Second Ward Savings Bank, and frequently visited a safety deposit company in which he had a couple of safety deposit boxes, and that occasionally he stayed overnight in Milwaukee. There is not a shred of testimony to show that Dickson left Milwaukee for the purposes of concealment, or that he did anything whatever to conceal himself during the months of July and August, or that he had

any reason to believe that plaintiff intended to redeem when he moved to Spring Bank. There were valuable buildings on the Spring Bank property, which, by the way, was the property plaintiff had contracted to buy. By the terms of that contract the defendant had the right to the possession of the property until certain payments were made, which the plaintiff did not make. The plaintiff knew that the defendant's son had occupied the Spring Bank property formerly at least, and made no effort to ascertain whether he was still residing there. The plaintiff knew that one Mrs. Siemens was renting one of the buildings on the property for a summer cottage, and knew her and her husband well, and made no inquiry from either of them as to where Dickson was. The plaintiff knew that Wildish was the attorney for Dickson in the litigation between them. The evidence showed that Wildish was at his office during the months of July and August, except as he might be away for an occasional day or so, and practically made no effort to ascertain from him where his client was at least up to the 21st or 22d of August, and apparently very little, if any, effort was made then. Plaintiff knew that Judge Neelen lived in close proximity to Dickson's house, and he testifies that he asked the judge on one occasion whether Dickson was at home, but he did not take the trouble to ask him if he knew where Dickson was. No inquiry was made of Dickson's neighbors as to his whereabouts except as above stated. The plaintiff consulted no attorney as to the proper means of finding Dickson, and neither did he consult any member of the sheriff's office or of the police force. The evidence as to Dickson's whereabouts was not only given by himself and members of his family, but by a number of wholly disinterested witnesses. There was practically the same evidence of hiding that might be shown in reference to any other resident of Milwaukee who lived out at one of its suburbs during the summer months. It is a little strange that plaintiff and his agents should make so many trips to a house that was closed up and unoccupied and do practically nothing else to find the defendant, when, according to plaintiff's testimony, so much depended on his being able to locate him. The only circumstance we have been able to find in the testimony at all tending to support the claim of the plaintiff is the fact that he said he wrote numerous letters and received no answer thereto. Dickson denied receiving any such letters. He was under no legal obligation to answer the letters, although it would have been a courteous thing for him to have done so had he received them. But Loehr knew at a very early date in July that his letters were not being answered, and still he persisted in sending letter after letter and notice after notice to the same place and continued to make trip after trip day after day to the

same house, which he knew to be closed up and unoccupied. He made no inquiries as to Dickson's whereabouts of any one who was likely to know, except it was of the woman who lived near him, and did nothing to ascertain his whereabouts that was at all calculated to produce results. On this state of the record we are unable to see where there is any evidence that it was impossible for plaintiff to make the tender because the defendant was in concealment.

We say, therefore, that this fourth finding of the jury must be set aside as not supported by any testimony. What has been said in reference to the fourth finding also applies to the third finding, by which the jury said that the plaintiff made reasonable efforts to tender payment of the amount due to the defendant on or before August 23, 1906. We think it would have been a very easy matter for the plaintiff to find Mr. Dickson if he wanted to find him.

[3] We next come to the consideration of the fifth finding of the jury, by which it was determined that on or about August 23, 1906, the defendant extended the time of redemption for a few days. Two different transactions are relied upon to support this finding. It is argued that the witness Hedrick found Dickson on the 23d of August, and served a demand upon him on behalf of the plaintiff for a deed of the premises and satisfaction of a mortgage thereon and the assignment of insurance policies and certain other things which it is unnecessary to enumerate, and that at the time of serving such demand Hedrick requested the defendant to call at the plaintiff's office on the afternoon of the following day to settle the matter up and that defendant agreed to do so, but failed to keep his promise. Dickson denies making the appointment to meet the plaintiff, but says he did tell Hedrick that he would take the matter up with his attorney. In discussing this finding of the jury we shall assume that the testimony of Hedrick is true wherever there is any conflict between the witnesses, because the jury evidently believed his statement as to what conversation took place. There was no statement in the notice served that plaintiff was ready or willing to pay over the money, but perhaps it might be fairly implied from the demands contained in the notice, which, by the way, was not signed, that plaintiff was ready to pay. Construing this conversation most favorably to the plaintiff, it might be held to amount to an agreement to extend the period of redemption until the afternoon of August 24th and for a sufficient length of time thereafter to enable the plaintiff to call on the defendant and make a legal tender to him when he found that defendant did not keep his agreement to call at his office. But we fail to see how that conversation can be construed as amounting to an agreement to extend the time of redemption from August

23d to August 28th, when the plaintiff insists that he actually made the tender. While the jury found that plaintiff was in concealment not only up to the 23d of August, but also thereafter and until the 28th of August, we hold that there is no testimony in the record which shows that he was ever in concealment a single day or a single hour. So we dismiss the claim that the alleged agreement between Hedrick and Dickson on the 23d of August amounted to or was an agreement to extend the time of payment for a few days or until August 28th.

The second ground on which plaintiff seeks to support this finding of the jury arises out of an alleged transaction between Wildish, the defendant's attorney, and the plaintiff on the 24th of August. After Hedrick left the plaintiff's demand with Dickson on August 23d, the latter went to the office of Wildish, and found that he was out, and left the notice there with a memorandum in reference to it. Wildish testified that on the following morning he found the demand, started to draw some of the necessary papers in reference to the transfer, and then went over to Loehr's office and told him that the abstract would have to be carried down to date, and that possibly a new abstract would have to be provided, and a mortgage would have to be satisfied, and that it might take a few days within which to complete the transaction, and that he then told Loehr that Dickson was ready and willing to perform on his part and asked Loehr if he was ready to pay and that Loehr told him he was not. Loehr does not deny this conversation, except by saying that Wildish did not call at his office, and that he did not have any such conversation with him on August 24th or at any other time. Counsel for respondent argues that the jury had a right to believe Wildish and to disbelieve Loehr and that it evidently did so as to this transaction, and that, inasmuch as Wildish was Dickson's attorney, he had a right to bind his client by extending the time within which payment might be made a sufficient length of time to enable the parties to get the papers ready. The trouble with the contention for the respondent is that the jury did not believe Wildish, but did believe Loehr. By the eleventh finding it found that Wildish did not on August 24, 1906, offer to perform the contract on the part of the defendant, and by the twelfth finding it found that the plaintiff did not say to Wildish that he was not ready to perform. Now, it may be said that the twelfth finding of the jury is supported by the testimony of other witnesses than the plaintiff, and that, therefore, it does not necessarily follow that the jury believed Loehr's evidence to be true when it answered that question. This, however, cannot be said of the answer to the eleventh question. Wildish testified positively that he told Loehr the defendant was ready to per-

form. There is absolutely no evidence in the record to dispute the testimony of Wildish that he did say so, except that of Loehr to the effect that Wildish was not in his office, and that he did not have any conversation with him. There being evidence in the record which would warrant the jury in answering the eleventh question as it did, we must assume that it followed such evidence when it made its answer, and that it found Loehr's testimony to be true. Its answer to the fifth question was evidently given on the assumption that the conversation between Hedrick and Dickson warranted such a finding.

We therefore hold (1) that there was no evidence in the case tending to show that Dickson ever concealed himself or rendered it impossible for the plaintiff to find him and make a tender to him, or that plaintiff used reasonable diligence in an effort to find the defendant; (2) that there was no agreement made either on the 23d or on the 24th of August, or at any other time, to extend the time of payment to August 28th, when the alleged tender was made; (3) that defendant had the right to refuse the tender made on August 28th, if one was made, because the same was not made within the time prescribed by the judgment. It follows from these conclusions that no cause of action was proved by the plaintiff.

[4] The printed case contains 909 pages of printed matter aside from a rather poorly prepared index. Nearly all of the evidence is printed by giving the questions and answers. Everything material and immaterial, important or trifling, is printed. Several hundred pages are devoted to irrelevant matter that could in no way be helpful to this court on any aspect of the case. There was no necessity for preparing a case to exceed 250 pages in length. This allowance is liberal. The appellant's brief contains 219 pages, and gives no orderly presentation of the issues or of the things relied on by appellant to support his contentions. The lack of concentration and the rambling method of argument pursued in the brief rendered it necessary for the court to carefully read over the mass of relevant and irrelevant testimony printed in the case, in order to get a clear understanding of the issues between the parties and the evidence bearing on such issues. All the material questions raised by appellant could be fully treated in a 50-page brief. If all the cases that come before this court were prepared and presented in the way this one has been, the court could not begin to keep up with its work. Rule 44 (108 N. W. viii) of this court is neither ornamental nor innocuous. Under it no costs will be allowed appellant for printing. *Gerbig v. Bell*, 143 Wis. 157, 126 N. W. 871, and cases cited.

The judgment of the circuit court is reversed, and the cause is remanded, with di-

rections to enter judgment dismissing the complaint. No costs for printing will be allowed.

AMERICAN CAN CO. v. STARE et al.
(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. ACTION (§ 38*)—DUPLICITY—SECURITIES.

In a suit to collect a debt, the fact that the plaintiff has as securities for payment of the note several mortgages and certain pledged personalty which it prays may be subjected to the payment of the debt does not state more than one cause of action; the test being not whether there are different kinds of relief prayed for or objects sought, but whether there is more than one primary right sought to be enforced, or one subject of controversy presented for adjudication.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549, 565; Dec. Dig. § 38.*]

2. ACTION (§ 1*)—"CAUSE OF ACTION."

A cause of action consists of the facts from which plaintiff's primary right and the defendant's corresponding duty have arisen, together with the facts showing defendant's wrong.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 1-7, 85; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1015-1019; vol. 8, p. 7598.]

3. ACTION (§ 38*)—STATUTES—FORECLOSURE—DEFICIENCY JUDGMENTS.

St. 1898, § 3156, which permits a demand for a deficiency judgment in foreclosure actions, does not create an additional cause of action, but is merely intended to afford additional relief in the foreclosure action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549, 565; Dec. Dig. § 38.*]

Appeal from County Court, Waukesha County; David W. Agnew, Judge.

Action by the American Can Company against Frank T. Stare and others. From an order overruling a demurrer to plaintiff's complaint, defendants appeal. Affirmed.

Tullar & Lockney, of Waukesha, for appellants. Merton, Newbury & Jacobson, of Waukesha, for respondent.

BARNES, J. This action is brought to foreclose two real estate mortgages executed by the defendants Frank T. Stare and Frances F., his wife, given to secure the payment of a note for \$20,000 signed by the defendants Frank T. Stare and Charles S. Crary, and also to foreclose a pledge of certain certificates of corporate stock deposited with the plaintiff as collateral security for the payment of said note by the defendant Frank T. Stare. The facts are all set forth in a single count in the complaint, and the plaintiff asks that the pledged personal property and the mortgaged real estate be sold to satisfy its debt, and that it have judgment for deficiency against the makers of the note, if the property pledged and mortgaged is insufficient to pay the amount due on the note with interest and costs. The defendants demurred to the complaint on the ground that two or more causes of action were im-

properly united, and from an order overruling such demurrer they appeal.

[1] The complaint states but a single cause of action. The giving of the note and the real estate mortgages and the pledging of the personal property occurred at the same time and as part of the same transaction. The purpose of the plaintiff's suit is to collect the \$20,000 note which it holds. The fact that it has securities which it seeks to subject to the payment of the debt does not create any additional cause of action. The securities are auxiliary aids or adjuncts which enable the plaintiff to collect its debt. They afford the plaintiff a right which it would not have if no security had been given.

✓ [2] A cause of action consists of the facts from which plaintiff's primary right and the defendant's corresponding duty have arisen, together with the facts showing defendant's wrong. *McArthur v. Moffett*, 143 Wis. 564, 571, 128 N. W. 445, 33 L. R. A. (N. S.) 264: "The test of whether there is more than one cause of action stated in a complaint is not whether there are different kinds of relief prayed for or objects sought, but whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication." *South Bend Chilled Plow Co. v. Geo. C. Cribb Co.*, 105 Wis. 443, 446, 81 N. W. 675, 676; *Gager v. Marsden*, 101 Wis. 598, 77 N. W. 922; *Herman v. Felthousen*, 114 Wis. 423, 90 N. W. 432. The fact that the plaintiff in endeavoring to enforce the primary right denied "prays for full relief, combining several elements or objects, does not render the complaint open to demurrer on the ground of multifariousness." *South Bend Chilled Plow Co. v. Geo. C. Cribb Co.*, supra. The test of whether there is more than one cause of action stated in a complaint in an equitable action is whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication. *Zinc Carbonate Co. v. First National Bank*, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845. A complaint for an accounting and for the recovery of the amount of money found to be due on such accounting which involves numerous items of property for which the defendant is sought to be charged, which items of property come into the control of the defendant in different ways, some by fraud and others innocently, and which seeks a rescission of certain conveyances of land and the return of the ostensible title to the plaintiff, sets forth but a single cause of action; the different kinds of relief sought being simply necessary adjuncts to the main purpose of compelling an accounting for that which the defendant wrongfully detains. *Somervall v. McDermott*, 116 Wis. 504, 509, 93 N. W. 553. In the instant case the relief sought by way of selling the mortgaged and pledge property to extinguish in whole or in

part the debt is germane and auxiliary to the single purpose of the action, which is to collect the debt evidenced by the note in suit.

There is language used in *Plankinton v. Hildebrand*, 89 Wis. 209, 61 N. W. 839, which might be fairly understood as holding that in every action to foreclose a real estate mortgage where a deficiency judgment is asked for there are two causes of action united, one in equity to foreclose the mortgage and one at law for a money judgment. This statement was made arguendo and was not necessary to a decision of the case.

[3] The statute (section 3156) which permits a demand for a deficiency judgment in foreclosure actions contains no intimation that an additional cause of action is thereby created. On the other hand, it would appear to be quite plain that the statute merely intended to afford additional relief in the foreclosure action. The intimation in *Plankinton v. Hildebrand* above referred to is disapproved.

The order appealed from is affirmed.

CORRY v. SCUDDER et ux.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. TAXATION (§ 708*)—TAX SALE—JOINDER OF ACTIONS.

Under the direct provisions of St. § 1181, plaintiff, in an action on tax certificates, may include in one action all of the certificates he holds upon the same tract of land.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1291-1297, 1406, 1635-1642; Dec. Dig. § 708.*]

2. TAXATION (§ 686*)—TAX SALE—CERTIFICATES.

Tax certificates described the property as "all of Lot 1, H. Bentley's 3rd Add. to City of Mar., ex. pt. owned by E. F. Simpson, now W. B. Quinlan," also as "Lot 1, H. Bentley's 3rd Add. to Vil. of Marinette (part not owned by B. F. Simpson)," and also as "All of Lot 1, Except part owned by W. B. Quinlan, H. Bentley's 3rd Add.," and also as "All of Lot 1, H. Bentley's 3rd Add., except part owned by W. B. Quinlan." St. § 1047, provided that in all assessments or proceedings for the assessment and collection of taxes any descriptions of land which shall indicate the land intended with reasonable certainty and which would be sufficient between a grantor and grantee shall be sufficient. *Held*, that the description in the tax certificates was sufficient if the part of the lot excepted was distinctly identified by extrinsic evidence and fixed by metes and bounds, as alleged in the complaint in an action on the certificates.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1377-1379; Dec. Dig. § 686.*]

Appeal from Circuit Court, Florence County; John Goodland, Judge.

Action by O. H. Corry against H. T. Scudder and wife. From an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded, with directions to overrule demurrer, and for further proceedings.

The amended complaint sets forth facts of four alleged causes of action, each based upon a tax certificate covering the same piece of ground, described in the first paragraph of the complaint as "Lot one (1) of H. Bentley's 3rd Addition to the village (now city) of Marinette," except a part thereof, which is alleged to be described by the metes and bounds stated in the complaint. The descriptions in the several certificates are as follows: "All of Lot 1, H. Bentley's 3rd Add. to City of Mar., ex. pt. owned by B. F. Simpson, now W. B. Quinlan." "Lot 1, H. Bentley's 3rd Add. to Vill. of Marinette (part not owned by B. F. Simpson)." "All of Lot 1, Except part owned by W. B. Quinlan, H. Bentley's 3rd Add." "All of Lot 1, H. Bentley's 3rd Add., except part owned by W. B. Quinlan." The identity of the land described in the several certificates, the facts regarding the ownership of the part excepted and the ownership of the balance by the defendants, and the facts regarding notice to the defendants that the certificates were outstanding and about to outlaw, that a demand had been made that the defendants redeem or purchase them and notice in case of refusal that the plaintiff would commence foreclosure proceedings, and the defendants' refusal, are alleged. The plaintiff demands judgment for the amounts due him under these certificates, with expense of sale and interest, and judgment of foreclosure and sale of the defendants' interest in such parts of the land as may be required to be sold to satisfy the demand. The defendants demurred to the complaint upon the ground that it appears on the face thereof (1) that several causes of action have been improperly united; (2) that sufficient facts are not stated therein to constitute a cause of action. This is an appeal from the order of the court sustaining the demurrer to the complaint.

Sanborn, Lamoreux & Pray, of Ashland, for appellant. H. T. Scudder, of Marinette, for respondents.

SIEBECKER, J. (after stating the facts as above). [1] The complaint sufficiently alleges that the plaintiff is the owner of the several alleged tax certificates, and that they are on the same tract of land. These allegations, if the allegations are sufficient in other respects, authorize her to include in one action of foreclosure of them all the certificates she holds upon the same tract of land. Section 1181, Stats. This is sufficient to negative the first ground of demurrer, namely, that several causes of action have been improperly united in one complaint.

[2] The ground of demurrer urged in defendants' behalf, and before this court, is that each of the several alleged causes of action in the complaint fails to state facts sufficient to constitute a cause of action. This is based on the claim that all the tax certificates on which plaintiff rests her claim

fail to describe any land with sufficient definiteness to give the plaintiff as holder of such certificates a lien on the land. The foregoing descriptions are copied into the foregoing statement. From a comparison of them it will be observed that they all refer to "Lot 1, H. Bentley's 3rd Add." to Marinette, and that the tax sales all pertained to this lot and embraced all of it "ex. pt. owned by B. F. Simpson, now W. B. Quinlan," "part not owned by B. F. Simpson," or "except part owned by W. B. Quinlan." No point is raised as to the sufficiency of the complaint under this ground of demurrer, aside from the one that the descriptions of the alleged parcel of land are so defective that they fail to describe any land. Section 1047, Stats., provides: "In all assessments and tax rolls, and in all advertisements, certificates, papers, conveyances or proceedings for the assessment and collection of taxes, and proceedings founded thereon, * * * any descriptions of land which shall indicate the land intended with ordinary and reasonable certainty and which would be sufficient between grantor and grantee in any ordinary conveyance shall be sufficient." This statute has been applied in numerous cases, wherein it is held that descriptions in tax proceedings must be given the same effect as descriptions in ordinary conveyances between grantor and grantee, and, if the descriptions indicate the land intended with ordinary and reasonable certainty, they may be aided in the application to specified property by reference to extrinsic facts and descriptions. "Where the language in the description of the land conveyed or excepted from the conveyance is otherwise doubtful, a practical location by the agreement, acts, conduct, or declarations of the parties concerned, followed by adverse and exclusive possession, is sufficient to remove the doubt and give certainty to the description." *Meade v. Gilfoyle*, 64 Wis. 18, 24 N. W. 413. This is on the theory that the law will not declare a description void for uncertainty when the light which contemporaneous facts and circumstances furnish renders it definite and certain. *Murphy v. Hall*, 68 Wis. 202, 31 N. W. 754. In this last case, a description, "Part 5 of lot 4 of section 20, town 28 north, of range 22 east," without reference to any record, plat, or description, or other extrinsic evidence to enable a court to ascertain the property, was held void for uncertainty. This was necessarily the result, since nothing in the description could be referred to by which the land could be ascertained. In *N. Boyington Co. v. Southwick*, 120 Wis. 184, 97 N. W. 903, the assessment roll described the part excepted from lot 7 as "a piece 10 ft. x 25 ft. out of the southwest corner." This was assailed as void for indefiniteness and uncertainty, but the court held: "The uncertainty as to the parcel

excepted could easily be made certain by reference to the Prentice deed, or by inference from contemporaneous conditions, such as the occupancy by Prentice of a particular piece answering the description."

In *Scheiber v. Kaehler*, 49 Wis. 291, 5 N. W. 817, a tax deed was assailed as void for indefiniteness in description of the land, which was described as "one quarter-acre ($\frac{1}{4}$) in the south half of northeast quarter, bounded north, west and south by H. Krohn's land, east by milldam and Cedar creek" in section 9, etc. As to the sufficiency of this description in the tax deed, the court observed: "It is not an uncertain description, unless it should appear upon investigation that Krohn did not have any land in that south half of the northeast quarter, which bounded a quarter-acre not owned by him, on the north, west and south, and which was bounded east by the creek and dam; but if, upon investigation, a quarter-acre should be found so bounded, and not owned by Krohn, then the quarter-acre would be located, and the description made certain." It will be observed that, to make this description certain, resort was had to extrinsic evidence to ascertain the land owned by Krohn, and the boundaries and location of the land embraced in this deed. From these adjudications it is manifest that the statute has been liberally construed and a wide latitude has been allowed in its application by permitting reference to extrinsic facts to ascertain with definiteness and certainty what land the tax proceedings embraced. The description in the instant case, in the first certificate, refers, properly, to a platted addition to the city and designates and covers all of lot 1, "ex. pt. owned by B. F. Simpson, now W. B. Quinlan." In the *Scheiber* Case, the exception referred to lands owned by Krohn, and it was held that a description of land in a tax proceeding which was described as bounded by land owned by a third person does not render the description void on its face for uncertainty, and that a reference to extraneous facts and circumstances, locating the land referred to by land owned by such third person, was proper to make it certain. And so here, if the description can be made certain by such evidence, the portion of lot 1 referred to in the proceeding could be located, and the description made definite and certain. The complaint alleges a certain and definitely described piece of land as being the part excepted from lot 1 embraced in the certificate, and as lying within fixed lines and metes and bounds. If the evidence on the trial sustains these allegations, then the calls of the statutes are fully met and satisfied. In the light of the adjudications the facts alleged in the complaint are sufficient to constitute a good cause of action to foreclose each of the tax certificates

described therein, and the court erroneously sustained the demurrer to the complaint.

The order appealed from is reversed, and the cause is remanded, with directions to the trial court to enter an order overruling the demurrer, and for further proceedings according to law.

CITY OF MONROE v. ENDELMAN.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. LICENSES (§ 7*)—TRANSIENT MERCHANTS—REASONABLENESS OF FEE.

Laws 1905, c. 490, is entitled "An act relating to hawkers and peddlers and various other occupations," and includes transient merchants, and authorizes the imposition of a license fee to be paid to the state, and also a per diem fee which may be imposed by municipalities. *Held*, that the purpose of the Legislature was to regulate and tax the kinds of business specified and not to prohibit or destroy the same, and hence the delegation of power to municipalities to exact per diem fees did not include the power to prohibit or destroy the occupations by imposing unreasonable fees.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.*]

2. LICENSES (§ 7*)—TRANSIENT MERCHANTS—AMOUNT OF FEE.

Laws 1905, c. 490, relating to transient merchants, provides, by section 5, that such merchant shall pay to the treasurer of any city or village where he may be conducting his business a sum not to exceed \$25 per day for each day that he may carry on his business, such amount to be determined by ordinance or resolution of such city or village. *Held*, that the amount specified was to be regarded as a limitation on the maximum amount that could be demanded in any city under any circumstances and not as a delegation of authority to any city or village to impose the maximum amount, authorizing the city only to impose a reasonable per diem fee in accordance with the size of the city and all surrounding circumstances, and hence an ordinance in a city having only 4,500 population requiring transient merchants to pay \$25 a day, the effect of which, if enforced, would be confiscatory, was void for unreasonableness.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.*]

3. LICENSES (§ 7*)—TRANSIENT MERCHANTS—CITY ORDINANCE—REASONABLENESS—DETERMINATION.

Where a city has discretion to impose a per diem fee on transient merchants up to a specified maximum, the courts may inquire into the extent of the limits and purpose of the discretion delegated to the city, and, if it be found that they have been manifestly exceeded, may declare the act invalid; the municipal discretion being supreme only within the field and for the purposes granted.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.*]

4. LICENSES (§ 7*)—TRANSIENT MERCHANTS—AMOUNT OF FEES.

The business of a transient merchant being a lawful one, Laws 1905, c. 490, authorizing the imposition of a per diem fee by cities where the business is carried on, does not contemplate that the cities may impose a fee so high that the business cannot be carried on at a profit, and therefore entirely suppress the same by means of license fees or regulations.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.*]

Appeal from Circuit Court, Green County; George Grimm, Judge.

Action by the City of Monroe against D. Endelman. Judgment for defendant, and plaintiff appeals. Affirmed.

The city of Monroe is the county seat of Green county, with a population of about 4,500, and is a city of the fourth class, operating under the general charter law of the state. Three policemen are employed by it to whom it pays salaries of \$75, \$65, and \$60 per month, respectively. For several years the rate of taxation in the city has been approximately 2 per cent. on the assessed valuation of all property, real and personal. On the 18th day of October, 1910, the city, pursuant to chapter 490, Laws of 1905, passed an ordinance requiring all transient merchants desiring to do business therein to obtain a license, and to pay therefor at the rate of \$25 per day. The defendant, Endelman, is a nonresident of the state of Wisconsin; his home being in Columbus, Ohio. For the past 10 or 11 years he has been a transient merchant. He came to the city of Monroe on the 23d day of July, 1911, bringing with him a stock of clothing of the value of \$2,500 to \$3,000. He rented a store building, for which he agreed to pay \$30 per month, had two clerks to whom he paid \$5 per day, and had a transient merchant's license issued to him by the state for which he had paid \$75. On the 27th day of July, 1911, the defendant offered for sale, and sold, merchandise in the city without first having obtained a local license, as required by the ordinance hereinbefore referred to. The defendant sold goods in the city of Monroe during the days of July 27, 28, 29, and 31, 1911. He took out a local license for each of the dates of July 28th, 29th, and 31st and paid under protest for each license \$25. During the four days the defendant sold goods in the city his gross sales amounted to \$352 or an average of \$88 per day. His profits were 20 per cent. of his gross sales. His daily expense, other than clerk hire, was about \$7. It was then a dull time or season of the year for that class of business. The cost of issuing a license to the defendant by the city did not exceed \$1. The character of the defendant's business was such that it did not require any special police protection or inspection, and it was conducted and carried on by the defendant in an orderly and law-abiding manner. The above are substantially all the facts stipulated to be the facts upon the trial of the case. The defendant was arrested for conducting the business of a transient merchant on the 27th day of July without first having paid the license or per diem fee of \$25 as required by the city ordinance. He was brought before the police justice of the city, who found him guilty of violating the ordinance, and imposed a fine of \$50 and the costs of the action. The de-

fendant then appealed to the circuit court for Green county, before whom the case was tried upon the facts hereinbefore set forth. The circuit court sustained the constitutionality of chapter 490 of the Laws of 1905, but held the ordinance void on the ground that it was unreasonable and in effect prohibitory, and entered judgment in favor of the defendant, from which the plaintiff appealed.

W. H. McGrath, of Monroe, for appellant. J. L. Sherron, of Monroe, and T. S. Nolan, of Janesville, for respondent.

VINJE, J. (after stating the facts as above). [1] Chapter 490, Laws of 1905, is entitled, "An act relating to hawkers and peddlers and various other occupations." Among the occupations therein mentioned is that of transient merchants, circuses and exhibitions, traveling vaudeville, Ferris wheel, merry-go-round, ocean wave, transient shooting gallery, the exhibition of trained or wild animals or other objects of curiosity, and that of fire sale merchants. The constitutionality of the law, so far as its general scheme is concerned, was sustained in the case of *Servonitz v. State*, 133 Wis. 231, 113 N. W. 277, 128 Am. St. Rep. 955. Judging merely from the title of the act, it would seem to be an exercise of the police power alone; but, in view of the amount of license fee required to be paid the state and of the per diem fees which may be imposed by municipalities, it seems that its purpose was a dual one, namely, to regulate the trades and occupations mentioned under the exercise of the police power, and to impose a reasonable tax upon such occupations and trades. It is evident, however, that the purpose of the Legislature was to regulate and tax, not to prohibit or destroy, the occupations to which the law related. Hence the delegation of power to the municipalities of the state to exact per diem fees did not include the power to prohibit or destroy the callings or occupations which they were empowered to regulate and tax.

[2] Section 5 of the act provides, among other things, that each transient merchant "shall * * * also pay to the treasurer of any city or village where he may be conducting his business a sum not to exceed \$25 per day for each day that he may be engaged in carrying on his business, such amount to be determined by ordinance or resolution of such city or village." This language must be held to be a limitation upon the maximum amount that can be demanded to be paid in any city under any circumstances, and not to be a delegation of authority to every city and village to impose the maximum amount, as is claimed by the plaintiff. The Legislature was well aware of the fact that the cities and villages within the state varied greatly as to population, and that the value of carrying on the business of a transient

merchant in any village or city depended quite largely on the number of inhabitants of such village or city. It is unreasonable, therefore, to suppose that the Legislature intended that the smallest village in the state could lawfully fix and demand a tax equal in amount to that which the largest city in the state could impose. Such a construction of the law would enable most cities and villages to entirely suppress and prohibit the lawful callings that were intended by the Legislature to be merely regulated and taxed. The naming of a maximum per diem fee did not absolve villages and cities from the duty of fixing reasonable per diem fees, taking into consideration the size of the village or city in which the business was to be conducted, and perhaps the nature and extent of the business of the transient merchant. Hence the act must be construed to delegate to cities and villages the authority to exact reasonable per diem fees, which fees must in no case exceed the sum of \$25 per day. Such a construction of the language quoted above harmonizes it with the evident intent and purpose of the act, and places the law safely within the constitutional limits of legislative power.

The delegation of legislative power to subordinate political divisions of the state is solely for public purposes, and, when the scope and purpose of such delegated power is manifest, it must be exercised within the limits and for the purposes disclosed in the act delegating it. *Le Feber v. West Allis*, 119 Wis. 608, 97 N. W. 203, 100 Am. St. Rep. 917.

[3] This brings us to a consideration of the reasonableness of the ordinance. Unquestionably the discretion vested in the municipal authorities of fixing the per diem fee must be controlling as long as it is exercised within the delegated limits and purposes. But courts may inquire into the extent of those limits and purposes, and, if it be found that they have been manifestly exceeded by a municipal act, declare such act invalid on the ground that it is in excess of the authority granted. This leaves municipal discretion supreme within the field, and for the purposes granted. Judicial control only restrains it within its legitimate boundaries. It does not supplant, limit, or modify it within such boundaries. That courts have uniformly exercised such power in this and other states may be seen by reference to the case of *Le Feber v. West Allis*, 119 Wis. 608, 613, 97 N. W. 203, 100 Am. St. Rep. 917, and cases cited.

The ordinance in question must be held to be void on the ground that it is confiscatory. It requires no argument to demonstrate that it is so. A mere statement of the material facts is sufficient. The defendant carried a stock of merchandise of a value not exceed-

ing \$3,000. He was offering this for sale at retail in a city containing 4,500 inhabitants. His daily sales averaged only \$88. His gross profits were 20 per cent. of his sales, and his daily expenses about \$7. The \$25 per diem fees would alone more than consume his gross profits. Tested in another way, it appears that, if he continued in business in Monroe for a year, he would pay in fees over \$7,500 on a stock of merchandise, the average value of which did not exceed \$3,000. Obviously such a tax would confiscate defendant's whole property long before the year expired. Similar ordinances have invariably been held to be confiscatory, and therefore void. *Carrollton v. Bazzette*, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522; *Ottumwa v. Zekind*, 95 Iowa, 622, 64 N. W. 646, 29 L. R. A. 734, 58 Am. St. Rep. 447; *Chaddock v. Day*, 75 Mich. 527, 42 N. W. 977, 4 L. R. A. 809, 13 Am. St. Rep. 468; *Brooks v. Mangan*, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137; *City of Peoria v. Gugenheim*, 61 Ill. App. 374; *Sipe v. Murphy*, 49 Ohio St. 536, 31 N. E. 884, 17 L. R. A. 184; *Ex parte Eaglesfield* (D. C.) 180 Fed. 558.

[4] It is true that cases may be found in which it has been held that a calling or business may be entirely prohibited by the imposition of such a tax or regulatory fee as is sufficient to prevent the business from being carried on with profit, but such cases relate to businesses or callings that are more or less injurious to society, and which, therefore, may be entirely suppressed by means of license fees or regulations. The business of the defendant was a lawful one, not injurious, but beneficial to society, and does not fall under the class just mentioned where prohibitory ordinances have been upheld.

Judgment affirmed.

DARLINGTON et al. v. J. L. GATES LAND CO.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. APPEAL AND ERROR (§ 843*)—REVIEW—ACADEMIC QUESTION.

Whether the cause of action against a vendor by the vendee for failure to get timber standing on the land, but previously sold to another, is for fraud or breach of warranty, is immaterial to defendant, and so will not be decided; the complaint stating both causes of action and the measure of damages adopted, the value of the timber removed, being the lowest applicable to either.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

2. FRAUD (§ 20*)—FRAUDULENT REPRESENTATIONS—RELIANCE ON REPRESENTATIONS.

Fraudulent representations constituting a material inducement to a contract are actionable, although they did not constitute the sole

inducement, and although the transaction would have taken place if they had not been made.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 17, 18; Dec. Dig. § 20.*]

3. VENDOR AND PURCHASER (§ 350*)—EVIDENCE—WEIGHT AND SUFFICIENCY—VALUE.

In an action involving the value of four kinds of timber, a verdict for an amount greater than the combined value of the four kinds given by any one witness, but less than the value obtained by taking the highest value placed on each kind by any witness, was supported by the evidence, since the jury are not compelled to rely solely on the testimony of any one witness, or make a computation based on any particular testimony.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 1043-1046; Dec. Dig. § 350.*]

4. VENDOR AND PURCHASER (§ 351*)—UNLIQUIDATED DAMAGES—INTEREST.

In an action to recover the damages sustained by a purchaser of land from his failure to receive timber thereon which the vendor had previously sold, in which the value of the timber constituted the measure of damages, interest was properly allowed on such value from the date of the contract of sale, since such value could be found from reasonably definite standards.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 1017, 1047-1068; Dec. Dig. § 351.*]

Appeal from Circuit Court, Rusk County; James Wickham, Judge.

Action by William H. Darlington and another against the J. L. Gates Land Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

See, also, 142 Wis. 198, 125 N. W. 456, 135 Am. St. Rep. 1070.

Action to recover damages for failure to acquire certain timber standing on lands purchased by plaintiffs from the defendant, and which it is alleged the defendant falsely and fraudulently represented belonged to it at the time of sale, and was included in the purchase of the lands. The case was here before on appeal from an order overruling a general demurrer to the complaint, and is reported in 142 Wis. 198, to which reference is made for a fuller statement of facts. The jury found (1) that, when plaintiffs were negotiating with defendant for the purchase of the lands in question, J. L. Gates, the president of the defendant company, stated to W. L. Darlington that, if plaintiffs purchased said lands, they would become the owners of the timber thereon, and that the defendant had not sold any of said timber; (2) that J. L. Gates made said statement to induce plaintiffs to make the purchase; (3) that the plaintiffs relied on the truth of said statement, and were induced thereby to purchase the lands; (4) that Gates made said statement not knowing the same to be false so far as it related to the lands covered by the William Diamond contract; (5) that Gates made said statement knowing the same to be false so far as it related to the lands covered by the Charles Wood contract; (6) that the plaintiffs, con-

sidering their intelligence and experience by ordinary attention to their business, under the circumstances shown in this case, ought to have relied on said statement and accepted said statement as true without doing more than the testimony in this case disclosed they did to ascertain the truth or falsity of such statement; (7) damages as to the lands covered by the William Diamond contract in the sum of \$1,047.07, plus interest \$384.45, total \$1,431.52; and (8) damages as to the lands covered by the Charles Wood contract in the sum of \$378.35, plus interest \$138.92, total \$517.27. From a judgment in favor of the plaintiffs entered upon such verdict the defendant appealed.

Sturdevant & Farr, of Eau Claire, for appellant. W. H. Stafford, of Chippewa Falls (T. J. Connor, of Chippewa Falls, of counsel), for respondents.

VINJE, J. (after stating the facts as above). [1] The case was tried on the complaint before this court in *Darlington v. Gates*, 142 Wis. 198, 125 N. W. 456, 135 Am. St. Rep. 1070, and it was there held that it sufficiently alleged a cause of action for fraud and also one for a breach of the covenants of warranty in the deed. Claim is now made by the defendant that the action is one for fraud, and that as to the Diamond lands, since no actual fraud was shown, the representations merged in the covenants of the deed, and there is nothing to support the judgment. The question of whether this is an action *ex delicto* or *ex contractu* is purely academic. True, as stated by counsel for defendant, if the action is *ex delicto*, then the measure of damages is the difference between the market value of the land as it was and the market value as it would have been had it been as represented, while, if the action is *ex contractu*, it would be such fractional part of the whole consideration paid as the value of the timber at the time of purchase bore to the whole purchase price, with interest, as announced on the former appeal, 142 Wis. 204, 125 N. W. 456, 135 Am. St. Rep. 1070, citing *Docter v. Hellberg*, 65 Wis. 415, 27 N. W. 176. But "such fractional part of the whole consideration paid as the value of the timber at the time of purchase bore to the whole purchase price" is nothing more nor less than the value of the timber at the time of purchase, and that was exactly the measure of damages applied in this case. Every witness who testified to the difference between the market value of the land as it was with the timber standing thereon and its market value without the timber said that the difference in market value was the value of the timber removed, and that only was taken into consideration. The value of the timber removed, with interest, was the only element that made up the damages assessed. No lower measure of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

damages could have been applied under either kind of action, and defendant, therefore, would have fared no better had the action been expressly labeled *ex contractu*. So it becomes unnecessary to decide whether or not misrepresentations amounting only to constructive fraud merge in the covenants of title, and the question is reserved for future consideration and determination.

[2] Error is alleged because the court instructed the jury: "In order to answer this question (the third one) in the affirmative, you must find from the evidence that the plaintiffs believed said statement to be true, and that said statement constituted a material inducement for them to purchase the land. It is not necessary, however, that the plaintiffs should have relied exclusively upon such statement as an inducement to the plaintiffs to purchase the land, if such statement exerted a material influence upon their minds, inducing them to purchase." It is claimed that, in order to constitute actionable fraud, the false representations must have been the sole cause or inducement that led to the contract or agreement. Such is not the law of this state. It has been repeatedly held that, if the representations constitute a material inducement towards entering into the contract, it is sufficient. *Davis v. Nuzum*, 72 Wis. 440, 40 N. W. 497, 1 L. R. A. 774; *Beetle v. Anderson*, 98 Wis. 5, 73 N. W. 560; *Krause v. Busacker*, 105 Wis. 350, 81 N. W. 406; *Benolkin v. Guthrie*, 111 Wis. 554, 87 N. W. 466; *Hurlbert v. Kellogg, L. & M. Co.*, 115 Wis. 225, 91 N. W. 673; *J. H. Clark Co. v. Rice*, 127 Wis. 451, 106 N. W. 231, 7 Ann. Cas. 505; *Post v. Roberts*, 127 Wis. 605, 106 N. W. 1099. The language used in *Shaw v. Gilbert*, 111 Wis. 165, 185, 86 N. W. 188, 194, "A false statement relied on, and without which the transaction would not have been made, constitutes legal deceit, although it may not have been the sole and only motive or consideration moving the defrauded party thereto," may be susceptible of the inference that it would not constitute legal deceit if the transaction would have taken place had it not been made. But that such is not its true construction is readily perceived when reference is had to other adjudications in this court, wherein it is held that, if the representations constitute a material inducement and are relied upon, that is sufficient. The rule is thus stated in *Farrar v. Churchill*, 135 U. S. 609, 615, 10 Sup. Ct. 771, 773 (34 L. Ed. 246): "The representations must be in regard to a material fact, must be false, and must be acted upon by the other party in ignorance of its falsity and with a reasonable belief that it was true. It must be the

very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were proximate, immediate, and material." We find no error in the instruction to which exception is taken.

[3] It is urged that the damages assessed are higher than any evidence in the case warrants. It is true the assessment is slightly higher than the testimony of any one single witness produced by plaintiffs would support. But there is evidence on behalf of plaintiffs which sustains the assessment. Four kinds of timber were removed from plaintiffs' lands, namely, basswood, pine, hemlock, and ash. The testimony of the witnesses varied somewhat as to the price per thousand feet of the different kinds of timber testified to by them, but the total value of the timber, based upon the highest scale and the highest market price thereof testified to would exceed the amount of damages assessed by the jury. The assessment, therefore, is not as high as it might have been made, and still be supported by the testimony. The jury is not compelled to accept, and rely solely upon, the testimony of any one witness in assessing damages, or merely to make a computation based upon any particular testimony. *Merrill v. Nightingale*, 39 Wis. 247; *Churchill v. Price*, 44 Wis. 540.

[4] It is also urged that the court erred in allowing interest upon the market value of the timber from the time the contract was entered into. This court has held "that there are cases for breach of contract, and cases sounding in tort, where the damages are wholly unliquidated, but where they may be fixed by known and reasonably certain market values or other definite standards, where interest is to be allowed from the time of the breach or the commission of the injury." *J. I. Case Plow Works v. Niles & Scott Co.*, 107 Wis. 9, 17, 82 N. W. 568, 571. See, also, *Gross v. Heckert*, 120 Wis. 314, 97 N. W. 952. Here the damage to plaintiffs was the market value of the timber at the time it was removed. Such value could be found by known and reasonably fixed market values or other reasonably definite standards, and the court properly allowed interest from the time of the date of the land contract when plaintiffs became the equitable owners of the lands. *Krakow v. Wills*, 125 Wis. 284, 103 N. W. 1121, 4 Ann. Cas. 1016. At that time the evidence shows that both Wood and Diamond were in possession of their respective tracts of land on which they had bought the timber and had commenced the cutting thereof.

Judgment affirmed.

DOHR v. WOLFGANG.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. CONTRACTS (§ 54*)—CONSIDERATION—SUFFICIENCY.

There was a sufficient consideration to support a contract by plaintiff to relinquish a homestead entry theretofore made by plaintiff, so that defendant's son might apply to enter the land as a homestead, irrespective of whether defendant or his son actually secured the homestead.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 233-239, 243, 251, 254, 255, 291-315; Dec. Dig. § 54.*]

2. PUBLIC LANDS (§ 139*)—CONTRACTS—RELINQUISHING HOMESTEAD ENTRY—VALIDITY.

An agreement by plaintiff to relinquish a homestead entry made by him, so that defendant's son might apply to secure the land as a homestead, was not contrary to public policy and was valid; plaintiff having the right to relinquish his homestead entry under Act Cong. May 4, 1880, c. 89, 21 Stat. 140 (U. S. Comp. St. 1901, p. 1392).

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 369-376; Dec. Dig. § 139.*]

3. FRAUDS, STATUTE OF (§ 56*)—SALE OF LAND—CONTRACTS WITHIN STATUTE.

An oral contract by plaintiff to relinquish his homestead entry, so that defendant's son could apply to enter the land as a homestead, was not void under the statute of frauds (St. 1898, § 2304); the contract not contemplating a sale of an interest in the land.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83-89, 136-138; Dec. Dig. § 56.*]

Appeal from Circuit Court, Eau Claire County; James Wickham, Judge.

Action by Fred Dohr against John Wolfgang, impleaded. From a judgment for plaintiff, defendant named appeals. Affirmed.

W. H. & T. F. Frawley, all of Eau Claire, for appellant. E. M. Bradford, of Augusta, and Sturdevant & Farr, of Eau Claire, for respondent.

BARNES, J. The plaintiff sued to recover the sum of \$300, which he alleged the defendant owed him on an oral contract. Plaintiff claimed that the defendant desired to have one of his sons secure title to certain land which plaintiff entered as a homestead in July, 1902, under the homestead laws of the United States, and agreed to pay the plaintiff the above-named sum if he would relinquish his right to such homestead, so that defendant's son might make the necessary application to enter the land as a homestead; that plaintiff accepted such offer, and did relinquish and surrender possession of the homestead, and one of the defendant's sons attempted at least to enter the land as a homestead. The attempted entry by defendant's son was made immediately after the plaintiff filed his relinquishment at the land office. The defendant denied making the contract. The disputed issues of fact were all found in plaintiff's

favor by the jury on sufficient evidence, and defendant appeals from a judgment entered on the verdict.

The appellant assigns four errors: (1) The alleged contract was void because contrary to public policy; (2) there was no sufficient consideration to support the contract; (3) the contract was void under the statute of frauds; and (4) the court should have submitted certain questions to the jury propounded by the defendant.

1. On the first point it is urged that a homesteader cannot sell his homestead before final proofs are made and a receiver's receipt is issued, and that, in the event of a relinquishment, the improvements belong to the United States, and that the contract was one that either contemplated the sale of an interest in the land or of the improvements made thereon and that it is against the policy of the law to sanction such an agreement. While there was some loose talk between the parties about selling the homestead and selling the relinquishment, the evidence was ample to warrant the jury in finding that what the plaintiff agreed to do was to relinquish his homestead entry to the United States and surrender up the possession thereof and the improvements thereon. This would enable the defendant's son to enter the land under the homestead laws and acquire title thereto on compliance with such laws, and give him the benefit of all improvements made on the homestead by the plaintiff.

[1] There was a valid consideration for such a contract, whether defendant or his son secured the homestead or not. Consideration may consist of a benefit to the promisor or an injury to the promisee. *Messenger v. Miller*, 2 Pin. 60; *Eycleshimer v. Van Antwerp*, 13 Wis. 546; *Hewett v. Currier*, 63 Wis. 386, 23 N. W. 884. By performing his part of the contract plaintiff surrendered up the possession of the homestead and the improvements he had placed thereon, as well as his inchoate right to eventually acquire title to the land by complying with the homestead laws.

[2] Obviously the plaintiff did not attempt to sell or convey the homestead itself. He had a perfect right to relinquish his homestead entry. Act Cong. May 14, 1880, c. 89, 21 Stats. L. 140, 6 Ann. Stats. U. S. 300 (U. S. Comp. St. 1901, p. 1392); *Love v. Flahive*, 205 U. S. 195, 202, 27 Sup. Ct. 486, 51 L. Ed. 768. Our attention has not been called to any case holding that such an agreement as the one under consideration is in contravention of public policy. There are a number of cases which hold such a sale to be valid and which also recognize the right of the homesteader to sell certain kinds of improvements. *Lindersmith v. Schwiso*, 17 Minn. 26 (Gil. 10), *Paxton Cattle Co. v. First National Bank*, 21 Neb. 621, 33 N. W. 271, 59 Am.

Rep. 852, and *Tarrance v. Hatfield*, 71 Ala. 234. *Moore v. McIntosh*, 6 Kan. 39, *Hooker v. McIntosh*, 76 Miss. 693, 25 South. 866, and *Coleman v. Allen*, 5 Mo. App. 127, affirmed 75 Mo. 332, so hold. Under these cases we hold the contract here made was valid.

It is further urged that there was no consideration for the promise to pay because the testimony showed that it was not made until June 28, 1909, whereas the relinquishment was filed in the land office on June 16th, so that plaintiff had nothing to give in return for the promise when it was made. Plaintiff did testify that according to his recollection the contract was made on June 28th, and so did Attorney Bradford, who drew the relinquishment. We think it is quite obvious that the witnesses were mistaken as to the date on which the transaction took place. Plaintiff's evidence is to the effect that they dickered about the price and finally reached an agreement and that thereupon he executed a relinquishment and went to the land office at Wausau to file it, and that defendant's son accompanied him for the purpose of making an entry as soon as the relinquishment was filed. The jury found that plaintiff filed his relinquishment in reliance on the defendant's promise to pay the sum of \$300, and the evidence sustains the finding.

[3] 3. It is urged that the contract was void under section 2304, Stats., which provides that every contract for the sale of lands or of any interest therein shall be void unless the contract or some note or memorandum thereof expressing the consideration be in writing. It is sufficient to say in answer to this contention that the contract did not contemplate the sale of any land or of any interest therein.

It is further said that the contract was void under subdivision 2 of section 2307, Stats., because the promise was not in writing and was one to answer for the debt, default, or miscarriage of another. The jury found that the debt was that of the defendant. Such finding is supported by the evidence.

4. Complaint is made because of the failure of the court to submit certain questions to the jury as requested by the defendant. The verdict as submitted sufficiently covered the issues in the case.

Judgment affirmed.

STATE ex rel. NEACY v. CITY OF MILWAUKEE et al.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. MUNICIPAL CORPORATIONS (§ 63*)—DIVISION OF CITIES INTO WARDS—LEGISLATIVE QUESTION.

The general question of the division of a city into wards is a legislative question, and

in the absence of any constitutional requirement that a city shall be divided into wards of equal population, or that it shall be divided according to population, a division into wards containing a population running from minimum of 9,238 to a maximum of 19,517 will not be interfered with by the courts.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 155, 1378, 1879; Dec. Dig. § 63.*]

2. MUNICIPAL CORPORATIONS (§ 76*)—CURATIVE ACTS.

The Legislature may cure by subsequent legislation defects or irregularities in proceedings of municipal corporations which it may have dispensed with or made immaterial by prior law, and such ratification or curative effect may result by implication, as well as by direct legislative act.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 181, 687; Dec. Dig. § 76.*]

3. MUNICIPAL CORPORATIONS (§ 40*)—CURATIVE ACTS.

An ordinance dividing the city of Milwaukee into wards, running from a minimum population of 9,238 to a maximum of 19,517, enacted pursuant to Laws 1901, c. 436, empowering councils of cities of the first class to readjust the boundaries of wards, so that they shall be as nearly equal in population as may be, though conceded to be void when passed, is recognized and approved, by Laws 1911, c. 661, redistricting the state for legislative purposes, and dividing the county of Milwaukee into assembly and senatorial districts, bounded by ward lines as established by the ordinance, and the ordinance is validated thereby.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 112-116; Dec. Dig. § 40.*]

4. STATUTES (§ 90*)—CHARTERS—AMENDMENTS—SPECIAL OR PRIVATE LAW.

Const. art. 4, § 31, prohibiting the amendment of a city charter by special or private law, does not make Laws 1911, c. 661, redistricting the state for legislative purposes, a special or private law, though it incidentally affects the city of Milwaukee, by recognizing and validating an ordinance of the city redistricting the city into wards, though the ordinance was concededly void when passed, because the wards were not as nearly equal in population as might be, as required by Laws 1901, c. 436.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 98-100; Dec. Dig. § 90.*]

Appeal from Circuit Court, Milwaukee County; W. J. Turner, Judge.

Quo warranto by the State, on the relation of Thomas J. Neacy, against Francis P. Kane and others, Assessors of the City of Milwaukee, and the City of Milwaukee. From an order overruling a joint demurrer to the complaint, defendants appeal. Reversed and remanded.

This is an action in the nature of quo warranto, brought by a taxpayer of the city of Milwaukee, challenging the right to office of a number of the acting ward assessors of the city of Milwaukee on the ground that an ordinance passed by the city council June 20, 1911, redistricting the city, changing the boundaries of wards, and forming a number of new wards, is void. The city of Mil-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

waukee was joined as a defendant. If the ordinance is void, it is conceded that the defendants have no right to the offices which they hold, because the assessors who were in office at the time of the passage of the redistricting ordinance would still be the lawful assessors. The law under which the redistricting ordinance was passed is chapter 436, Laws of 1901, which provides as follows:

"Section 1. The common council of all cities of the first class organized under special charter, may by a two-thirds vote of all its members, within two years after each state or United States census is taken and the result thereof as to its population is made known, re-district, readjust and change the boundaries of wards so that they shall be as nearly equal in population as may be, and to that end such council may create new wards and consolidate old ones, but no ward shall be created having a population less than eight thousand nor exceeding twenty thousand. In redistricting such cities the original numbers of the wards and their geographical outline shall, as far as possible, be retained, and the wards so created and those the boundaries of which are changed shall be in as compact form as possible."

The ordinance is attacked principally because the new wards are not made as nearly equal in population as practicable by the ordinance, but run from a minimum of 9,238 to a maximum of 19,517. It is not claimed that the disparity resulted from an attempt to gain political advantage by a gerrymander, but that the city council made allowance for future growth and gave to rapidly growing outlying wards a less population than the central wards, with the expectation that the population would soon be equalized by growth. A joint demurrer to the complaint on behalf of all the defendants was overruled by the trial court, and the defendants appeal.

Daniel W. Hoan, City Atty., and Garfield S. Canright, Asst. City Atty., both of Milwaukee, for appellants. Miller, Mack & Fairchild, of Milwaukee, for respondent.

WINSLOW, C. J. (after stating the facts as above). A number of objections to the plaintiff's procedure are made by the demurrants which we do not find it necessary to consider. The importance of a decision upon the merits is such that it would certainly not be good administration to base a decision upon some defect in procedure when it is possible to take up and decide the vital question in the case, namely, the question of the validity of the redistricting ordinance. The importance of an early decision upon this question is greatly increased by the fact that the general biennial election is impending, the result of which might be wholly invalidated, or at least thrown into lament-

able confusion, so far as the city of Milwaukee is concerned, if the question of the validity of the ordinance were now to be put aside and at some later period taken up and decided adversely. We therefore proceed at once to a consideration of the ordinance. Here, also, we find it unnecessary to consider a number of the questions which were vigorously presented both in the briefs and upon the oral argument.

[1] Undoubtedly substantial equality of population is the primary object sought to be attained by the law under which the ordinance was passed; but whether the council might not lawfully consider the growth of population and make allowance for the changes which that growth was reasonably certain to produce within a very short period in the future, is a question upon which we express no opinion. There is no constitutional requirement that a city shall be divided into wards of equal population, or that it shall be divided according to population. The general question of the division of a city into wards is a legislative question, at least within limits which have not been passed in the present case. If, therefore, it were to be admitted, for the purposes of the case, that the ordinance was void when passed, because the wards created by it were not "as nearly equal in population as may be," still, if the Legislature by subsequent act recognized and ratified the ordinance it undoubtedly became valid by such legislative ratification.

[2] This court has frequently recognized the power of the Legislature to cure by subsequent legislation defects or irregularities in municipal proceedings which it might have dispensed with or made immaterial by prior law. *May v. Holdridge*, 23 Wis. 93; *Single v. Supervisors*, etc., 38 Wis. 363; *Cawker v. C. B. P. Co.*, 133 Wis. 29, 113 N. W. 419; *State ex rel. v. McGovern*, 100 Wis. 666, 76 N. W. 593. It is also well established that such ratification or curative effect may result by implication, as well as by direct legislative act. *Fisk v. Kenosha*, 26 Wis. 23; *Knapp v. Grant*, 27 Wis. 147; *Hasbrouck v. Milwaukee*, 21 Wis. 217; *Campbell v. Kenosha*, 5 Wall. 194, 18 L. Ed. 610; *Mattingly v. Dist. of Columbia*, 97 U. S. 687, 24 L. Ed. 1098; *Brown v. Mayor*, 63 N. Y. 239.

[3] By chapter 661 of the Laws of 1911, published July 17, 1911, the Legislature redistricted the state for legislative purposes, divided the county of Milwaukee into 19 assembly districts and 6 senatorial districts, bounded the various districts by ward lines, and distinctly provided that the wards named in the law should be construed to be the wards created by the ordinance in question. This was beyond question a complete and unequivocal recognition and approval of the ordinance.

[4] It is argued that the act cannot be operative for this purpose, for the reason

that changing the ward boundaries of a city amounts to an amendment of its charter, and is prohibited by section 31 of article 4 of the Constitution. The objection fails, because the constitutional provision cited only prohibits the amendment of a city charter by "special or private" law, and by no stretch of imagination can a state-wide apportionment law be called either a special or private law. So far as this case is concerned, chapter 661 of the Laws of 1911 must be considered as a valid general law. The mere fact that it incidentally affects a given locality in some of its provisions cannot logically make it a special or private law, or deprive it of constitutionality.

Order reversed, and action remanded, with directions to sustain the demurrer to the complaint.

STATE ex rel. HAYDEN v. ARNOLD,
Tax Com'r.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

(Syllabus by the Judge.)

1. MANDAMUS (§ 77*)—SUBJECTS OF RELIEF—REINSTATEMENT OF OFFICERS.

Mandamus is a proper remedy where a person has been unlawfully removed from office, regardless of the place having been filled before commencement of the proceedings.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 161-169; Dec. Dig. § 77.*]

2. MANDAMUS (§ 77*)—NATURE OF REMEDY—DISCRETION OF COURT.

The mandamus remedy, in exceptional cases, may or may not be used, in the discretion of the court. There is no absolute rule as to use of such remedy to obtain possession of an office, except, it is not proper in case of a claimant having no prima facie title against one in possession holding by right, at least de facto.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 161-169; Dec. Dig. § 77.*]

3. MANDAMUS (§ 1*)—NATURE OF REMEDY—STATUTORY PROVISIONS.

In harmony with the liberal spirit of the Code, the use of mandamus, in general, should be favored where permissible at all, as the most expeditious mode of vindicating the right.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

4. STATUTES (§ 159*)—REPEAL—IMPLICATION.

Repeals of written law by implication are not favored; therefore, if two legislative enactments, in terms, seem to conflict, they should be reconciled if practicable, and, if not, the earlier should give way to the later, in harmony with the presumed legislative intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. § 159.*]

5. STATUTES (§ 181*)—CONSTRUCTION—LEGISLATIVE INTENT.

All rules for statutory construction are subservient to the one that the legislative intention must prevail if it can reasonably be discovered expressed in the language used for that purpose.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

6. MUNICIPAL CORPORATIONS (§ 125*)—OFFICERS—CIVIL SERVICE LAW.

By the civil service law (chapter 313, Laws of 1895), the manifest general intent was to place all municipal officers, in the cities referred to, except such officers as are specially excepted, under the merit system, both as to appointment and retention.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 125.*]

7. STATUTES (§ 181*)—CONSTRUCTION—PURPOSE OF ENACTMENT.

Where the general intention in the passage of a law is plain, the enactment, in case of uncertainty, should be liberally construed to effect such intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

8. STATUTES (§ 219*)—CONSTRUCTION—EXTRINSIC AIDS—CONTEMPORANEOUS CONSTRUCTION.

In case of obscurity in a legislative enactment, the general understanding by all administrative officers having to do with applying it, which has subsisted for a long term of years, is strong, and in some cases conclusive, evidence of the true meaning.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. § 219.*]

9. MUNICIPAL CORPORATIONS (§ 125*)—OFFICERS—CIVIL SERVICE LAW.

The civil service law (chapter 313, Laws of 1895), by necessary implication from its terms, by its manifest general purpose and by such long understanding as to become, in practical effect, a part of it, supersedes all city charter provisions relating to the appointment and removal of assessors, inconsistent therewith.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 125.*]

10. MUNICIPAL CORPORATIONS (§ 125*)—OFFICERS—"HEAD OF PRINCIPAL DEPARTMENT"—"SUBORDINATES."

Under such civil service law (Laws 1895, c. 313), the tax commissioner in the city of Milwaukee, is the "head of a principal department," having power to appoint the ward assessors as his "subordinates," and the power to remove them, anything in the city charter, existing at the date of the enactment, to the contrary notwithstanding.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 125.*]

For other definitions, see Words and Phrases, vol. 7, p. 6720.]

11. MANDAMUS (§ 77*)—SUBJECTS OF RELIEF—REINSTATEMENT OF OFFICER.

A person who has been, under the forms of law, dispossessed of an office to which he, at best, had only a de facto right, is not entitled to regain possession by mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 161-169; Dec. Dig. § 77.*]

12. OFFICERS (§ 77*)—DE FACTO OFFICERS—NATURE OF RIGHT.

The rule giving de facto dignity to the occupant of an office, is for the protection of the public; not to furnish him a weapon with which to regain possession. Being possessed thereof, he can defend against one who attempts to intrude thereinto; but cannot rely upon his de facto character to gain or regain that to which he has no right, in fact.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 109; Dec. Dig. § 77.*]

13. OFFICERS (§ 71*)—TITLE.

The power of appointing and removing subordinate officers having been conferred upon their superior, and procedure provided for ex-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cuting such power and for use of a removed officer, in case of his deeming himself aggrieved, such procedure is exclusive in case such superior, in good faith, acts within the law.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. § 99; Dec. Dig. § 71.*]

Appeal from Circuit Court, Milwaukee County; W. J. Turner, Judge.

Mandamus by the State, on the relation of Thomas F. Hayden, against Louis A. Arnold, Tax Commissioner of the City of Milwaukee. From an order denying a motion to quash the alternative writ, the defendant appeals. Reversed and remanded, with directions to dismiss.

Mandamus to compel the tax commissioner of the city of Milwaukee to recognize the relator as assessor of the Third ward of such city and to fully reinstate him in such position. The following appeared by the petition:

For some time prior to January 31, 1912, the relator was assessor of the Third ward of the city of Milwaukee, duly appointed and qualified as such under the civil service law and rules. In the meantime the boundaries of such ward were by a municipal ordinance under authority of chapter 436, Laws of 1901, changed so as to locate two assessors therein. On such date the tax commissioner of the city, pretending to act under power vested in him by the civil service law, notified relator of the change of ward boundaries, with the result stated, while only one assessor could legally perform the duties of the office, and that by reason thereof such relator was "removed and discharged" from his position. Since such time such commissioner, as president of the board of assessors of such city, has declined to recognize the relator as assessor of such ward or a member of the board of assessors, or permit him to perform the duties of such office. The ordinance changing the ward boundaries was not published till July 3, 1911. By chapter 497, Laws of the State for 1911, published July 3, 1911, and by its terms to take effect from and after its passage and publication, the law under which the ward boundaries were attempted to be changed was repealed. Further facts were stated to show that the ordinance was void because of failure to comply with the law in attempting to make the change of ward boundaries. An alternative writ of mandamus was issued, motion made to quash the same and denial thereof. This appeal is from the order accordingly entered.

Daniel W. Hoan, City Atty., of Milwaukee (Garfield S. Canright, Asst. City Atty., of Milwaukee, of counsel), for appellant. Miller, Mack & Fairchild, of Milwaukee, for respondent.

MARSHALL, J. (after stating the facts as above). [1-3] Is mandamus a proper remedy

to restore a person to an office from which he has been unlawfully removed?

In examining authorities bearing on the proposition stated, at least, the following situations should be observed:

(1) In general, where a person has been ousted from office, unlawfully, as he claims;

(2) Where a person was ousted and an action for possession commenced and brought to trial before the vacancy, thus in form created, was refilled;

(3) Where the circumstances exist as in No. 2, except the vacancy was filled after commencement of the action;

(4) Where a person seeks original possession of an office against the one holding the same by right, de facto, the outside claimant having no prima facie title;

(5) Where a person, having prima facie evidence of title seeks possession of an office against one therein holding the same in defiance of such prima facie title and without color of right himself, other than such as mere possession might indicate and afford.

Failure to note these differences, it is thought, has led to some apparent conflict in decisions.

In some cases, involving the right of a person claimed to have been unlawfully ousted from an office to use the mandamus remedy to repossess himself thereof, the subject will be found treated in a broad general way as if such remedy were proper in all such cases, as for example, *State ex rel. Gill v. Common Council of Watertown*, 9 Wis. 254. This court there, speaking by Mr. Justice Paine, said:

"It cannot be necessary to examine authorities to show that a mandamus is a proper remedy to restore a party to the possession of an office from which he has been illegally removed. If citations were necessary, the following list would seem to place the question beyond discussion," giving a large number of illustrations.

An examination of them at this time is not satisfying that the broad general declaration was grounded on adjudications referred to; but was based on several standard elementary works, which support it so fully, it seems evident the court did not think there should be any fine distinctions between the different situations which may be characterized by an unlawful ouster from office. That would not militate against the propriety of a trial court exercising some measure of discretion as to whether to allow such remedy or not and deny it in case of the office being occupied at the time of suing out the writ and the real right of the matter being better triable by quo warranto, which could not often be the case, since the court might make the incumbent a party to a mandamus proceeding, if not so made at the start. The mere form of remedy is not of controlling consequence under the Code.

Whether the particular remedy is appropriate to the case is the main thing,—not whether it is the sole remedy, but is it a proper one because it is appropriate to the end sought.

This court has held that, under some circumstances, a person, who has never been in possession of an office claimed by him, may use the mandamus remedy to gain it of an adverse claimant. *State v. Oates, etc.*, 86 Wis. 634, 57 N. W. 296, 39 Am. St. Rep. 912; *State ex rel., etc., v. Kersten*, 118 Wis. 287, 95 N. W. 120. In *Board of Education of South Milwaukee v. State ex rel. Reed*, 100 Wis. 455, 76 N. W. 351, after deciding the case upon other grounds, and apparently without any claim of the sort having been made by the prevailing party, it was said, substantially, that where a person has been wrongfully ousted from an office he cannot wait for redress till the place is filled again and then use the remedy by mandamus to regain possession,—not citing the early case in this state, which did not recognize any exception, nor any other Wisconsin decision. The foreign authorities cited, upon examination at this time, are not satisfactory, from an original standpoint, and certainly not in view of the early case here. The only one which treats of the subject so as to challenge attention, is *People v. Goetting*, 133 N. Y. 589, 30 N. E. 968, and that only goes to the length of holding that, where the office has been filled and the right to regain possession turns on some difficult question of statutory construction, the trial court, exercising the measure of discretion which it might, properly, in such a case, may deny the mandamus remedy.

In other jurisdictions mandamus, regardless of whether intricate questions are involved, has been said to be the more appropriate remedy for a wrongfully ousted officer to use for repossession. As for example *Lewis v. Whittle*, 77 Va. 415. There the court said:

"Wherever there is a right to execute an office, perform a service, or exercise a franchise, more especially if it is a matter of public concern, and a person is dispossessed of such right and has no other specific adequate remedy, then the court ought to assist by mandamus upon reasons of justice, as expressed by the writ, and upon reasons of public policy, to preserve the peace, good order and good government. * * * Whatever may be the rule elsewhere, it may be safely laid down as the doctrine of this court that mandamus is a true specific remedy for wrongful deprivation of an office."

Continuing, in effect, where a person has been wrongfully ousted from his office and another installed therein the former is entitled to an adequate remedy for redress. The public is likewise interested and, in such circumstances, a remedy which merely decides the right but does not restore possession is not an adequate remedy:

"If, as suggested, quo warranto should be adopted and the petitioners should succeed therein, they would not thereby be put in possession of what they seek, but might still be put to the necessity of mandamus for relief. They might succeed in quo warranto in removing their adversaries from office, and yet need the mandamus to put them in possession."

A full and adequate remedy is needed to cover both and the party should have the benefit of it if he asks for it.

Many other authorities might be cited to the same effect as the foregoing. We will refer to but a few. In *Ex parte Wiley*, 54 Ala. 228, the court remarked:

"While the current of authority does not recognize mandamus as an appropriate remedy to test a disputed title to a public office, or in the first instance to compel the admission of a claimant, yet if the rightful officer in the actual enjoyment of the office, is wrongfully removed, it is generally regarded as the proper remedy to compel his restoration."

In *High on Extraordinary Legal Remedies* (3d Ed.) at § 67, no exception is recognized to the propriety of the use of mandamus to restore to office a person who has wrongfully been removed therefrom. Much authority is cited to support that view, and among them, one holding that the court should not thus interfere in case of an incumbency being *de facto*. That, the annotator remarked, is contrary to the current of authority.

It seems that the rule as here broadly stated in *State, etc., v. Common Council of the City of Watertown*, *supra*, has not been intentionally disturbed and that the practice should be regarded as settled accordingly; eliminating anything said in *Board of Education of South Milwaukee v. State, etc.*, *supra*, to the contrary. The remedy by mandamus, as has been said, is the "right arm of the court." There should be freedom to use it whenever speedy justice and adequate redress seems to demand it, and when the public, in great measure, is interested, the court should be quite liberal in allowing such use. There should be no arbitrary rule of denial, except in case of occupancy of an office by one holding *de facto* against another claiming title thereto, but never having been in possession, or regularly declared to be entitled thereto,—a case involving a square dispute as to the title between one claiming the right, though holding no *prima facie* title, as for example a certificate of election duly issued, and one in possession holding *de facto*.

It has seemed best to treat the subject of the mandamus remedy thus broadly, though the case might be rested on the narrow ground that no one was adversely in possession when the action was commenced, hence there was no one against whom quo war-

ranto would lie, leaving mandamus, clearly, the only remedy for relator. However, if there would be any great impropriety in allowing such remedy in case of the office having been filled before commencement of the action, because of its involving the title as between the two, it would seem that much impropriety existed in the circumstances of this case at the time of the trial, since the right to the office between adverse claimants was involved just the same, and without the incumbent being before the court.

No good reason appears why the liberal spirit of the Code should not be extended to mandamus actions so as to enable any one unlawfully ousted of his office to use the strong "right arm of the court" for his speedy restoration. That broad rule will, if well understood, prevent much vexation of courts, delay of justice, and expense to litigants and the public by efforts in trial and appellate jurisdictions for recognition of exceptions having no substantial basis to rest upon and not contemplated when this court first dealt with the matter.

In so far as approval of respondent's claim for relief upon the facts appearing in the petition for the writ, is dependable upon whether the ordinance redistricting the city of Milwaukee into wards is invalid and, so, the cause for removal of relator did not exist, it must be resolved in favor of appellant, following *State ex rel. Neacy v. City of Milwaukee*, 138 N. W. 76, decided October 15, 1912, where the court held such ordinance to be valid.

Did the civil service law,—chapter 313 of the Laws of 1895, as amended, particularly, by chapter 547, Laws of 1911,—confer the power exercised in removing the relator? The plan thereof is that, in general, positions and employments in the several principal departments of the civil service of a city shall be made by the respective heads of such departments, under rules established in a manner specified. The general scope is found in section 4 of the act and the exceptions in section 6. Among them is named "heads of any principal department." It is not contended that assessors are within the general class unless as subordinate officers under the tax commissioner as "head of a principal department," within the meaning of section 6. So it cannot be well claimed that they are specifically excepted out of such general class unless they are "heads of principal departments" instead of being subordinates under the tax commissioner.

The civil service law, in the beginning, provided that "heads of departments shall respectively have power to remove or discharge at pleasure any person holding any subordinate office, position or employment in their respective departments," and the act of 1911 added:

"For cause which shall not be religious or political and shall be set forth in detail in

writing and be filed within ten days with the secretary of the civil service commission. But such discharged subordinate shall be given an opportunity to make answer and his answer, when made in writing, shall be filed with the secretary of the commission."

At this point it is well to take note of the slight difference in phraseology between "heads of departments" mentioned in section 4 as having the power of appointment and removal and "heads of any principal department" mentioned in section 6 as being exempt from the civil service rules. It seems too clear to admit of fair doubt that the two terms are used synonymously. Therefore every head of a department having the power of appointment and removal is the "head of a principal department," and is, as such, exempt from the exercise of such power by a superior.

Counsel for the relator contend that the power of removal by the tax commissioner did not exist under section 4, because the power of appointment was not thereby vested in him; that the city charter of Milwaukee, from before the passage of the civil service law, has provided that "the mayor with the concurrence of the common council shall on the first Monday of January in every second year appoint an assessor for each ward in said city of Milwaukee whose term of office shall commence on the first day of February following, who shall have been recommended to him by the tax commissioner, and who shall be a resident of the ward for which he is appointed at the time of his appointment, and who shall continue to reside in such ward during the term for which said appointment is made;" that such provision was not superseded by the civil service law.

It must be conceded that, if the contention as regards undisturbed integrity of the charter be sound, then the tax commissioner did not possess the power of removal when he pretended to exercise it.

The general scope of the civil service law is declared, plainly, in its title thus: "An act to regulate the civil service of cities." By the first section it was restricted to cities of the first and second class. So the design was to regulate such service in the city of Milwaukee. In general language it, manifestly, vested in the "head of each principal department" the power to appoint all his subordinates. If the assessors were such they, obviously, were not, at the same time "heads of principal departments" and excepted from full operation of the civil service law by the terms of section 6.

There was no express amendment, by the civil service law, of the city charter respecting the power of appointment of assessors. Was there an implied amendment, by lodging such power in the tax commissioner, or an express repeal of such charter provision and substitution of the civil service plan therefore, in that the two are in irreconcilable con-

sift and the civil service act contains a repealing clause as to "any acts and parts of acts conflicting with the provisions hereof are hereby repealed."

[4, 5] It is elementary that repeals and changes of existing laws by implication are not favored. Therefore, if a later law, in its terms, conflicts with an earlier enactment, and the former will admit of a reasonable construction leaving the latter in force, that is to be adopted. *State ex rel. Milwaukee v. Mil. E. R. & L. Co.*, 144 Wis. 386, 129 N. W. 623, 140 Am. St. Rep. 1025. When it is thus said, it is supposed to harmonize with that other elementary and dominating rule, that the purpose of construction is to give effect to the legislative intent so far as that can reasonably be read out of the language used to express it. Therefore, though words may, looking only thereat, admit of a reasonable construction, working harmony between two enactments, if such construction will clearly violate the legislative purpose, it is not adoptable under the first rule, but must be rejected under the second. So an act, which by the fair import of its terms, looking thereto alone, conflicts with a former act, a variation therefrom by construction, within the scope of the language used, which would be permissible to effect a plain legislative purpose, cannot be resorted to where the effect would be to defeat it.

It follows, assuming for now, that there is ambiguity as to whether the assessors in the city of Milwaukee are subordinates in a department headed by the tax commissioner, that the general purpose of the civil service law, if that can be plainly seen, is important.

[6] Without stopping to discuss at any great extent, the subject suggested, it may be safely said that, by the civil service act, the Legislature intended to go as far as practicable in placing all administrative officers, below those elected by the people, in the cities dealt with, under the merit system. At that time the desirability of such a system was uppermost in the public mind, as a means of removing the mischiefs believed to exist in municipal administration. The evils to be remedied, the objects to be attained and the general spirit of the enactment, show a studied effort to give the broadest effect thereto practicable. First there is the general reference to the entire civil service of the city. Then the section intended to place all officers thereunder except those specifically excepted in a subsequent section. That the term "subordinate officers," used at this point, was intended to include all except those specially excepted, making two classes, one mentioned in section 4 to be under the civil service rules and one mentioned in section 6 to be excepted therefrom, is put beyond all room for question by the intervening section, 5, providing that all applicants for offices in the civil service, except those mentioned in section 6 shall submit to the

civil service rules. Section 6 completes the scheme by excepting certain principal officers, not including in the descriptive words, as before indicated, assessors, unless they were intended to be so by the words "heads of principal departments."

[7] The plain purpose of the civil service law, being as indicated, in case of any uncertainty as to what intended meaning can be read therefrom, either in respect to particular words, terms or clauses, they should be read rather favorable to the end sought to be attained, than unfavorable thereto so as to restrict the scope thereof, where there may be, reasonably, two views. In case of the purpose of a law being very manifest and construction being required to determine the expressed meaning, the import of words and clauses should be bent, so far as can be, reasonably, to effect such purpose. *Neacy v. Board of Supervisors of Milwaukee County*, 144 Wis. 210, 129 N. W. 1063.

In the foregoing it has been assumed in favor of the appellant that there is obscurity in the civil service law as to whether it was intended thereby to supersede the charter provision as regards the manner of appointing assessors and as to whether they are "heads of principal departments," and shows, it seems, that the first must be resolved in favor of appellant,—that is that the legislative purpose was to change the manner of selecting assessors if they were spoken of as subordinates. In that case a change in the charter provision must have been in the legislative mind, since the power of appointment of subordinates was unquestionably conferred upon "heads of principal departments." In such circumstances the two provisions cannot stand together and the early law must give way to the later, in harmony with the presumed legislative purpose.

[8] Were the assessors treated as subordinates? If so, the tax commissioner was treated as the head of a principal department. It would seem that, if practical construction could ever be controlling, it should be regarded decisive in favor of the affirmative of that question. It is the established doctrine of this court that "uninterrupted practice of a government prevailing through a long series of years and the acquiescence of all departments, legislative, executive and judicial, sometimes becomes decisive even on constitutional questions." *Dean v. Borchsenius*, etc., 30 Wis. 236.

"The general understanding of a law and constant procedure under it for a long period by all officers of government whose duty it has been to execute it, unquestioned by any suit brought or public or private action instituted to test or settle the construction in the courts, ought to be very strong, if not conclusive, evidence of its true meaning and application, and that they are such as it has thus received." *Scanlan v. Childs*, 33 Wis. 663, 666.

For some 16 years prior to the commence-

ment of this litigation, the Milwaukee charter provision respecting the selection of assessors has been supposed, by all concerned, to have been superseded by the civil service law. That has been "the general understanding and constant procedure under it * * * by all officers of government whose duty it has been to execute it." It has been submitted to, unquestionably, by every one. The relator accepted office under it. He was appointed by the tax commissioner, according to his petition, 13 years before the happening of the incident of which he complains. He held office during that long period under such appointment which, if valid, was subject to recall at the pleasure of the person making it. Not even was it necessary, as we have seen, prior to the amendment in 1911, for the appointing officer to assign any cause for exercising the power of recall. During all that time the tax commissioner, by general consent, has been regarded as head of a principal department under the civil service law.

Now, it is true, that if there be no reasonable ground in the civil service act for the notion that the tax commissioner is the "head of a principal department" having the assessors, his appointees, as subordinates, practical construction cannot put such meaning into it. Such construction sometimes is the most conclusive means of getting the real legislative purpose out of a law, but cannot be resorted to for the purpose of changing it, any more than any other rule of construction can be so used.

[10] Turning now to the scope of the tax commissioner's duties, it is easily seen that there is a very legitimate basis for the meaning the administrators of the civil service law started with. Those who had to do with the enactment appreciated, probably, better than we can at this time, the evils it was intended to remedy and the required status of the tax commissioner in the general scheme respecting assessors.

The features of the Milwaukee city charter giving rise to the thought that the Legislature regarded the tax commissioner as the head of a principal department, are these: One of the major subjects dealt with in the charter is that of assessment and collection of taxes, chapter 18 being specially devoted thereto. The first office therein created is that of tax commissioner. A means of filling it was specified, and the place was clothed with much dignity. A term of three years was fixed and the selection was left to the mayor, subject to confirmation by the council. The one chosen was required to file an official oath and give a large bond to secure faithful performance of his official duties. He was given power to appoint a deputy tax commissioner and provided with clerks and an office and required to keep important records,—in fact all records appertaining to the subject of assessment of property for

taxation. All complaints as to mistake, and injustice otherwise, in the administration by the assessors, were required to be filed in his office to be disposed of by the board of assessors presided over by him. Power was given to the common council to provide for assistants to the assessors to be appointed in the same manner as the regular assessors and to "enter upon their duties under the direction of the tax commissioner." In case of an assistant assessor for any ward, the tax commissioner was required to "designate the property and territory to be assessed by each." He was given "power, with the written approval of the mayor, to remove from office any assessor" for incompetency in his opinion or neglect to perform the duties of his office. All assessors were required to report their work to him and he was required to furnish to them specified information to aid in the performance of their duties. Upon receiving the completed tax rolls from the assessors, the commissioner was required to give notice of the times and places where they would be open for examination. There are other features of a persuasive character found in the charter, chapter 184, Laws of 1874, chapter 144, Laws of 1875 and chapter 391, Laws of 1891 (Compiled Charter of 1905). Moreover, by chapter 401, Laws of 1907, there is unmistakable recognition of the tax commissioner being head of a principal department. The whole framework thereof so indicates. He is there clothed with power to create from the assessors a board of five appraisers with extraordinary duties; also power to divide the city into assessment districts without regard to ward lines, and do, or have done, under his immediate supervision, much of the work ordinarily done by assessors; to assign to each assessor his particular task and they are required "to proceed under the supervision and direction of said tax commissioner" to perform their duties. The completed tax rolls are treated as made under the control of the tax commissioner. The work of the assessors is confined, in the main, to merely exercising their discretion as to the assessable value of property. The ordinary requirement that an assessor shall verify his roll when completed and deposit it with the person required by law to make out the tax roll, is taken away and conferred upon the tax commissioner. He is required to make oath to all matters ordinarily covered by the assessor's oath,—to depose that "as far as practicable each parcel of real estate was valued by the assessor making such valuation from actual view of such parcel," etc.

Taking the features aforesaid in the aggregate, they seem to make a very strong case in favor of the view that, by necessary implication, the tax commissioner was intended to be dealt with as the head of a principal department,—that rules for construction are not required to clear up any obscurity in

respect to the matter. In any event, the major and controlling probabilities are in favor of the idea that the Legislature so considered at the start, and long acquiescence in such view should be regarded as decisive; moreover, the legislative recognition of such view after prevalence thereof for twelve years seems to leave no reasonable room for doubt as to the right of the matter.

[9, 11] The trial court reached the rather illogical conclusion, it seems, that the tax commissioner is the head of a principal department, within the meaning of the civil service law, but that the Milwaukee charter provision respecting the appointment of assessors was not disturbed thereby, because the assessors are themselves heads of departments,—not subordinates under the tax commissioner,—that they are not such since they are required to exercise their judgment in making the assessment without dictation from the tax commissioner—and, therefore, relator is entitled to restoration though he was not legally appointed in the first place. The dominant feature of the law, the persuasiveness of the practical construction referred to, the manifest legislative recognition of the status of the tax commissioner and the inconsistency of mandamusing one into office who was never entitled thereto, must have been overlooked. If the logic of the circuit court's decision be sound, in that the power of appointment of assessors is not conferred upon the tax commissioner by the civil service law, then the result reached must be plainly wrong, as appellant's counsel claim, since, in any event, the relator has no more right to that which he seeks than a stranger. Why should the court restore a person to an office to which he was never legally appointed and in which he was little more, if anything, than a mere intruder, a person not appointed by any authority given power in that regard under any circumstances?

[12] To be a de facto officer one must be in place under color of right. If the office is appointive, as said in the books, he must be in possession under authority having colorable power to make the appointment, *Kempster v. Milwaukee*, 97 Wis. 343, 72 N. W. 743; *Ex parte Strang*, 21 Ohio St. 610, 617; *Prescott v. Hayes*, 42 N. H. 56, 58; *Fitchburg R. Co. v. Grand Jct. R., etc.*, 83 Mass. 552, 557, though, probably, long acquiescence might make him an officer de facto upon the presumption of an appointment by lawful authority. *Auditor Gen. v. Menominee County Sup'rs*, 89 Mich. 552, 51 N. W. 483. But a person confessing himself, and found to be only, at best, an officer de facto, cannot have mandamus to obtain possession of the office. The doctrine throwing a measure of protection around an officer de facto is for the protection of the public, not to afford such an officer any advantage in ousting some other person from the de jure office. *Adams v. Tator*, 42 Hun (N. Y.) 384, 386.

Thus counsel for appellant is logical in seeking to overturn the final conclusion below as inconsistent with the one respecting the legitimate source of an assessor's authority in a city of the first and second class, but concede too much in assuming that the trial court's holding as to such source is sound. We confess the wisdom of counsel for respondent in rejecting the trial court's conclusion as regards the effect of the civil service law in changing the appointing power, and attempt to sustain the judgment, nevertheless, upon the theory that the assessors are not subordinate officers under the tax commissioner; but we cannot agree with counsel on that as we have indicated.

The trial court's idea that the contrary of the foregoing is supported by anything decided in *Johnson v. Milwaukee*, 147 Wis. 476, 133 N. W. 627, does not seem to be warranted. The reasoning in that case is in harmony with that here. Emphasis was given there to the words "principal department" and the fact that the law required the officers in question, as here, to perform their duties under the direction of the one held to be "head of a principal department." The idea was made prominent that there may be subordinate departments, each complete in itself, in the sense of having duties incident thereto to be performed in the discretion of the incumbent, and yet performance be under the direction of the head of a principal department of which each of the smaller ones is an integral part.

[13] We see no escape from the conclusion that the tax commissioner of the city of Milwaukee is the head of a department contemplated by section 4 of the civil service law conferring power upon such to appoint subordinates and the companion power of removal, and that the assessors are subordinates within the scope of such authority, as has been understood to be the case and must be, if relator has any standing whatever under any circumstances, as he refers to such source for his official status.

The point is made that the ground assigned for the removal of the relator did not constitute "cause" within the meaning of the civil service law. It is considered otherwise. The law did not contemplate there being two assessors in the same district. It, especially the act of 1907, rather repels the idea of any such divided responsibility, or opportunity for clash of authority, or necessity for the tax commissioner to deal with such a situation to prevent a clash. A pretty plain case existed of necessity for recall of one of the assessors, since the new division of the city into wards left two such officers in the particular ward, each claiming to be an assessor of such ward. However, whether the cause was a good one or whether it existed, was not a matter to be settled by a mandamus action, as said in *State ex rel. Bannen v. Arnold* (decided herewith) 138 N. W. 85. The relator accepted office under the law which

reserved the right to remove him for "cause," affording him opportunity to answer and raise the question of whether the assigned cause existed or not and whether it was a real cause within legislative contemplation. His remedy was under the act creating the system by favor of which he held office.

The order appealed from is reversed, and cause remanded with directions to dismiss the proceedings with costs.

STATE ex rel. BANNEN v. ARNOLD,
Tax Com'r.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. OFFICERS (§ 69*)—CIVIL SERVICE—REMOVAL OF SUBORDINATES.

One who accepts an office under the civil service law (Laws 1895, c. 313) submits to its provisions, including those empowering his superior to remove him at pleasure, filing a statement of the reasons, as provided by the law.

[Ed. Note.—For other cases, see *Officers*, Dec. Dig. § 69.*]

2. MANDAMUS (§ 77*)—OFFICERS—CIVIL SERVICE—REMOVAL OF SUBORDINATES—REMEDY.

Under Civil Service Law (Laws 1895, c. 313) § 4, as amended by Laws 1911, c. 547, § 2, so as to provide that the exercise of the power of removal at pleasure by the appointing power must be for cause, neither religious nor political, and be set forth in detail in writing and filed with the civil service commission, and declaring that any discharged subordinate shall be given an opportunity to make answer, to be filed with the secretary of the commission, etc., an assessor of the city of Milwaukee, removed by the tax commissioner of the city for cause, is not entitled to compel by mandamus his reinstatement, but he must pursue the remedy prescribed by the act, and seek relief from the civil service commission.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 161-169; Dec. Dig. § 77.*]

Appeal from Circuit Court, Milwaukee County; W. J. Turner, Judge.

Mandamus by the State, on the relation of William Bannen, against Louis A. Arnold, as Tax Commissioner of the City of Milwaukee, to compel the recognition of relator as assessor of a ward of the city. From an order denying the motion of defendant to quash the alternative writ of mandamus, defendant appeals. Reversed and remanded.

Mandamus to compel the tax commissioner of the city of Milwaukee to recognize the relator as assessor for the Sixteenth ward of such city and to fully reinstate him in such office from which he had been, in form, removed.

The proceedings were the same in this case and based on the same state of facts as in *State ex rel. Hayden v. Arnold*, 138 N. W. 78, decided herewith, except the change of ward boundaries, as stated in the petition, left the relator still a resident of the Sixteenth ward, for which he was appointed, with no other assessor residing therein,

though the order of removal was grounded on the theory that the Fourth ward, as reorganized by the ordinance changing the ward boundaries, included the residence of the relator and that of another assessor.

Daniel W. Hoan, City Atty., of Milwaukee (Garfield S. Canright, Asst. City Atty., of Milwaukee, of counsel), for appellant. Miller, Mack & Fairchild, of Milwaukee, for respondent.

MARSHALL, J. (after stating the facts as above). [1] This case, in the main, is ruled by the decision in *State ex rel. Hayden v. Arnold*, mentioned in the statement. The only difference as to facts is that the cause assigned for removal did not exist. But we are constrained to hold that such circumstance cannot make any difference. Manifestly, the legislative purpose was that relief from any mistake of that sort should be sought by the specific means provided in the civil service law. The relator in accepting office under it submitted to its provisions, including those empowering the commissioner to remove him at pleasure, filing a statement of the reasons, to which, as indicated in the former case, the law gives opportunity to answer.

[2] Section 4 of the Civil Service Law (chapter 313, Laws of 1895), in the beginning, clothing the appointing power with power of removal or discharge at pleasure, does not suggest that such power is usable otherwise than within the boundaries of discretion and for legitimate purposes. The fact that the Legislature saw fit by chapter 547, Laws of 1911, to amend such section by providing, specifically, that exercise of the power of removal must be for cause, "neither religious nor political" and "be set forth in detail in writing and be filed within ten days with the secretary of the civil service commission, * * * any such discharged subordinate" to "be given an opportunity to make answer and his answer, when made in writing," to be "filed with the secretary of the commission," suggests that the Legislature contemplated such joining of issue, at the option of the discharged employé, to afford him a hearing of some sort before the administrative head respecting existence of the cause assigned and redress by re-instatement in case of its appearing to the responsible officer that he had misjudged the matter. It was competent for the Legislature to give or not give this opportunity. In case of the latter, and a person accepting service under the law, he has no reason to complain. In case of the former, so long as the appointing and removing officer acts within his jurisdiction, the remedy afforded is exclusive. That is according to elementary principles, there-

fore we will not emphasize it by citation of authority.

Applying the foregoing, in view of the fact, which satisfactorily appears, that the tax commissioner acted in the removal proceedings in the honest belief that the cause assigned for displacing relator existed, the latter's remedy, if such cause did not exist, was under the civil service law, not by ignoring it and appealing to the courts in a mandamus or other proceeding. If such were not the case then, every time an appointing authority under the civil service law acts under the correlative power to discharge or remove, he would do so in peril of having to justify his action in judicial proceedings by showing satisfactorily to some court of general jurisdiction within his judicial district, that the cause assigned exists and is sufficient. Certainly the Legislature did not contemplate any such thing. Nothing of the sort is suggested, expressly, in the language of the law. Nothing of the sort is suggested by it inferentially. The legislative policy, evidenced by the enactment, is repellant to any such thing. To engraft upon it any such an incident by construction, would undermine the law by taking from it one of the most essential elements of the legislative plan, i. e., to give the appointing authority the largest practicable measure of discretionary power to act summarily, in all cases, respecting the incumbency of subordinate positions, with reasonable opportunity to correct mistakes upon the same being brought to attention in the manner specified; such course being supposed to be promotive of if not actually necessary, to, the best attainable performance of subordinate duties.

So, regardless of whether the assigned cause existed for the removal of the relator, his remedy was not that to which he resorted. The petition for the writ shows that the tax commissioner exercised the power of removal for cause, as the facts appeared to him, and that the relator instead of following the course open to him for having the mistake, if there were one, corrected, commenced a hostile judicial proceeding. As well may a defeated litigant in a trial court which has rendered judgment on a mistaken notion of the facts, instead of following the proper remedy for redress, commence an action against the judge to compel him to correct his mistake. Obviously, a complaint in such circumstances, would state no cause of action for relief within the competency of a court to grant. The same is true in this case. So the motion to quash the alternative writ should have been granted and the proceedings dismissed.

The order appealed from is reversed, and the cause remanded with directions to dismiss the proceedings with costs.

GRAVES v. RIB LAKE LUMBER CO.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. MASTER AND SERVANT (§ 278*)—DEATH OF MILLWRIGHT—EVIDENCE—SUFFICIENCY.

In an action against a lumber company for death of a sawmill employé, evidence held to warrant a finding that the accident resulted from the company's failure to provide a practical guard for a belt and pulley at which decedent was working when killed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954-972, 977; Dec. Dig. § 278.*]

2. EVIDENCE (§ 471*)—CONCLUSIONS OF WITNESSES.

A question asked a witness as to what was the practice among "reasonably careful" sawmill men as to the guarding of shafts and pulleys was properly excluded as involving the witness' conclusion as to who were "reasonably careful" mill men.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

3. WITNESSES (§ 269*)—CROSS-EXAMINATION.

Where, in an action for death of an employé in a sawmill accident, a witness for plaintiff testified as to whether it was practicable to guard the machinery at which the accident occurred without impairing its efficiency, it was not error to exclude a question, asked him on cross-examination, whether he knew of any mill in the state where similar machinery was guarded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*]

Appeal from Circuit Court, Eau Claire County; J. G. Wickham, Judge.

Action by Spencer E. Graves, administrator, against the Rib Lake Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action to recover for the death of one Farrington, an employé of the defendant in its sawmill, who was killed while at work in the mill. The negligence claimed was failure to comply with the statute requiring the guarding or fencing of a certain large belt and pulley, alleged to be dangerous to employes in the performance of their duties. The deceased was a millwright, and at the time of his death he, with two associates, was attempting to shift a large and heavy power belt from a live pulley to a dead pulley. The belt furnished the power to run a slab machine, called the "hog," and it was necessary to throw off this belt while in motion. The pulley and shaft on which it ran were elevated from the floor and were near the ceiling of the room. The pulley was 25 inches in diameter, and the belt 18 inches wide. In order to shift the pulley, an employé was obliged to go up a short ladder to a platform running parallel with and near the shaft, take a long stick and reach over the top of the belt near the pulley, insert the lower end of the stick behind a cleat, and pull the stick towards himself, thus pulling the belt also towards himself and onto the dead pulley. At the time of the accident Farrington took the stick

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(which was kept on the floor of the mill) and went up the ladder, while his two associates in the operation, Mock and Bangle, stayed on the floor of the mill to release a heavy tightener for the purpose of loosening the belt. While the two last named were lifting the tightener, they heard a noise and turned around. They found deceased upon the floor with a large gash in his right temple. He lived about half an hour, but never spoke. The stick was afterwards found in its place behind the cleat ready to pull the belt off. The jury returned the following special verdict: "(1) Was John Farrington injured by coming in contact with the belt, pulley, and shaft, or with any of said appliances? Answer: Yes. (2) If you answer question No. 1 'yes,' then with which of said appliances did he so come in contact? Answer: Belt and pulley. (3) If you answer question No. 1 'yes,' then was the said machinery with which the said John Farrington came in contact at the time of his injury so located as to be dangerous to employes of the defendant when in the discharge of their duty while using ordinary care? Answer: Yes. (4) If you answer question No. 3 'yes,' then was the failure of the defendant to securely guard or fence said machinery the proximate cause of the injury to said Farrington? Answer: Yes. (5) If you answer question No. 1 'yes,' then did the defendant fail to exercise ordinary care in failing to securely guard or fence said machinery? Answer: Yes. (6) If you answer question No. 5 'yes,' then was the failure of the defendant to exercise ordinary care the proximate cause of the injury to said Farrington? Answer: Yes. (7) Was it practical in the efficient operation of said mill to securely guard or fence said belt and pulley? Answer: Yes. (8) If you answer question No. 7 'yes,' then would such guard or fence have lessened the danger, if any, to the said Farrington in the performance of his duties? Answer: Yes. (9) Did any want of ordinary care on the part of said Farrington proximately contribute to his injury? Answer: No. (10) If the court should determine that the plaintiff is entitled to judgment on this verdict, at what sum do you assess plaintiff's damages? Answer: \$5,000." From judgment in accordance with the verdict, defendant appeals.

McFarland & Murat, of Stevens Point, for appellant. D. D. Conway, of Grand Rapids (P. H. Martin, of Green Bay, of counsel), for respondent.

WINSLOW, C. J. (after stating the facts as above). [1] The contention that the manner of Farrington's death rests purely in conjecture cannot be sustained; in fact, it seems that it would be impossible to arrive at any conclusion except that he came in con-

tact with the belt and pulley, as found by the jury. The contention that it is demonstrated by the evidence that it was not feasible or practically possible to fence or guard the belt and pulley is equally untenable. The device for shifting the belt was certainly crude and would necessitate a somewhat cumbersome fence; but the testimony was ample that a fence with an opening through which the arm could be put was entirely practicable and would have obviated the danger of any such accident.

[2] Two rulings on testimony are complained of and will be noticed. One Ehrman, a witness for defendant, was asked what the practice was among "reasonably careful" mill men as to the guarding of such a shaft and pulley, and objection to the question was sustained. The ruling was right. Conceding, but not deciding, that the question was otherwise unobjectionable, it was clearly incompetent, because it left the witness to decide what mill men were "reasonably careful" mill men, and this was not the proper province of the witness. The question (if proper at all) was what the practice was among sawmill men generally, or the great mass of sawmill men, with regard to the fencing of such belts and pulleys, and this question was allowed to be asked and answered by the witness at a later period in his examination.

[3] A witness for the plaintiff was asked on direct examination whether it was practical to guard such a shaft and belt without impairing its efficiency, and was not examined on any other subject. Upon cross-examination he was asked whether he knew of any mill in Wisconsin where a similar shaft and pulley was guarded, and an objection to the question as not proper cross-examination was sustained. This ruling is assigned as error; but, though somewhat technical in its enforcement of the general rule which limits cross-examination to matters gone into on the direct examination, it seems to be strictly correct. No other contentions require treatment.

Judgment affirmed.

FALBE et al. v. CAVES.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. EXECUTION (§ 293*)—SALE—REDEMPTION—RIGHT TO REDEM—EVIDENCE.

Where a purchaser at an execution sale sought to defeat the right to redeem on the ground that the person seeking to redeem was not the mortgagee of the owner because the owner had previously conveyed the premises to defraud his creditors, but there was no proof that the alleged fraudulent deed was delivered, and the findings in a suit to set aside the deed expressly stated that the deed was never delivered, the purchaser did not establish facts showing a want of right to redeem.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 835-844; Dec. Dig. § 293.*]

2. MORTGAGES (§ 33*)—DEEDS ABSOLUTE IN FORM—AGREEMENTS TO RECONVEY—EFFECT.

Where a grantor conveyed his premises by deed absolute in form to secure the payment of money previously advanced by the grantee to him, and money advanced at the time of the execution of the deed, and the grantee gave the grantor a contract whereby he agreed to reconvey on payment of the debt, the transaction established the relation of mortgagor and mortgagee.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 67-82; Dec. Dig. § 33.*]

3. EXECUTION (§ 293*)—SALE—REDEMPTION—PARTIES ENTITLED TO REDEEM.

Under St. 1898, § 3007, giving to judgment and mortgage creditors the right to redeem from execution sale against the debtor within a specified time, the right to redeem is not limited to judgment and mortgage creditors at the time of sale, but extends to judgment and mortgage creditors becoming such after the sale and within the time to redeem.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 835-844; Dec. Dig. § 293.*]

4. EXECUTION (§ 300*)—SALE—REDEMPTION—WAIVER.

A purchaser at an execution sale who denies the right of another to redeem on the ground that the time for redemption has expired thereby waives any informality in the papers showing the right to redeem.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 878-882; Dec. Dig. § 300.*]

5. EXECUTION (§ 300*)—SALE—REDEMPTION—STATUTORY PROVISIONS.

St. 1898, § 3015, subd. 4, providing that within three days after making redemption the creditor shall file such evidence of his right in the office of the register of deeds, is not intended for the benefit of the purchaser at an execution sale, but for the protection of third persons who may desire to acquire title and to secure an interest in the premises sold, and one making a valid redemption is not defeated by his failure to comply with the statute.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 878-882; Dec. Dig. § 300.*]

6. COSTS (§ 13*)—EQUITABLE ACTIONS—DISCRETION OF COURT.

Where a defendant in an equitable action did not challenge the form of the action by demurrer or answer, but interposed an equitable counterclaim and asked for equitable relief, and the case was tried as an equity action, he could not complain that costs were awarded against him, on the ground that it was unnecessary to bring a suit in equity to obtain the desired relief.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 21, 25; Dec. Dig. § 13.*]

Appeal from Circuit Court, Marquette County; A. H. Reid, Judge.

Action by August Falbe and another against Joseph O. Caves and another. From a judgment for plaintiffs, defendant named appeals. Affirmed.

The plaintiff Blader claims that on and after June 5, 1903, he was the owner of an undivided one-half interest in certain real estate; that his interest therein was sold by a judgment creditor on an execution sale on October 18, 1904; that before the expiration of one year from the date of said sale he conveyed his interest to his coplaintiff Falbe

as security for a loan, and that thereafter the relation of mortgagor and mortgagee existed between the plaintiffs; that, within the 15 months in which Falbe might redeem the premises from the execution sale, he tendered to the defendant J. O. Caves, who was the purchaser at such sale, the amount necessary to redeem and at the same time offered to submit proofs showing that he was a mortgage creditor and entitled to redeem; that such tender was refused, and that thereupon Falbe deposited the amount thereof in a bank and notified the defendant Caves that the money was on deposit and subject to his order, but that Caves refused to receive the same. Among other relief the plaintiffs prayed that the sheriff of Marquette county be adjudged to issue a certificate of redemption to the plaintiff Falbe, and that the defendant Caves be adjudged to release to such plaintiff, by the execution and delivery of a proper deed, an undivided one-half interest in and to the premises in suit on payment of the amount which defendant was entitled to receive. Among other things, the answer denied that Blader owned any interest in the premises when the conveyance was made to Falbe, denied that Falbe was in fact a mortgage creditor, or that he became such within one year from the date of the sale on execution, denied that any legal tender was made to the defendant, and generally put in issue the material allegations of the complaint. The court found all of the disputed issues in favor of the plaintiffs. It was contended on the trial that Falbe did not make a good redemption because he failed to present to Caves at the time of the tender the proofs required by section 3015, Stats. (1898), to show that he was a mortgage creditor and entitled to make the redemption. In reference to this contention the circuit court found that Caves made no objection to the effect that Falbe had not presented sufficient proof of his interest as a mortgage creditor, or that he had failed in any way to comply with the requirements of the law in respect thereto, but that he objected to the right of said plaintiff to redeem solely on the ground that the time limited therefor had expired, making no other objection and raising no other question, and declining to look at or read the proofs furnished as to the relationship between the plaintiffs, thereby inducing Falbe to believe that no question was raised as to the sufficiency of the proof of such relationship. The court further found that the defendant Caves waived any defects there might be in the proof offered to show that the plaintiff Falbe was a mortgage creditor, and estopped himself from claiming that the proofs which Falbe had with him to show that fact are or were faulty or defective. From a judgment in plaintiffs' favor the defendant appeals.

D. W. McNamara, of Montello, for appellant. Daniel H. Grady, of Portage, for respondents.

BARNES, J. (after stating the facts as above). This appeal involves the following questions: (1) On October 18, 1904, was the plaintiff Blader the owner of an undivided one-half interest in the property involved in this suit, and thereafter until he conveyed to his coplaintiff Falbe, subject to the lien of the certificate of sale on execution which had been issued to the defendant Caves? (2) Did the plaintiff Falbe become a mortgagee of the premises? (3) If so, did he become such mortgagee in time to entitle him to redeem the premises from the execution sale within 15 months from the date thereof under the provisions of section 3007, Stats.? (4) Did Falbe in fact redeem said premises from said sale?

[1] 1. The appellant insists that the plaintiff Blader conveyed the premises in suit to his brother on March 4, 1903, for the purpose of defrauding his creditors; that such deed was declared to be in fraud of creditors in a suit brought by the Dowagiac Manufacturing Company to set the sale aside; that, although said deed was set aside in form, it was good between the parties thereto and as to all persons except creditors, and that Blader had no right, title, or interest to convey when he executed the deed to his coplaintiff Falbe on October 18, 1905. Counsel's position is that the judgment declaring the conveyance to be fraudulent did not operate to transfer back to the plaintiff Blader any title which he had conveyed away, and a large portion of his brief is devoted to a discussion of this proposition, and to the citation of authorities sustaining the arguments advanced. The question is not in the case. No proof was offered either showing, or tending to show, that Blader ever conveyed the land to his brother, or that any action was brought to set such conveyance aside. The appellant in his answer alleged that such a deed was given, and set forth the pleadings in the action brought to set the same aside and the findings and judgment of the court. However, the judgment roll in the case was not offered on the trial, and neither was any other evidence offered that we are able to find which established the fact that a conveyance was made. Apparently the defendant lost nothing by failure to make this proof. The findings of the court set up in the answer expressly find that the deed in question was never delivered. If there was no delivery, it follows as a matter of course that Blader did not part with his title. So in the first place it is apparent that the appellant failed to sustain by any proof the allegations of the answer referred to, and, in the next place, that, if proof had been made by offering the judgment roll in the action referred to, the ap-

pellant would be no better off than he was in the situation in which the case was left.

[2] 2. The proof showed quite satisfactorily that on the 18th of October, 1905, the plaintiff Blader conveyed to his coplaintiff Falbe the premises in question by warranty deed, that such deed though absolute in form was a mortgage in fact, and that it was given to secure the payment of money theretofore advanced by Falbe to Blader, as well as money advanced at the time the deed was made, and that Falbe gave Blader a land contract back, by the terms of which he agreed to reconvey the lands to Blader on payment of the amount of money which Blader owed him. There is no doubt under the authorities in this state that this transaction established the relation of mortgagor and mortgagee between the plaintiffs, and that Blader was a mortgagee within the meaning of section 3007, Stats., and might redeem from the execution sale, provided he took his conveyance soon enough to entitle him to redeem. *Rogan v. Walker*, 1 Wis. 527; *Orton v. Knab*, 3 Wis. 576; *Plato v. Roe*, 14 Wis. 453.

[3] 3. Counsel for appellant contend that the rights extended by section 3007 to judgment and mortgage creditors apply only to persons who were such creditors at the time of the sale on execution, and, furthermore, that in any event Falbe did not become a creditor until the expiration of the period within which Blader might redeem, and that the statute has no application to such persons as become judgment or mortgage creditors after the expiration of the one year period. Section 3007, Stats., reads as follows: "Any creditor of the person against whom such execution issued having, in his own name, or as assignee, representative, trustee, or otherwise, a judgment rendered or a mortgage duly recorded, at any time before the expiration of fifteen months from the time of such sale and which shall be a lien and charge upon the premises sold, by paying the sum of money which was paid on the sale of such premises, together with interest thereon at the rate of ten per cent. a year from the time of such sale, shall thereby acquire all the rights of the original purchaser, subject to be defeated in the manner hereinafter mentioned." We perceive no reason for limiting the application of this statute to such persons as were judgment or mortgage creditors at the time the execution sale was made. There is nothing contained in it which indicates that the Legislature had any intention that it should be so limited. Any judgment or mortgage creditor of the person against whom the execution is issued has the right at any time before the expiration of fifteen months from the time of sale to pay to the purchaser at the sale the amount for which the land was sold, with interest, and he thereby acquires all the rights of the original purchaser. We can-

not read into this statute any limitation which would bar judgment and mortgage creditors who became such after the sale was made. The cases hold that this should not be done. *Prescott v. Everts*, 4 Wis. 814; *Martin v. Judd*, 60 Ill. 78; *Densmore v. Tomer*, 14 Neb. 392, 15 N. W. 734; *Piereson v. Hickey*, 16 S. D. 46, 91 N. W. 339; *Mandeville v. Avery*, 124 N. Y. 376, 28 N. E. 951, 21 Am. St. Rep. 678. Of course, when we speak of judgment and mortgage creditors, we refer to those creditors whose mortgages or judgments are in fact a lien upon the land sold on execution. If Falbe did not become a mortgage creditor until after the expiration of the year in which the debtor Blader might redeem, a different question might arise. No such question is involved in the case, however, because the proof is quite satisfactory that Falbe became a mortgagee within the year, and the court so finds. What the respective rights of the parties might be had the year elapsed before Falbe became a mortgagee we need not determine, and we do not determine.

[4] 4. We are satisfied that there was a valid redemption made in this case. In arriving at this conclusion, we do not attach any significance to the fact that the necessary amount of money to redeem seems to have been paid to the sheriff at one time, because the money was refunded by the sheriff. The proof is undisputed that Falbe, within the time in which he was entitled to redeem, if he was in fact a mortgage creditor, secured the necessary amount of money to make a redemption of the lands from the execution sale, to wit, the sum of \$1,068.75, that he made a legal tender of such amount to the defendant, and at the same time had with him a certified copy of his deed and of the land contract which he had given back to his coplaintiff, and an affidavit presumably made with the intention of complying with the requirements of section 3015, Stats., although the affidavit was not produced on the trial and neither were its contents disclosed; that the papers were exhibited to the defendant, and that he refused to accept the money or to look at the papers, because, he said, the time within which the redemption might be made had expired; that, immediately thereafter, the plaintiff Falbe deposited said money in the bank at the village of Westfield, and notified the defendant Caves of such deposit, and that the money was subject to his order. This tender was kept good up to the time of the trial.

The only weakness about the plaintiffs' case with reference to the matter of tender arises out of the fact that there was no proof showing that the defendant was informed that Falbe claimed to be a mortgage creditor, and the proof is also silent as to whether or not the affidavit which Falbe had in his possession, and which was drawn by a

lawyer, complied with the requirements of section 3015, Stats. But the plaintiff did not reject the tender because of any defect or of any insufficiency of the proofs which Falbe had in his possession. He took the ground that the offer came too late, and refused to either count the money or look at any of the papers which Falbe had in his possession and which he offered to exhibit to the defendant. He testified: "I was denying the right to redeem to him simply on the ground that I thought the time had expired. I was not denying it because he had not proven to me that he was not the mortgagee of Mr. Blader." By this conduct defendant waived the right to complain of any informality there might have been as to the papers which Falbe had with him, if it be conceded that such informality existed. *Sexton v. Rhames*, 13 Wis. 99, 101; *Badgley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256, 259; *Bank of Vergennes v. Warren*, 7 Hill (N. Y.) 91, 93. If defendant had rejected the tender because the proofs were insufficient in any respect, there was ample time within which the plaintiff Falbe might supply the defects in his proofs, and still renew his tender before the period of redemption expired.

[5] It is also urged that there was no redemption in this case because the following requirement found in subdivision 4 of section 3015, Stats., was not complied with: "Within three days after making such redemption or purchase such creditor shall file such evidences of his right in the office of the register of deeds of the county where the original certificate of sale is filed." We do not think that the failure to comply with this provision of the statute defeated redemption. There either was or was not a good redemption at the time the tender was made. If there was, it was not defeated by the failure of Falbe to make the required filing. This does not appear to be a provision of law intended for the benefit of the purchaser at the execution sale, but rather one that is made for the protection of third persons who might desire to acquire title to or secure an interest in the premises sold. *Chautauqua Bank v. Risley*, 4 Denio (N. Y.) 480, 484.

[6] It is argued that the court erred in awarding costs against the defendant Caves, because it was wholly unnecessary to bring a suit in equity to obtain the desired relief. However that may be, the equitable action was brought, no challenge was made, by either demurrer or answer, to the form of the action, the defendant interposed an equitable counterclaim and asked for equitable relief, the case was tried before the court as an equity action, and we are unable to see wherein the court abused its discretion or otherwise violated the law in awarding costs. Judgment affirmed.

KIMBALL v. UNIVERSAL CRUSHED STONE CO.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

MASTER AND SERVANT (§ 129*)—INJURIES—PROXIMATE CAUSE.

Plaintiff was injured while working in defendant's engine room by a large wheel, which had been detached and set up on its rim, falling upon him. Plaintiff claimed that the room was not well lighted, and that the floor was not level and the face of the wheel was convex, and that the accident was caused by defendant's failure to warn him of the condition of the floor and wheel, and of the consequent danger of the wheel falling upon him. *Held*, that the accident could not have resulted from the causes contended by plaintiff, so that they could not have been the proximate cause of his injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257-263; Dec. Dig. § 129.*]

Appeal from Circuit Court, Racine County; E. B. Belden, Judge.

Action by C. F. Kimball against the Universal Crushed Stone Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

On March 9, 1910, plaintiff was employed as a laborer by the defendant company. A large steam engine which stood upon a cement foundation in the engine room of defendant's plant was being dismantled, and plaintiff was instructed by the superintendent to go to the engine room and assist the other workmen there. A wheel weighing from five to seven tons, which had been detached from the engine and placed in an upright position preparatory to being rolled along the cement floor to an adjoining room, overbalanced and fell upon the plaintiff. This action is brought to recover damages for personal injuries sustained, the complaint alleging that the surface of the cement floor was uneven, and that the face of the wheel was oval, but that, owing to the insufficiency of the lighting in the room, these facts were not discernible to plaintiff; that plaintiff's assistants in the work were unskilled and ignorant, and were unfamiliar with the kind of work to be done, and that plaintiff was without experience in such work and unfamiliar with the proper method of doing it; that sufficient appliances were not furnished, and that no directions or instructions were given to plaintiff, and that he was not warned of the dangers incident to the work. The answer was a general denial of the allegations of the complaint. At the close of the testimony, the defendant's motion for a nonsuit was granted, and judgment entered accordingly. Plaintiff appeals.

Wallace Ingalls, of Racine, for appellant. Simmons & Walker, of Racine, for respondent.

BARNES, J. (after stating the facts as above). The appellant insists that there was

evidence tending to show (1) that the room was not well lighted; (2) that the cement floor was not level; (3) that the face of the wheel was convex; (4) that an insufficient force of men was provided to do the work; (5) that the plaintiff's regular and usual place of employment was in another building; and (6) that plaintiff did not know of the unevenness of the floor or of the convexity of the face of the wheel. From these facts appellant argues that the jury might have found that the defendant either knew, or ought to have known, of the condition of the wheel and the floor, and was negligent in failing to warn the plaintiff of the danger of the wheel toppling over because of these conditions, and, furthermore, that it might have acquitted the plaintiff of contributory negligence and of assumption of risk. The wheel was 90 inches in diameter, and its face was 13 inches in width. The hub and the rim were connected by eight spokes. After the wheel had been removed from the shaft to which it had been attached, it stood on the floor in an upright position in close proximity to an abutment. It was necessary to move it from the place where it stood in order to roll it along the floor to the opening through which it was to be removed from the room. The workmen "cut" or gouged the wheel back and forth for some time until it was moved out a couple of feet from the abutment, and far enough therefrom so that it could be rolled along on the floor. During the "cutting" process, the plaintiff stood on the abutment, assisting in the work. When the parties were ready to begin rolling the wheel, plaintiff turned his back thereto to step down from the abutment, and before he got out of the way of the wheel it fell over in his direction and injured him. None of the employees who were about the wheel at the time of the accident, aside from the plaintiff, testified in the case.

It is undisputed that the convexity of the wheel was one-eighth of an inch. Stated in another way, the center line of the face of the wheel projected one-eighth of an inch beyond its outer edges. The wheel in question had been used for driving a belt, and the evidence showed that such wheels are slightly crowned toward the middle of the face, and that there was nothing unusual about the construction of this one. It may well be doubted whether there is any evidence tending to show that the concrete floor was not level, but we will assume the fact to be that it sloped one-eighth of an inch to the foot at the place where the wheel stood when it fell over. This is the most that plaintiff claims. The plaintiff testified that, when he let go of the wheel to step down from the abutment, he was not conscious of exerting any force upon it to hold it in an upright position, and that it was not inclining in his direction so as to require any strength on

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Key's Indexes

his part to hold it in position, but that it stood perfectly straight. It is obvious that not to exceed $6\frac{1}{2}$ inches of the face of the wheel could rest upon the floor, and that in this distance the inclination of the floor was substantially one-sixteenth of an inch. It seems apparent that the accident could not have resulted from the causes which plaintiff assigns, and that there was no causal connection between the failure to warn and the accident, and therefore no negligence in not warning. The law of gravity is immutable, and we think it is impossible that the unevenness of the floor, coupled with the convexity of the wheel, should so disturb the center of gravity as to cause the wheel to topple over, when considered in connection with the slight momentum which the wheel would have in moving to one side about three-sixteenths of an inch. The court was therefore right in not submitting the case to the jury. *Groth v. Thomann*, 110 Wis. 488, 495, 86 N. W. 178; *Vorbrich v. Geuder & Paeschke Mfg. Co.*, 96 Wis. 277, 71 N. W. 434; *Badger v. Janesville Cotton Mills*, 95 Wis. 599, 603, 70 N. W. 687; *Lee v. Railway Company*, 101 Wis. 352, 77 N. W. 714; *Wunderlich v. Ins. Co.*, 104 Wis. 382, 80 N. W. 467; *Kroger v. Cumberland Fruit Package Co.*, 145 Wis. 433, 130 N. W. 513, 35 L. R. A. (N. S.) 473; *Flaherty v. Harrison*, 98 Wis. 559, 74 N. W. 360.

If an insufficient number of men were employed, that fact was as apparent to the plaintiff as it was to the defendant, and, in any event, there was no evidence tending to show that the failure to furnish additional help had anything to do with the accident. There is an additional reason why the plaintiff cannot recover in this case, but it is unnecessary to discuss it.

Judgment affirmed.

HAMMOND v. CAPITOL CITY MUT. FIRE INS. CO.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. EVIDENCE (§ 460*)—PAROL EVIDENCE—WRITTEN CONTRACT—INSURANCE POLICY.

A partnership engaged in the hotel business obtained a policy insuring \$700 on "household goods" located in a described building occupied by assured as a hotel and saloon. The rider attached to the policy covered household furniture and utensils, family wearing apparel, stores, etc. Held, that the policy was ambiguous as to whether there was an intent to insure, not only property of the partnership, but also of the individual members, and that parol evidence was therefore admissible to show a conference between one of the members of the firm and defendant's agent prior to the issuance of the policy in which the different ownerships of property contained in the hotel were disclosed, and that it was agreed that the policy be written to cover the individual as well as the partnership property.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115-2128; Dec. Dig. § 460.*]

2. EVIDENCE (§ 452*)—PAROL EVIDENCE—LATENT AMBIGUITY.

Where a latent ambiguity appears on applying a written instrument to the subject-matter, parol evidence of the facts and circumstances surrounding its execution may be received to solve the same, such testimony not being objectionable as contradicting, varying, adding to, or taking from the writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2093-2101; Dec. Dig. § 452.*]

Appeal from Circuit Court, Marquette County; C. A. Fowler, Judge.

Action by Philo Hammond against the Capitol City Mutual Fire Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Action upon a fire insurance policy. It appears that the defendant company some time in October or about the 1st of November, 1909, took over the business of another insurance company known as the Poynette Mutual Fire Insurance Company, and issued new policies to its members. About November 1, 1909, it delivered to plaintiff a Wisconsin standard form policy, reciting that defendant "in consideration of the stipulations herein named and \$4.38 premium does insure Hammond Bros., of Westfield, Wisconsin, from the first day of November, 1909, at noon, to the 20th day of July, 1911, at noon, against all direct loss or damage by fire and lightning, except as hereinafter provided, to an amount not exceeding \$700 to the following described property while located and contained as described herein and not elsewhere, to wit: \$700 on household goods as per form attached, all while contained in the two story composition and gravel, cement block building situated on lot 1, block 'C' in the village of Westfield, Wisconsin, occupied by assured as a hotel and saloon." The rider attached was as follows: "On household furniture and utensils, useful and ornamental, including beds, bedding, linen, family wearing apparel and materials for same, plate, plated ware, printed books and music, musical instruments (excepting pianos and organs), mirrors, portraits, pictures, paintings, engravings and their frames (no picture, painting nor engraving to be valued at more than cost), watches and jewelry in use, fishing tackle, fire arms, sewing machines, trunks, umbrellas, fuel, family stores and supplies, all while contained in the above described building." This policy was issued upon an application presented to the Poynette Mutual Fire Insurance Company in which the words printed thereon, to wit, "household goods, piano or organ," were stricken out by crosses made with a pen and the words "hotel furn. & fix." inserted by pen in place thereof. In the rider attached to the Poynette policy describing the property, the word "household" was stricken out by a pen line drawn through the same, and the word "hotel" writ-

ten in place thereof, so that it read: "\$700.00 on hotel furniture and utensils," etc.

The complaint alleged that the defendant, by virtue of the terms and conditions of the policy described, insured the property of the plaintiff, which was destroyed, with other property belonging to the plaintiff and his coinsured, Zera Hammond, in addition to the joint property of the said plaintiff and the said Zera Hammond, so that the policy covered the individual property of the plaintiff, the individual property of his brother, Zera Hammond, and the partnership property of Hammond Bros. It further alleged that the defendant previous to the issuance of the policy was informed of the separate ownership of the property contained in the building described, and that it was specifically agreed between defendant and plaintiff and Hammond Bros. and Zera Hammond that the policy of insurance should cover the individual property of each of the partners as well as the partnership property, and that it was further distinctly understood and agreed by and between the plaintiff herein and said Zera Hammond and said copartnership of Hammond Bros. that all of said property in said hotel building so described, referred to in said policy, and covered thereby should be described and insured as the property of Hammond Bros.

The answer denied any liability to the plaintiff upon any cause of action, and alleged that the defendant on or about November 1, 1909, issued and delivered its policy of insurance to Hammond Bros., wherein and whereby it did insure the property of Hammond Bros. only, and it specifically denied that said policy by its terms covered any individual property belonging to the plaintiff or his copartner. It further alleged that the policy was executed and received by said Hammond Bros. on or about the day of its issue, and retained by said Hammond Bros., without any objection being raised by them or either of the individuals that composed the firm of Hammond Bros.

The jury by a special verdict found (1) that Johnson (the agent of defendant) and Philo Hammond had a conversation prior to the delivery of the policy in suit relative to insurance with the defendant company; (2) that it was agreed at said time that a policy would be taken in the defendant company; (3) that Johnson and Philo Hammond both intended and understood at said time that the partnership property of Hammond Bros., and the individual property of each partner situated in the building was all to be insured by said policy; (4) that Johnson knew at said time that part of the property in the building intended to be insured belonged to the partnership of Hammond Bros., and part to the partners individually; and (5) that the actual value of the property destroyed by fire was \$400.

On such verdict the court entered judg-

ment in favor of the plaintiff, from which the defendant appealed.

Richmond, Jackman & Swansen, of Madison, for appellant. D. W. McNamara and Anna B. Hull, both of Montello, for respondent.

VINJE, J. (after stating the facts as above). [1] The principal error assigned is that the plaintiff was allowed, against objection by defendant, to testify as to the substance of conversations had between himself and defendant's agent, Johnson, previous to the issuance of the policy, wherein the different ownerships of the property contained in the hotel building was claimed to have been disclosed to Johnson, and the property pointed out to him, and wherein, plaintiff testified, it was expressly agreed that the policy to be written should cover his individual property, the individual property of his brother Zera Hammond, and the partnership property. The policy insured Hammond Bros. It appeared that in the building described in the policy the plaintiff and his brother, Zera Hammond, carried on a partnership business known as Hammond Bros., and had partnership property therein, that plaintiff and his brother each also had individual property therein; and the question arises, What is the meaning of the term "Hammond Bros.," as used in the policy? Is it descriptive of the brothers Zera and Philo Hammond, or is it used to designate the partnership? If the latter, then it would exclude individual property. If the former, it would include individual as well as partnership property. *Castner v. Farmers' Insurance Co.*, 46 Mich. 17, 8 N. W. 554; *Foster v. U. S. Ins. Co.*, 11 Pick. (Mass.) 85; *Lenagh v. Commercial Union Assur. Co.*, 77 Neb. 649, 110 N. W. 740; *Peck v. New London Ins. Co.*, 22 Conn. 575. See, also, *Siemers v. Meeme Mutual H. P. Ins. Co.*, 143 Wis. 114, 126 N. W. 669, 139 Am. St. Rep. 1083, and cases cited. The ambiguity in the term became apparent when by extrinsic evidence it was made to appear that the building in which the insured property was located contained property owned individually and also property owned by the partnership. Such ambiguity was emphasized by the term "household" furniture used in the policy in question, instead of the term "hotel" furniture used in the superseded policy, and also by the terms, "family wearing apparel," "family stores and supplies," "watches," "jewelry," etc., presumably not owned by a partnership in the hotel and saloon business. So it appears that the trial court was correct in holding that upon the facts disclosed there was a latent ambiguity in the contract of insurance, viz., Whose property was insured under the term Hammond Bros.? To solve such ambiguity, he permitted plaintiff to testify to what was said upon that subject by the par-

ties at the time the contract was entered into, for the purpose of ascertaining in what sense they used the term Hammond Bros., whether as descriptive of the persons Zera and Philo Hammond or as designating the partnership. Was the reception of such testimony error? The rule is elementary that parol testimony is not admissible to contradict, vary, add to, or take from, the terms of a valid written instrument. 1 Greenl. Ev. (15th Ed.) § 275; Tayl. Ev. (10th Ed.) § 1132; Jones, Ev. § 434.

[2] But when, upon applying the writing to the subject-matter to which it relates, a latent ambiguity appears therein, then parol testimony of the facts and circumstances surrounding its execution may be received to solve the ambiguity. Jones, Ev. § 453. Such testimony neither contradicts, varies, adds to, nor takes away from the writing. It merely aids in determining the true meaning thereof. Boden v. Maher, 105 Wis. 539, 81 N. W. 661; Klueter v. Joseph Schlitz Brewing Co., 143 Wis. 347, 128 N. W. 43, 32 L. R. A. (N. S.) 383. The meaning so arrived at must not be inconsistent with the language of the writing, but it may limit such language to a particular meaning which is included therein, and exclude another meaning which the language may also bear. The office of such testimony is, within the meaning of the terms employed in the writing, to render certain that which is uncertain, and to determine just what in fact the writing was intended to express. Boden v. Maher, 105 Wis. 539, 81 N. W. 661. That such ambiguity may be solved by parol proof of extrinsic facts and circumstances surrounding the execution of the writing is the general doctrine announced by text-writers and courts alike. 1 Greenl. Ev. (15th Ed.) § 297; Jones, Ev. § 453. That parol proof of conversations or negotiations had between the parties at the time of the execution of the writing which serves to construe a latent ambiguity therein is also admissible is established by both early and late decisions of our court. Ganson v. Madigan, 15 Wis. 144, 82 Am. Dec. 659; Becker v. Holm, 89 Wis. 86, 61 N. W. 307; Rib River L. Co. v. Ogilvie, 113 Wis. 482, 89 N. W. 483; Burton v. Douglass, 141 Wis. 110, 123 N. W. 631, 18 Ann. Cas. 734; Klueter v. Joseph Schlitz Brewing Co., 143 Wis. 347, 128 N. W. 43, 32 L. R. A. (N. S.) 383; Pedelty v. Wisconsin Zinc Co., 148 Wis. 245, 134 N. W. 356. True, a number of cases may be found in which language to the contrary is used in the opinions, and also a few cases in which a decision has been made not in harmony with the rule here announced. But no good ground is perceived why parol proof of such conversations or negotiations is not admissible to solve a latent ambiguity in a writing, thus enabling the court to determine upon what precise subject-matter the minds of the parties met. Nothing in the

writing is thereby contradicted, nothing subtracted, and nothing added. The meaning read out of the writing in the light of such parol proof must be included therein; that is, the language used must be susceptible of the construction which the parol testimony tends to support. The conversations or negotiations are resorted to merely for the purpose of ascertaining the actual meaning ascribed to the ambiguous term by the parties themselves when the writing was executed. Such conversations or negotiations, therefore, become in a sense characterizing circumstances surrounding the execution of the writing, as expressed in Klueter v. Joseph Schlitz Brewing Co., 143 Wis. 347, 128 N. W. 43, 32 L. R. A. (N. S.) 383, and Pedelty v. Wisconsin Zinc Co., 148 Wis. 245, 134 N. W. 356, and serve to show what the writing meant when it was made and what it now in fact means, as expressed in Burton v. Douglass, 141 Wis. 110, 123 N. W. 631, 18 Ann. Cas. 734. So we conclude there was no error in the reception of the testimony to which objection was made.

It is urged that, since the policy was retained by plaintiff for a period of more than 14 months without making any objection to the term describing the assured, the written contract is conclusively presumed to represent the actual agreement. Both the trial court and this court have so treated the policy. It is held to represent the actual contract made, and in order to determine what that contract was and is, as written, the testimony which aided in rendering certain the meaning of the term "Hammond Bros." was received.

Error is also assigned because the evidence does not support the first finding of the jury, and because the court refused to set aside findings 2, 3, and 4. A careful examination and consideration of the evidence does not convince us that the assignment of error is well taken.

Judgment affirmed.

McMILLAN v. BARBER ASPHALT PAVING CO.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. JUDGMENT (§ 675*)—PARTIES CONCLUDED —PERSONS PARTICIPATING IN DEFENSE.

Where in a suit by a taxpayer, on his own behalf and on behalf of others similarly situated, against a city to enjoin the execution by it of a contract for street paving, the attorney for the contractor appeared and participated in the defense in the trial court and on appeal, and such attorney was under a general retainer from the contractor, and made no charge against the city, and the contractor paid his expenses, the judgment adjudging the invalidity of the contract was binding on the contractor, though not made a party to the suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1190, 1191, 1194; Dec. Dig. § 675.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. MUNICIPAL CORPORATIONS (§ 513*) — STREET IMPROVEMENT BONDS—INVALIDITY—REMEDY OF TAXPAYER—ALTERNATIVE RELIEF.

Where a special improvement bond issued pursuant to St. 1898, §§ 925—190, 925—192, 925—193, was issued to a contractor in an illegal contract and the contractor sold the bond to an innocent purchaser, the owner of the property against which the bond was issued was entitled, in a suit to cancel the bond as illegally issued, to a money judgment against the contractor, since, where a suit in equity is brought in good faith, and, by reason of acts of defendant or the intervention of the rights of innocent third persons, the equitable remedy due plaintiff cannot be given, the court will decree money compensation in lieu of the equitable remedy.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1188—1193, 1195—1206; Dec. Dig. § 513.*]

3. JUDGMENT (§ 663*)—CONCLUSIVENESS—EFFECT OF APPEAL.

Where a taxpayer, in his own behalf and in behalf of others similarly situated, brought suit against a city to enjoin it from letting a contract for street paving, the fact that the trial court erroneously decided that the contract could be legally entered into did not protect the contractor, who entered into the contract and performed the work pending an appeal to the Supreme Court, which held the contract illegal.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1174; Dec. Dig. § 663.*]

4. MUNICIPAL CORPORATIONS (§ 350*)—CONTRACTS FOR PUBLIC IMPROVEMENTS—ILLEGALITY—RATIFICATION.

The illegality inherent in a contract by a city for a street improvement arising from the fact that the contractor bought off the opposition of an alderman to the contract continues, notwithstanding the resignation of the alderman and the subsequent execution of the written evidence of the contract by the remaining city officials, since it was not a case of the relation of principal and agent existing between the city and such alderman, so as to permit the city to ratify an illegal contract, but the city could not condone the illegality.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 879, 880, 882; Dec. Dig. § 350.*]

5. MUNICIPAL CORPORATIONS (§ 350*)—CONTRACTS FOR PUBLIC IMPROVEMENTS—ILLEGALITY—RATIFICATION.

The illegality of a street-paving contract arising from the fact that the contractor bought off the opposition of an alderman to the contract by a concession to him and third persons of a reduction of a specified sum per thousand on paving brick which the contractor was selling is unaffected by the fact that the contractor, when it made the concession, did not know that the alderman had a private pecuniary interest in obtaining it, but the contract is avoided by the fact that the officer agreed to and withdrew his opposition in consideration of a concession of pecuniary value made to him and others, and that he availed himself of such concession to his own private pecuniary advantage.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 879, 880, 882; Dec. Dig. § 350.*]

6. MUNICIPAL CORPORATIONS (§ 350*) — STREET IMPROVEMENT CONTRACTS—ILLEGALITY—RIGHTS OF TAXPAYERS—EQUITY.

Where a taxpayer sued a city to enjoin it from letting a street paving contract, but pending an appeal from an adverse decision

the contract was executed and the work performed, and on the appeal it was adjudged that the contract was illegal, the contractor was a wrongdoer, and equity would not recognize his right to compensation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 879, 880, 882; Dec. Dig. § 350.*]

7. MUNICIPAL CORPORATIONS (§ 514*)—PUBLIC IMPROVEMENTS—REASSESSMENT—STATUTORY PROVISIONS—APPLICABILITY.

The reassessment statutes (St. 1898, § 1210d, as amended by Laws 1901, cc. 9, 19, and Laws 1903, c. 276, and Laws 1905, c. 501), authorizing reassessment of special assessments in the event of the invalidity of any special assessment, do not apply to a case where improvement work was done pending a suit by a taxpayer to enjoin the execution by the city of a contract for the work, and where on appeal it was adjudged that the contract was illegal.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1207—1215; Dec. Dig. § 514.*]

8. INJUNCTION (§ 211*)—RESTRAINING ILLEGAL CONTRACTS—OPERATION AND EFFECT.

Where a court declares a contract illegal and enjoins its execution, no rights against the party in whose favor the judgment is made can be founded on an execution of the contract, unless the parties before or after take such steps as are equivalent to the making of a new contract on a new and lawful consideration.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 434; Dec. Dig. § 211.*]

9. EQUITY (§ 63*)—RELIEF IN PERSONAM OR IN REM.

The rule that decrees in equity are enforced only in personam has given way to the paramount rule that equity may in all cases so frame its decrees as to make them effective to do equity, and the forms of equitable relief are as various as the transactions regulated in equity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 184; Dec. Dig. § 63.*]

Appeal from Circuit Court, Fond du Lac County; Chester A. Fowler, Judge.

Action by C. V. McMillan against the Barber Asphalt Paving Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank M. Hoyt, of Milwaukee, for appellant. H. E. Swett, of Fond du Lac, for respondent.

TIMLIN, J. [1] In *McMillan v. Fond du Lac*, 189 Wis. 367, 120 N. W. 240, the city of Fond du Lac was enjoined from entering into the paving contract in question because the Barber Asphalt Paving Company had bought off the opposition of an alderman named Dockery to such contract by a concession to him and others of a reduction of \$6 per thousand upon paving brick which that company was selling. When the former case was begun, the contract was executory, a preliminary injunction restraining its execution was obtained, but vacated on motion of the city, and the circuit judge refused to continue it pending the appeal to this court. While that appeal was pending, the contract in

question was executed by the city and the Paving Company, and the pavement therein provided for was laid. After the decision of this court on March 9, 1909, although the contract had been then executed, judgment in the circuit court was entered enjoining the execution of that contract, thus relating back to the time of the commencement of that action, and giving the plaintiff McMillan the benefit of his temporary injunction which the circuit court had wrongfully refused to continue pending the appeal. The present defendant was not a party to the former action, but its counsel appeared therein and participated in the defense in the circuit court and in this court. He was then under a general retainer from the defendant in this cause. He made no charge against the city, and this defendant paid his expenses. The city had other counsel, but the defendant's counsel, while defending in the name of the city and to some extent for the city, was also defending for the Barber Asphalt Paving Company in the name of the city. It could not have been otherwise. Under such circumstances, the judgment in the former action was binding upon the defendant in this cause as well as upon the city of Fond du Lac. *Kolpack v. Kolpack*, 128 Wis. 169, 107 N. W. 457, 116 Am. St. Rep. 29, and cases cited; *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1, 3 Ann. Cas. 773.

[2] When the paving work was completed under the contract in question, payment was made to the defendant in special improvement bonds pursuant to sections 925—190, 925—192, 925—193 of chapter 40a, Stats. 1898. A bond was issued against plaintiff's property. The plaintiff thereafter brought this action to cancel and annul this special improvement bond. It appeared on the trial that the bond had been sold by the defendant to an innocent purchaser and judgment was rendered in favor of the plaintiff and against the defendant for the present worth of this bond amounting to \$1,214.58. This procedure was correct. *Luetzke v. Roberts*, 130 Wis. 97, 109 N. W. 949. Where a suit within the jurisdiction of equity is launched in good faith, and it thereafter appears that, by reason of acts of the defendant or the intervention of the rights of innocent third parties, the equitable remedy is due to the plaintiff, but impossible to be carried out, the courts may and frequently do decree money compensation in lieu of such other remedy. *Bigelow v. Washburn*, 98 Wis. 553, 74 N. W. 362; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931.

[3] The defendant also contends upon this appeal that notwithstanding the adjudication that the contract in question could not be legally entered into yet the fact that such contract was, while the judgment of the court below sustaining it stood, not only entered into, but fully performed, now operates to

deprive the plaintiff of any benefit of the former judgment of this court. We cannot assent to this. The defendant, after it was informed by the commencement of the other action that its contract was tainted with illegality, went on and performed the same at its peril. It merely took its chances of the plaintiff making good his contentions and annulling the contract. Any other rule would permit the trustee and a third person, or a municipal corporation and a third person to defeat the action of a cestui que trust or a taxpayer charging fraudulent collusion by merely continuing the collusion and completing the execution of the writing and performing the work upon the contract after the action to enjoin execution of the same was begun. *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931. Courts are not so impotent. The law is not so easily disregarded.

[4] The illegality inherent in this contract continued and vitiated the contract notwithstanding the resignation of the erring alderman as a member of the city council and the execution of the written evidence of the contract after such resignation by the remaining city officers. This is not the case of a principal who, after being informed of the fact that his agent had been corruptly influenced by the person with whom he has made a contract on the principal's behalf, yet chooses to permit the contract to be performed and avail himself of the benefits to be derived therefrom.

The relation of principal and agent did not exist between the erring alderman and the city. A municipal corporation cannot condone in this way illegalities of this nature. The plaintiff is entitled to vindicate the rights recognized and established by the judgment in the action in which he prevailed. We find nothing in the conduct of the plaintiff which amounts to a waiver of his right to assert the illegality of the contract declared in *McMillan v. Fond du Lac*, supra.

[5] It is argued that the defendant in this cause when it made the concession upon the price of brick to the erring alderman did not know that the latter had a private pecuniary interest in obtaining that concession, but thought, or might have thought, he was acting for the general welfare in so doing. We consider that the defendant in this action is upon this point foreclosed by the decree in *McMillan v. Fond du Lac*, supra, on account of its participation in the defense of that action. But there are also other considerations. It can hardly avail to remove the taint of illegality from an offer to buy off opposition of a public officer to a contract by a reduction of price on a certain staple article of property to profess ignorance of how such reduction would benefit the officer. If this is enough to remove the taint of illegality, then a new safe and ingenious method of bribery has been discov-

ered. It is enough to avoid the contract that the officer agreed to and did withdraw his opposition in consideration of concession of pecuniary value made to all including himself, and that he availed himself of this concession to his own private pecuniary advantage. It is better that those dealing in municipal contracts were made aware that all their acts will be strictly scrutinized.

[6] As to the plaintiff, this paving contract between the defendant and the city made in violation of a law founded upon public policy is as if it never existed. As to the plaintiff, the defendant was a wrongdoer placing improvements on plaintiff's property against the will of the latter and in spite of opposition. Under such circumstances, there is no rule of equity which recognizes the defendant's right to compensation. 3 Pom. Eq. Jur. (3d Ed.) § 1241.

[7] The point is made that the reassessment statutes should have been applied in this action. We do not think so. Section 1210d, Stats. 1898, as amended by chapters 9 and 19, Laws of 1901, chapter 276, Laws of 1903, and chapter 501, Laws of 1905, relate to cases where the work of paving, etc., has not been done in the face of pending preventive litigation. The present is a case where the work was done after the preventive suit was begun and while it was pending. It was not intended by that statute to take away from the courts the power to prevent the execution of an unlawful contract where the action was begun before the contract was consummated and the preventive jurisdiction of equity invoked.

[8] Where a court declares a contract illegal and enjoins its execution, no rights against the party in whose favor the decree is made can be founded on an execution of that contract, unless the parties before or after such execution take such steps as are equivalent to the making of a new contract upon a new and lawful consideration. Chippewa Bridge Co. v. Durand, supra; Cawker v. Central B., etc., Co., 140 Wis. 25, 121 N. W. 888. If a connection between the original illegal transaction and a new promise can be traced, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery. Repeating a void promise cannot give it validity. So every new agreement in furtherance of, or for the purpose of, carrying into effect any of the unexecuted provisions of a previous illegal agreement, is likewise illegal and void. 9 Cyc. 562, citing among other cases Everingham v. Meighan, 55 Wis. 354, 13 N. W. 269.

[9] In the early stages of equity jurisprudence decrees were enforced only in personam. 1 Pom. Eq. Jur. §§ 135, 170. This rule has long since given way to the paramount rule that equity may in all cases so frame its decrees as to make them effective to do

equity, and now the forms of equitable relief are as various as the transactions investigated and regulated in equity. Chippewa Bridge Co. v. Durand, supra; Smith v. Northwestern Nat. Life Ins. Co., 123 Wis. 586, 102 N. W. 57; Ward v. Billups, 76 Tex. 466, 13 S. W. 308; Morris v. Bradford, 19 Ga. 527; Rowell v. Rowell, 122 Wis. 1, 99 N. W. 473; Bresnahan v. Bresnahan, 46 Wis. 385, 1 N. W. 39; Bailey v. Champlain, etc., Co., 77 Wis. 453, 46 N. W. 539.

The judgment of the circuit court is affirmed.

In re DOE'S ESTATE. In re WHEELER.
MALLORY, as Public Adm'r, v.
WHEELER.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. ARMY AND NAVY (§ 52*)—"OFFICER"—GOVERNOR OF NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.

An "officer" of the United States is, as a general rule, one who holds his place by virtue of appointment by the President, by one of the courts of justice, or by the heads of departments authorized by law to make such appointments, and the governor of the National Home for Disabled Volunteer soldiers, incorporated by act of Congress, holding by appointment of the board of managers, is not an "officer" of the United States.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 100-102; Dec. Dig. § 52.*]

For other definitions, see Words and Phrases, vol. 6, pp. 4933-4951; vol. 8, p. 7737.]

2. ARMY AND NAVY (§ 52*)—SOLDIERS' HOME—EXAMINATION AS TO ASSETS OF INTESTATES—JURISDICTION.

An order of the county court which requires the governor of the National Home for Disabled Volunteer Soldiers to submit to an examination touching the property in his possession of an inmate of the Home dying intestate, and leaving property within the county, is not invalid as in conflict with the duties of the governor under acts of Congress and regulations in pursuance as to the management of the National Home, providing for the taking of possession of the funds of deceased members and turning the same over to the treasurer, etc., since there is nothing to indicate that any proceeding will be taken to interfere therewith.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 100-102; Dec. Dig. § 52.*]

3. EXECUTORS AND ADMINISTRATORS (§ 85*)—EXAMINATION OF PERSONS IN POSSESSION OF INTESTATE'S PROPERTY—ORDERS—AVAILABILITY.

Under St. 1898, § 4081, as amended by Laws 1907, c. 593, giving any person aggrieved by an order of the county court the right of appeal, an order directing one to appear and submit to an examination touching any property in his possession belonging to an intestate, made pursuant to a statute providing that, if any person shall neglect to obey, he shall be attached and committed to prison, is appealable.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 323, 339-353; Dec. Dig. § 85.*]

Appeal from Circuit Court, Milwaukee County; F. C. Eschweiler, Judge.

Petition by Rollin B. Mallory, as public

administrator, against Cornelius Wheeler, governor of the northwest branch of the National Home for Disabled Volunteer Soldiers located in Milwaukee county, for an order to compel the latter to appear and submit to an examination touching the estate of one dying in the Home intestate. From an order of the circuit court reversing an order of the county court granting the relief prayed for, petitioner appeals. Order of circuit court reversed and cause remanded, with instructions to affirm order of the county court.

The appellant, Rollin B. Mallory, is public administrator for the county of Milwaukee; the respondent, Cornelius Wheeler, is governor of the northwest branch of the National Home for Disabled Volunteer Soldiers (hereinafter referred to as the National Home), located in the county of Milwaukee. The appellant filed his petition in the county court of Milwaukee county for letters of administration on the estate of John Doe (alias) deceased, in which petition all facts necessary to entitle him to letters of administration are alleged. The appellant also filed in said court his complaint on oath, in which it is alleged substantially that appellant was public administrator; that the National Home is a corporation owning and controlling land and buildings thereon in the county of Milwaukee; that the respondent was governor of said National Home; that said John Doe (alias) died in said Home intestate possessed of personal property within said county, and left debts due and unpaid; that he left him surviving neither widow, issue, nor next of kin residing in said county of Milwaukee, and no minor heirs; that as governor the respondent has in his possession or under his control goods, chattels, and effects belonging to said deceased, the possession of which belongs to appellant as public administrator; that appellant has duly demanded of respondent that he account for and deliver to appellant all the property in his possession belonging to deceased, but that the respondent has failed and refuses to account for or deliver any of said property to appellant; that the petitioner deems it necessary that the respondent be examined under oath in court concerning said matters; and appellant prays that the respondent be cited to appear before said court, and be examined on oath upon the matters of said complaint.

An order for citation was issued out of said court requiring the respondent to appear and submit to an examination on oath touching the matters of the complaint. Upon said order a citation issued directing the respondent to appear and submit to an examination on oath. The respondent appeared specially and moved to vacate and discharge the citation on the grounds (1) that it affirmatively appears from the complaint

that no cause for citation to the respondent is alleged in the complaint; (2) that it affirmatively appears from the complaint that, if any goods, chattels, and effects belonging to said deceased are in the possession or under the control of the respondent, the same are held by him as an officer, to wit, governor of said National Home; and (3) that as such officer respondent is a United States officer, and his possession as such is the possession of the United States, and that the court has no jurisdiction in the premises of the subject-matter of such proceedings nor the person of the respondent as such officer.

The county court overruled the contentions of the respondent, and made an order requiring respondent to appear and answer. From this order respondent appealed to the circuit court for Milwaukee county, and the circuit court ruled in favor of respondent, and made an order reversing the order of the county court and sustaining the objections of the respondent to the citation and vacating and setting aside said citation, from which order this appeal was taken.

Rollin B. Mallory and Churchill, Bennett & Churchill, all of Milwaukee, for appellant. Flanders, Bottum, Fawsett & Bottum, of Milwaukee, for respondent.

KERWIN, J. (after stating the facts as above). Counsel for appellant relies upon chapter 120 of the Private and Local Laws of Wisconsin for 1870 as amended by chapter 471 of the Private and Local Laws of 1871 respecting the rights and duties of the public administrator for the city and county of Milwaukee, which authorizes investigation by such public administrator for the discovery of goods and chattels in certain cases. The appellant contends that Gov. Wheeler, the respondent, was bound to appear and answer in accordance with the citation, and that the court below was in error in holding to the contrary.

The case presents some interesting questions, and is not free from difficulty. The state law referred to, not only authorizes examination and inquiry, but also authorizes the public administrator in some cases referred to to take charge of goods, chattels, credits, and estates of persons dying intestate. Chapter 120, Private and Local Laws 1870, as amended, sections 4, 7, 8, 9, 10, and 11. Chapter 16, Supplement to the Private and Local Laws of Wisconsin for 1865, provides for the incorporation of the "Wisconsin Soldiers' Home," to be permanently located at Milwaukee. By acts of the state Legislature of the state of Wisconsin and Congress of the United States all the property of the National Home was transferred, turned over, and conveyed to the "National Asylum for Disabled Volunteer Soldiers," incorporated by act of Congress. But the acts recognize in the state and reserve to

it the right to service of civil and criminal process within the territory ceded. Chapter 16 of Supplement to the Private and Local Laws of Wisconsin for 1865; chapter 68, Private and Local Laws of Wisconsin for 1867; Act Cong. March 21, 1868, c. 21, 14 Stat. 10; sections 4825 to 4837, inclusive, of the Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 3337-3353); chapter 275 of the Private and Local Laws of Wisconsin for 1867; Act Cong. March 3, 1901, c. 853, 31 United States Stats. at Large 1175 (U. S. Comp. St. 1901, p. 3353); In re O'Connor, 37 Wis. 379, 19 Am. Rep. 765. Chapter 51, United States Statutes at Large, p. 417, approved January 23, 1873, provides for the change of the corporate name from "The National Asylum for Disabled Volunteer Soldiers" to "The National Home for Disabled Soldiers."

[1] On the part of the respondent it is insisted that Gov. Wheeler, as governor of the National Home, was an officer of the United States, and could not be called to answer under state laws for his acts and doings; furthermore, that the management of the property and effects of deceased soldiers is exclusively under the control of Congress through a board of managers, under the federal statutes and rules and regulations made in pursuance thereof; that the inmates in said National Home are subject to the rules and articles of war the same as if they were in the army; that the governor of the Home under direction of the board of managers is engaged in the internal administration of a federal institution, hence the state Legislature has no constitutional power to interfere with such management as is provided by Congress. Respondent's counsel contends that state courts have no authority to interfere with federal officers or agents in the performance of their duties and cites *In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55; *In re Loney*, 134 U. S. 372, 10 Sup. Ct. 384, 33 L. Ed. 949; *In re Waite* (D. C.) 81 Fed. 359; *In re Fair et al.* (C. C.) 100 Fed. 149. The general proposition to which the foregoing cases are cited may be admitted, but neither the proposition nor the cases cited rule the instant case. An examination of these cases will show that they involve a situation where there was interference with an officer of the United States or an agent acting under federal authority. Gov. Wheeler was not an officer of the United States. As a general rule, an officer of the United States is one who holds his place by virtue of appointment by the President, by one of the courts of justice, or by the heads of departments authorized by law to make such appointment. 3 Cyc. p. 818; *United States v. Mouat*, 124 U. S. 303, 8 Sup. Ct. 505, 31 L. Ed. 463; *United States v. Germaine*, 99 U. S. 508, 25 L. Ed. 482; *Babbitt v. United States*, 16 Ct. Cl. 202; *Wood v. United States*, 15 Ct. Cl. 151.

Gov. Wheeler does not derive his appointment from the President, from any court of justice, or any head of the federal departments authorized by law to make such appointment. He is appointed by the board of managers as the local manager or governor of the corporation in question. He reports to the board of managers, and the board of managers annually reports to Congress.

This court held in *Re O'Connor*, 37 Wis. 379, 19 Am. Rep. 765, that the title to the premises occupied by the "National Home for Disabled Volunteer Soldiers" in Milwaukee county is not in the United States, but in a corporation created by Congress; that the corporation is in its nature a charitable institution, and its rights and property are not in any just and legal sense the rights and property of the United States; and that it was not competent for the Legislature of Wisconsin to abdicate its jurisdiction over this territory, except where the lands are purchased by the United States for the specific purposes contemplated by the Constitution. Counsel for respondent relies strongly upon *Ohio v. Thomas*, 173 U. S. 276, 19 Sup. Ct. 453, 43 L. Ed. 699. Complaint was made in that case by the dairy commissioner against Gov. Thomas of the Ohio branch of the National Home for the alleged violation of the act of the state Legislature of Ohio in relation to the use of oleomargarine. The governor was convicted and sentenced to pay a fine and to imprisonment until the fine was paid. On writ of habeas corpus sued out in the Circuit Court of the United States he was discharged. It will be seen in this case that the prosecution under the state law directly interfered and conflicted with the duty of the governor under federal authority, and it was held that the state Legislature had no constitutional power to interfere with the management as provided by Congress. In *Re Kelly* (C. C.) 71 Fed. 545, also relied upon by respondent and involving the Milwaukee institution, it was held that the management and officers are agencies of the United States, and as such are exempt from any interference by the authorities or courts of the state in their control, discipline, or government of the Homes or property. In *Boske v. Comingore*, 177 U. S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846, a United States collector of internal revenue was adjudged by a state court of Kentucky in contempt because he refused to file in the state court certain copies of reports which were in his custody as officer of the treasury department, basing his refusal upon a regulation of the Treasury Department, which restricted the use for any purpose other than that specified. It was held that the collector had no authority to do otherwise than to refuse to comply with the order of the state court.

[2] We think it quite clear that these cases do not reach the situation now before us.

There was nothing in the order or citation in the instant case in violation of or inconsistent with the acts of Congress or rules and regulations governing the Home. If the citation or order of the county court required Gov. Wheeler to do any act inconsistent with the federal statutes or rules and regulations in question, a different question would be presented. The order of the county judge provides that Gov. Wheeler be cited to appear and be examined on oath, and to answer such interrogatories as may be put to him touching the matter of the complaint, and further directs that the citation issue. The citation issued in pursuance of the order and requires Gov. Wheeler to appear and submit to examination on oath touching the matters of the complaint, and further recites that he is suspected of having in his possession or under his control certain personal property belonging to John Doe (alias), deceased, late an inmate of the Home, or show cause to the contrary.

Counsel for respondent lays great stress upon the acts of Congress and rules and regulations made in pursuance thereof relating to the management of the National Home, and argues that the proceeding here instituted is in conflict with such rules and regulations, and cites many sections of the rules in support of this contention. These rules it is true provide particularly with reference to the management of the National Home, the settlement of accounts of members, the conservation of property, and generally the management in considerable detail. For example, rule 409 provides for taking immediate possession of the moneys and effects of deceased members. Rule 410 provides for appraisal. Rule 411 provides that money shall be turned over to the treasurer and all property to the quartermaster. Rule 413 provides that in January and July of each year, the day to be fixed by the quartermaster in consultation with the governor, the quartermaster shall sell at public sale the effects of deceased persons, except letters or private papers, bank books, negotiable securities, which shall be held subject to application by heirs or legal representatives. Rule 415 provides that amounts received from sales of the effects of deceased members shall be turned over to the treasurer, etc. Rule 416 provides that all applications for effects of deceased members shall be referred to the manager of the branch to which the deceased member belonged, etc. Rule 417 provides form of application for effects of deceased members. Rule 418 provides with reference to application for effects of deceased members, and 419 for keeping account of posthumous funds. Rule 420 provides for individual accounts in name of deceased members. Rule 421 has reference to payment of approved claims. The foregoing and some other rules referred to are set out

in respondent's brief, and claimed by respondent to be inconsistent with the present proceeding. The court is not able to agree with counsel in this contention. It is quite clear that, in so far as the order and citation go, there is nothing to indicate that any proceeding will be taken to interfere with the federal statutes and rules and regulations made in pursuance thereof.

[3] It is claimed by appellant that the order from which the appeal to the circuit court was taken was not appealable. Section 4031, Stats., as amended by chapter 593, Laws of 1907, gives any person aggrieved by an order of the county court the right to appeal. The statute under which the present proceeding was taken provides, in effect, that, if any person shall neglect or refuse to obey the process provided for, he shall be attached and committed to prison. The governor was, therefore, obliged to comply with the order or suffer the penalties imposed for failure to do so. He was an aggrieved party, and the order appealable. *State v. Mil. E. R. & L. Co.*, 136 Wis. 179, 116 N. W. 900, 18 L. R. A. (N. S.) 672; *Powers v. Powers et al.*, 145 Wis. 671, 130 N. W. 888; *American F. P. Co. v. Winter*, 147 Wis. 464, 133 N. W. 595.

The order of the court below is reversed, and the cause remanded, with instructions to the court below to affirm the order of the county court.

PEOPLE'S TELEPHONE CO. v. LEWIS.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. TELEGRAPHS AND TELEPHONES (§ 34*)— CONTRACTS—DISCRIMINATIONS—UNJUST DISCRIMINATIONS.

A contract between a telephone company and a patron, giving a special rate for its service, is not invalid for the discrimination, in the absence of statute, where the compensation provided for is within reason, as only unjust discriminations are condemned at common law.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 34.*]

2. TELEGRAPHS AND TELEPHONES (§ 34*)— CONTRACTS FOR SERVICE—DISCRIMINATION— STATUTORY PROVISIONS.

St. 1898, § 1791a, requires every telephone company to furnish its service without discrimination. Laws 1907, c. 499, § 1797m91, provides that the furnishing by any public utility of any product or service at the rates and upon the terms and conditions provided for in any existing contract executed prior to April 1, 1907, shall not constitute a discrimination. *Held*, a contract between a public service company and an individual, providing for service at a rate different from the public rate, but not unjust, is not rendered invalid by section 1791a, which must have been and was recognized by the Legislature, in its enactment of section 1797m91, to be intended as a mere statement of the common-law rule against unjust discriminations.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 34.*]

Appeal from Circuit Court, Columbia County; Chester A. Fowler, Judge.

Action by the People's Telephone Company against Thomas Lewis. From a judgment for defendant, plaintiff appeals. Affirmed.

Action to recover for telephone service. The amount claimed was \$1 per month for 30 months. The answer admitted receiving the service but pleaded a contract, antedating the public utility law, to the effect that the price for such service should not exceed \$10 per year. This was alleged: In 1902 defendant subscribed for and became the owner of one share of the common stock of the defendant of the par value of \$50, paying therefor \$55, under an agreement that he should be furnished telephone service for not exceeding a charge of \$10 per year and that such agreement was embodied in and became a condition of the certificate of stock.

The cause was tried by the court. Facts were found as follows: Plaintiff was a duly organized telephone company under the laws of Wisconsin and has been since August, 1902. During such time defendant has had of plaintiff the use of its telephone service without paying therefor since January 1, 1909. The service was furnished pursuant to a contract made in August, 1902, and embodied in plaintiff's certificate of corporate stock No. 55, issued to defendant upon his subscription therefor and payment of the par value and 10 per cent. additional. The contract stipulated that the holder of the stock should possess, as owner, one telephone and be entitled to the use of plaintiff's lines, in common with those having rented telephones in the same locality, subject to assessments, ratably upon all common stock sufficient to pay the corporate expenses; but not exceeding \$10 per year. The amount assessable against the common stock for 1908 was not anything, for 1909 \$10, and for 1910 \$10.

Upon such facts it was held that the contract relied upon was not contrary to any law existing at the date thereof and was the measure of defendant's liability. Judgment was rendered accordingly.

Daniel H. Grady, of Portage, for appellant. Rogers & Rogers, of Portage, for respondent.

MARSHALL, J. (after stating the facts as above). The questions presented in this case are not new. All of them have been, either directly or substantially, repeatedly decided by this court in opinions in which attempts were made to so fully analyze the public utility law as to relieve administration of it as free from embarrassment as practicable. *Superior v. Douglas County Tel. Co.*, 141 Wis. 363, 122 N. W. 1023; *La Crosse v. La Crosse Gas & El. Co.*, 145 Wis. 408, 180 N. W. 530; *State ex rel. Kenosha G. & El. Co. v. Kenosha E. R. Co.*, 145 Wis. 337, 129 N.

W. 600; *Calumet Service Company v. Chilton*, 148 Wis. 334, 135 N. W. 131.

Very little, if anything, need be added to what is said in the cases referred to as to the questions there discussed. The better way, it seems, as the same questions again happen to be pressed upon our attention, is to treat them as ruled by the previous decisions without additional discussion.

What has been said suggests impropriety of treating the multitude of authorities, foreign and domestic, cited to our attention.

[1] The point that the contract with defendant was discriminatory at common law is met by *Superior v. Douglas County Tel. Co.*, supra, holding that only unreasonable discriminations are so condemned, and absence of proof that there was any such discrimination in this case.

[2] The suggestion that the special contract with defendant and others of his class is void under section 1791a, Stats. 1898, "requiring every telephone company engaged in the business of furnishing telephone service to do so without discrimination" is met by the fact that mere difference in method of dealing with customers, some by implied agreement to pay at schedule rates and others by express contract, was not considered by the Legislature in passing the public utility law, discrimination within the meaning of section 1791a. Evidently such section was regarded as a mere incorporation of the common rule into written law, because section 1797m91 (Laws 1907, c. 499) specifically recognized the existence of special contracts and provided that "the furnishing by any public utility, of any product or service at the rates and upon the terms and conditions provided for in any existing contract executed prior to April 1st, 1907, shall not constitute a discrimination within the meaning specified,"—referring to the provision of the section making any undue or unreasonable preference unlawful. Such section was held, in *Superior v. Douglas County Tel. Co.*, supra, to have been intended to preserve existing agreements with public utility corporations from being affected by the public utility law, and to be efficient for that purpose as to mere contractual matters such as ordinarily occur inter partes. That was affirmed in *La Crosse v. La Crosse G. & E. Co.*, supra, such ordinary contracts as the one in question being distinguished from such as form an element of a corporate franchise, the latter being held superseded by the public utility law, and the former within the limitation mentioned in section 1797m-91 and so expressly preserved and recognized as valid.

The foregoing seems to cover everything which needs treatment on this appeal. The case presents the question of whether a mere special contract with a public utility corporation for services made prior to the time limit mentioned in section 1797m91—one not

inhering in a corporate franchise, and so superseded by the public utility law; but, an ordinary agreement for service, recognized as valid and expressly given validity by such section—can be relied on by one party thereto as binding on the other seeking to repudiate it. No reason is perceived why the answer should not be in the affirmative as it was below.

The judgment is affirmed.

BARNES, J., took no part.

**WARREN WEBSTER & CO. et al. v.
BEAUMONT HOTEL CO. et al.**

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. PRINCIPAL AND SURETY (§ 82*)—BUILDING CONTRACTOR'S BONDS — LIABILITY OF SURETY.

A building contractor's bond conditioned that the contractor should perform the contract and pay all indebtedness incurred in completing the contract, and save the building and the owner free from mechanic's liens, imposes on the surety an obligation which is not restricted by stipulations in the building contract that the contractor agrees to furnish the material and labor embraced in the contract, to pay for the same, and furnish written vouchers showing payment or waiver of claim or lien therefor, and, if through the default in such conditions any liability should be incurred by the owner, the surety should indemnify him on account thereof.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 127; Dec. Dig. § 82.*]

2. MECHANICS' LIENS (§ 317*) — RIGHTS OF THIRD PARTIES.

A building contractor's bond obligating the surety to pay all indebtedness incurred by the contractor in completing the contract, and to save the property and the owner harmless from lien, covers material and labor secured by the contractor from third persons, and they may enforce payment by action on the bond.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 659; Dec. Dig. § 317.*]

3. MECHANICS' LIENS (§ 245*)—ACTION TO ENFORCE—NATURE OF ACTION.

An action to enforce a mechanic's lien is, by the express provision of St. 1898, § 3323, an equitable action, and sections 3321, 3322, 3324, and 3326, relating to pleadings and practice in actions to enforce liens, are but regulative of the equitable proceeding, and do not exclude the right to apply general equitable procedure in all other respects, so far as the facts of the case may require, to adjudicate the rights of all the parties thereto.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 427-430; Dec. Dig. § 245.*]

4. MECHANICS' LIENS (§ 263*)—ENFORCEMENT —ACTIONS—PARTIES.

Under St. 1898, § 2603, providing that any person may be made a defendant who has an interest in the controversy adverse to plaintiff, or who is a necessary party to a complete determination of the issues, and section 2656a, authorizing the court to grant relief against a codefendant or a codefendant and plaintiff, or a part of plaintiffs, or a codefendant and a person not a party on his being brought in, provided the relief involves or affects the contract, transaction, or property

which is the subject-matter of the action, and section 3321 providing that any lienor foreclosing his lien by action may join as plaintiffs all lienors, and that any of them who do not so join may be made defendants, and all persons having a subsequent mortgage, judgment, or other lien and the principal contractor may be made defendants, a subcontractor of one principal contractor and a subcontractor of another principal contractor who sue to enforce their liens on the same property and for a personal judgment in case of a deficiency properly make defendants the two principal contractors, and their sureties in bonds making them liable for the payment of any indebtedness incurred by the principal contractors in performing the contracts, so as to enable the court to grant complete relief.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 471-481; Dec. Dig. § 263.*]

5. ACTION (§ 50*)—JOINDER OF CAUSES OF ACTION—JURISDICTION OVER PARTIES.

Under St. § 2656a, the joinder of different causes of action is proper where the relief involves or in some manner affects the contract, transaction, or property which is the subject-matter of the action, and jurisdiction of the parties for the purpose of granting relief carries with it the right to unite in the complaint or cross-complaint the different causes of action for relief to enable the court to determine, as authorized by section 2883, the ultimate rights of the parties on each side as between themselves, either on cross-complaint or otherwise.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511-547, 1130, 1152, 1504; Dec. Dig. § 50.*]

6. ACTION (§ 50*)—ENFORCEMENT OF LIENS—JOINDER OF CAUSES OF ACTION.

An action by subcontractors to enforce their liens and for a deficiency judgment against the principal contractor and the surety on his bond, liable for debts incurred by the contractor in completing the work, and an action by the owner against the principal contractor and the surety on his bond for relief on the bond presented by cross-complaint, may properly be joined under St. 1898, § 2656a, declaring that a defendant may have affirmative relief against a codefendant or a codefendant and plaintiff, or a part of plaintiffs, providing the relief involves or affects the contract transaction, or property which is the subject-matter of the action, and thereby enable the court to determine the rights and liabilities of all the parties on each side as between themselves, as authorized by section 2883.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511-547, 1130, 1152, 1504; Dec. Dig. § 50.*]

7. JURY (§ 31*)—RIGHT TO TRIAL BY JURY—STATUTORY PROVISION.

St. 1898, § 2843, requiring an issue of fact in an action for the recovery of money only or for specific real or personal property, must be tried by jury, does not apply to a suit by subcontractors to enforce their liens and for a deficiency judgment against the principal contractor and the surety on his bond, and a suit by the owner on the bond conditioned on the contractor paying all debts incurred by him in completing the contract, and a joinder of the two actions does not deprive the principal contractor and his surety of the right to jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204-219; Dec. Dig. § 31.*]

Appeal from Circuit Court, Brown County,
Samuel D. Hastings, Judge.

Action by Warren Webster & Co. and H. W. Krueger against the Beaumont Hotel Company and others, in which the Beaumont Hotel Company filed cross-complaints. From orders overruling the demurrers to the complaint of plaintiffs and to the cross-complaints interposed by the National Surety Company and the Kirkman Construction Company, they appeal. Affirmed.

The complaint in this action alleges that the plaintiff Warren Webster & Co., as a subcontractor of Martin & Wigman, has a lien for labor and materials used in the construction of the Beaumont Hotel, and that the plaintiff Krueger, as a subcontractor of the Kirkman Construction Company, has a similar lien upon the same property. The various statutory requirements for the establishment of liens are alleged. It appears that on October 4, 1909, Martin & Wigman entered into a contract with the Beaumont Hotel Company to install in the Beaumont Hotel at Green Bay, Wis., the Webster system of steam circulation, and on December 23, 1909, a bond was executed by Martin & Wigman and J. H. M. Wigman as surety with the hotel company, conditioned that if the contractors should fully perform all the conditions of the contract with the hotel company, and "duly and promptly pay and discharge all indebtedness, that may be incurred in carrying out and completing said contract, and save said building and the Beaumont Hotel Co. free and harmless from all mechanics' liens, and claims of liens or other claim or expense by reason thereof," then the obligation was to be void. On June 9, 1910, Warren Webster & Co. contracted with Martin & Wigman to install the Webster system of steam circulation in the hotel. In behalf of the plaintiff H. W. Krueger, the complaint alleges that on November 1, 1909, the Kirkman Construction Company entered into a contract with the hotel company to furnish the materials and to perform the work in the erection, construction, and rebuilding of the Beaumont Hotel, except as such work and materials were covered by the contract between the hotel company and Martin & Wigman. On the same day the construction company and the National Surety Company as surety executed a bond in favor of the hotel company containing the same conditions as the bond previously executed by Martin & Wigman and J. H. M. Wigman with the hotel company. The plaintiff Krueger furnished materials and performed labor in the construction of the hotel under a contract with the Kirkman Construction Company.

The complaint also alleges that on or about September 1, 1909, the hotel company executed a trust deed or mortgage to W. P. Wagner, as trustee. It is alleged that the execution and delivery of this trust deed was subsequent to the commencement of the work of reconstruction, remodelling, and rebuild-

ing of the hotel, and that the trustee had notice that the work of rebuilding had commenced when the trust deed was executed. The complaint also sets out the interests and claims for liens of other subcontractors, in so far as they had been filed. The plaintiffs ask that the demands of all persons who have filed liens upon the premises be ascertained, and that the interest of the hotel company at the time of the commencement of the work and of the furnishing of materials, and of any person claiming under such interest may be sold to satisfy the liens and costs of the action, and that the plaintiff Krueger have judgment in case of a deficiency against the defendants the Kirkman Construction Company and the National Surety Company, and the plaintiff Warren Webster & Co. have a deficiency judgment against A. B. Martin and J. B. Wigman of the firm of Martin & Wigman, and against J. H. M. Wigman, the surety on their bond to the hotel company. The answer of the hotel company admits that the plaintiff Warren Webster & Co. furnished material and performed labor under its contract with Martin & Wigman, but alleges that it was obliged to purchase some material under its contract with Martin & Wigman. It also alleges that Martin & Wigman agreed to take \$2,000 of its bonds in partial payment of their contract, and that the plaintiff agreed to take \$1,000 of the hotel company bonds from Martin & Wigman. It is alleged that it is ready to deliver the bonds to the plaintiff, but that the plaintiff is unwilling to take them.

As to the cause of action alleged by H. W. Krueger, the answer of the hotel company admits the allegations made separately in his behalf. It is alleged that the trust deed to W. P. Wagner was given and recorded prior to the commencement of any work or the furnishing of any material under the Kirkman Construction Company or the Martin & Wigman contracts, and that these contractors and the subcontractors under them had notice thereof. The cross-complaint of the hotel company alleges the contract with the Kirkman Construction Company for the construction of the hotel and the execution of the bond by the National Surety Company to secure the execution of the contract. It is alleged that, before completion of the contract, the work was abandoned by the Kirkman Construction Company, and that, in accordance with the terms of the contract, the building was completed by the hotel company. It is alleged that, after the abandonment, it cost the hotel company \$11,105.35 to complete the work and furnish the materials under the contract; that damages for defective work and irremediable defective material and for liquidated damages were sustained by the hotel company in the further sum of \$14,257.20; and that approximately \$10,000 was due subcontractors from the Kirkman Construction Company at the time the con-

tract was abandoned; that this amount is still owing; and that mechanics' liens therefor, which the Kirkman Construction Company and the National Surety Company are obligated to pay, have been filed against the property of the hotel company. And it is alleged that of the sum of \$70,000 to be paid the Kirkman Construction Company for construction and materials all has been paid except \$4,912.73 in cash and \$12,000 in hotel company bonds. The hotel company demands judgment that Warren Webster & Co. be required under their contract to accept hotel company bonds in settlement of their claim; that the claims for liens of the various subcontractors under the Kirkman Construction Company may be ascertained and determined; that the Kirkman Construction Company and the National Surety Company be adjudged primarily liable therefor, and be required to pay the same into court; that the hotel company have judgment for \$21,449.82 and costs of the action against the Kirkman Construction Company and the National Surety Company; and that upon payment of these amounts the Kirkman Construction Company and the National Surety Company be entitled to the \$12,000 hotel company bonds.

The answer and cross-complaint of the trustee for the hotel company is substantially the same as the answer and cross-complaint of the Beaumont Hotel Company. He asks that the trust deed be declared and held a prior and superior lien to those of the subcontractors, that the principals and sureties on the bonds for construction be ordered to pay the liens of the subcontractors, and that the hotel property be liable to the liens of the subcontractors and be sold and the proceeds of the sale be applied to discharge the liens only in the event, and to the extent that such subcontractors be not paid by the principals and the sureties on the bonds.

The answers and cross-complaints of those of the defendant lienors who answered allege, in substance, that they were subcontractors, and as such furnished materials and performed labor in the construction of the hotel building under the contracts, that they have filed claims for liens for the amount of their claims, that the principal contractors have failed to pay them, and that the bondsmen are liable for the amounts of their claims, and they ask that the rights of all persons having liens on the premises may be ascertained and determined, whether they be plaintiffs or defendants, that the premises subject to the liens be sold to satisfy the liens so ascertained, and the costs, and, in case of a deficiency, that they have personal judgment against the parties liable on the demands for which the liens are claimed.

The National Surety Company demurred to the complaint of the plaintiffs on the

grounds that several causes of action had been improperly united; that the complaint did not state a cause of action against it; that no cause of action in favor of H. W. Krueger was stated against it; that the complaint did not state facts sufficient to constitute a cause of action against it and in favor of the plaintiff Warren Webster & Co., and in that Warren Webster & Co. was made a party plaintiff, and did not state a cause of action against it; that there was a misjoinder of parties in that subcontractor lien claimants were made parties defendant with it; and that the court had no jurisdiction because the action is one in equity for the foreclosure of mechanics' liens, and in such an action the court had no jurisdiction of a cause of action at law against the defendant.

The National Surety Company demurred to the cross-complaints of the defendant subcontractor lien claimants on the grounds that such cross-complaints did not state facts sufficient to constitute cross-complaints against it; that the court had no jurisdiction because the action was one in equity for the foreclosure of mechanics' liens and the cross-complaints stated causes of action at law; that the cross-complaints do not state facts sufficient to constitute causes of action against it; that the causes of action stated are not pleadable as cross-complaints in the action; that there was a defect of parties, in that the plaintiff Warren Webster & Co., making no claim against it, was improperly joined as a party plaintiff against it, that A. M. Duncan, trustee in bankruptcy for Martin & Wigman, not claiming to have a cause of action against it and not being liable with it, was improperly joined as a party to the action; and that the cross-complaints state no cause of action against it, in that the cause of action alleged does not affect or involve the contract, transaction, or property which is the subject of the action, and is not pleadable in or as a cross-complaint. The National Surety Company and the Kirkman Construction Company each demurred to the cross-complaint of the Beaumont Hotel Company on the grounds that, the cause of action alleged against them in the cross-complaint being an action at law and the complaint being an action in equity for the foreclosure of mechanics' liens, the court had no jurisdiction of the cause of action alleged in the cross-complaint; that the cause of action stated in the cross-complaint was not pleadable in the action; that there was a defect of parties, in that the plaintiff Warren Webster & Co., alleging no cause of action against either of them, was improperly joined as a party plaintiff in the complaint and in the cross-complaint; that the trustee in bankruptcy for Martin & Wigman, alleging no cause of action against either of them and not being liable with either of them, was improperly joined in the cross-

complaint as a party to the action; that the facts alleged as a cause of action in the cross-complaint do not constitute a cross-complaint against them because it does not involve or affect the contract, transaction, or property which is the subject-matter of the action, and is not pleadable as a cross-complaint or in the cross-complaint; and that the cause of action alleged does not constitute a cause of action, and because several causes of action have been improperly united.

All of the demurrers were overruled. This is an appeal from the orders overruling the demurrers.

Thompsons, Pinkerton & Jackson, of Oshkosh, for appellants. Cady, Strehlow & Joseph, Kittell & Burke, Sol. P. Huntington, M. E. Davis, Minahan & Minahan, Martin, Martin & Martin, Nath. Pereles & Sons, James H. McGillan, Sheridan, Evans & Merrill, Greene, Fairchild, North & Parker, and J. H. M. Wigman, all of Green Bay (George C. Greene, of Green Bay, of counsel), for respondents.

SIEBECKER, J. (after stating the facts as above). The questions raised by the different demurrers to the complaint and the cross-complaints of the Beaumont Hotel Company and the subcontractors as lienors may be treated together, because the same subjects are involved in their consideration and decision. In natural sequence the question of the nature and extent of the liability of the sureties under the bonds given by them to the principal contractors to secure performance of the contracts for the construction of the hotel and the nature of the action for the enforcement and foreclosure of the alleged liens should be first considered.

[1] 1. The complaint alleges that to secure the faithful performance of the contract of the Kirkman Construction Company with the Beaumont Hotel Company to furnish the material and perform the work therein specified for the construction of the hotel, the construction company, as principal, and the defendant National Surety Company, as surety, on November 1, 1909, made a bond, binding themselves to pay the hotel company the sum of \$35,000, conditioned that if the construction company should duly perform the contract with the hotel company for furnishing the material and performing the labor agreed upon, and "shall duly and promptly pay and discharge all indebtedness that may be incurred in carrying out and completing said contract, and save said building and the Beaumont Hotel Company free and harmless from all mechanics' liens and claims of liens, or other claim or expenses by reason thereof, then this obligation shall be void, otherwise to remain in full force and effect." The bond of the surety to secure the performance of the contract of Martin & Wigman contained

provisions of like effect. Confessedly, both of the principal contractors failed to perform their contracts. This failure imposes the obligation on the bondsmen to "pay and discharge all indebtedness that may be incurred in carrying out and completing said contract," and to save the hotel property and the hotel company "free and harmless from all mechanics' liens and claims of liens, or other claim or expenses by reason thereof." This undertaking is in no sense modified or restricted by the terms of the construction contracts of the parties, wherein the construction company agrees, in consideration of sums agreed upon, to furnish all the material and labor embraced in the contracts, to pay for the same, and to furnish written vouchers showing such payment or waiver of claim or lien therefor, and, if through default in these conditions any liability should be incurred by the hotel company, then the sureties were to indemnify and make whole the hotel company on account thereof. These stipulations of the contracts and bonds clearly mean and evince a purpose that the parties thereby intended that the sureties should secure payment for the material and labor furnished by the contractors. Obviously the parties understood that in the course of affairs such an obligation would cover the material and labor secured from third parties by the contractors.

[2] Under such circumstances, third parties furnishing labor and material obtain the benefit of such indemnity, and they can enforce their rights in all respects as if they had been parties to the contracts and bonds. The rights and liabilities of the principal contractors, the sureties and the persons furnishing material and labor within the terms of the transaction covered by the construction contracts and bonds have on several occasions recently been considered in this court, and need no further amplification here. See the following cases and the cases cited therein sustaining the right of such third persons to enforce the obligation against the bondsmen: *United States Gypsum Co. v. Gleason*, 135 Wis. 539, 116 N. W. 238; *R. Connor Co. v. Aetna Indemnity Co.*, 136 Wis. 13, 115 N. W. 811; *Tweeddale v. Tweeddale*, 118 Wis. 517, 93 N. W. 440, 61 L. R. A. 509, 96 Am. St. Rep. 1003; *Johnston v. Charles Abresch Co.*, 123 Wis. 180, 101 N. W. 395, 68 L. R. A. 934, 107 Am. St. Rep. 995. Under the facts and circumstances of the case, the subcontractors who have unpaid claims for material and labor furnished in the construction of the hotel and embraced in the provisions of the construction contracts are entitled to liens therefor on the hotel property, and they are entitled to enforce the liability of the sureties upon their bonds for payment thereof by action against the sureties.

[3] 2. It is contended by the appellants

that the action for the enforcement of mechanics', laborers', and materialmen's liens is a remedy provided by statute, which prescribes the rules of pleading and the procedure therein, and that the regulations on these subjects in the lien statutes exclude any intention that such actions are to be governed by the established rules in equitable proceedings other than those specifically included in the statutes. This contention is based on the provisions prescribing what claimants may be made parties to the action (section 3321, Stats.), what allegations of fact shall make a sufficient complaint (section 3322, Stats.), what shall be embraced in the judgment for a sale of the premises and the distribution of the proceeds, and whether there shall be personal judgments in case of a deficiency or for want of establishing a lien on the property (section 3324 to section 3326, Stats., inclusive). The contention that the right to a lien being created by a statute which prescribes the procedure to enforce it shows an intention that the remedy is to be restricted and limited to the statutory regulations provided is not sustained. The statute (section 3323, Stats.) by express provision declares that such an action shall be deemed equitable. This negatives the implication that it is to be restricted to the statutory procedure expressly provided. The statutory regulations concerning pleading and practice in the action to enforce the lien are to be treated as regulative of those parts of the equitable proceeding, and do not exclude the right to apply equitable procedure in all other respects so far as the facts and circumstances of the case may require to adjudicate upon the rights of all parties thereto. The remedy for foreclosing the lien is equitable in its nature and characteristics, and makes the action inherently an action in equity. The nature of the relief to be granted is such as the courts of equity award, and such as can be most readily administered under their procedure. That statutory regulation of the pleading and practice in lien suits does not provide a complete code of procedure, and that equitable rules, unless modified by statute, are applicable, is recognized in the following cases: *Huse v. Washburn*, 59 Wis. 414, 18 N. W. 341; *Bartlett v. Clough*, 94 Wis. 196, 68 N. W. 875; *Willer v. Bergenthal*, 50 Wis. 474, 7 N. W. 352; *Charles Baumbach Co. v. Laube*, 99 Wis. 171, 74 N. W. 96; *Charles v. Godfrey*, 125 Wis. 594, 104 N. W. 814. Had the statute simply declared that the action to foreclose a lien should be deemed equitable, there could be no claim but that an equitable procedure would apply and control in all respects. There is nothing in the provisions modifying the procedure in such actions which is inconsistent with the procedure in equity cases in other respects. The statutory regulation of the remedy goes no farther than to modify or confirm the rules that equity employs in similar suits, and in no

way abrogates their application to the varying exigencies that may arise in lien actions. From this it necessarily follows that the rights of the parties in such actions are to be enforced according to equitable remedies and the provisions of the statutes for determining the ultimate rights of the parties who have filed claims for liens against the property, whether they are plaintiffs or defendants in the action.

[4] 3. We now approach the specific grounds of demurrer. The complaint and the cross-complaints of the lienors allege, in substance and form, that they are subcontractors, that the principal contractors have failed to pay them in the amounts stated for materials furnished and labor performed under the construction contracts, and that they claim liens on the hotel property for these amounts and that the bondsmen are liable; and they ask that the rights of all persons who have filed claims for liens on the premises, whether plaintiff or defendant, be ascertained, that the premises subject to the liens be sold to satisfy the liens, with costs; and, in case of deficiency, that they have personal judgment against the parties liable on the demands for which liens are claimed. The hotel company in its cross-complaint alleges the making of the construction contracts, and the bonds to secure performance thereof, the terms and conditions of these agreements, the failure of performance, and that large sums are due the lienors, and that it has large claims against the principal contractors and their sureties for work done and material furnished in carrying the construction of the hotel to completion as called for by the construction contracts, and that it has a claim for damages against them for their default in not providing the material and completing the work as specified in the construction contracts. The sureties and the principal contractors contend, under their demurrers to the complaint and to the cross-complaints of the lienors and of the hotel company, that there is a defect of parties plaintiff and defendant, that several causes of action have been improperly united, and that the complaint and the cross-complaints do not state facts sufficient to constitute a cause of action.

It is provided in section 3321, Stats., that any such lienor may foreclose his lien by action and that all such lienors may join as plaintiffs, and if any of them do not so join, or refuse, they may be made defendants; also, that all persons having a subsequent mortgage, judgment, or other lien and all subsequent purchasers of the premises may be made defendants, and, if the action is brought by a subcontractor, then the principal contractor may be made a defendant. These provisions embrace all the persons who are parties of record in this suit, except the sureties. The question is whether they are properly before the court as parties to the action. The relation of the sure-

ties to the principal contractors, the subcontractors and the hotel company, under the terms of the construction contracts, and the bonds, have heretofore been considered, and they were found liable on their bonds to the hotel company and the lienors for any claims for material and labor needed to complete the construction of the hotel pursuant to the construction contracts on account of the principal contractors' default; hence, they are vitally and adversely interested in the claims presented by the pleadings in favor of the hotel company and the lienors. Under their bonds, they are primarily liable for payment of the debts and the liens for material and work. Under the equitable rule declared by section 2803, Stats.: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein." Since the bondsmen have an interest in the controversy adverse to the plaintiffs, they are interested in not being subjected to any liability for claims of the lienors in excess of what may be found justly due them, and they are necessary parties to the litigation to determine this liability on doubtful claims, should any such be presented for allowance. The sureties being thus adversely interested in the questions litigated, it is appropriate for a court of equity, in order to make a complete determination of all the questions involved between the parties, to require their presence so as to enable it to award judgment against them for the payment and discharge of all claims and liens according to the rights established in the action; thus saving the hotel company harmless in the matter. The court having jurisdiction of the parties, no obstacle exists to the granting of the relief demanded in the complaint and the cross-complaints, if it be so related to the subject of the action as to bring it within equitable cognizance. The primary right sought to be enforced in this action is to subject the property of the hotel company to the payment of the lienors' claims accruing for the improvement of this property. The enforcement thereof necessarily involves the establishment and determination of the amount of the claims justly due from the principal contractors for the construction of the hotel, the enforcement of the liens therefor, and the payment of the debts. The liability of the sureties to pay them is therefore a subject germane to the primary purpose and object of the action. This liability is properly enforceable between all parties appearing as codefendants, under the provisions of section 2856a, Stats., which declares: "A defendant * * * may have affirmative relief against a codefendant, or a codefendant and the plaintiff, or a part of the plaintiffs, or a codefendant and a person not a party, * * * upon his being

brought in; but in all such cases such relief must involve or in some manner affect the contract, transaction or property which is the subject-matter of the action." The relief here sought against the sureties and their principals manifestly is related to and connected with the cause of action of the complaint and the cross-complaints of the lienors, and hence it includes and affects "the contract, transaction or property which is the subject-matter of the action." Under the circumstances shown and under the provisions of the statutes, it is apparent that those who were made defendants in the action were properly before the court, and that there was no misjoinder or defect of parties to the action.

The claim that the principal contractors, Martin & Wigman, and their obligor have no interest in the liabilities arising out of the contract and the bond of the Kirkman Construction Company and its obligor, is not tenable, because the demands of all the parties are connected with and relate to the subject of enforcing liens against the premises of the hotel company and of obtaining the payment of the debts, or, as declared in section 2856a, Stats., they involve and affect "the contract, transaction or property which is the subject-matter of the action." In the case of Gager v. Marsden, 101 Wis. 598, 77 N. W. 922, this court states: "In an equitable action many matters are often adjudicated which would form the subject of an independent action, either at the suit of plaintiff against one or more of the defendants, or between different defendants, yet are properly brought before the court as germane to the subject of the action stated in the complaint." See, also, Carpenter v. Christianson, 120 Wis. 558, 98 N. W. 517; Level Land Co. v. Sivyver, 112 Wis. 442, 88 N. W. 317; Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

[8, §] 4. It is strenuously asserted in behalf of all the demurrants that several alleged causes of action have been improperly united, and that the complaint and cross-complaints do not state facts sufficient to constitute a cause of action. The joinder of different causes of action for relief in favor of a party to a lien suit, or in favor of different persons who are proper parties to the action, is justified and proper, as we have heretofore seen, if the relief sought involves, or in some manner affects, "the contract, transaction or property which is the subject-matter of the action." The grounds upon which the subcontractors, the hotel company, the principal contractors and their bondsmen are found to be proper parties to this action for foreclosure of liens on the hotel property, show that the relief they seek to enforce involves rights related and germane to the matter of enforcing the liens against the hotel property, and securing payment of the amounts due under the construc-

tion contracts, and involves the determination of the ultimate liabilities of the parties between themselves, on each side of the controversy, pertaining to the transaction of the construction of the hotel. Jurisdiction of the parties in the suit for these purposes carries with it the right to unite in the complaint or cross-complaints the different grounds or causes of action for relief, to enable the court to "determine the ultimate rights of the parties on each side, as between themselves, either on cross-complaint or equivalent pleading, or otherwise, and may grant to the defendant any affirmative relief to which he may be entitled." Section 2883, Stats. The scope of this power is declaratory of the board, equitable powers courts may employ in joining parties and subjects in one suit, to determine their ultimate rights within its jurisdiction. This power is of peculiar applicability to lien foreclosure suits under the statutory provisions heretofore referred to and considered. The appellants claim and insist, however, that the causes of action alleged by the lienors against the principal contractors and their bondsmen for relief on the bonds, and by the hotel company against the Kirkman Construction Company and its surety for relief under the construction contract and the bond, are actions at law which cannot be litigated in this equity suit. A portion of the relief demanded by the hotel company is that, if the principal contractor default in paying what is due subcontractors for material and labor, then that the surety be required to pay such claims to save the hotel company harmless from liens against its property. This the surety contracted to do, and under this obligation the hotel company may enforce this primary liability of the surety to pay the debts of its principal. This right is within the equitable principle governing this duty between the surety and the hotel company, which, in turn, is liable to these lienors as a surety of the surety company, that the surety company bear the obligation which is about to be cast on the hotel company, which principle was applied in the case of *Dobie v. Fidelity & Casualty Co. of New York*, 95 Wis. 540, 70 N. W. 482, 60 Am. St. Rep. 135; and approved in *Momson v. Noyes*, 105 Wis. 565, 81 N. W. 860. The trial court held that the hotel company's claim for breach of contract by the Kirkman Construction Company was not related to the primary right sought to be enforced in this lien action. Failure of the construction company to furnish the material, and do the work required of it, have it is alleged resulted in damages to the hotel company and in liens against its property. The rights and liabilities arising from the construction and surety contracts, the hotel property, the question of the hotel company's claim for unpaid

lien debts, and its claims for damages for breach of the construction contract, which claims the company may retain and offset against any claim of the principal contractor or affirmatively enforce against the surety if the principal defaults in paying them, connect these inquiries sufficiently with the subject of the litigation to empower a court of equity to adjust and settle them between the parties to this action. The trial and determination of these issues in this action are incidental to the enforcement of the rights of the lien claimants against the hotel property, which the owners have a right to protect by asking that all the liabilities of the parties be adjusted and that no more be allowed to lien claimants than they are upon investigation entitled to, and that the principal contractor and his surety be compelled to pay such debts, and save the hotel property harmless. The bond is involved in the suit and the relief therein as to lienors, and as to the hotel company for default in construction, and this sufficiently connects the hotel company's claim for damages for breach of the construction contract with the subject of the action to authorize the court to retain it in order to have a complete and final determination of the rights and liabilities of all the parties in any manner interested in these contracts and the property. We are persuaded that this holding is within the principle of the decision in the following cases, which hold that a court may "lay hold of a subject-matter, however large, made up of a single primary right and all rights germane thereto, however numerous, or several such subject-matters under certain circumstances, bring all parties directly interested before the court, with all parties necessary to be there for their due protection, and settle the entire controversy by a single decree." *Harrigan v. Gilchrist*, supra; *Gager v. Marsden*, 101 Wis. 598, 77 N. W. 922; *Carpenter v. Christianson*, 120 Wis. 558, 98 N. W. 517; *Herman v. Felthousen*, 114 Wis. 423, 90 N. W. 432; *Adkins v. Loucks*, 107 Wis. 587, 83 N. W. 934; *Level Land Co. v. Silver*, 112 Wis. 442, 88 N. W. 317; *Zinc Carbonate Co. v. First National Bank of Shullsburg*, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845; *St. Croix Timber Co. v. Joseph*, 142 Wis. 55, 124 N. W. 1049.

[7] The claim that this course deprives the demurrants of the right to have these issues tried by a jury is not sustained. Under section 2843, Stats., actions for the recovery of money only, or of specific real or personal property, or for divorce on the ground of adultery must be tried by a jury. No such case is here presented. The court properly overruled the demurrers interposed by the defendants.

The orders appealed from are affirmed.

CLANCY v. BOARD OF FIRE & POLICE COM'RS OF MILWAUKEE et al.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. ACTION (§ 35*)—REMEDIAL ACTS—EXCLUSIVENESS OF REMEDY.

Where a new remedy to meet a new situation is created by statute, the remedy is exclusive, and subject to the conditions and limitations thrown round it by the legislative wisdom.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 273-294; Dec. Dig. § 35.*]

2. APPEAL AND ERROR (§ 1*)—RIGHT TO APPEAL.

The right to appeal is purely statutory, and, unless given, it is withheld.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1-4; Dec. Dig. § 1.*]

3. MUNICIPAL CORPORATIONS (§§ 185, 198*)—REMOVAL OF MEMBERS OF FIRE AND POLICE DEPARTMENTS—RIGHT TO APPEAL.

St. 1898, § 959-46d, added by Laws 1911, c. 586, provides in subsections 19 and 20 for the removal, suspension, or reduction of a member of either the fire or police departments by the board of fire and police commissioners, and the procedure therein. Subsection 21 gives the accused a right to bring an action in the circuit court to review the action of the board, and subsection 22 provides that, if the decision of the board is reversed, the discharged member shall be at once reinstated, and that, if the decision of the board be sustained, the order of discharge shall be final and conclusive. The act nowhere provides for any appeal from the decision of the circuit court, although the Railroad Commission Law, Public Utilities Law, and the law governing condemnation proceedings for railroad, drainage, and highway purposes, which give the circuit courts right of review of the decisions of special tribunals, contain special provisions for an appeal. *Held* that as no right of appeal is expressly conferred, and the evident intention of the Legislature was to terminate the proceedings with the decision of the circuit court, no appeal will lie therefrom.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 492-509, 540-545; Dec. Dig. §§ 185, 198.*]

4. CONSTITUTIONAL LAW (§ 74*)—DISTRIBUTION OF GOVERNMENTAL POWERS—REMOVAL OF PUBLIC EMPLOYEES—RIGHT OF COURTS TO REVIEW ACTS OF SPECIAL BOARDS.

St. 1898, § 959-46d, added by Laws 1911, c. 586, provides for the removal, suspension, or reduction of a member of either the fire or police departments by the board of fire and police commissioners, and in subsection 19 provides that the hearing shall be on verified charges. Subsections 20 and 21 provide for an action in the circuit court by a removed member against the commissioners to reverse their decision, the only question for the court being whether, under the evidence, the decision of the board was reasonable. Subsection 21 further provides that the court may require a further or additional return, and may also require the board to take further and additional testimony and make return thereof. Const. art. 7, § 8, provides that the circuit courts shall have a supervisory control over all inferior courts and tribunals, and may issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and all other writs necessary to carry into effect their orders, judgments, and decrees, and give them a general control over inferior courts and jurisdictions. *Held*, that the clause of the statute providing that the court may re-

quire the board to take further and additional testimony and make return thereof contemplates the taking of testimony by the board and the making of a new finding in the light of the additional evidence, so that it gives the court no power to make any finding in regard to a dismissal of a person, except to review the evidence to determine the reasonableness of the decision of the board, which is authorized under Const. art. 7, § 8, and it is not therefore unconstitutional as vesting the administrative or executive function of removal in the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 124; Dec. Dig. § 74.*]

Appeal from Circuit Court, Milwaukee County; James Wickham, Judge.

Thomas A. Clancy, chief of the Milwaukee fire department, was removed from office by the board of fire and police commissioners under Laws 1911, c. 586, and brought an action in the circuit court to reverse the decision. From a judgment of the circuit court reversing the judgment of removal, the commissioners appeal. Appeal dismissed, and motion for writ of certiorari denied.

Daniel W. Hoan, City Atty., of Milwaukee, for appellants. Walter H. Bender, Thomas H. Dorr, Norman L. Baker, and W. J. Zimmers, all of Milwaukee, for respondent.

WINSLOW, C. J. Thomas A. Clancy, chief of the fire department of the city of Milwaukee, was removed from office by the board of fire and police commissioners of Milwaukee after trial upon charges as provided by subsection 19 of section 959-46d, Statutes of Wisconsin (chapter 586, Laws of 1911). He thereupon brought action in the circuit court of Milwaukee county against the board to reverse their decision, as provided by subsections 20 and 21 of the same law, and upon trial thereof the circuit court reversed the judgment of removal, and the commissioners appealed to this court from such judgment of reversal. The respondent now moves to dismiss the appeal to this court on the ground that no appeal from the judgment of the circuit court is provided for by the law. The appellants, while contesting the motion to dismiss, make a motion for the issuance (in the event of a dismissal of the appeal) of a writ of certiorari out of this court directed to the circuit court for the purpose of reviewing the judgment, claiming that the circuit court had no jurisdiction because of the unconstitutionality of the act aforesaid. It seems to us quite clear that no appeal lies from the decision of the circuit court.

[1] The law creates a new remedy to meet a new situation. The principle is familiar that, under such circumstances, the remedy is exclusive, and is subject to the conditions and limitations which legislative wisdom has seen fit to throw around it. *State ex rel. Cook v. Houser*, 122 Wis. 534 (see page 595), 100 N. W. 964.

[2] The right of appeal is purely statutory,

and unless given, it is withheld. *Puffer v. Welch*, 141 Wis. 304, 124 N. W. 406.

[3] It is true that our statutes in general terms authorize appeals from judgments in actions in the circuit court, and that the present proceeding is expressly termed an action in the law which creates it. Examination of the provisions of the law, however, seems to indicate very conclusively that no appeal to this court was contemplated. In the first place, nothing is said about any such appeal, and this is the more significant because, upon examination of somewhat similar laws giving to circuit courts the right of review of the decisions of special tribunals, we find special provisions for appeal to this court industriously inserted. Chapter 362, Laws 1905 (Railroad Commission Law) § 16; chapter 499, Laws 1907; sections 1797m1—109, Stats. (Public Utilities Law); section 1797m—69. See, also, sections 1849, 1379—36, and section 1299f (Stats. Wis.), governing condemnation proceedings for railroad, drainage, and highway purposes. Much stronger than this mere negative inference, however, is the inference necessarily to be drawn from the positive provisions of the law itself. Subsection 22 provides that, if the decision of the board is reversed by the court, the discharged man shall be at once reinstated in his position, and entitled to his pay as if never discharged, and that, if the decision of the board be sustained, the order of discharge shall be final and conclusive in all cases. The purpose to absolutely terminate the proceeding with the decision of the circuit court seems here very certain. Doubtless the probable demoralizing effect on the public service of long drawn-out proceedings, during which time no permanent appointment could be made, was fully appreciated. Every clause of the law indicates the intention to make the entire proceeding as speedy as possible, and yet give the accused person the right to fully make his defense, and in view of the very significant provisions of the section last cited we entertain no doubt that the statute means, and was intended to mean, that the proceeding should be finally closed by the decision of the circuit court. It follows that the appeal will be dismissed. As to the motion for the issuance of a writ, different considerations arise.

[4] The appellants' contention is that the removal of such officers is purely an administrative or executive function and in no sense judicial, and cannot under the Constitution be vested in the courts, that the law in hand practically gives to the circuit court the power of removal, and hence is unconstitutional. We do not find it necessary to decide the question whether the power of removal of local officers is a function which can constitutionally be vested in the courts. Counsel urge that this question was decided in the negative by the case of *State ex rel.*

Davern v. Rose, 140 Wis. 360, 122 N. W. 751, 28 L. R. A. (N. S.) 194, but an examination of that case shows that the question there presented was an entirely different one, and has only a remote bearing on the present case, if indeed it has any bearing at all. For many years the statutes of this state have provided for the removal of certain administrative officers by judges of courts of record, and we are not aware that the constitutionality of these provisions has ever been attacked. Circuit judges are authorized to remove the clerk of the circuit court (section 973, Stats. Wis.), the county superintendent of schools (section 975, Id.), and town officers (section 976, Id.). County judges are empowered to remove all school district officers (section 507, Id.). Circuit judges are also empowered to remove jury commissioners (section 2533a, Id.), and there may be other instances. However, we intimate no opinion upon the question. We do not consider that the law before us places the power of removal in the hands of the circuit court under any reasonable construction of its provisions. Subsection 19 of the law provides for a hearing upon verified charges, and further provides that the board shall decide by majority votes whether the charges are sustained, and, if sustained, shall at once determine whether the accused shall be removed, suspended from office temporarily, or reduced in rank. Subsections 20 and 21 provide for the commencement of an action such as the present by the removed officer against the commissioners in the circuit court for the purpose of reversing the decision, and that the same shall be tried by the court without a jury upon the evidence returned by the board. Upon this retrial the only question to be reviewed by the court is the question "Under the evidence was the decision of the board reasonable?" Section 21 further provides that the court may require a further or additional return to be made, and may also require the board "to take further and additional testimony and make return thereof."

Taking the two sections together, it is plain that the legislative purpose was to require the board not only to decide whether the charges are sustained, but to make a decision which is reasonable under the evidence taken. The object evidently was to require that the decision should not be whimsical, capricious, or merely partisan, but a decision founded on some rational view of the evidence. It is equally plain, we think, that the legislative idea further was that as a further safeguard against purely partisan decisions or predetermined decisions founded on no substantial grounds the circuit court should have power to summarily review the trial and decision, not for the purpose of deciding whether the officer was in fact guilty of the charges made, or whether the court would decide the same way upon the evidence,

but simply whether the board had performed its statutory duty and made a reasonable decision upon the evidence; i. e., had acted not necessarily wisely, but as reasonable men, upon the evidence placed before them.

In substance, this appeal was intended to perform the functions of a writ of certiorari in a case where the writ is directed to a tribunal of this nature, namely, to review the evidence to ascertain only whether there was reasonable ground for the decision made. *State ex rel. Foster L. Co. v. Williams*, 123 Wis. 61, 100 N. W. 1048. It is a method provided by statute by which the power of superintending control which is vested in the circuit courts by the Constitution is to be exercised. The Constitution (article 7, § 8) provides that the circuit courts shall have a supervisory control over all inferior courts and tribunals and shall have power "to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and all other writs necessary to carry into effect their orders, judgments, and decrees, and give them a general control over inferior courts and jurisdictions." While no formal writ issues in the present case and the proceeding is termed an appeal, it accomplishes the same result as though it had been commenced by the issuance of the ancient writ, and there can be no doubt of the legislative power to reach the desired end by procedure termed an appeal as well as by an original common-law writ. It is true that by the last clause of section 21 it is provided that the court may require the board to make a further return and also "to take further and additional testimony and make return thereof." The appellants claim that this clause authorizes the circuit court to try and decide the case on testimony which has never been considered by the board, and thus that in such cases the court is authorized to pass de novo upon the question as to whether the accused is guilty or not. We do not so construe the clause in question. It is true that there is no specific provision that the board shall consider the additional testimony, but that seems to us to be the only construction which fully harmonizes the clause with the general purpose of the other provisions regulating the appeal. That general purpose, as before said in this opinion, is clearly not to make the court a trier of the facts, but simply a trier of the question whether the board has acted reasonably on the evidence before them. To so construe the law as to permit the court to pass upon the question of guilt as an original question upon evidence never considered by the board would subvert its dominant purpose, and should not be done, unless unequivocal words require such construction. We do not think that such a case is presented here. While the law does not expressly say that the board shall report whether their decision

remains the same as before or not, it requires that they make a return, and we construe this as meaning not only that they send up the evidence, but also return therewith their decision in the light of the additional evidence. If this were not the intention, it would certainly be absurd to require the board to formally meet for the sole purpose of taking additional testimony when the same could be at once taken by the court itself, or by a single officer authorized to take depositions with far greater dispatch and far less trouble.

The conclusions reached demonstrate that in acting under this statute the court neither removes an officer nor extends his term of office. It simply decides whether the board has performed the duty imposed on it by the statute. This question is purely judicial. There is no ground for a claim that the provisions attacked are unconstitutional.

Upon respondent's motion the appeal is dismissed, with costs. Appellants' motion for the issuance of a writ of certiorari is denied, without costs.

ARNOLD v. INGRAM et al†

(Supreme Court of Wisconsin. Oct. 29, 1912.
Dissenting Opinion Oct. 31, 1912.)

1. LIBEL AND SLANDER (§ 74*)—PUBLICATION—PARTICIPATION BY DELIVERY.

One participates in publication of a libel, so as to make himself liable, by delivering manuscript, with knowledge of its statements, to a newspaper for publication.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 175-178; Dec. Dig. § 74.*]

2. LIBEL AND SLANDER (§ 21*)—WORDS REFERRING TO ALL OFFICERS.

Where words of a published article refer to all officials, with nothing to show that they point to one officer more than another officer, they are not actionable as libelous.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 108; Dec. Dig. § 21.*]

3. LIBEL AND SLANDER (§ 82*)—PLEADING—INUENDO.

Words of a published article referring to all officials, with nothing therein to show they point to one officer more than any other officer, may not, by innuendo, be shown to refer to a particular officer.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 187-197; Dec. Dig. § 82.*]

4. LIBEL AND SLANDER (§ 10*)—COMMENTS ON CANDIDATES FOR OFFICE.

Words of a political sermon, in the nature of an appeal to electors to overthrow at an election the ruling political clique and all adhering to it, relating to the fitness for office of those adhering and their conduct in office, imputing to them no crime, employing no degrading or insulting epithets towards them, but only in extravagant language denouncing them as derelict in the duties of their office, unfit, unfaithful, etc., are not libelous.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 41, 91-96; Dec. Dig. § 10.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

† Motion for modification of mandate denied, with \$25 costs.

5. LIBEL AND SLANDER (§ 86*)—NEGATIVING LIBELOUS MEANING.

The libelous meaning attempted to be put on certain words by innuendo being negated by the jury, and no other meaning being claimed for them, they furnish no support for recovery.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 205-208; Dec. Dig. § 86.*]

6. LIBEL AND SLANDER (§ 48*)—QUALIFIED PRIVILEGE—DISCUSSING CANDIDATES.

The words of a political sermon directed against the alleged ruling political clique of saloon keepers of a city and their adherents: "If in our city, you see a man in the office of district attorney, who has based his claim to re-election on the ground that he saved the county money by refusing to prosecute more than half the criminal cases which he was elected and paid to prosecute; [if you see an official who publicly, in the courtroom, apologizes for prosecuting the criminal at the bar and declares his personal disapproval of the law under which the defendant was arraigned; if you see an official who, in this city within the present year, has refused to prosecute a considerable number of cases so flagrant that when the judge before whom they were brought declared his intention to continue them, the defendants at once pleaded guilty and were fined;] if you know an officer whose fidelity to his oath of office is open to grave doubt, what matters it to you whether he disgraces the Republican or Democratic ticket?"—being found true as to the bracketed words, the rest, in the nature of conclusions, resting in part or in whole on the matter found to be true, must be accorded the protection of the qualified privilege of discussing the relevant merits and demerits of candidates for office.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 144-147; Dec. Dig. § 48.*]

7. LIBEL AND SLANDER (§ 48*)—DISCUSSION OF POLITICAL CANDIDATES—FAIR COMMENT.

The words in brackets in a political sermon, directed against the alleged ruling political clique of saloon keepers of a city and their adherents, which, after discussing the district attorney, discusses candidates for assembly and senate, and then concludes: "Let the refreshing breeze of a nonpartisan ballot blow away the morally devitalized atmosphere which we have been breathing, replacing with the quickening ozone of righteousness [the effluvia of corruption which is undermining our moral stamina and familiarizing our entire population with the betrayal of trust in high places, and the practice of wickedness in low, till it is demonstrated anew before our own eyes, that the wicked indeed walk, or, as the original reads, 'strut proudly on every side, when villainess is exalted among the sons of men']"—are not reasonably susceptible of any defamatory meaning so far as concerns the district attorney; but are within the bounds of fair comment.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 144-147; Dec. Dig. § 48.*]

8. LIBEL AND SLANDER (§ 19*)—CONSTRUCTION.

In libel words are to be construed according to their plain and natural import.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 98, 99; Dec. Dig. § 19.*]

9. LIBEL AND SLANDER (§ 123*)—CONSTRUCTION—PROVINCE OF COURT.

Where there is no ambiguity in alleged libelous language, its meaning is for the court to determine.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. § 123.*]

10. LIBEL AND SLANDER (§ 123*)—OCCASION OF QUALIFIED PRIVILEGE.

Whether the occasion of alleged libelous language was one affording to the writer a qualified privilege or right of fair comment and criticism is a question for the court.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. § 123.*]

11. LIBEL AND SLANDER (§ 123*)—MALICE—QUESTION FOR JURY.

In libel, the question of malice is for the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. § 123.*]

12. LIBEL AND SLANDER (§ 123*)—CONSTRUCTION—QUESTION FOR THE JURY.

The question of the meaning of an alleged libel, when the words are ambiguous or fairly susceptible of a libelous meaning, is for the jury; their inquiry being, How did the persons to whom they were originally published understand them?

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. § 123.*]

13. LIBEL AND SLANDER (§ 125*)—MALICE—FINDINGS.

The finding negating bad motive in the publication on an occasion of qualified privilege is equivalent to one of good faith and absence of malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 374; Dec. Dig. § 125.*]

14. LIBEL AND SLANDER (§ 50½*)—PRIVILEGE—EXCESSIVE PUBLICATION.

Because the paper in which is published an article on candidates for office in a county, privileged in that county, has some circulation outside the county, there is not such excessive publication as to give right of recovery.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 50½.*]

Barnes, J., dissenting.

Appeal from Circuit Court, Eau Claire County; E. W. Helms, Judge.

Action by Fred Arnold against Orrin H. Ingram and others. Judgment for plaintiff. Defendant Ingram appeals. Reversed and remanded, with directions.

C. T. Bundy and L. A. Doolittle, both of Eau Claire (Bundy & Wilcox, of Eau Claire, of counsel), for appellant. Fred Arnold, in pro. per., and V. W. James, both of Eau Claire (T. D. Sheridan, of counsel), for respondent.

TIMLIN, J. In this action for libel against the appellant and one Granville Ross Pike, it appeared that the latter was a clergyman who delivered a political sermon or discourse, and sent a synopsis of it for publication to the Daily Telegram, a newspaper printed and published in the city of Eau Claire, an-

other to the Eau Claire Leader, a like newspaper. There was evidence tending to show that the appellant in person delivered the manuscript of this synopsis to the publisher of the Daily Telegram, who published the same, and the jury so found, but found that the appellant did not deliver the manuscript of the synopsis of the sermon in question to the Eau Claire Leader. Only the defendant Ingram appeals.

The alleged libelous article is as follows:

"From the text Ps. 12:8, 'The wicked walk on every side when the vilest men are exalted,' the Rev. Granville Ross Pike spoke yesterday morning at the First Congregational Church, on 'The Kakarky of Eau Claire.' He said in part:

"'In one of the banks of this city is a most ingenious invention, which indicates what the weather is to be by means of an automatic pen controlled by the rising or falling of the mercury in the glass tube of the barometer. The record made is permanent, and the fluctuations of the weather may thus be read backward through months and years. Just such an automatic pen is the history of mankind. It records faithfully the fair weather of liberty or the foul weather of enslavement, according as the free spirit of a people has waxed or waned in their political institutions. "Man," says Aristotle, "is by nature a political animal, and has endured or created every conceivable form of government." He has suffered under monarchy, or the government by one; under oligarchy, or the government by a few; under anarchy, or no government at all. A measure of his progress in civilization and true development is found in the degree to which he approaches a real democracy or that mutual government succinctly described in Lincoln's classic phrase: "A government of the people, by the people and for the people."

"'Under whatever form of government the people might lie, so dominant is the selfish impulse in human nature, they have always been forced to contend with those who have seized supremacy for the sake of personal gain. The passage just read from the prophet Isaiah is a striking indictment of such an instance and its results in ancient Israel. Our text describes a similar condition and its consequences at a still earlier date. It is therefore, one of the oldest and at the same time one of the newest usurpations of the rights and liberties of the commonwealth, to which I direct your attention this morning, in a consideration of The Kakarky of Eau Claire.

"'At the present moment we here in Eau Claire are enduring the reign of a Kakarky, a government by the bad. We fondly imagine that we have elected by our free suffrages certain city officials to administer the affairs of the city honestly, economically, equably, and with due regard to decency and order, and that these officials are doing that

which they have been elected or appointed to do. This, however, is an altogether mistaken notion. The real rulers of Eau Claire to-day are a clique of seventy-three men, who have no official place of authority, no fitness for such a position, and no respect from much the larger proportion of our citizens. We flatter ourselves that it is the men whose enterprise and industry have created the wealth and industrial and commercial prosperity of the city, the men whose moral probity and high standards have given Eau Claire a character for splendid citizenship among the municipalities of the state, men whose patriotic zeal and self-denying generosity toward the city of their habitation have built her institutions of learning, of mercy and of justice, are those whose will shapes our municipal policy and determines the influences which surround the childhood, the womanhood and the common manhood of our city. It is not so. The actual sovereigns of this city are the seventy-three men, sixty-eight retail saloon keepers and five wholesale liquor dealers, whom our culpable acquiescence has permitted to become enthroned as the dictators of the conditions under which we must live, transact our business and bring up our children. The extent of their dominance is not generally recognized; if it were we would be roused to a revolt, which would sweep away utterly and at once that "covenant with death and agreement with hell," as Isaiah calls it, which, for a paltry forty-four thousand dollars, we have been seduced into making. Think a moment upon the measure of our subservency. First, this monstrous autocracy has its hand in every business man's pocket, sipping tribute under threat of boycott and antagonism. The Street Fair, just closed, is merely the latest, not the chief, instance of this. I asked business men if the Street Fair was of any advantage to them. One man said it had brought certain patrons of his to town and they had taken that occasion to settle their bills with him. This was the only favorable word that I heard. The others all declared it to be no help to trade; some called it a detriment to business, while still others declared that they would gladly have given twice as much to prevent the Fair coming, as they felt compelled to give to carry it on. Why, then, did all these merchants contribute? Because the seventy-three sent out word that they wanted the Street Fair and expected the business men of the town to largely finance it. Business is prostituted by the will of the saloon keeper.

"'The holiest sanctuary of a commonwealth is its law. This group of seventy-three rulers tramples with contempt upon the divine law of the Sabbath, written alike in the sacred decalogue and the still more sacred constitution of man; it spurns the statutes of Wisconsin, which declare that you shall do no business upon Sunday, except works of

necessity or mercy, by systematically and persistently plying a nefarious trade, for which there is no necessity and in which there is no mercy; it ignores the fundamental ordinances of our city government, which prohibit the sale of liquor on Sunday, and sells to whomsoever will buy. This insolent domination creates an atmosphere of lawlessness and real anarchy, in which evil flourishes and good withers away. The time was when tropical plants flourished and tropical animals roamed, where for ages have been unmelting ice fields and all vegetation has perished in the strangling grasp of continuous Arctic cold. The historic campaign of Rome has become, through neglect, so saturated with malaria that it is well-nigh utterly unfit for human habitation. There is a deadly exhalation from these sinks of iniquity—the regal palaces of our sovereign lords—which, like the deadly choke damp of the mines, asphyxiates the moral sense of the community and paralyzes the energies of its administration. (1) [Officials, under its benumbing influence, violate their oaths of office] juries are hypnotized into the giving of unjustifiable verdicts, and I myself, within the past fortnight, have heard a shrewd attorney of this city conduct three successive schools for the instruction of malefactors with what ease and impunity they might violate the laws of the land and of this municipality. Moreover, under the deadly shadow of this deadly upas tree, called the saloon, which is the throne of our rulers' power, there have sprung up other evils, grossly detrimental to the peace and welfare of the community. In the spirit of lawlessness engendered by the brazen defiance of law by this dominant element, opportunity is found for Sunday horse-racing, Sunday baseball, Sunday tournaments, and kindred violations of the quiet and sanctity of the day, to the great demoralization of our population. The Sunday theaters, unknown in this city four years ago, have become a large factor in the perversion, especially of the young people of the community, houses of a sort unfit to be named in decent company are always and everywhere the concomitants of the saloon and of saloon dominated territory; gambling is fostered, encouraged and developed in the saloon. Sweep these away, let in the flood of public attention and public interest and the uprising of public wrath upon these hiding places of evil and they will be drowned out and washed clean, and with them will disappear altogether some of these evils and the residue will be greatly minimized.

"The serious question for each of us is: How may this hellish régime be overthrown? It is a problem which has confronted every people and every state at intervals since the dawn of history. Xenophon, the Greek historian, tells us how Athens, the glory and crown of art, of literature, of philosophy,

fell into the hands of thirty tyrants, who violated her public offices and wholly reversed the principles and traditions which, in making her free, had made her great. Eight months the citizens endured this reign of the Thirty. They then arose and overthrew these despots, killing some and driving the rest into exile. The pages of English history inform us how our own forefathers, wearied by the oppression of the Stuarts, arose and cast them out, beheading one, and when the restored line made no improvement, repudiated the house of Stuart altogether and established another. Our own ancestors, when the mother country sought to exercise unlawful jurisdiction over these colonies, wrote and maintained their immortal Declaration of Independence. Our own contemporaries in many of our cities, disgusted by the brazen effrontery and gross abuse of power of ruling factions, have risen and put them down. Eau Claire may be cleared of this pestiferous Kakarky by a similar assertion of manhood on the part of her citizens. The time is at hand in which to do this. Ten days hence occurs the election. When the ballots shall fall as lightly

"As snowflakes on the sod,
Yet execute the freeman's will
As lightning does the will of God."

"(2) [then will be opportunity to discriminate between those who have served the city and the community in public office, and those who have betrayed her]. (3) [The great danger is that the momentum of a presidential ticket will carry with it into office those who are utterly unworthy of public confidence.] Partisanship in city affairs is the curse of city administration. There is no partisanship in the ranks of those whom, in the name of the home, the law and the commonwealth the entire citizenship should rise up and hurl from their seats. (4) [Chicago is, even now, in the midst of such an attempt as we should make, to rid that city of the gang of those who, like our own Seventy-three, have purchased the privilege of plunder, by the nonpartisan election of a district attorney on an independent ticket, when neither party has provided a candidate for that office for whom a self-respecting man can vote.] (5) [If in our city, you see a man in the office of district attorney, who has based his claim to re-election upon the ground that he saved the county money by refusing to prosecute more than half the criminal cases which he was elected and paid to prosecute; if you see an official who publicly, in the courtroom, apologizes for prosecuting the criminal at the bar and declares his personal disapproval of the law under which the defendant was arraigned; if you see an official who, in this city within the present year, has refused to prosecute a considerable number of cases so flagrant that when the judge before whom they were brought declared his intention to continue

them, the defendants at once pleaded guilty and were fined; if you know an officer whose loyalty to this ruling clique is beyond question and whose fidelity to his oath of office is open to grave doubt, what matters it to you whether he disgraces the Republican or the Democratic ticket? If you find a candidate for the office of sheriff, whom you know, from past actions and evidence, to be allied with this rule that must be overthrown, what bearing upon your vote in this matter should have the question of the national policy of protection or free trade? If you see men on either ticket, who, if elected, when this small but pernicious group of Seventy-three has been thrown out of the front door, will not allow them to sneak in at the back, does it matter which?

"On a wider field. If you can find among the candidates for the assembly or for the senate one who will stand for liberation rather than for further enslavement to this same dominant power that holds Eau Claire in its grasp, what need you care which party had the honor of placing such a man in nomination? The test of free suffrage is each man's liberty, without bondage to any, to vote for what and whom he considers right.

"Let the refreshing breeze of a nonpartisan ballot blow away the morally devitalized atmosphere which we have been breathing, replacing with the quickening ozone of righteousness (6) [this effluvia of corruption which is undermining our moral stamina and familiarizing our entire population with betrayal of trust in high places] (7) [and the practice of wickedness in low, until it is demonstrated anew before our own eyes, that the wicked indeed walk, or, as the original reads, "Strut proudly on every side, when villainess is exalted among the sons of men"]."

The whole synopsis of the sermon as above printed is annexed to the complaint and part thereof. The headlines may be disregarded because it appears they were put on after the synopsis was delivered by appellant. That part of the complaint relating to publication in the Eau Claire Leader may be omitted because it was found that the appellant did not cause that publication.

The matter inclosed in bracket No. (1) is also separately stated in the same complaint with an innuendo to the effect that it was intended and understood to assert as a fact that the plaintiff had under corrupt influence violated his oath of office. By answer to question 5 of the special verdict the jury found that a person of average comprehension upon reading these words in connection with the remainder of the synopsis as published would ordinarily have understood that the plaintiff was accused thereby of having under corrupt influence violated his oath of office. By their answer to question 15 of the verdict they found that this accusation was not substantially true.

The matter inclosed in bracket No. (2) was also separately stated in the same complaint, with an innuendo to the effect that it meant, and was understood to mean, that plaintiff had betrayed the trust of the office of district attorney. The jury in answer to question 6 of the verdict found that a person of average comprehension reading these words in connection with the remainder of the synopsis would ordinarily have understood therefrom that the plaintiff was accused of betraying the trust of his office as district attorney; and by their answer to question No. 16 of the special verdict found that this accusation was not substantially true.

The matter inclosed in bracket No. (3) was also separately stated in the same complaint with an innuendo to the effect that this meant, and was understood to mean, that the plaintiff was, in fact, unworthy of public confidence to any extent. The jury in answer to question 8 of the verdict found that a person of average comprehension reading these words with the rest of the synopsis would ordinarily have so understood it, and by their answer to question 18 of the verdict found that this accusation was not substantially true.

The matter inclosed in bracket No. (4) was also separately stated in the same complaint, with an innuendo to the effect that it meant and was understood to mean that the plaintiff was in fact so base and vile that a self-respecting man could not vote for him. The jury in answer to question 9 of the verdict found that a person of average comprehension would not ordinarily so understand it, and, although the question of the truth or falsity of this was submitted to the jury by question 19 of the verdict, they did not answer it.

The matter inclosed in bracket No. (5) is also separately stated in the same complaint with an innuendo to the effect that it meant, and was understood to mean, that each of the several charges and matters therein stated were disgraceful facts. The jury by their answer to question 1 of the special verdict found that that part of the matter in bracket No. (5) printed in ordinary type and preceding the italics would by a person of average comprehension reading the synopsis of the sermon as published have been understood to accuse the plaintiff of basing his claim to reelection upon the ground that he saved the county money by refusing to prosecute more than one-half of the criminal cases which he was elected and paid to prosecute. By their answer to question 11 the jury found that this accusation was not substantially true. By their answer to question 2 of the special verdict the jury found that a person of ordinary comprehension reading the synopsis in question as published would ordinarily have understood that the plaintiff was accused thereby of having publicly in the courtroom apologized for prosecuting a criminal at the bar and de-

claring his personal disapproval of the law under which the defendant was arraigned. But by their answer to question 12 of the verdict the jury found that it was substantially true that the plaintiff had publicly in the courtroom apologized for prosecuting the criminal at the bar. By their answer to question 12½ of the verdict, the jury found that it was substantially true that the plaintiff had publicly in the courtroom declared his disapproval of the law under which the defendant was arraigned. By their answer to question 3 of the verdict, the jury found that a person of ordinary comprehension reading the synopsis would understand therefrom that the plaintiff as district attorney in the year 1908 refused to prosecute a considerable number of cases, so flagrant that, when the judge before whom they were brought declared his intention to continue them, the defendants at once pleaded guilty and were fined. By their answer to question 13 of the verdict the jury found that the accusation last stated was substantially true.

That part of the synopsis contained in bracket No. (5) and which was found to be true is in italics above. By their answer to the fourth question of the verdict, the jury found that a person of ordinary comprehension would ordinarily have understood that the plaintiff was thereby accused of being an officer whose loyalty to the ruling clique of 73 liquor dealers was beyond question, and whose fidelity to his oath of office was open to grave doubt.

By their answer to question 14 of the verdict the jury found that this accusation was not substantially true. The matter inclosed in bracket No. (6) is also separately stated in the complaint, with an innuendo, in effect, charging that it meant and was understood to mean that the plaintiff had in fact and through said corruption betrayed the trust of his said office. The jury found in their answer to question 7 that a person of average comprehension would so understand it, and in their answer to question 17 that the accusation was not substantially true.

The matter inclosed in bracket No. (7) is also separately stated in the same complaint, with an innuendo to the effect that it was meant and understood to charge that the plaintiff was the vilest of men, and that in him vileness was, in fact, exalted among the sons of men. The jury by their answer to question 10 of the special verdict found that a person of average comprehension would not ordinarily so understand it, and returned no answer to question 20, which asked whether this charge was substantially true.

With reference to the whole article, the jury found by their answer to question 23 that the appellant in person delivered the manuscript of the synopsis to the office of the Daily Telegram on October 27, 1908, and by answer to question 24 that the appel-

lant, when he so delivered said manuscript, had knowledge of the statements therein referring to the plaintiff. The answer to question 32 established that the defendant Granville Ross Pike was not actuated by any ill will, hostility, bad motive, or malicious feeling against the plaintiff in the publication of the synopsis of the sermon in question. The answer to question 33 found that the appellant in delivering the manuscript for such publication was not actuated by any ill will, hostility, bad motive, or malicious feeling against the plaintiff. For the publication in the Eau Claire Leader with which the appellant was not concerned the jury assessed compensatory damages against the defendant Granville Ross Pike by their answer to question 21 of the verdict in the sum of \$600. For the publication in the Daily Telegram with which the appellant was concerned as aforesaid by delivering the manuscript for publication having knowledge of its contents, the jury assessed compensatory damages against Granville Ross Pike in the sum of \$525. Punitive damages assessed were not allowed, and no question is made concerning the correctness of that ruling. No damages were expressly assessed by the verdict against the appellant, but against the defendant Granville Ross Pike in the form stated, and the defendant was only connected with this by the finding that he delivered the manuscript in question to the newspaper office with knowledge of the statements therein contained referring to the plaintiff.

[1] It is argued that appellant's participation in publication of the alleged libel is not sufficiently established. "Every one who requests or procures another to write, print, or publish a libel is answerable as though he wrote, printed, or published it himself." Odgers, L. & S. (5th Ed.) p. 168. "The mere delivery of a libel to a third person by one conscious of its contents amounts to a publication." Id. p. 165. Instances illustrating the application of this general rule may be found in 25 A. & E. Ency. (1st Ed.) pp. 820, 821, 27 A. & E. Ency. (2d Ed.) p. 1056, where a telegraph company is held responsible for publishing a libel in transmitting a telegram from the sender to the person addressed; also *Monson v. Lathrop* & *Western U. Tel. Co.*, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54; *Peterson v. Western U. Tel. Co.*, 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302. In *Loibl v. Breidenbach*, 78 Wis. 49, 47 N. W. 15, it is held that one who negligently signs a libelous article without knowing its contents, and delivers it to the person who wrote it without any direction restricting the use to be made of it, is responsible for the publication thereof by the person to whom it is delivered, where the article shows on its face that it is intended for publication. Participation in publishing a libel is participation in the commission of tort, and the old

and well known rule is that all who aid, advise, countenance, or assist the commission of the tort are wrongdoers.

[2, 3] The most serious question raised by the appeal is the claim of qualified privilege on the ground that the plaintiff was a candidate for public office and his official acts and public character open to discussion, and therefore the article in question, so far as it concerns the plaintiff, did not exceed the bounds of fair comment and criticism. The alleged libelous matter is set forth in full in this opinion because we found it impossible by mere description to convey an accurate idea of the nature and contents of the synopsis. It is purely political, such a discourse as one often hears on the stump from politicians or public men during an election campaign. The authority of Isaiah, Aristotle, and Abraham Lincoln is invoked, and the experience of Athens, Rome, and England drawn upon as a warning against the domination of the 73 saloon keepers in Eau Claire. These 73 are the principal objects of attack, but all who adhere to them are also condemned and exposed. In presenting the 73 and their adherents for disapproval, the writer, for the purpose of impressing his readers or because of a personal peculiarity, employs some highly rhetorical and extravagant forms of expression. "A deadly exhalation from the regal palaces" of those whom he describes as sovereign lords of Eau Claire, which deadly exhalation is compared to the deadly choke damp of the mines, is said to asphyxiate the moral sense of the community, and paralyze the energies of its administration. Then follows the first alleged libelous statement complained of as above set forth. It does not refer to the district attorney nor to the plaintiff, but to all officials who come under the benumbing influence of this deadly exhalation and under such influence they violate their oaths of office. "The defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. If the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory. An innuendo cannot make the person certain which was uncertain before." Newell, S. & L. (2d Ed.) p. 256, § 17. Illustration: If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there is something to point to the particular individual. *Eastwood v. Holmes*, 1 F. & F. 349. This matter in bracket (1) refers to all officials, and does not point to the district attorney or to the plaintiff any more than it does to the county judge, the mayor of the city, or any city or county officer. The matter in brackets (2) and (3) is subject to this same weakness. There is nothing to show that it points to the district attorney more than it does to any other of-

ficer, unless it be the innuendo which is not warranted by the context.

[4, 5] The alleged libelous matter in brackets (1), (2), and (3) not only fails to point to the district attorney more particularly than to any other officer, but is in the nature of an appeal by one elector to the other electors to overthrow the ruling political clique and all who adhere to it. It relates to the fitness for office of those who adhere to the ruling clique and their conduct in office. It imputes no crime to them. It employs no degrading or insulting epithets toward them, but in extravagant language denounces them as derelict in the duties of their office, unfit, unfaithful, etc. This we understand a political stump orator may do, and outside of ethics there is no rule against using the pulpit for a like purpose. It would be absurd to hold it libelous to say of a candidate for office that he was utterly unworthy of public confidence. To maintain that proposition all political arguments are advanced against a candidate. They are sometimes very rambling, remote, and irrelevant, but the law does not undertake to punish the man who sums them up in a single sentence. The district attorney is introduced for the first time in the matter contained in bracket (4). Here we have it that a gang in Chicago similar to the 73 Eau Claire saloon keepers purchased the privilege of plunder by the nonpartisan election of a district attorney on an independent ticket, when neither party had provided a candidate for that office for whom a self-respecting man could vote. We do not understand that there was any nonpartisan candidate for district attorney in Eau Claire, or that the plaintiff was so described. He simply endeavors to bring himself within the last part of that sentence, which states neither party has provided a candidate for the office of district attorney for whom a self-respecting man can vote. The plaintiff was the nominated candidate to the office of district attorney on the Republican ticket, and it may be fairly said that this part of the synopsis describes the plaintiff as a candidate for whom a self-respecting man could not vote. This is all that is claimed for it in the complaint. The jury negated the libelous meaning attempted to be put on this by innuendo and no other meaning was claimed for it so we may say this drops out as a support for the recovery.

[6, 7] The matter inclosed in bracket (5) presents more difficulty. Although cast in a single sentence in the synopsis and this sentence set forth separately in the complaint followed by an innuendo to the effect that it meant and was understood to refer to plaintiff, and to assert in the form of a climax that each of the several charges and matters were facts, it was separated in the verdict. The jury found that part of it in

italics above to be true, the remainder of the sentence not true. That part found to be true contains the most specific and serious accusations in the sentence. The parts found by the jury not to be true are also found by them to accuse the plaintiff of basing his claim to re-election upon the ground that he saved the county money by refusing to prosecute more than half of the criminal cases which he was elected and paid to prosecute. This merely finds that he made claim to re-election upon that ground. The other part of the same sentence was interpreted by the jury to charge the plaintiff with being an officer whose loyalty to the ruling clique of 73 liquor dealers was beyond question and whose fidelity to his oath of office was open to grave doubt. Taken in connection with the rest of the synopsis, the fair interpretation of this, it seems to us, is that the matter found to be true by the jury formed the basis of the writer's conclusion that the plaintiff was loyal to the ruling clique of liquor dealers, and that his fidelity to his oath of office was open to grave doubt. That appears to be an argumentative inference from the fact that he apologized for certain prosecutions, disapproved the law under which they were brought, and refused to prosecute others who nevertheless pleaded guilty and were fined.

The matter in bracket (6) was found by the jury to present to a person of average comprehension on reading the synopsis the idea that the plaintiff was accused of having through effluvia of corruption betrayed the trust of his office as district attorney. It does not seem to us to refer to the plaintiff. Its meaning is not very apparent. The writer had just before been discussing candidates for assembly and for senate. The article speaks for itself on this point. He wishes the refreshing breezes of a certain ballot to blow away the morally devitalized atmosphere which they have been breathing, and he wishes to replace an effluvia of corruption (which was undermining their moral stamina and familiarizing them with betrayal of trust in high places) by the quickening ozone of righteousness. This is another attempt to break up a sentence into fragments and give an independent meaning to each fragment.

The matter in brackets (6) and (7) seems to us to be a sort of a pious peroration closing the argument. It is noticeable that the jury found that that part of this sentence inclosed in bracket (7) would not bear the libelous construction placed upon it by the innuendo in the complaint. Considering the last sentence in the synopsis, we think it could not be fairly said that one discussing political questions from the viewpoint of the Reverend Mr. Pike exceeded the bounds of fair comment by indulging in such generalities. This matter in brackets (6) and (7) is not reasonably susceptible of any defamatory meaning so far as the plaintiff is con-

cerned. Indeed, the whole synopsis is directed against the 73 liquor dealers and their adherents, including all other public officers who adhere to them or their cause, except where he takes up the district attorney in brackets (4) and (5).

The matter contained in bracket (4) having been found by the jury not libelous, the whole case really rests upon the matter contained in bracket (5). If part of this last had not been found true by the jury, a very different question would be presented. The occasion being one of qualified privilege and the more serious matters in the synopsis so far as they refer to the plaintiff, having been found by the jury to be true and those related matters in the same sentence being in the nature of conclusions resting in part or in whole on the matter found to be true, the protection of privilege must be accorded to the appellant. In the law of libel that branch or subdivision of qualified privilege which permits discussion of the relative merits and demerits of candidates for office is not identified with the defense of fair comment and criticism of a book, a play or other similar thing offered to the public. But the qualified privilege to discuss the relevant demerits of a candidate for office is broader, and includes privilege as well as the right of fair comment and criticism.

[8-12] In libel words are to be understood according to their plain and natural import. Where there is no ambiguity in the language its meaning is for the court to determine. *Odgers, L. & S. (5th Ed.)* p. 688, par. 6. The court also determines whether the occasion was one affording to the writer a qualified privilege or right of fair comment and criticism. *Newell, S. & L. (2d Ed.)* p. 391, par. 9. The question of malice is for the jury and also the question of the meaning of the alleged libel when the words used are ambiguous or fairly susceptible of a libelous meaning. The question always is: How did the persons to whom the words were originally spoken or published understand them? In answering this question it is the duty of the jury to weigh all the circumstances of the case, the occasion of speaking, and the relationship between the parties. They should consider the words as a whole, not dwelling on isolated passages, but give its proper weight to every part. The defendant is therefore entitled to have the whole of the alleged libel read as part of the plaintiff's case, and, for the purpose of showing that what he wrote was not libelous and will not bear the construction which plaintiff seeks to put upon it, may give in evidence any other passages in the same publication which plainly refer to the same matter or which qualify or explain the passage sued on. *Newell, S. & L. (2d Ed.)* p. 305.

[13] The scope of questions 32 and 33 of the special verdict is very broad. Neither defendant was actuated by any ill will, bad

motive, or malicious feeling against the plaintiff. The negation of bad motive is equivalent to a finding of good faith, so that we may say it is a verity that the synopsis, such as it is, was published in good faith and without malice. The occasion was one of qualified privilege. The publication was made in good faith, and without malice. There was no accusation of crime contained therein, and no gibes, taunts, or insulting epithets tending to bring the plaintiff into public contempt or ridicule. The extravagant expressions contained in the publication relating to the manner of performance of official duty and to the qualifications and reliability of the candidates so far as they applied to the plaintiff by reason of the finding of the truth of a substantial part of the synopsis and the privilege of the occasion made no case for recovery against the appellant. "Every citizen has a right to comment on those acts of public men which concern him as a citizen of the state, if he do not make his commentary a cloak for malice and slander. Those who fill a public position must not be too thin-skinned in reference to comments made upon them. It would often happen that observations would be made upon public men which they knew from the bottom of their hearts were undeserved and unjust; yet they must bear with them and submit to be misunderstood for a time, because all knew that the criticism of the press was the best security for the proper discharge of public duties." Newell, S. & L. (2d Ed.) p. 577.

It is said in *Buckstaff v. Viall*, 84 Wis. 129, 54 N. W. 111, that a privileged communication is a fair comment by a public journal upon a matter of public interest. But gibes, taunts, contemptuous, and insulting phrases are not a fair comment nor privileged by any principle of law. It was said by Chief Justice Dixon in *Calkins v. Sumner*, 13 Wis. 193, 80 Am. Dec. 738, marg., that to support an action for verbal or written slander it is necessary that the charges should be false, and that they should be maliciously made. "When the prima facie case of privilege has been thus made by proof that the communication was made in the course of a public duty from a sense of public duty, and with an honest belief in its truth, it becomes the duty of the plaintiff, as in other cases of communications conditionally privileged, to prove actual malice by some facts tending to prove a malicious or guilty motive." *Joseph v. Baars*, 142 Wis. 390, 125 N. W. 913, 135 Am. St. Rep. 1076. "The exemption from liability for words spoken on a privileged occasion is not the same privilege recognized in the law as pertaining to confidential communications as between attorney and client and other like confidential relations, but they are privileged upon the ground that they furnish no ground of action

for alleged injury." *Schultz v. Strauss*, 127 Wis. 325, 106 N. W. 1066, 7 Ann. Cas. 528.

[14] It is contended by respondent's counsel that, even if the publication was privileged in Eau Claire county in which the electors were interested in the qualifications of the candidate, evidence shows that the newspaper had some circulation outside of that county, and therefore there was an excessive publication within the rule of *Buckstaff v. Hicks*, 94 Wis. 34, 68 N. W. 403, 59 Am. St. Rep. 853. This rule relating to excessive publication applies more strictly to cases in which privilege is claimed on the ground that the communication was private and confidential and from one having an interest in, or duty relating to, the subject of the communication to another having a like interest or duty. But it is also applied as shown in *Buckstaff v. Hicks*, supra, to cases where the interest is more public, although not generally public. When we come to the application of the rule to the instant case, it will be found there are no charges in the synopsis to which it applies. It cannot apply to those which do not designate the plaintiff, nor to those which the jury found not ordinarily susceptible of the libelous meaning attempted to be put on them by the innuendo, nor to those which are found to be true, nor to those which are mere argumentative inferences from the latter. If we assume that some expressions in bracket (5) of the synopsis not found to be true would have been actionable but for the privilege of discussing the relevant demerits of a candidate for office, then the alleged excessive publication was merely incidental, and, coupled with the finding of good faith and lack of malice, gave no right to recover damages within the rule of *Coleman v. MacLennan*, 78 Kan. 711, 98 Pac. 281, 20 L. R. A. (N. S.) 361, 130 Am. St. Rep. 390; *Hatch v. Lane*, 105 Mass. 394; *Shurtleff v. Stevens*, 51 Vt. 501, 31 Am. Rep. 698.

Judgment reversed and the cause remanded, with directions to render judgment for appellant.

BARNES, J. (dissenting). By question 4 of the special verdict, the jury found that a person of average comprehension, upon reading the synopsis of the sermon as published, would have ordinarily understood that the plaintiff was accused in said sermon of being an officer whose loyalty to the ruling clique of 73 retail and wholesale liquor dealers mentioned in the sermon was beyond question, and one whose fidelity to his oath of office was open to grave doubt.

Question 5 of the special verdict was as follows: "Would a person of average comprehension upon reading the words 'officials under its benumbing influence violate their oaths of office,' and considering these words in connection with the remainder of the synopsis of said sermon as published, ordinarily have understood that plaintiff was ac-

cused by said words in said sermon of having, under corrupt influence, violated his oath of office?" To which question the jury answered "Yes."

By the answer to the fifteenth question the jury found that it was not substantially true that the plaintiff had under corrupt influence violated his oath of office.

By its answer to question 14 the jury found that it was not substantially true that the loyalty of the plaintiff to the ruling clique of 73 retail and wholesale liquor dealers was beyond question, or that his fidelity to his oath of office was open to grave doubt.

I think the jury was warranted in answering the fourth, fifth, fourteenth, and fifteenth questions as they did. It was charged that the loyalty of the plaintiff to the ruling clique of 73 liquor dealers was beyond question, and not only that his fidelity to his oath of office was open to grave doubt, but that he, in fact, violated such oath by reason of the corrupt influence exercised over him by the saloon keepers in question. These charges were false, but not maliciously made. I cannot assent to the doctrine that, in the absence of malice, any person can make and publish of and concerning a candidate for office untrue charges such as the foregoing and escape responsibility for them on the ground of "qualified privilege." Candidates for office should not be treated as pariahs who can with impunity be charged with grave crimes, albeit those charges are in somewhat general terms. They are just as harmful as though they were made specific enough to satisfy the demands of a criminal pleading. It would be a misnomer in fact and in law to call the article "fair comment," in view of the fact that the jury found that the most flagrant charges contained therein were untrue.

THRASHER v. STATE. (No. 17,503.)

(Supreme Court of Nebraska. Oct. 18, 1912.)

(Syllabus by the Court.)

1. RAPE (§ 52*)—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

The unquestioned proof that a female child of the age of 17 years was pregnant and dies from the effects of an abortion is sufficient evidence of the fact that some one had had sexual intercourse with her at the time of age which is prohibited by statute.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-74, 76; Dec. Dig. § 52.*]

2. RAPE (§ 57*)—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

The evidence by which it was sought to prove the guilt of the defendant of the crime of statutory rape was largely circumstantial, although not wholly so. The facts testified to are examined and found to be sufficient to be submitted to the jury.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 87; Dec. Dig. § 57.*]

3. WITNESSES (§ 217*)—COMPETENCY—PRIVILEGED COMMUNICATIONS—TESTIMONY OF PHYSICIAN.

In a trial of a charge of statutory rape, where the female child died from the effects of an abortion criminally produced, evidence by the physicians who attended her in her last illness, and who were present at the time of the miscarriage, as to what they discovered upon an examination of the patient during such attendance, is not prohibited by the law of this state.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 780; Dec. Dig. § 217.*]

4. INSTRUCTIONS EXAMINED—NO ERROR.

Instructions, both given and refused, are examined, though not set out in the opinion, and no reversible error is found in them.

5. CRIMINAL LAW (§ 1156*)—APPEAL—REVIEW—DISCRETION OF TRIAL COURT.

Where misconduct on the part of a bailiff in charge of a trial jury during their deliberations is alleged in a motion for a new trial, and the issue is submitted upon conflicting affidavits, the decision of the district court thereon will not be reversed, unless found to be clearly wrong.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.*]

Error to District Court, Scott's Bluff County; Hobart, Judge.

George Thrasher was convicted of statutory rape, and brings error. Affirmed.

M. S. McIninch, of South Auburn, and L. L. Raymond, of Scott's Bluff, for plaintiff in error. Grant G. Martin and Frank E. Edgerton, both of Lincoln, for the State.

REESE, C. J. An information was filed in the district court for Scott's Bluff county, accusing plaintiff in error, George Thrasher, who will be referred to as the defendant, of the crime of statutory rape, committed upon one Edith Perry on the 15th day of April, 1911, in said county; the said Edith Perry being at said time but 16 years of age and not previously unchaste. A plea of not guilty was duly entered and a jury trial had, which resulted in a verdict of guilty. A motion for a new trial was filed and overruled, when defendant was sentenced to imprisonment in the penitentiary for the term of eight years. He alleges error, and brings the case to this court for review.

[1] The evidence shows that on or about the 25th day of August, 1911, the said Edith Perry died from the effects of an abortion, criminally produced, and that at the time of her decease she was 17 years of age. These facts being undisputed, it is settled beyond controversy that some one had illicit relations with her at an unlawful age at or about the time alleged. The fact that defendant was over 18 years of age at the time of the alleged intercourse was also established. So far as the evidence is concerned, the case is narrowed down to the one question of the identity of defendant as the guilty person.

[2] Upon the trial he became a witness in

his own behalf, and testified that he had never at any time had sexual relations with the decedent. She being dead, of course her testimony could not be had. The evidence on the part of the state was therefore largely circumstantial. There were many phases of the case in which the evidence was conflicting. These conflicts were, in almost all instances, between the testimony of the state's witnesses and that of defendant, consisting in the main of his denial of their statements as to his conversations and conduct. The former personal chastity of the decedent was not directly attacked, and the evidence in its support was sufficient for its submission to the jury. The evidence tended to prove that for perhaps a year or more defendant and Miss Perry were often together, he waiting upon her as a close associate, if not a suitor; that he frequently visited her at her home, on one or two occasions remaining with her in the parlor or sitting room all night; that they were often seen upon the streets of the village where they resided, both by day and night, and at one time were in the store, where defendant was employed as a clerk, after night and without a light. She was employed in a hotel, where her last sickness came upon her, and from where she was removed to her home a short time before her death. While she was sick at the hotel, he visited her and appeared to be interested in her case and in the physicians employed. One physician testified that some six weeks before her death defendant applied to him for "medicine to cause a girl to come around"; that he said to the physician the girl was pregnant, and the request was refused. The father of the decedent testified that at the time of the arrest of defendant they had a conversation in which defendant requested the father to help him out of his trouble, and in which he admitted the illicit relations, but denied having taken any part in causing the abortion which resulted in the death of Edith. There was other evidence of a more or less criminating character, but which we need not recount. Practically all of the alleged admissions and statements were denied by defendant upon the witness stand, but the matter of the truth or falsity of the testimony was for decision by the jury, and with that feature of the case we can have nothing to do; the evidence being sufficient to submit to them.

[3] The physicians who attended the decedent in her last sickness were called as witnesses, and testified as to her condition at that time and the cause of her death. Their testimony was objected to on the ground that it violated the law of privileged communications. The contention is probably based on the provisions of sections 333 and 334 of the Civil Code, which prohibit the disclosure of confidential communications to a physician, etc. The physicians testified to the physical facts discovered by them in their treatment

of the decedent, and as to their course of treatment. We had never understood that the rule extended so far as is claimed by defendant. The testimony had no reference to him, and there was nothing for him to waive. The prohibitions of the section were not in his "favor." So far as we are aware, the provisions of the section have never been held to apply to cases of this kind. No authorities so holding are cited. Communications between patient and physician were not privileged at common law, but depend alone upon the statute. It is to be applied only as between them, and is for the protection of the patient. 1 Wharton, Criminal Evidence (10th Ed.) § 516; *Hauk v. State*, 148 Ind. 238, 260, 46 N. E. 127, 47 N. E. 465; *Boyle v. Northwestern Mutual Relief Ass'n*, 95 Wis. 312, 322, 70 N. W. 351; *Pierson v. People*, 79 N. Y. 424, 433, 35 Am. Rep. 524. In *Underhill*, Criminal Evidence (2d Ed.) § 180, it is said: "A construction, which would operate to convert a statutory provision, intended to protect a patient from a damaging or objectional disclosure, into a protection for a person accused of the murder of the patient, cannot be admitted, nor can he believe that such was the legislative intent"—citing *People v. Harris*, 136 N. Y. 423, 33 N. E. 65; *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465. We are unable to see that the same class of evidence is inadmissible in cases of this kind. There was no error in the admission of the physicians' testimony.

[4] Some objection is made to the action of the court in refusing to give the jury certain instructions requested by defendant, and in giving instructions by the court upon its own motion. We have examined all with care, and are unable to detect any error in the matters named. The principles involved in the instructions refused were sufficiently included in those given, and we find no prejudicial error in any instructions given and complained of. We have examined all instructions, both given and refused, and are persuaded that the cause was fairly and fully submitted by the instructions given. An analysis of each would extend this opinion to an unwarrantable length without the accomplishment of any compensating results.

Upon the close of the state's evidence, and also after the evidence had all been given, the defendant moved the court for a directed verdict in his favor. The motions were both overruled, and to which defendant excepted. The action of the court thereon is now assigned as error. Since our conclusion upon the whole case necessarily covers the questions presented by the motions, they will not be specifically noticed nor separately discussed.

[5] Complaint is made of the alleged action of the bailiff in charge of the jurors during their deliberations. It is claimed by the state that the affidavits upon which the matter was submitted to the court are not

preserved in the bill of exceptions, although set out in the abstract. We do not pass upon the question of their preservation, for the reason that, were the facts as stated in defendant's affidavits true, we would hesitate to set the verdict aside on that ground alone. But they are contradicted by other affidavits, thus presenting a question of fact, and we cannot say that the decision of the court thereon was wrong.

With the full appreciation of the importance of this case to defendant, we have examined the evidence adduced upon the trial, and are satisfied that the questions presented were properly submitted to the jury, and were for their determination.

Finding no reversible error in the record, the judgment of the district court is affirmed.

STATE ex rel. BENSON v. MAYOR AND COUNCIL OF CITY OF HASTINGS et al. (No. 17,504.)

(Supreme Court of Nebraska. Oct. 18, 1912.)

On petition for rehearing. Overruled.

For former opinion, see 91 Neb. 304, 135 N. W. 1028.

John M. Ragan, of Hastings (Geo. W. Tibbets, of Hastings, of counsel), for appellant. W. L. Hand and Frank E. Beeman, both of Kearney, amici curiæ. John C. Stevens, of Hastings, for appellee.

PER CURIAM. This cause was argued and submitted, and in due time a decision was rendered. The opinion is reported in 91 Neb. 304, 135 N. W. 1028. A motion and briefs for rehearing were filed, and, upon further reflection and examination, some of the members of the court became doubtful of the correctness of the decision, and argument was ordered upon the motion for rehearing. When the cause was called for hearing, it was shown that the respondents had complied with the commands of the alternative writ of mandamus in all things, and no rights could be protected or enforced by any further hearing.

The motion for rehearing is overruled.

PETERSON v. LINCOLN COUNTY (JOHN-SON, Intervener). (No. 16,731.)

(Supreme Court of Nebraska. Oct. 18, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 888*) — REVIEW — AMENDMENT IN APPELLATE COURT.

Under section 144 of the Code, power is given the court to conform the pleadings to the proof in an appellate court only "where the amendment does not change substantially the claim or defense."

[Ed. Note.—For other cases, see Appeal and Error. Cent. Dig. §§ 3617-3619; Dec. Dig. § 888.*]

2. APPEAL AND ERROR (§ 888*) — REVIEW — AMENDMENT IN APPELLATE COURT.

The power of the Supreme Court to permit an amendment of a pleading to conform to the proof is, as a rule, only exercised to sustain a judgment, and not to reverse it, except where it clearly appears that a refusal to permit the amendment would cause a miscarriage of justice.

[Ed. Note.—For other cases, see Appeal and Error. Cent. Dig. §§ 3617-3619; Dec. Dig. § 888.*]

3. QUIETING TITLE (§ 34*)—PROCEEDINGS—PLEADINGS AND PROOF.

The record examined, and *held* that the decree of the district court is sustained by the pleadings and proof upon which it was based.

[Ed. Note.—For other cases, see Quieting Title. Cent. Dig. §§ 69-72, 76; Dec. Dig. § 34.*]

Sedgwick and Hamer, JJ., dissent. Letton, J., dissenting in part.

Appeal from District Court, Lincoln County; Grimes, Judge.

Action by Nels Peterson against the County of Lincoln, impleaded with Albert Johnson, intervener. From a judgment for plaintiff, the intervener appeals. Affirmed.

Halleck F. Rose and John A. Sheean, both of Omaha, and Albert Muldoon, of North Platte, for appellant. L. E. Roach, E. H. Evans, and Hoagland & Hoagland, all of North Platte, for appellee.

FAWCETT, J. This suit was instituted in the district court for Lincoln county to quiet plaintiff's title to certain lands in that county, described in plaintiff's petition. Defendant William Robb was holding as grantee of the defendant county under a title obtained in a tax foreclosure proceeding which was void by reason of the fact that in such proceeding service was had by publication upon the then record owner as a nonresident, when, in fact, he was an actual resident of this state. Albert Johnson, whom we will hereinafter designate as defendant, intervened, and as an answer and cross-petition to plaintiff's petition alleged, substantially, that he purchased the land in controversy in 1893, and rented the same to plaintiff for that year and the year following; that, on account of a lack of rainfall and of hot winds during those years, no crops were raised, and that plaintiff moved off without paying any rent, and defendant, being unable to obtain a renter, was unable to procure the money with which to pay taxes; that a few years thereafter plaintiff returned to Saunders county, where defendant resided, and represented to defendant that the land was valueless, and advised him not to attempt to redeem the same; that defendant had no further knowledge or information concerning the land until about a month prior to filing his answer and cross-petition, but still believed the land to be valueless, and not worth the taxes assessed against it; that some time prior to March 6, 1909,

plaintiff made a trip to Lincoln county, visited the land, and saw that said county was enjoying a heavy annual rainfall; that good crops were being raised, and that the land was worth the sum of \$3,000; that upon his return from Lincoln county he asked defendant if he still owned the land, and, upon receiving an affirmative answer, suggested that he was going back to Lincoln county, and would look up the land in controversy, "at the same time informing this defendant that he understood land was 'picking up' a little, and, if it was worth the taxes against it, he would make this defendant an offer on it"; that at that time plaintiff was fully aware of the value of the land, but, in order to mislead and defraud defendant, led defendant to believe that he knew nothing of it; that a short time thereafter he came to defendant and represented that he was intending to move out to Lincoln county, and take "a bunch of horses" with him; that he would need some place for them to run in, and that under those conditions he believed he could afford to pay off the taxes on the land, and give defendant \$100 for a deed to the same; that it was risky to pay that much for it; that perhaps it would be impossible to redeem, but, as he needed a place to run his horses, he would do it; that defendant asked time to think it over, but plaintiff insisted that unless he could make the deal at once he would not buy; that he was buying only because he was moving out and wanted the land to run his horses on; that defendant had not seen the property since 1893, was not aware of the changed climatic conditions, believed the land was valueless, relied upon the assertions of plaintiff, and, being financially unable to make the trip out to see the land, and not being able financially to redeem the taxes, he agreed to accept the sum of \$100 for the deed, which he executed on March 6, 1909; that the representations of plaintiff were false and known to be false when made; that the same were falsely and fraudulently made for the purpose of misleading the defendant, and causing him to convey a valuable right for practically nothing; that the land was well worth \$2,500 in excess of the taxes and assessments, and that defendant Robb had no valid title to said property, all of which was well known by plaintiff. Defendant then tenders plaintiff a return of the \$100 received by him for the deed, ending with a prayer that defendant Robb take nothing, and that the deed from defendant and his wife to plaintiff be canceled, and that his title be quieted.

For reply to the answer and for answer to the cross-petition of defendant Johnson, plaintiff traversed the allegations in such answer and cross-petition with general and specific denials, and alleged that by the deed of March 6th he purchased whatever un-

litigated equity defendant had in the premises; that at that time defendant Robb was claiming to be the owner, was in possession under the proceedings referred to, was denying that Johnson had any right or title or any right of redemption; that, while plaintiff believed that Johnson had an equity in the premises and the right of redemption, yet such rights of Johnson could only be enforced by extended litigation in the courts; that prior to the execution and delivery of the deed plaintiff fully informed defendant both by himself and his agent, L. E. Roach, as to the full rights that said Johnson had in the premises; that Johnson was fully informed that plaintiff and his attorney believed that he, Johnson, could enforce his title to said premises, and, after being fully informed as to all of the facts and circumstances, defendant, without any misrepresentation or concealment of any kind on the part of plaintiff, made the contract and executed and delivered the deed; that the deed was not made and executed until after Johnson had fully considered the matter for several weeks, and had made investigation as to his interest and rights in the premises; that, after plaintiff had instituted this suit, Johnson for a time assisted him in the prosecution of the same, and that, with full knowledge of all of the facts, Johnson never complained to plaintiff in any manner with reference to his contract or deed until his answer and cross-petition was filed in this suit; that Johnson had not tendered to plaintiff any part of the moneys which plaintiff had paid for the deed, and had not offered to reimburse plaintiff for any portion of his expenses and liabilities which he had incurred with reference to the premises.

The district court found that the tax foreclosure proceeding was void, and vested no title in defendant Robb; that they were entitled to nothing more than the return of the money which they had paid to the defendant county, and for subsequent taxes, with interest and penalties, which sum the court found to be \$215. The court further found upon the issues joined between plaintiff and Johnson that for about 30 days prior to the making of the deed in controversy Johnson had knowledge of the condition of the property and title and had every opportunity to make investigation concerning the same; that there were no fiduciary relations existing between Peterson and Johnson with reference to said transaction, found the issues in favor of Peterson as against Johnson and dismissed the petition of intervention. From this decree defendant Johnson alone has appealed, and the only question for our consideration is the one presented by his cross-petition, viz., his right to have his deed to plaintiff set aside upon the grounds alleged in his answer and cross-petition above set out. Plaintiff filed a motion to dismiss the appeal for various reasons set out in his motion. As the case must be affirmed on the

record, we have not considered the merits of this motion, but overrule the same pro forma.

[1] While not expressly, it is practically, conceded in the briefs of counsel for defendant that upon the pleadings above outlined and the evidence the decree of the trial court cannot be disturbed. They seek to avoid this disastrous result by now tendering and asking leave to file in this court an amended answer and cross-petition "to conform to the proofs adduced upon the trial in the district court," in which, in addition to what was alleged in their original answer and cross-petition, they alleged that plaintiff and L. E. Roach, a practicing attorney at North Platte, entered into a collusive agreement to defraud defendant out of his land, worth, as they allege, over \$3,000, for the mere pittance of \$100; that, in furtherance of such collusive agreement, plaintiff induced defendant to write to Roach for information respecting his land and legal rights, and to employ him as defendant's attorney in that behalf; that Roach accepted the retainer, but, in violation of his duty as such attorney, he concealed from defendant all information as to the value of the lands, and entered into a collusive agreement with plaintiff to assist plaintiff in obtaining title thereto for a pittance, in which event plaintiff and Roach were to divide the profits made from such transaction. Plaintiff vigorously assails the right of defendant to file such amendment upon the ground that it constitutes a material change of defendant's claim or defense, and, if permissible at all, the leave should have been sought and obtained in the trial court; that, while an appellate court may, and occasionally does, permit the amendment of pleadings to conform to the proofs, for the purpose of sustaining a judgment of an inferior court, it never permits such amendment for the purpose of reversing a judgment.

Defendant made no request in the court below, either before or after judgment, for leave to file this amended pleading. The decree recites: "This cause came on for trial before the court upon the petition of the plaintiff, the answer of the defendant Robb, and reply of the plaintiff, and upon the answer and cross-petition of the intervener, Albert Johnson, and the answer of plaintiff to cross-petition of the intervener, Albert Johnson, and reply of intervener, Albert Johnson, and the evidence, and this cause is submitted to the court upon the pleadings and evidence, and the cause is taken by the court under advisement." Four days later the court made its findings and entered the decree. These recitals clearly advised counsel that the court was basing its decree upon the pleadings then on file, and if, after the decree was entered, any amendment of the pleadings was deemed necessary, or desired, the trial court was entitled to be advised thereof, so that it might correct its decree,

if such amendment made a correction necessary. It would be sanctioning a very loose practice and be unfair to the trial court to permit an amendment here under such circumstances. Section 144 of the Code is relied upon by defendant, but we do not think it is sufficient to entitle him to the relief now sought. The section provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved." That the amendment tendered "substantially" changes "the claim or defense" of defendant is clear. This provision of the Code is found substantially in this same form in most if not all of the states in the Union, and, so far as we have observed, it is construed liberally when relief under it is sought in the trial court, but, when appealed to in an appellate court, it is construed much more strictly. As said in Boone, Code Pleading, § 234: "Amendments after trial are very cautiously allowed, and the general rule is that a party who has not sought to amend until after he had been nonsuited is too late to ask for a new trial and an amendment." The proposition thus stated is in accord with the views of other writers and has received our approval in *Scott v. Spencer*, 44 Neb. 93, 62 N. W. 312.

Upon the point under consideration, section 723 of the New York Code is identical with our section 144. In *Alden v. Clark*, 86 Hun, 357, 33 N. Y. Supp. 454, the first paragraph of the syllabus holds: "Under the provisions of section 723 of the Code of Civil Procedure, power is given the court to conform the pleadings to the proof only in a case 'where the amendment does not change substantially the claim or defense.'" In the opinion it is said: "By section 723 of the Code of Civil Procedure power is only given to conform the pleadings to the proof in a case 'where the amendment does not change substantially the claim or defense.' Apparently under the evidence given, Clark claimed that he had through his purchase from Butler an absolute title to the safe. As his answer stood, it was insufficient as a defense. The amendment sought, if it amounted to anything, would substantially change the defense set up in the pleading and so would not be admissible." In *Fitch v. Mayor*, 88 N. Y. 500, it is said: "As the case stood before the trial court, it was its duty to dismiss the complaint, for the alleged cause of action had not been made out. It is not necessary to restate the grounds of this conclusion, for in regard to them we con-

cur with the learned court below. The appellant, however, desires us to amend the complaint, so that the plaintiff shall be designated as 'record clerk of the court of special sessions,' and supposes that this may be done under section 723 of the Code of Civil Procedure. If the section applies to this court, the power should not be exercised unless it is plain that no substantial right of the adverse party would be affected. Here the case has been tried upon a different issue, and without amendment disposed of by the General Term. The application should have been to that court, or the trial court." We concur in the holdings in the two cases cited, and for the reasons, therein given, we hold that defendant's application is not within the scope of section 144; that the proposed amendment clearly changes the claim or defense of defendant; that the application should have been made in the district court, and cannot be allowed here.

[2] The reason assigned by plaintiff why the amendment should not be permitted in this court, viz., that this court will in a proper case permit an amendment to conform a pleading to the proofs for the purpose of sustaining a judgment, but will never grant such permission to defeat a judgment, is also fatal to defendant's right to this amendment. We turn again to the New York decisions. In *McGinniss v. Mayor*, 6 Daly (N. Y.) 416, it is said: "No motion was made on the trial to conform the pleadings to the facts proved, or to amend the answer. It is now too late to do either. The power of the General Term to amend a pleading, or to conform the pleadings to the proof, is only exercised to support or sustain the judgment—never to reverse it." In *Steinam v. Strauss*, 18 N. Y. Supp. 48,¹ it is said: "Two questions are raised upon this appeal. The first is whether the judgment was void upon its face; and the second, whether, as matter of fact, and from proof of extraneous circumstances, it was invalid. The latter proposition it is not necessary to consider. No such issue was presented by the complaint, and although evidence was taken in respect thereto, and the learned judge seems to have passed upon the same, yet, as it was not within the scope of the pleadings, and they never having been amended for the purpose of conforming the pleadings to the proof, this question was improperly considered by the court, and the result of the decision it is not necessary to review here. If it may be said that the court should amend the pleadings to conform the same to the proof, the proof having been taken without objection, it may be suggested, in the first place, that objections appear as to some of the proof, and also that a complaint is never amended for the purpose of reversing a judgment, although such amendments are

made in some instances for the purpose of sustaining a judgment." In *Weems v. Shaughnessy*, 70 Hun, 175, 24 N. Y. Supp. 271, the last paragraph of the syllabus reads: "Pleadings will not be conformed to the proof for the purpose of reversing a judgment." In the opinion, on page 177 of 70 Hun, on page 272 of 24 N. Y. Supp., it is said: "But, although pleadings are sometimes made to conform to the proof in order to support a judgment, we have not yet heard of a case where such a practice was resorted to for the purpose of reversing a judgment." The Court of Appeals has also spoken on the subject. In *Volkening v. De Graaf*, 81 N. Y. 268, the last paragraph of the syllabus reads: "The pleadings in an action will not be amended on appeal to this court for the purpose of reversing a judgment." In the opinion by Mr. Chief Justice Folger, on page 272 of 81 N. Y., it is said: "It is urged that as the averments of the answer show the true contract between the parties, as shown by the proofs, the complaint may now on appeal be amended so as to conform to the proofs, and judgment be given thereon for the plaintiff; and *Bate v. Graham*, 11 N. Y. 237, *Pratt v. Hudson R. R. Co.*, 21 N. Y. 305, and *Haddow v. Lundy*, 59 N. Y. 320, are cited. Those were cases of a recovery by the plaintiffs below and an appeal by defendant to this court. We may not amend the pleadings on appeal so that we may reverse a judgment."

The Supreme Court of Vermont has had the same question under consideration, and in *Chaffee v. Rutland R. Co.*, 71 Vt. 334, 45 Atl. 750, it is said: "An amendment is not allowed if it introduces a new cause of action. An amendment in the case before us is only permitted in order that the pleadings may conform to the proof, and for the purpose of sustaining the judgment, not reversing it (1 Ency. Pl. & Pr. 582); for, as said by Redfield, C. J., in *White River Bank v. Downer*, 29 Vt. 332, 'an amendment will cure error, but cannot create it.'"

Upon this branch of the case counsel for defendant cite *Humphries v. Spafford*, 14 Neb. 488, 16 N. W. 911, *Homan v. Steele*, 18 Neb. 652, 28 N. W. 472, and *Bennett v. Baum*, 90 Neb. 320, 133 N. W. 439. In *Humphries v. Spafford*, supra, the suit was for the foreclosure of a mortgage. In the petition plaintiff appears to have made a mistake in stating the amount due upon the notes, and this court held: "If the amount actually due on the two notes be, as we infer from the brief of counsel, greater than is alleged, if she desire it, the plaintiff may take leave to amend her petition so as to correct the mistake, upon the terms of paying all accrued costs, and have the case remanded to the district court to make the amendment, and for further proceedings. We have no doubt whatever that an amendment at this stage of the case is in harmony with section 144 of the Code, where the ends of justice

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 68 Hun, 629.

seem to demand it. But, if no amendment be desired, for the reasons stated the judgment will have to be affirmed." The ruling there, if justifiable at all, is under the clause of section 144: "Or by correcting a mistake in the name of a party, or a mistake in any other respect." The case has no reference to the clause of section 144, under which relief is sought here. In *Homan v. Steele*, supra, the plaintiff recovered, and in considering the case *Maxwell, J.*, said: "It is claimed that the action should have been to recover on a quantum meruit, and not upon the contract. * * * The few days which elapsed after the time fixed for the completion and occupation of the building and the time in which it was actually completed and occupied do not in our view affect the right to recover. The defendant's attorneys in their brief virtually admit this, but say the action should not have been upon the contract. This objection should have been made on the trial to be available here. Where proof has been introduced without objection which would entitle a plaintiff to recover, this court would, if necessary, permit an amendment of the petition to conform to the proof, or remand the cause to the district court for that purpose." In other words, if in that case it had been necessary in order to sustain plaintiff's judgment (not to reverse it), the court would have permitted an amendment of the petition to conform to the proof, or would have remanded the cause to the district court "for that purpose," but not for a new trial. In *Bennett v. Baum*, supra, counsel rely upon the tenth paragraph of the syllabus, which reads: "Where it is clear that all of the evidence to sustain or defeat an issue was adduced by the respective litigants in an equitable action in the district court, it is competent on an appeal for this court in the interests of justice to permit amended pleadings to be filed so as to conform to that proof." Even under this syllabus defendant would not be entitled to the amendment tendered, for the reason that it is not clear in this case that all the evidence to sustain or defeat an issue was adduced "by the respective litigants." On the contrary, it is urged by plaintiff here that, if the proposed amendment had been made in the court below, they could have met and overcome it. Whether this be true or not, the fact is they did not have the opportunity to meet it upon the trial below, nor did the trial court have any opportunity to pass upon it. But let us see why the amendment was permitted in *Bennett v. Baum*. In the opinion on page 337 of 90 Neb., on page 445 of 133 N. W., *Root, J.*, said: "But, however liberal we may desire to be in affirming a judgment, we cannot sustain a finding which is not responsive to any allegation in the pleadings, nor to a theory mutually adopted by the litigants in the district court. We have the authority to permit amendments in this court. We therefore shall permit the

plaintiffs, if they are so advised by counsel, to amend their petition so as to allege such facts as will justify us in sustaining the decree quieting title in the *Bennett Company* to all of the real estate described in the referee's report, and to a decree for a specific performance of their contract for one-fifth of the \$200,000 capital stock of the *Bennett Company*. Ordinarily such amendments would not be permitted.

In the instant case counsel for the defendants strenuously objected to the introduction of all evidence touching title to this real estate. We are confident, however, that the defendants will not be prejudiced by the amendments, because all features of the transactions touching those subjects have been testified to by the only persons having knowledge thereof, and this litigation should cease at as early a day as possible." It will be seen that there is nothing in any one of the three cases cited which conflicts with the holdings of the New York and Vermont courts, herein adopted by us. The amendment tendered is not for the purpose of sustaining a judgment, but for the purpose of reversing it, not to cure error, but to create it. In the opinion of the writer, in which he is not alone, such a request should never be allowed in this court; but a majority of the court are of the opinion that we should not go further than to hold that: "The power of the Supreme Court to permit an amendment of a pleading to conform to the proofs is, as a rule, only exercised to sustain a judgment, and not to reverse it, except where it clearly appears that a refusal to permit the amendment would cause a miscarriage of justice." As this case does not present such a situation, the request of defendant to file the amended pleading tendered is denied.

[3] The only question left is: Is the decree of the district court sustained by the pleadings and proofs upon which it was based? After a careful reading of the entire record, we feel that that question must be answered in the affirmative.

The judgment of the district court is therefore affirmed.

ROSE, J., took no part.

LETTON, J. (dissenting in part). I do not agree with the proposition that the proposed amendment changes the "claim." The action is based on fraud. The tendered amendment merely adds another specification of fact tending to establish the same. Otherwise, I concur.

SEDGWICK, J. (dissenting). The majority opinion announces two new propositions of law, neither of which have been so determined heretofore by this court.

1. The first proposition is that in an action for fraud where facts constituting the alleged fraud are stated an amendment which

alleges additional facts constituting the same fraudulent transaction changes substantially the claim or defense, so that such an amendment cannot be allowed in any case after judgment. Section 144 of the Code contains the language: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading * * * when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved." What does the statute mean by the words "change substantially the claim"? In one sense of these words any change of a petition which would admit of a different decision than could be supported by the original petition would of course be a substantial change, but unless such a change can be made—that is, unless a pleading can be amended so as to support a different judgment—there would never be any object in making the amendment. The purpose of allowing the amendment is to support a judgment that otherwise would not be supported, and this, of course, in the ordinary sense of the word, is a very substantial change. We have, however, generally held that to change "the claim" is to substitute a new cause of action for the former one or to add a new cause of action to the former one, and I suppose that the purpose of this proviso in the statute is to prevent an amendment that would allege a new cause of action, and not to prevent any change or amendment that would add to or make more certain the cause of action upon which the suit was based. And then, again, to change substantially the claim is not limited to changing the claim alleged in the original pleading, but under the liberal practice of our Code must be held to mean the claim actually tried in the lower court, whether it was in the pleadings or not. I think that the opinion gives the wrong construction to the language of the statute in that regard.

2. I am still more strongly opposed to the new construction which is given to the statute in another respect. The second paragraph of the syllabus is: "The power of the Supreme Court to permit an amendment of a pleading to conform to the proofs is, as a rule, only exercised to sustain a judgment, and not to reverse it, except where it clearly appears that a refusal to permit the amendment would cause a miscarriage of justice." There are many decisions of this court in which it is held that a pleading may be amended after judgment to conform to the proofs, and in all of them the language is general and no distinction made as to whether such amendment will sustain or reverse the judgment of the trial court. The first case cited and reviewed in the majority opinion is *Humphries v. Spafford*, 14 Neb. 488, 16 N. W. 911. The opinion was by Chief Justice Lake. The petition in foreclosure failed to allege

that no payments had been made on the note; the allegation being that no payments were made at the particular time when the notes fell due. The petition also failed to allege that the defendant failed to pay interest "within ten days after due." The allegation was that he failed to pay it on the particular day on which it came due. The trial court therefore held that one of the notes was not due and refused to give the plaintiff judgment thereon. The plaintiff appealed, and the Supreme Court held that upon appeal her petition might be amended in accordance with the evidence upon the trial, and that the case would be remanded to the trial court for that purpose, if she decided to so amend. This was a direct holding that the pleadings would be amended for the purpose of reversing the judgment of the trial court. In regard to this case the opinion says: "The ruling there, if justifiable at all, is, under the clause of section 144, 'or by correcting a mistake in the name of a party, or a mistake in any other respect.'" But section 144 of the Code provides that a pleading may be amended "by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting other allegations material to the case." Inserting other allegations material to the case is precisely upon the same basis in the section as correcting a mistake in the name of the party or a mistake in any other respect, and the fact that the pleading may be amended by inserting other allegations "material to the case" shows clearly that the next clause, that amendments may be made when they do not "change substantially the claim," means that they may be made unless a new cause of action or defense is stated that has not been tried below. The opinion cites early cases, mostly from inferior courts, that hold that amendments will never be allowed for the purpose of reversing a case, but I think that those cases are hostile to the language of the statute which does not limit the allowing of amendments to supporting the judgment but requires them to be made when it is "in furtherance of justice" to have them made. In *Humphries v. Spafford*, supra, the leading case above referred to, it was in the interest of justice to the plaintiff to allow her to amend her petition to conform to the proofs which were made upon the trial and reverse the judgment of the district court refusing to allow her to recover upon both of her notes, and I think the decision was right. It has never been criticised by this court, but has been apparently universally followed and ought to be adhered to. Suppose that in an action to foreclose a mortgage the plaintiff failed to make the technical allegation that there had been no proceedings at law to recover the debt, both the plaintiff and the defendant, as well as the court, supposed that that allegation was in the peti-

tion and tried the case fully upon that theory, the proof showing plainly that there had been no proceedings at law, but the trial court for some unaccountable reason refused to enter judgment for the plaintiff and the plaintiff appeals to this court, and for the first time it is ascertained that the allegation that no proceeding at law had been had was omitted from the petition, would this court refuse to allow such amendment and refuse to allow the plaintiff to recover, that being the only possible legal objection to such recovery?

Unless the case has been tried in the lower court, as though the proposed amendment was already in the pleadings, the amendment is never allowed in this court either to sustain or to reverse the judgment. If it was so tried, and no objection was made to the evidence because of the defect in the pleading and the court or jury determined the issue as tried, the amendment will be allowed in this court, if necessary, to make the pleadings conform to the case actually tried, or the case will be disposed of as though the amendment had been made. Lawsuits were not invented to afford sparring matches to exhibit the cuteness of attorneys at the expense of justice to litigants, at least they are not so regarded in modern times in this state. The courts are not looking for immaterial technicalities to defeat justice.

The second paragraph of the syllabus, which is also quoted in the opinion as the view of the majority of the court, does not harmonize with the discussion in the opinion, and I think that discussion is misleading in view of the quotations made from the early cases in other jurisdictions, which quotations do not fully present the real point decided by those courts. The second paragraph of the syllabus makes an unnecessary and incorrect distinction in amendments in this court. The true test is, Are they in furtherance of justice? And that depends upon how the case was tried in the court below. If the parties without any suggestion of defect in the pleadings have fully and fairly tried the cause, the pleadings in this court should be made to state the cause actually so tried, or the cause should be disposed of here as though that had been done.

HAMER, J., concurs in this dissent.

TYLER v. HOOVER. (No. 18,617.)
(Supreme Court of Nebraska. Oct. 18, 1912.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 705*) —
STREETS—USE FOR TRAVEL—RIGHT OF AUTOMOBILES.

The law does not denounce the use of an automobile on a public highway; and the appel-

lant is not guilty of negligence because he used one on the streets of the city of Lincoln.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705;* Highways, Cent. Dig. §§ 459, 460-469.]

2. MUNICIPAL CORPORATIONS (§ 705*) —
STREETS—USE FOR TRAVEL—RIGHT OF AUTOMOBILES.

It is improper to say that the driver of a horse attached to a carriage has rights in the road superior to the rights of the driver of the automobile, as both have a right to go upon the public highway, and each is restricted in the exercise of his rights by the corresponding rights of the other, and each is entitled to regulate his use of the public streets and roads by the observance towards others on the road of ordinary prudence and care, under all the circumstances.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.*]

3. MUNICIPAL CORPORATIONS (§ 705*) —
STREETS—USE FOR TRAVEL—CARE REQUIRED.

The restrictions which the law imposes on all modes of travel on the highways are such as tend to secure to the general public the largest enjoyment thereof, and must be observed and borne by all alike upon the broad ground that all have an equal right to travel in safety; and when accidents happen as incidents to reasonable use and reasonable care the law affords no redress.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.*]

4. MUNICIPAL CORPORATIONS (§ 705*) —
STREETS—USE FOR TRAVEL—CARE REQUIRED.

If the driver of an automobile sees that a horse driven to a carriage is restive and frightened, he should take such course to avoid inflicting an injury as the dictates of ordinary prudence may demand. He should reduce the speed of his vehicle, or stop it, if requested to do so, or if he sees that it is necessary to avoid an accident; but he is not relieved from the duty of exercising ordinary care to prevent injury to those he may meet or overtake upon the highway.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.*]

5. MUNICIPAL CORPORATIONS (§ 705*) —
STREETS—USE FOR TRAVEL—FRIGHTENING ANIMALS.

The fact that a horse becomes frightened by an automobile upon the highway does not render the operator of such vehicle liable for resulting injury, as the horse has no paramount or exclusive right to the road; and the fact that a horse takes fright at a vehicle run by new and improved methods, and smashes things, does not of itself give the injured party a cause of action.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.*]

6. APPEAL AND ERROR (§§ 999, 1002, 1011, 1012*)—REVIEW—QUESTIONS OF FACT.

The rule is well established that, where there is a conflict of evidence upon the material facts, touching the cause of action or defense, in an action at law, a reviewing court will not disturb the verdict of a jury or the findings and judgment of the trial court (O'Chander v. Dakota County, 90 Neb. 3, 132 N. W. 722); but, where a verdict is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, it will be set aside

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(Garfield v. Hodges & Baldwin, 90 Neb. 122, 132 N. W. 923), as, also, will the findings and judgment of the trial court, where they are clearly against the weight of evidence (Roberts v. City of Lincoln, 6 Neb. 352; Southard v. Behras, 52 Neb. 486, 72 N. W. 860; American Fire Ins. Co. v. Buckstaff Bros. Mfg. Co., 52 Neb. 676, 72 N. W. 1047; Symms Grocery Co. v. Snow Bros., 58 Neb. 516, 78 N. W. 1066; Frerking v. Thomas, 64 Neb. 193, 89 N. W. 1005).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912–3924, 3935–3937, 3963–3969, 3990–3992; Dec. Dig. §§ 990, 1002, 1011, 1012.*]

Reese, C. J., and Rose, J., dissenting.

Appeal from District Court, Lancaster County; Frost, Judge.

Action by Emma E. Tyler against A. L. Hoover. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Hall & Bishop, of Lincoln, for appellant. Chas. O. Whedon, of Lincoln, for appellee.

HAMER, J. This is an appeal by the defendant from the judgment of the district court of Lancaster county. The plaintiff brought an action to recover damages for personal injuries alleged to have been caused by the careless, negligent, and unlawful manner in which the appellant, on the 19th day of July, 1908, ran, handled, and managed an automobile, so that, as alleged in the petition, it struck and overturned the carriage in which the plaintiff was then riding with her husband, son, and daughter, and threw the plaintiff, with violence, out of said carriage upon a paved street in the city of Lincoln, and against the iron inlet guard to the city sewer, severely lacerating the plaintiff's right ear and scalp and bruising and wounding her, and thereby causing her physical pain and mental suffering and rendering her unable to perform her household duties and putting her to expense in procuring medicines, physicians, and nurses. The petition also alleged that the defendant was running said automobile on the left side of the street at the rate of more than 12 miles per hour, and that he gave no sound or warning as he approached the intersection of Eleventh and L streets, as required by rules 2 and 7 of the General Revised and Consolidated Ordinances and Special Ordinances of Lincoln, Neb., being a part of chapter 120 of said ordinances. The answer admits the conclusion, but alleged that the horse attached to the carriage was wild, fractious, and unsafe, and that the driver, who was the appellee's son, was unable to manage and control him, and that the horse took fright and ran into the automobile at the intersection of Eleventh and L streets in Lincoln, and when the automobile, which before that time had been running at a rate of speed not to exceed three or four miles an hour as it approached said intersection from the north on Eleventh street, being under a complete state of con-

trol, was at once slowed up, and was standing still when run into by the plaintiff's horse and carriage, and that the horse and carriage left the car after running into it, and that the carriage upset a short distance east of the point of collision, and that the injuries resulting therefrom were caused by the wild and fractious character of the horse and the carelessness and negligence of the driver and his inability to handle and control the horse, and that the appellant used every care and precaution possible and in no way contributed to the injuries; that the plaintiff, by reason of the vicious character of the horse and the carelessness and negligence of the driver, who was her son, and his inability to manage the horse, caused the injuries complained of. The reply was a general denial of new matter in the answer. Appellant claims that the evidence fails to prove the cause of action, and attempts to show that the injuries sustained were so sustained because the horse was vicious and unmanageable, and because the plaintiff's driver was unable to control him. Errors at the trial are also alleged.

The horse and carriage were going east on L street at the time the automobile was going south on Eleventh street. The son of the appellant, who had gone to the depot for his mother, and who was driving the family horse and carriage, puts the horse and carriage, by his testimony, half way across Eleventh street at the time he first saw the automobile coming along Eleventh street from the north, and then distant from the carriage he was driving about 400 feet. He was driving on a trot. As Eleventh street is 70 feet between curbs, he had only 35 feet to drive, if he went on straight ahead towards the east, before he would be across Eleventh street and out of the way of the automobile going south. According to his statement, the automobile had more than 10 times as far to go as the horse and buggy before it would collide with them, if they went straight east across Eleventh street. The husband of the appellee corroborates the son as to the whipping of the horse by the son; and he, by his evidence, puts the horse and carriage about two-thirds of the way across Eleventh street when he first saw the automobile coming, and it was then distant from him about 250 feet, according to his opinion. The daughter of the appellee was riding in the carriage, at the time of the collision, with her brother, at the left of him and on the front seat, and the father and mother were in the back seat of the carriage. The daughter, by her testimony, puts the carriage two-thirds of the way across Eleventh street when she first saw the automobile, which was then in front of the grocery store referred to by the father in his testimony, and about 250 feet north.

Mrs. Roy Young lived at 310 South Elev-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 188 N.W.—9

enth street, over Pfeiff's grocery store, north of the point of collision and about one-half way between the alley and M street. She saw the automobile going south past her window. "Q. He was going at a moderate rate of speed, was he not? A. Well, very slow; not very fast. Q. He was going very slow? A. Yes, sir." If the right hind wheel of the carriage struck the automobile, this could have been done, it would seem, by the carriage turning and going northeast with its right hind wheel next to the automobile. The latter theory is supported by the testimony of De Vore, Spain, Mrs. Herpolshelmer, Mrs. Hoover, and the defendant, Dr. Hoover. The defendant, Dr. Hoover, corroborated the statement of Mrs. Young as to the speed of the automobile. He testified that he turned on the brake and stopped the car before the collision occurred and just as the horse started towards him. Before that he was running slowly. He says that if the horse, attached to the carriage, had gone straight across Eleventh street he would have missed the car by from 6 to 10 feet, but that the horse turned south on Eleventh street, and "all at once the horse wheeled around and made a lunge and came down at an angle, as though he was going to plunge right into the car, and, as he got right up close to the car, then he swung right around to the left, kind of doubled around the car, and struck the car; and I had brought my car to a standstill when his carriage struck me, and, as I say, that he kind of swung around the car, and then ran on—the distance was probably 30 or 35 feet—and the horse started off then a little to the right, again to the south, and there the carriage, it seemed to me, collided with the curb, and the horse went down, and the carriage upset and spilled them all out there." This tends to show that the frightened horse was unmanageable, and that he attempted to, and probably did, go north, and in that way brought the right hind wheel of the carriage in contact with the automobile on the west side of the automobile, and then went around the automobile, perhaps behind it, and turned and went south to the southeast corner of the intersection space of the two streets, where the carriage went down. It is in testimony that there were marks on the car.

Lottridge testified that the hind wheel of the buggy ran over the wheel of the automobile, and that the buggy did not tip over until it struck the curbstone, which was about 35 feet from where it ran into the automobile. Leslie Keizer testified that when he first saw the automobile it was at the intersection of Eleventh and L streets and going slow, and that the horse and buggy at first were going east on L street, and all at once the horse turned south on Eleventh street, and then that he turned around towards the automobile and was going northeast at the time of the collision. He says

that when the carriage struck the car it seemed to sway around to the south and then hit the curb on the corner, and then the carriage turned over; that the right hind wheel of the carriage broke when it hit the curbing or basin. De Vore testified that the horse and carriage were going east on L street, and then that the horse turned south on Eleventh street, and then reared and turned around northeast towards the automobile, as though he was going to run into it; that the appellant stopped the car, and the horse sprang around to the south; that the horse was rearing and plunging, and the carriage turned over, and the horse fell near the corner of Eleventh and L, and that the automobile was standing still when struck by the carriage; that the driver was trying to hold the horse, but did not have control of it, and that the horse was rearing and running. Mrs. Louise Herpolshelmer, the appellant's daughter, testified that she was in the automobile, and that the horse was going on a swift trot, and that as he reached the southwest corner of Eleventh and L he broke into a run; that the automobile had been slowed down, and that the car was stopped when the horse broke and ran, and that the horse seemed to run straight for the car, and that when the carriage struck the car it was standing still; that the horse then went to the southeast corner, where he fell, and the carriage upset; that the carriage did not upset when it struck the car; that the carriage struck the right front wheel of the car. The appellant's wife, Mrs. Della J. Hoover, testified that as the horse struck Eleventh street he made a turn as though going south, and then the driver suddenly lost control of him; that the husband slowed down the car, and that the carriage hit the car, and that the horse ran with the driver trying to hold him; that when he reached the corner he fell, and the carriage went down.

The horse seems to have been badly frightened, and ran when he was whipped, and reared and plunged, and finally went down, and the carriage upset. The right side of the carriage and the automobile were brought together; that the right hind wheel of the carriage was injured, and that there were marks on the right front wheel of the automobile tends to corroborate the testimony of the foregoing witnesses for the defendant as to the manner in which the injuries occurred. There is also testimony which tends to show that the horse was skittish and easily frightened; and it is shown that he had before been frightened by a street car, which struck him, and the same buggy was overturned, and the same woman was injured.

The weight of the evidence clearly shows that immediately upon the horse entering upon the intersection space of the two streets he started south on Eleventh street, appar-

ently to avoid the automobile, then moving south, but the driver began whipping him, and apparently pulled him around until he faced the automobile, which was then northeast of him, and, as the whip was applied, the horse began to plunge and rear, and finally dashed by the automobile, probably on the west side, and close enough to it so that the right wheel of the carriage came in contact with the right-hand front wheel of the automobile and ran over it; the horse and carriage going around the automobile, probably behind it, and then going south 30 or 35 feet to the southeast corner of the intersection space, where the horse fell and the carriage went down, and the plaintiff was hurt. All the witnesses say the horse went south immediately after entering Eleventh street, except the Tylers; and nearly all, including the driver, say the horse faced northeast towards the automobile immediately before the collision.

The driver, Edward G. Tyler, testified: "I was going northeasterly, would hit the alley back of the Odd Fellows Hall."

Lottridge testified that the horse got six or eight feet into Eleventh street "and made a little turn, as though he was going south. Well, the man that was driving pulled the horse back. That turned him down this way, * * * down northeast; yes. Yes; that would be northeast. Well, the automobile by that time came long here, and the consequence was the buggy ran into the automobile."

Leslie Kelzer testified: "Well, at first the horse, it was going east on L street, and when it got over by the little fountain it looked like it was going straight across, and all of a sudden it turned. Q. Turned which way? A. South; gave a short turn, and then turned around again and swung over. Q. Towards the automobile? A. Towards the automobile. * * * Q. And now in which direction was the horse going at the time of the collision? A. It was going northeast."

J. S. De Vore testified: "We were going south on Eleventh street, and Mr. Tyler was on L street, coming into Eleventh, and as the horse came into Eleventh he turned south; he was going south, and then he reared up and swung right around, and came right kind of northeast, I should think, right towards the automobile, as though he was going to run right onto it. * * * Q. The carriage struck the front wheel of what? A. The automobile. Q. What do you say happened to the carriage? A. That wheeled the carriage to the front. The horse was rearing and plunging, and fell down just when they got over about the corner of Eleventh and L, and then the carriage turned over."

A. J. Spain testified: "Well, I was standing on the northeast corner next to the Odd Fellows Block with my little boy, and I saw the machine coming up Eleventh street, and I also noticed a horse and buggy—a horse

and carriage—coming east on L street, and I noticed the carriage as it came to the corner. I noticed the horse make a sort of a turn south. He was going south on Eleventh street. * * * Mr. Hoover turned the wheels of the automobile to the east, in order to let the buggy slide by. * * * The buggy did not tip clear over until it struck the east side of the crossing or the curbstone, and I ran right to Mrs. Tyler, and I was the first one to her, excepting Mr. Tyler."

Mrs. Herpolsheimer testified: "Well, we were going south on Eleventh, on the west side of the street. As we approached L street, we were going at a moderate rate of speed. As we approached L, the horse and carriage in question was seen coming from L, going east. * * * When the horse broke and ran, the car was stopped. The horse then made straight for it. When the horse and carriage struck the automobile, the automobile was still. The carriage was not upset. On the contrary, the horse then went on back to the southeast corner. There the horse fell right at the crossing, and the carriage with it, and they spilled out. * * *

Q. What would you say as to the horse being scared or unmanageable? A. He was certainly frightened, and I think he must have been unmanageable, or he would not have come into the car. Q. What did the horse do just before he came to the car? A. Plunged. Q. I know; but what direction did he take? A. Northeast. Q. He did not jump into the car, did he? A. Well, he ran right for it. Q. I know; but what did he do when he got to the car? Where did he go with reference to the car? A. Why, he went right around the front end of the car, and a little bit to the north, and then, of course, they pulled him around the other way. Q. So that the horse missed the car? A. I don't think that the horse struck the car; but the carriage did. * * * Q. Which wheel of the automobile did the carriage collide with? A. The right-hand front wheel. That would be on the west side."

Mrs. Della J. Hoover testified: "As we came up Eleventh street nearly to L—I could not say just the distance—I noticed Mr. Tyler's carriage coming, going east, and as they struck Eleventh street the horse made a little turn, as though he was going to go south. My husband saw the horse there and the way he was doing, and really we thought he was going south, and then he made a sudden turn. It looked to me as though he was going south, and then he suddenly dashed around, and I think the horse—the young man lost control of it. * * * My husband slowed the car down, and it came to me—it looked as though they were going to dash right into the car. I was very much frightened. Well, it came out, and they did strike us, and we had stopped. They struck us, hit the car, and then the horse ran on. The young man was holding on and trying to control him, and they went

across the street to the corner. They went several feet. Now, I can't tell you how many feet; but they went over there. The horse fell, the carriage went down, and the occupants were all spilled out, of course."

Dr. A. L. Hoover, the defendant, testified: "The horse seemed to be excited, and I grabbed the lever of my car. * * * I grabbed the lever so as to control my car, slowed it down, and watched what they were going to do, and as their horse came onto Eleventh street he turned south. He was going to turn south on Eleventh street, made quite a decided turn, and all at once the horse wheeled around and made a lunge and came down at an angle, as though he was going to plunge right into the car; and, as he got right up close to the car, then he swung right around to the left, kind of doubled around the car, and struck the car, and I had brought my car to a standstill when his carriage struck me, and, as I say, that he kind of swung around the car, and then ran on. The distance was probably 30 or 35 feet, and the horse started off then a little to the right, again to the south, and there the carriage, it seemed to me, collided with the curb and the horse went down, and the carriage upset and spilled them all out there."

The great weight of the evidence is that the defendant was proceeding slowly on Eleventh street, and that immediately after entering upon the intersection space of Eleventh and L streets he stopped his machine, which was standing still a little west of the center line of Eleventh street, with the front near the center line of L street, when the collision occurred. The machine was not in motion when the carriage collided with it. The horse was apparently badly frightened, and was very unmanageable. The defendant contends that the cause of the collision and injuries was unmanageable character and conduct of the horse, together with his driver's lack of skill and strength or judgment, and that he drove northeast towards the automobile, instead of keeping away from it, or he permitted the horse to go in that direction, and so the collision was brought about.

[8] If equally capable men, carefully considering the evidence, may honestly differ as to the facts of the case, then it is one peculiarly adapted to the jury; and their verdict should stand, even though this court should unanimously conclude that a different verdict ought to have been reached, but is at the same time of the opinion that the verdict is not against the weight of the evidence. It may sometimes seem to be a narrow and uncertain line which determines the reviewing court to follow after the weight of evidence, instead of following that which seems to barely preponderate; but this line should at all times be visible to a discriminating and courageous court willing to limit

itself to its own proper province, and not to invade that field of inquiry which relates only to finding the facts by ascertaining a preponderance of the evidence, and which belongs, and should belong, exclusively to the jury.

If a careful examination of the evidence shows that the material contentions of the plaintiff are clearly not sustained, the verdict and judgment cannot be right, and are therefore wrong, and the judgment should be set aside.

This court has recently said, in *O'Chander v. Dakota County*, 90 Neb. 3, 132 N. W. 722, that: "The rule is well established that where, as in the case at bar, there is a conflict of evidence upon the material facts, touching the cause of action or defense, in an action at law, a reviewing court will not disturb the verdict of a jury or the findings and judgment of a trial court." And in *Smith v. McKay*, 90 Neb. 703, 124 N. W. 272, the first paragraph in the syllabus reads: "The finding of a jury on conflicting evidence will not be disturbed on appeal, unless manifestly wrong." In *Kafka v. Union Stockyards Co.*, 87 Neb. 331, 127 N. W. 129, this court adhered to the view that: "If different minds may reasonably draw different conclusions or inferences from the state of facts established by the evidence in a cause, whether such facts show negligence or contributory negligence is not a question of law for the court, but must be submitted to the jury. *Omaha Street R. Co. v. Loehneisen*, 40 Neb. 37 [58 N. W. 535], followed." *Chicago, B. & Q. R. Co. v. Pollard*, 53 Neb. 730 [74 N. W. 331]; *Shirley v. City of Minden*, 84 Neb. 544 [121 N. W. 431]; *Hair v. Chicago, B. & Q. R. Co.*, 84 Neb. 398 [121 N. W. 430, 133 Am. St. Rep. 629]; *Crabtree v. Missouri P. R. Co.*, 86 Neb. 33 [124 N. W. 932, 136 Am. St. Rep. 663]." In *Kafka v. Union Stockyards Co.* the opinion contains liberal quotations from the evidence taken, and shows that this court most carefully looked into the evidence to ascertain what the facts really were and made its determination after it ascertained that there was clearly a conflict of the evidence on the material questions involved in the case. The opinion was delivered by Judge Letton.

In *Garfield v. Hodges & Baldwin*, 90 Neb. 122, 132 N. W. 923, this court declared in the first paragraph of the syllabus: "A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial ordered." That case originated in a tombstone business, where every man employed by the business seems to have been his own boss. There was a large stone, which was denominated A, and it was nearly evenly balanced upon a supporting stone with a sharp edge, and being steadied against the

west side of a large post. Another stone, denominated B and weighing about a ton, was placed on top of the stone A. There was nothing to prevent this stone from toppling and falling to the west if only a small amount of weight was placed on the west half of either of said stones. The deceased was in the employ of the defendants, and in the course of his duties went to the yard to get a stone weighing several tons, and denominated C, and lying immediately south of and adjacent to the two stones A and B. The deceased and his brother were lifting the stone C by means of a chain around the same and attached to a traveling crane and a rope running over a pulley. Both were on the north side of C and immediately west of A and B. After C had been lifted to a certain height, the deceased, to obtain a better hold upon the rope, stepped upon the stones A and B, and they, being in a balanced condition, were by his weight tipped downwards to the west, and the upper stone sliding off its blocks fell over and upon the deceased, crushing his leg and inflicting injuries which caused his death. Plaintiff claimed that the defendants permitted the two stones A and B to remain in the dangerous condition set forth for five or six weeks, and that the deceased was injured through their negligence and through no fault of his own. There was a failure to prove the specific acts alleged. This court said: "When he went out that morning to get stone C, he went on his own initiative; he was right beside and had a plain view of stone A; and, if stone B was then resting upon stone A, the dangerous condition of the two stones could be plainly seen by him. * * * The deceased was in duty bound to have noted their dangerous condition and to have guarded against it. * * * He could not carelessly and negligently shut his eyes to or ignore the dangerous situation which confronted him, and charge the defendants with his own negligent act. Having elected to proceed with his work in the face of the dangerous situation or conditions from which his injury resulted, we know of no theory upon which his administratrix can recover. * * * The rule is well settled in this state that, where a verdict is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, it will be set aside and a new trial granted." In that case, Judge Fawcett, delivering the opinion of this court, seems to have made a careful examination of the evidence, and the opinion shows, as does the opinion in the case of *Kafka v. Union Stockyards Co.*, supra, that this court will carefully analyze the testimony with a view to ascertaining whether there is a mere conflict of evidence, or whether the verdict and judgment are sustained by the evidence.

In *Christensen v. Tate*, 87 Neb. 848, 128 N. W. 622, the question was whether the plaintiff should recover damages for personal injuries and for damage done to his horse and buggy because of the negligence of the defendant in driving his automobile along one of the streets of Fremont. In that case the defendant testified that he (the defendant) turned around a bill board while driving his machine, and as he did so he noticed the horse "looked up, as though he was going to be frightened," and that he then turned out into the ditch and gave the plaintiff the full road and stopped his machine; but the plaintiff denied that the defendant stopped his car at all. This court said, Judge Sedgwick delivering the opinion: "It was fully shown by many witnesses that at the place of the meeting in question 10 or 12 miles an hour would be a highly dangerous rate of speed. In view of the fact that the defendant was a witness in his own behalf, and did not testify as to the rate of speed he was driving when he met the plaintiff, we cannot say that the finding of the jury is unsupported by the evidence." In the syllabus, the sixth paragraph reads: "It is found upon examination of the record that the evidence is sufficient to support the verdict and judgment." The fair implication is that the reviewing court will look into the evidence, and, if there is simply a conflict of evidence, that the verdict and judgment will be allowed to stand, but not where they are clearly against the weight of the evidence.

[1] The automobile furnishes an improved method of travel. It is to be welcomed as a saver of time and a protection to man's favorite domestic animal, the horse, against long drives. It is said to be in use in all civilized countries, and it has come to stay. We are told that there are 760,000 automobiles in use in the United States alone. The law therefore does not denounce the use of an automobile on a public highway; and the appellant is not guilty of negligence because he used one on the streets of the city of Lincoln.

[2, 4] It would be improper to say that the driver of a horse, attached to a carriage, has rights in the road superior to the rights of the driver of the automobile, as both have a right to go upon the public highway, and each is restricted in the exercise of his rights by the corresponding rights of the other, and each is entitled to regulate his use of the public streets and roads by observance of ordinary prudence under all circumstances. If the driver of an automobile sees that a horse driven to a carriage is restive and frightened, it would seem that he should take such course to avoid inflicting an injury as the dictates of ordinary prudence may demand. He should reduce the speed of his vehicle, or stop it if requested to do so, or if he sees that this is necessary to avoid an accident. *Indiana Springs Co. v. Brown*, 185

Ind. 465, 74 N. E. 615, 1 L. R. A. (N. S.) 238, 6 Ann. Cas. 656; Gue v. Wilson, 87 S. C. 144, 69 S. E. 99. In this case the defendant was not requested by the driver of the horse to stop, and therefore was not bound to do so, unless ordinary prudence required it; but he was not relieved from the duty of exercising ordinary care to prevent injury to the occupants of the carriage.

[3, 6] The restrictions which the law imposes upon all modes of travel upon the highways are such as tend to secure to the general public the largest enjoyment thereof, and must be observed and borne by all alike upon the broad ground that all have an equal right to travel in safety; and when accidents happen as incidents to reasonable use and reasonable care the law awards no redress. The fact that a horse becomes frightened by a motor vehicle upon the highway does not render the operator of such vehicle liable for resulting injury, as the horse has no paramount or exclusive right to the road; and the fact that a horse takes fright at a vehicle run by a new and improved method, and smashes things, does not of itself give the injured party a cause of action. Davids, *Law of Motor Vehicles*, § 125.

In *Nason v. West*, 31 Misc. Rep. 583, 65 N. Y. Supp. 651, it is said, among other things: "Horses may take fright at conveyances that have become obsolete, as well as at those which are novel; but this is one of the dangers incident to the driving of horses, and the fact cannot be interposed as a barrier to retrogression or progress in the method of locomotion. Bicycles used to frighten horses; but no right of action accrued. * * * Electric street cars have caused many run-aways. Automobiles operated without steam, by storage batteries, or by gasoline explosive engines, running at a moderate speed, may cause fright to horses unused to them; yet the horses must get used to them, or the driver take his chances."

It is contended by the defendant that he was driving in his automobile at the rate of from four to six miles an hour, and that he slowed up as soon as the horse and carriage entered the intersection space of the two streets, and that he has been guilty of no negligence. A careful reading of all the evidence in the case compels us to find that the verdict is clearly against the weight of evidence.

Our Supreme Court reports contain many hundred cases where the verdict and judgment have been set aside because of the insufficiency of the evidence. The most recent of these cases are *Rockwell v. State*, 90 Neb. 744, 134 N. W. 528; *In re Estate of Paisley*, 91 Neb. 139, 135 N. W. 435; *Bartels v. State*, 91 Neb. 575, 136 N. W. 717; *Carlos v. Hastings Independent Telephone Co.*, 91 Neb. 538, 136 N. W. 345; *Fitzgerald v. State*, 91 Neb. 481, 136 N. W. 50; *Gering v. Leyda*, 91 Neb. 430, 136 N. W. 53.

The seventh instruction, given by the court upon its own motion, reads: "(7) If you determine from the evidence and under these instructions that the defendant was negligent in one of the respects alleged in plaintiff's petition, as set out in the first paragraph of these instructions, and if you further determine from the evidence that the defendant's said negligence proximately contributed to the injuries of the plaintiff, then you should direct your attention, among other things, to the claim of the defendant that the plaintiff was guilty of contributory negligence; or, in other words, that the plaintiff by her negligence proximately contributed to the injuries done her. Contributory negligence is a part of the defendant's case, and the burden of proof is upon the defendant, unless you find that plaintiff in making her own case has shown such contributory negligence, to prove by a preponderance of the evidence that the plaintiff was guilty of such contributory negligence. In this particular, you are further instructed that if the horse which, at the time of the accident, was being driven by plaintiff's son was a fractious, dangerous, and unsafe animal, and that the plaintiff's injuries were proximately caused, even in part, because of that fact, then that would constitute contributory negligence on the plaintiff's part. On the other hand, any negligence of plaintiff's son in the management of the horse would not constitute negligence on the plaintiff's part, and she would not be responsible therefor. In any event, if you find that plaintiff was guilty of contributory negligence, which proximately contributed to her injuries, she cannot recover in this action."

The jury must have been misled by the following sentence contained in the instruction above quoted: "On the other hand, any negligence of plaintiff's son in the management of the horse would not constitute negligence on the plaintiff's part, and she would not be responsible therefor." The foregoing sentence would seem to be clearly wrong and misleading and in a high degree prejudicial to the defendant. The plaintiff's son, with plaintiff's consent, was driving the family horse and carriage. All the members of the family were with him. Presumably he was driving as the plaintiff and her husband desired him to drive, because they were with him. If the plaintiff had herself driven the horse and buggy in such a negligent and careless way as to bring about the collision and the injury, she would be the direct cause of the injuries suffered, and she could not recover damages because of her own carelessness and negligence. The plaintiff's son, for the time being, was the plaintiff's servant. He had gone to her stable and got out the family horse and buggy to bring her from the railroad station. It was her journey that was being made. It was

made by her by and with the assistance of her son and husband. Suppose that she herself had driven the horse and buggy against the automobile, and that the horse then turned and ran until it fell, would it be possible, under these circumstances, that anybody could seriously think that she ought to recover for her carelessness, negligence, or inability to control a fractious or an exceedingly timid horse? The all-important question to be determined: Who is to blame for the collision and injuries which are the direct result thereof? If the thing which happened would not have happened except for what the plaintiff did through her son, then she certainly cannot recover. What her son did must be attributed to her, because he was her servant or agent, and it is immaterial which he was.

The plaintiff was herself guilty of negligence, and therefore should not recover. *Hajsek v. Chicago, B. & Q. R. Co.*, 5 Neb. (Unof.) 67, 97 N. W. 327; *Aurelius v. Lake Erie & W. R. Co.*, 19 Ind. App. 584, 49 N. E. 357; *Cunningham v. City of Thief River Falls*, 84 Minn. 21, 86 N. W. 763; *Wosika v. St. Paul City R. Co.*, 80 Minn. 364, 83 N. W. 386; *Donnelly v. Brooklyn City R. Co.*, 109 N. Y. 16, 15 N. E. 733; *Brickell v. New York C. & H. R. R. Co.*, 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648; *Chicago Union Traction Co. v. Leach*, 215 Ill. 184, 74 N. E. 119; *Beach, Contributory Negligence* (3d Ed.) § 115.

If the plaintiff's son drove into the automobile of defendant, then the defendant is not liable, because he is not responsible for the collision. There is no liability of the defendant, whether the act done is regarded as the act of the plaintiff or the act of her son. She cannot be held free from responsibility for the negligence of the driver, and the instruction is most misleading. *Koplit v. City of St. Paul*, 86 Minn. 373, 90 N. W. 794, 58 L. R. A. 74; *Cunningham v. Thief River Falls*, 84 Minn. 21, 86 N. W. 763; *Wosika v. St. Paul City R. Co.*, 80 Minn. 364, 83 N. W. 386; *Town of Knightstown v. Musgrove*, 116 Ind. 121, 18 N. E. 452, 9 Am. St. Rep. 827; *Kessler v. Brooklyn Heights R. Co.*, 3 App. Div. 426, 38 N. Y. Supp. 799; *Beach, Contributory Negligence* (3d Ed.) § 115a; 29 Cyc. 543.

It is urged by appellant that the verdict is the product of bias and prejudice upon the part of the jury, and in support thereof it is stated that it appears from the affidavits of three of the jurors that they understood from the remarks of the court, urging the jury to agree upon a verdict, if possible, and from the conduct of the attorneys of the respective parties, whom the trial judge called to his desk, and with

whom he held a private consultation, that it was the desire, both of the court and the attorneys, that there should be no disagreement, and that a verdict of some kind should be returned, and therefore, solely by reason of that fact, they consented to join in the verdict rendered; that they would not have done so but for the reason that they were influenced by the remarks of the court and what took place between the court and the attorneys. We do not pass upon this question, because compelled to grant a new trial for the reasons above specified.

The judgment of the district court is reversed.

SEDGWICK, J. I concur in the result reversing the judgment.

FAWCETT, J. (concurring in part). I concur in so much of the opinion as holds that the evidence does not establish negligence on the part of defendant. This being true, there is no question of contributory negligence in the case. There cannot be such a thing as contributory negligence by one party where there is no negligence by the other.

LETTON, J. (concurring in part). I concur in the view that the judgment should be reversed as unsupported by the evidence. It is my view, however, that the duties of the driver of a motor vehicle with respect to meeting or passing horse-drawn vehicles are laid down in sections 6235, 6236, Ann. St. 1911 (Comp. St. 1911, c. 78, §§ 146, 147), and that, unless the accident is caused in some other manner than by a violation of these rules, the court is bound by the police regulations established by the Legislature, and should adhere to the same. As to other points decided, I express no opinion.

ROSE, J. (dissenting). It seems to me there is sufficient evidence of defendant's negligence to justify the action of the trial court in submitting that issue to the jury. I do not concur in the reversal for any reason given in the opinion, and therefore dissent.

REESE, C. J. (dissenting). The evidence in this case is conflicting, although seemingly preponderating in favor of defendant. It is my view that the question of the weight of the testimony is for consideration and decision by the trial jury, and not for this court. While, had I been called upon to determine the case upon the preponderance of the evidence, I probably could not have agreed to the verdict, it is the well-settled law that in such cases the verdict of a trial jury should close the inquiry.

NIXON v. STATE. (No. 17,546.)
(Supreme Court of Nebraska. Oct. 18, 1912.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 236*)—ILLEGAL SALE—EVIDENCE.

In a prosecution for the sale of spirituous and intoxicating liquor called whisky, in violation of chapter 50, Comp. St. 1911, evidence that the liquor sold, without a license, to the prosecuting witnesses, was intoxicating, that it looked like whisky, and tasted like whisky, is sufficient to sustain a conviction. *White v. State*, 88 Neb. 177, 129 N. W. 259.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

2. INTOXICATING LIQUORS (§ 239*)—ILLEGAL SALE—INSTRUCTIONS.

In such prosecution, if the evidence is conflicting, the court should submit the case to the jury under proper instructions, and an instruction that "the law of Nebraska provides that all persons who shall sell any spirituous liquors or any intoxicating drinks without first having obtained a license for selling such liquors shall be deemed guilty of a misdemeanor," is without error.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 331-347; Dec. Dig. § 239.*]

3. INTOXICATING LIQUORS (§ 239*)—CRIMINAL LAW (§ 829*)—ILLEGAL SALE—INSTRUCTIONS.

Other instructions examined, the substance thereof stated in the opinion, and held to be without error.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 331-347; Dec. Dig. § 239.*; *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829.*]

4. CRIMINAL LAW (§ 395*)—ILLEGAL SALE—EVIDENCE.

On the trial of such a case, it is not error to permit the state to introduce in evidence the federal liquor license issued to the defendant, where the sole objection to its introduction is that it was obtained from him by stealth.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 877; Dec. Dig. § 395.*]

Error to District Court, Richardson County; Raper, Judge.

Arthur W. Nixon was convicted of an illegal sale of intoxicating liquors, and brings error. Affirmed.

E. Falloon, of Falls City, for plaintiff in error. Grant G. Martin and Frank E. Edger-ton, both of Lincoln, for the State.

BARNES, J. The plaintiff in error, hereafter called the defendant, was tried in the district court of Richardson county on an information containing four counts, in each of which he was charged with the crime of selling spirituous and intoxicating liquors called whisky without a license. He was found not guilty on the first two counts, and guilty as charged in the third and fourth counts of the information. He was sentenced to pay a fine of \$300 on each count, together with the costs of prosecution, and to stand committed until the fines and costs were paid.

To reverse the judgment of the district court he has brought the case here by a petition in error.

Defendant's first contention is that the evidence is wholly insufficient to sustain the verdict. It appears that the third count of the information charged that defendant did on or about the 26th day of March, 1911, in the county of Richardson, state of Nebraska, unlawfully and willfully sell to one Robert Ankrom certain spirituous and intoxicating liquors, to wit, one gill of whisky, without having obtained a license therefor. The abstract, record, and briefs show that upon the trial Ankrom testified, in substance, that he was living in Barada on the 27th day of March, 1911, where he had always lived; that he was acquainted with the defendant, Arthur Nixon; that he did not remember whether he was in there on the 26th day of March of that year, but that he visited Nixon's place of business very frequently and frequently drank there. He said: "I can't say I remember of drinking whisky. I can't tell what it was. If a man drank enough of it, it would intoxicate him. I didn't buy the drink. I drank in there with James Graham on or about the 1st of March. I can't say what I drank, but it was within the last 18 months. I drank with Al Davis. I don't think anybody paid for it. I don't remember what we called for. I don't remember the number. I don't think it was over four. I took one drink with Mr. Davis. I was satisfied with that. * * * I took a drink with Al Davis. The drink was colored like whisky. I didn't smell it. I tasted it, and it tasted like whisky. * * * I only took one drink. * * * I suppose the graduate was half full. At the time I drank with Al Davis, Davis called me up and Nixon waited on me. I have not purchased within the last 12 months any liquor that looked like whisky. It was the same color. I usually paid 10 cents for a drink. I never bought any by the bottle. I never bought any by the jug. Within the last 12 months I think I have bought something that looked like whisky and tasted like whisky, and paid 10 cents for it. I never became intoxicated on it within the last 12 months." The witness also testified on cross-examination that he never bought any whisky at Nixon's place of business within the last 18 months. "I don't know whether Nixon treated us or not, but I don't think the drink was paid for, not that I know of. I can't swear that this treat was whisky." On redirect examination the witness further said: "This stuff that I have been drinking at Nixon's place I would not swear it was whisky. If he drank enough of it, he might become intoxicated. I didn't get any of this stuff at Nixon's place in March of this year, nor April. I might of bought some in May. I don't remember the time of the month of May I bought it. I think, if I bought it at

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

all, it was about the middle of the month. I called for medicine. I suppose he understood me. We went into the back room, and took it from a bottle. It looked like one of those patent medicine bottles, a square bottle. Sometimes he poured it out, and sometimes I did. Sometimes I paid for it, and sometimes I didn't. I usually paid 10 cents. I didn't tell what particular ailment I wanted the medicine for. I can't tell the jury what it was. He gave me medicine for headache, for dyspepsia, for the appetite, an appetizer. It kind of braced a fellow up."

The fourth count of the information charged that the defendant, in the county of Richardson and state of Nebraska, on or about the 28th day of March, 1911, did unlawfully and willfully sell to one Albert Davis certain spirituous and intoxicating liquors, to wit, one gill of whisky, without having first complied with the laws of the state of Nebraska, and obtained a license therefor. To support that count of the information Albert Davis testified, in substance, as follows: "I live north, just across the line of Nemaha county. Was living there during the month of last March. I was in Barada nearly every day along through March at least three times a week. Am acquainted with Arthur Nixon, and have been in his place of business. I have purchased of him groceries, some hardware, and drugs. On or about the 25th day of March I bought something I suppose was whisky. It was red looking stuff. It was a poor article of stuff whatever it was. It tasted to me like it might have been whisky, a poor grade of whisky. Well, if a man would drink enough of it, I suppose it would make him crazy. I bought this stuff of him. I paid all kinds of prices, from 10 cents up. I usually paid 10 cents a drink. When I bought it by the bottle, I paid from 25 cents to \$1, owing to the size I bought. When I got this liquor, I called for booze. I drank with Bob Ankrom at the time he would not pay the assessment. We drank red-eye booze, and I paid for it. We drank it out of a small like glass, I think it was a wine glass, as well as I remember."

It appears, without dispute, that the defendant was engaged in the business of selling hardware, groceries, and drugs in the village of Barada, in Richardson county, Neb., at the several times mentioned in the information. The defendant positively denied on oath that he sold any whisky to Robert Ankrom or Albert Davis at any time within 18 months before the time alleged in the information. Defendant also produced three witnesses to impeach the testimony of Albert Davis, each of whom testified that on a certain day in a saloon conducted by one Hunker, while drinking with the defendant Nixon, and at his expense, Albert Davis said, in substance, that he never bought any whisky of the defendant. Davis, however, de-

nied that he had ever made such a statement.

[1] The foregoing is the substance of the evidence on which the case was submitted to the jury. The probative effect of this evidence was a question for the jury, and, notwithstanding the witnesses for the state avoided stating in clear and direct language that they knew the liquor that they purchased of the defendant was whisky, still the jury, taking into consideration their reluctance to testify against one who had thus favored them, might well have concluded that the liquor was what one of the witnesses said "seemed to be a poor quality of whisky." In any event, in the light of this testimony, it cannot be said that the liquor was not intoxicating. We are therefore of opinion that the evidence was sufficient to sustain the verdict, and we would be invading the province of the jury to hold otherwise. *White v. State*, 88 Neb. 177, 129 N. W. 259.

[2] Defendant also contends that the court erred in giving and refusing instructions. By the third instruction the court charged the jury that "the law of Nebraska provides that all persons who shall sell any spirituous liquors or any intoxicating drinks without first having obtained a license for selling such liquors, shall be deemed guilty of a misdemeanor." It is argued that this instruction is erroneous because under its direction the jury could convict for the sale of spirituous liquors or any intoxicating drink. We think this instruction contains a fair statement of the law, as we understand it, and the district court did not err in giving it.

[3] By the fourth instruction the court charged the jury as follows: "You are instructed that it is not necessary that any witness testify positively as to the particular name of the liquor. It is sufficient, if you are satisfied from all the facts and circumstances in evidence that the liquor so sold, if any, was intoxicating liquor of the kind generally known as whisky. The name or lack of name given to such liquor is not material, if the kind and character of such liquor is shown by the evidence to be as alleged in the information." We think this instruction is correct, and is fairly within the rule announced in *White v. State*, supra.

At the request of the state, the court instructed the jury that the beverage commonly known as whisky is an intoxicating liquor, and, if you believe from the evidence beyond a reasonable doubt that the defendant sold whisky as charged in the information, your verdict should be guilty. The jury were also told in the same instruction that it was not necessary for the state to prove the component parts of the beverage alleged to have been sold, or make a chemical analysis of the same; that it was sufficient if they were satisfied from the evidence

beyond a reasonable doubt that the defendant sold the beverage commonly called and generally known as whisky as charged in the information; and that the beverage so sold was intoxicating. From an examination of the authorities, both in this and other jurisdictions, we are satisfied that this instruction is without error.

Complaint is made because the court refused to instruct the jury that a conviction could not be had upon mere suspicion, however strong. An examination of the instructions given by the court upon his own motion, and the one requested by the defendant and given by the court, in which it was clearly stated that it was incumbent upon the state to prove beyond a reasonable doubt all the material allegations of any or all counts of the information; that the material allegations of the counts of the information are that the beverages charged as sold are whisky; that they were sold, if at all, to the persons named in the information, and that any or all of the sales, if made, were made within 18 months next preceding the commencement of this prosecution (June 15, 1911); that the charge in the information that the sales were made without a license is material—obviated any necessity for instructing the jury that they could not convict the defendant upon mere suspicion. As we view the record, the case was fairly tried, and the instructions are without error.

[4] Finally, it is contended that the court erred in permitting the state to introduce in evidence the federal liquor license issued to the defendant, because it had been obtained by the state by stealth. In *Younger v. State*, 80 Neb. 201, 114 N. W. 170, objection was made to the introduction of defendant's shoes, upon the ground that they were taken from him by force, and it was held that, where matters are offered in evidence on the trial of the case which are pertinent to the issue, they should be admitted, and the court will not take notice of how they are obtained. To the same effect are *Geiger v. State*, 6 Neb. 545; *Russell v. State*, 66 Neb. 497, 92 N. W. 751; *Williams v. State*, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269; 1 *Bishop, New Criminal Procedure* (4th Ed.) §§ 210-212.

As defendant cites no authority in support of this contention, and in view of the authorities above mentioned, we are of opinion that the receiving of the federal license in evidence presents no ground for a reversal of the judgment.

The evidence clearly shows that the defendant in the back room of his store, in Barada, Richardson county, Neb., at or about the time charged in the information, sold intoxicating liquors, which the witnesses saw looked and tasted like whisky, to the persons charged in the information. It was

admitted that he had no license to make such sales. Therefore the judgment of the district court should be, and is, affirmed.

PAGE v. BRESEE et al. (No. 16,779.)
(Supreme Court of Nebraska. Nov. 1, 1912.)

(Syllabus by the Court.)

1. MORTGAGES (§ 497*)—FORECLOSURE BY ACTION—SUMMONS—MISNOMER OF DEFENDANT.

By actual personal service of summons upon the mortgagor, who is also the owner of the equity of redemption, in an action to foreclose a mortgage, the court obtains jurisdiction; and a mistake in the name of the defendant which is not brought to the attention of the court by motion or plea in abatement does not deprive the court of its jurisdiction, or render a decree foreclosing the mortgage subject to collateral attack.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1469, 1471-1473; Dec. Dig. § 497.*]

2. TAXATION (§ 642*)—FORECLOSURE OF TAX LIEN—PROCESS—PUBLICATION.

In an action for the foreclosure of a tax lien against unknown heirs, a substantial compliance with the provisions of section 83 of the Code, an order of the court for service by publication upon such unknown heirs, and a legal publication of summons thereunder is sufficient to confer jurisdiction upon the court to render a decree of foreclosure.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1305-1307; Dec. Dig. § 642.*]

3. TAXATION (§ 642*)—FORECLOSURE OF TAX LIEN—PROCESS—PUBLICATION.

In an action by a county against unknown heirs to foreclose its tax lien, the affidavit for service by publication as provided by section 83 of the Code may be made by the county attorney.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1305-1307; Dec. Dig. § 642.*]

4. TAXATION (§ 648*)—ENFORCEMENT OF LIEN—COLLATERAL ATTACK—GROUNDS—IRREGULARITIES.

Where the court has obtained jurisdiction, mere informalities of procedure will not subject the decree of foreclosure to collateral attack.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1316; Dec. Dig. § 648.*]

(Additional Syllabus by Editorial Staff.)

5. TAXATION (§ 722*)—REDEMPTION FROM TAX SALE—ACTIONS TO REDEEM—LIMITATIONS.

Under the revenue laws barring the right of redemption from decree foreclosing a tax lien after two years from the confirmation of sale, the fact that plaintiff, seeking to redeem, also prays for a decree quieting title, does not of itself toll the statute.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1449-1453; Dec. Dig. § 722.*]

Appeal from District Court, Sheridan County; Westover, Judge.

Action by Mary F. L. Page against Charles P. Bresee and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Albert W. Crites, of Chadron, for appellant. Allen G. Fisher, of Chadron, and A. M. Morrissey, of Lincoln, for appellees.

BARNES, J. Action to redeem the S. E. $\frac{1}{4}$ of section 10, township 33 N., of range 44 W., situated in Sheridan county, from tax sale under a decree of foreclosure in which the county of Sheridan was plaintiff and the unknown heirs of one Charles J. Chapman, deceased, were defendants, and quiet the title thereto in the plaintiff. It appears that one Charles J. Chapman had previously, in his lifetime, obtained title to the land in question under a decree of the district court of Sheridan county foreclosing a mortgage on the premises. The plaintiff, Mary F. L. Page, claimed title thereto by a deed from the original entryman, one Johann F. M. Laue, while defendant Bresee derived his title under the tax decree of foreclosure above mentioned; and defendant, Walter Morse, claimed an interest in the premises as mortgagee. On the trial the district court of Sheridan county found generally for defendant Bresee, and dismissed the plaintiff's action. From the judgment the plaintiff has appealed.

[1] 1. Plaintiff's first attack is centered upon the mortgage foreclosure decree, under which Charles J. Chapman obtained his title to the premises in question. It is claimed that that decree was void, for the reason that the mortgagor was sued by the wrong name. It appears that title to the mortgaged premises was obtained by one Johann F. M. Laue from the United States government; that his entry and final receiver's receipt described him as "John F. M. Lowe"; that he thereafter executed the mortgage on which the foreclosure was based, and in which he was named as "John F. M. Lowe," but which he signed in German script as Johann F. M. Laue. It further appears that personal service of summons was duly made upon both Laue and his wife in the mortgage foreclosure suit; that they failed and neglected to appear or answer or in any manner direct the attention of the court to the alleged misnomer. It follows that the decree of foreclosure was not void, and therefore is not subject to collateral attack. *Smelt v. Knapp*, 16 Neb. 53, 20 N. W. 20; *Kronski v. Missouri P. R. Co.*, 77 Mo. 362; *Whitcomb v. Hooper*, 81 Fed. 946, 27 C. C. A. 19; *Davis v. Jennings*, 78 Neb. 462, 111 N. W. 128. We are of opinion that Charles J. Chapman obtained title to the premises in question by the sheriff's deed based on the foreclosure decree.

[2] 2. Plaintiff attacks the decree foreclosing the tax lien upon the premises in question, and contends that the decree was void for reasons hereinafter stated. It appears, however, that, when that suit was commenced, Charles J. Chapman was made the defendant as owner of the land, and the fact of his death was not ascertained until after a decree of foreclosure was rendered; that, when that fact was ascertained, the decree was set aside and held for naught. The petition was thereupon amended by

making the unknown heirs of Charles J. Chapman the defendants therein; that the plaintiff by its county attorney made an affidavit and filed the same in compliance with the provisions of section 83 of the Code, which provides that in actions where it shall be necessary to make the heirs of any deceased person defendants, and it shall appear by affidavit of the plaintiff annexed to his petition that the names of such heirs and their residences are unknown to the plaintiff, proceedings may be had against such unknown heirs without naming them, and the court shall make such order respecting service as may be deemed proper. If service by publication be ordered, the publication shall not be less than four weeks; that upon the filing of the affidavit the district court continued the cause, and ordered service of summons by publication, upon the unknown heirs of Charles J. Chapman, deceased. It is claimed that the county attorney was not authorized by any statutory provision to make such an affidavit; that it was not annexed to the original petition; that it was not sufficient in form and substance to authorize the court to order service by publication upon unknown heirs; that the order of the court in that behalf was defective and insufficient; that the decree based upon the service thus ordered was void; and that the purchaser under the decree obtained no title to the land in question. In support of this argument, plaintiff cites *Stull v. Maslonka*, 74 Neb. 322, 106 N. W. 166, where it was said: "Where a defendant is sought to be brought into court by some method prescribed by a statute, other than personal service, which notice may or may not reach him, and which is more or less unsatisfactory, the statutory provisions relating to such service are construed with strictness, and it is incumbent that all steps in the process required to be taken shall be followed with substantial accuracy." In that case, however, the decree of foreclosure was sustained on the ground that there was a substantial compliance with the provisions of the statute authorizing service by publication. In the instant case there was an attempted compliance with every requirement of section 83, and, while the proceedings were in some respects somewhat informal, still we are of opinion that there was substantial compliance with the terms of the statute.

[3] 3. It is contended that the county attorney of Sheridan county, who made affidavit for service of summons upon the unknown heirs of Charles J. Chapman, deceased, could not make such affidavit. We think, however, that the words "appear by the affidavit of the plaintiff," as found in section 83 of the Code, are not to be taken so literally as is contended by plaintiff. Such a construction would prevent a corporation or partnership from maintaining the action. We are of opinion that the plaintiff

may make it appear by his own affidavit, or from the affidavit of an attorney, especially in cases where the plaintiff is a corporation, as in this case, and could not make such an affidavit. We therefore hold that the affidavit may be made by the county attorney, who is the official law officer of the county.

[4] There having been a substantial compliance with all statutory provisions in the tax foreclosure suit, the decree rendered therein is not subject to collateral attack. The effect of that decree, as declared by statute, was to create a new and independent title to the land in question. It divested the heirs of Charles J. Chapman of their interest therein, and transferred the same by such independent title to the defendant who was the purchaser at the foreclosure sale.

[8] 4. Finally, it appears that the defendant by his answer properly pleaded the statute of limitations as one of his defenses, and the record discloses that the sale under the decree foreclosing the tax lien was confirmed on the 6th day of September, 1901, and the sheriff thereupon made a deed to the defendant as such purchaser. By the provisions of our revenue laws the right of redemption from a decree foreclosing a tax lien is barred after the expiration of two years from the confirmation of sale. The fact that the plaintiff also prays for a decree quieting title does not of itself toll the statute. It is quite probable that the district court was of opinion that the plaintiff's cause of action, which was commenced on the 3d day of April, 1906, was barred by the statute of limitations. There was a general finding for the defendant, and an examination of the record satisfies us that the evidence was sufficient to warrant such a finding and sustain the decree appealed from.

For the foregoing reasons, the judgment of the district court is affirmed.

FAWCETT, J., not sitting.

TIERNEY v. EVANS et al. (No. 16,823.)
(Supreme Court of Nebraska. Nov. 1, 1912.)

(Syllabus by the Court.)

1. JUDGMENT (§ 872*)—DORMANT JUDGMENT—REVIVAL.

Revivor of a dormant judgment under our statute has no other effect than to reinstate the judgment, and authorize execution to collect the same.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1641, 1642; Dec. Dig. § 872.*]

2. JUDGMENT (§ 872*)—REVIVOR—PARTIES.

One not a party to the original judgment who fails to appear upon service of the conditional order of revivor is not made a party to the judgment by the final order reviving the same.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1641, 1642; Dec. Dig. § 872.*]

3. EXECUTION (§ 172*)—LEVY—INJUNCTION.

One who was not a party to the proceedings in which judgment is entered may enjoin the levy of an execution upon his property to collect such judgment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 519-539; Dec. Dig. § 172.*]

Appeal from District Court, Boone County; Paul, Judge.

Action by Patrick J. Tierney against Edwin Evans and others. Judgment for plaintiff, and defendants appeal. Affirmed.

France & France, of York, and H. C. Vail, of Albion, for appellants. F. J. Mack and C. E. Spear, both of Albion, for appellee.

SEDGWICK, J. In December, 1883, the St. Paul Harvester Works recovered a judgment in the county court of Boone county against Patrick Tierney. In August, 1909, the St. Paul Harvester Works filed in that court a motion and affidavit for a revivor of the judgment. A conditional order of revivor was made by the court, which was served upon this plaintiff. The sheriff's return upon the order shows that he served it personally upon "the within named Pat Tierney." This plaintiff made no appearance in the proceedings. Upon this return an order of revivor was made by the county court. Execution was then issued upon the judgment, and, the sheriff being about to levy upon the property of this plaintiff, this action was brought in the district court for Boone county against the sheriff and the county judge to restrain them from enforcing the judgment against this plaintiff. A temporary injunction was allowed, and upon the trial the injunction was made perpetual, and the defendants have appealed.

[1-3] The plaintiff upon the trial testified that at the time of the entering of the judgment he was not of legal age, and was residing in the state of Missouri; that two or three years afterwards he removed to Madison county, in this state, where he resided for 19 years, and then removed to Boone county, where he had resided about 4 years at the time the conditional order of revivor was served upon him; that he never had any transactions whatever with the St. Paul Harvester Works, and was never sued by them; and that no summons had ever been served upon him at their suit. In this testimony he was supported by several witnesses, from which it appears that this plaintiff was not the party against whom the judgment of the St. Paul Harvester Works was rendered. The defendants offered no evidence upon this question, and rested their case upon the proposition that this plaintiff was bound by the order of revivor, and was estopped to deny that the judgment was against him. This position of the defendants is wholly untenable. A judgment against one who has not been served with process and has made no appearance is not merely

voidable. It is absolutely void. As said in *McKinney v. Frankfort & State Line Co.*, 140 Ind. 95, 38 N. E. 170, it "is a mere nullity." The evidence clearly shows that the judgment against Patrick Tierney was not a judgment against this plaintiff, Patrick J. Tierney. This plaintiff was never sued nor served, and as against him the judgment is a nullity. The proceeding in this state to revive a dormant judgment is not a new action, but is a continuation of the old. It takes the place of the old common-law writ of *scire facias* for that purpose. This was early determined in this state in *Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365, where the authorities are cited, and the matter fully considered. In that case it was sought to make the order of revivor determine certain rights of the parties. The effect of a judgment of revivor is stated in the first paragraph of the syllabus: "A judgment of revival is merely a continuation of the original action, and continues the vitality of the original judgment with all its incidents from the time of its rendition." This conclusion was cited and approved by this court in *Bankers' Life Ins. Co. v. Robbins*, 59 Neb. 170, 80 N. W. 484. In this latter case the court said: "It is not the commencement of a civil action, but the continuation of an action previously commenced. The object in view is not to obtain a judgment, but to obtain permission of the court to execute a judgment already in existence."

Other interesting and important questions are presented in the brief, but are not necessary to this decision. There never having been any judgment against this plaintiff, and the order of revivor having no other effect than to renew the former judgment, there was no authority to levy the execution on the property of this plaintiff, and the judgment of the district court is affirmed.

CHRISTENSEN v. OMAHA ICE & COLD STORAGE CO. (No. 16,784.)

(Supreme Court of Nebraska. Nov. 1, 1912.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES (§ 171*)—FLOWAGE—ACTIONS FOR INJURIES.

It is the duty of one who uses, maintains, and controls a ditch for the purpose of lowering the waters of a lake or pond to a navigable river to erect and maintain a dam at the outlet of the ditch sufficient to prevent the flood waters of the river from entering it, and overflowing the lands owned by other persons adjacent thereto.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 216-222; Dec. Dig. § 171.*]

2. WATERS AND WATER COURSES (§ 172*)—FLOWAGE—ACTIONS FOR INJURIES.

Where such dam is negligently constructed or maintained, and by reason thereof farm lands in the vicinity of the ditch are overflowed, and crops growing and personal property situated

thereon are injured and destroyed, the person or corporation having the control, management, and use of such ditch and dam is liable for the damages caused thereby.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 233-236; Dec. Dig. § 172.*]

3. LIMITATION OF ACTIONS (§ 55*)—FLOWAGE—ACTIONS FOR INJURIES.

In such a case the cause of action arises when the damages are sustained.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 299-306; Dec. Dig. § 55.*]

4. WATERS AND WATER COURSES (§ 176*)—FLOWAGE—ACTION FOR INJURIES—DEFENSES.

The fact that the ditch and dam are situated upon lands owned by persons other than the defendant is no defense to such an action, where it is shown that defendant freely exercises the use, control, operation, and management thereof, in the prosecution of his own private business.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 237-243; Dec. Dig. § 176.*]

5. INSTRUCTIONS—NO ERROR.

The substance of instructions given and refused by the trial court are stated in the opinion, and the rulings thereon are held to be without error.

Appeal from District Court, Douglas County; Kennedy, Judge.

Action by Hans Christensen against the Omaha Ice & Cold Storage Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Brown, Baxter & Van Dusen, of Omaha, for appellant. S. A. Searle and B. S. Baker, both of Omaha, for appellee.

BARNES, J. Action by plaintiff, the lessee of a tract of farm land situated between what is known as Cut-Off Lake and the Missouri river near to and east of the city of Omaha, for damages to his growing crops and personal property caused by the flood waters of the river alleged to have been thrown upon the premises by failure of the defendant to properly maintain a ditch leading from the lake to the river for drainage purposes; and a dam constructed therein to prevent the flood waters of the river from flowing from that stream into the lake. On the trial in the district court of Douglas county the plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that about the year 1898 David Talbot and E. W. Lamoreaux, who were the incorporators of the defendant company, were conducting the business of cutting and storing ice on the banks of Cut-Off Lake; that at times of high water in the lake their icehouses were partly submerged, and the ice stored therein was destroyed; that, to obviate that trouble, they constructed a ditch in an easterly direction from the lake to the Missouri river, and cut the same through the high bank of that stream which had theretofore been a safe and sure bar-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

rier to its flood waters, and had prevented them from reaching the land between the river and the lake; that, when the water in the river was low, the ditch drained the lake and lowered the stage of the water sufficiently to protect the ice houses above mentioned; that, when that purpose was accomplished, a dam was constructed across the ditch near its mouth sufficient to prevent the flood waters of the river from entering the ditch in question; that, when it again became necessary to lower the water in the lake, the ditch was cleaned out and the dam removed, and, when the lake was sufficiently lowered, the dam was replaced. It also appears that the defendant was incorporated in December, 1901, and took over the property rights and business of the former owners, who were thereafter members, officers, and managers of the corporation; that from thence to and including the year 1905 the defendant company conducted its business in relation to the management of the ditch and dam above described in the same manner as it had theretofore been conducted; and there is sufficient evidence in the record to sustain a finding that the defendant had frequently cleaned out the ditch, taken out the dam, drained the lake, and thereafter on each occasion had replaced that structure. It also appears that in July, 1905, the flood waters of the Missouri river by reason of the negligent reconstruction and maintenance of the dam broke through and washed away that structure and flowed back through the ditch in such volume as to overflow its banks and flood the plaintiff's premises, destroying his growing crops, together with a large amount of his personal property.

[1, 2] 1. It is strenuously argued that the evidence is not sufficient to sustain the judgment because it does not show that defendant reconstructed the dam at the outlet of the ditch in question in the year 1904. In disposing of this contention it is sufficient to say that the evidence clearly shows that the defendant company cleaned out the ditch and used it to drain the lake in 1903 and 1904. To do this necessarily required the removal of the dam. It appears that it was negligently replaced by some one, and, in any event, it was the plain duty of the defendant to reconstruct it in such a manner as to protect the lands adjacent to the ditch from inundation by the flood waters of the Missouri river. A failure to perform that duty rendered defendant liable for resulting damages.

[4] 2. It is also contended that defendant was not the owner of the land through which the ditch was dug and on which the dam was constructed, but was a trespasser thereon, and therefore it was not liable for its failure to properly maintain the ditch and reconstruct the dam after using them for the protection of their ice houses. We find nothing

in the record showing, or tending to show, that defendant was denied the right to construct the ditch and dam in question by the owner or owners of the land on which they were situated. But, on the contrary, it appears that defendant has at all times exercised the right to enter upon the premises when it became necessary to do so for the protection of its own property. If defendant could exercise such right, it necessarily assumed the duty of so exercising it as not to thereby injure the property of others. We are therefore of opinion that this contention cannot be sustained. *Reams v. Clopine*, 78 Neb. 166, 110 N. W. 550.

[3] 3. It is also contended that the right of action, if any existed for defendant's acts, accrued when the ditch was dug and the dam was first constructed in 1898, and was therefore barred by the statute of limitations. This defense was not pleaded, and, if it had been made an issue, could not have been maintained. The action was not one for permanent injury to the land leased by plaintiff, but was one for damages to his growing crops and personal property, caused by the negligent reconstruction and the maintenance of the ditch and dam; and the plaintiff's right of action accrued when his property was injured and destroyed. *Chicago, R. I. & P. R. Co. v. Andreeson*, 62 Neb. 456, 87 N. W. 167. In that case it was said: "The right to damages for an obstruction of a stream by an insufficient culvert or drain does not accrue when the railroad is built, but when the overflow actually results."

4. The defendant requested the district court to instruct the jury, in substance, that there was no evidence that the David Talbot Ice Company, which constructed the ditch and dam in question, sold or transferred any right thereto or therein to the defendant; that there was no evidence produced as to who were the associates of David Talbot; that they having constructed the ditch and dam in 1898, some years before the organization of the defendant company, the defendant could not be held responsible for the acts of David Talbot and his associates in digging the ditch in question.

For the reasons heretofore stated, it is apparent that the court did not err in refusing defendant's instructions. It seems equally clear that the district court properly refused to instruct the jury to return a verdict for the defendant at the conclusion of all of the evidence.

5. It is contended that the court erred in giving paragraph 4 of the instructions upon his own motion. An examination of that instruction discloses that it fairly and clearly stated the issues presented by the pleadings, and informed the jury that, if they found the plaintiff had proven all of the allegations of his petition, enumerating and describing them, by a preponderance of the

evidence, their verdict should be for the plaintiff. In this there was no error.

Finally, it appears from a careful examination of the whole record that the case was fairly tried, that the evidence is sufficient to sustain the verdict, and, no error appearing in the record, the judgment of the district court is affirmed.

FREEBURG v. STATE. (No. 17,529.)

(Supreme Court of Nebraska. Nov. 1, 1912.)

(Syllabus by the Court.)

1. DRUNKARDS (§ 10*)—CRIMINAL DRUNKENNESS—INSTRUCTIONS.

The instruction set out in the opinion is held to be an erroneous definition of drunkenness and a state of intoxication.

[Ed. Note.—For other cases, see Drunkards, Cent. Dig. §§ 10, 11; Dec. Dig. § 10.*]

2. WITNESSES (§ 211*)—COMPETENCY—PHYSICIANS.

The doctor who was called to testify as a witness on behalf of the state, and who dressed the wounds of the defendant, was incompetent to testify to the defendant's condition over the objection of the defendant that he was disqualified by reason of section 333 of the Code.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 768, 773; Dec. Dig. § 211.*]

(Additional Syllabus by Editorial Staff.)

3. DRUNKARDS (§ 10*) — "INTOXICATION"—"DRUNKENNESS"—"INEBRIETY"—"DRUNK."

Though one may be said to be under the influence of liquor, he is not necessarily intoxicated, this being far short of "intoxication" which is the synonym of "inebriety" and "drunkenness"; the word "intoxicated" being synonymous with "drunk," and "drunk" being defined in the Standard Dictionary as to have lost the normal control of one's bodily and mental faculties (citing 4 Words and Phrases, 3734, 3735).

[Ed. Note.—For other cases, see Drunkards, Cent. Dig. §§ 10, 11; Dec. Dig. § 10.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2208-2211.]

Error to District Court, Phelps County; Dungan, Judge.

Gust Freeburg was found guilty of drunkenness, and brings error. Reversed.

James I. Rhea, of Holdrege, for plaintiff in error. A. J. Shafer, of Holdrege, for the State.

HAMER, J. The plaintiff in error, Gust Freeburg, hereafter designated as the defendant, was complained against in the police court of the city of Holdrege July 5, 1911, and was charged with the violation of an alleged ordinance in that city on July 4, 1911. The plaintiff charged that the said Gust Freeburg "on or about the 4th day of July, A. D. 1911, in the county last named (Phelps) and within the corporate limits of the city of Holdrege, then and there being, did then and there unlawfully become drunk and was then and there found in a state of

intoxication and drunkenness contrary to section 44 of Ordinance 45 of the Compiled and Revised Ordinances of the city of Holdrege." The defendant was found guilty in the police court, and sentenced to pay a fine of \$10 and costs. He appealed to the district court, and was there convicted and sentenced to pay a fine of \$1 and costs. He brings the case here for review.

Upon that point there seems to be a conflict of evidence, but there is no conflict touching the fact that the defendant was going home with a Mr. Levine and the city marshal started to arrest him, and the defendant and Levine begged him not to make the arrest. The city marshal struck the defendant over the head with his revolver, but claims in justification that the defendant and Levine objected to the arrest, and finally resisted. At the time this happened, they were near Levine's tailor shop, and Levine said he wanted to go in his shop to get his coat, and then they would go home together. Freeburg and Levine denied making any resistance to the arrest, and it does not appear that Freeburg was in any way offensive in his conduct.

Dr. S. F. Sanders was called by the county attorney, and testified as a witness on behalf of the state and over the objection of counsel for the defendant. He testified that he was a practicing physician in the city of Holdrege, and that on the afternoon or evening of July 4, 1911, he was called upon to dress certain wounds from which the defendant was suffering, that he found the defendant at the tailor shop of Mr. Levine and had him removed to his (Sanders') office, which was near by, and where he treated him for the injuries which he had received. He gave as a reason for believing that the defendant was intoxicated that his breath smelled of beer, and immediately after his wounds were dressed the defendant said, "I guess it is all right." The defendant had also said something else which the witness testified he was unable to remember. The fact that Sanders was a doctor, and that he had been called to attend the defendant, and testified to his opinion concerning the condition of the accused as to intoxication, would give his testimony great weight with the jury because of the confidential relation which he sustained to the defendant, and because as a doctor his knowledge would be supposed to be superior to that of other men.

[2] Section 333 of the Code of Civil Procedure provides that "no practicing attorney, counsellor, physician, surgeon, minister of the gospel, or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline."

The foregoing section would seem to justify the exclusion of the testimony of Dr. Sanders. We think that his testimony was clearly prejudicial. *Bryant v. Modern Woodmen of America*, 86 Neb. 372, 125 N. W. 621, 27 L. R. A. (N. S.) 323, 21 Ann. Cas. 365; *Sovereign Camp W. O. W. v. Grandon*, 64 Neb. 39, 89 N. W. 448; *Smart v. Kansas City*, 208 Mo. 162, 105 S. W. 709, 14 L. R. A. (N. S.) 565, 123 Am. St. Rep. 415, 13 Ann. Cas. 932; *Gartside v. Connecticut Mutual Life Ins. Co.*, 76 Mo. 448, 43 Am. Rep. 765; *Masonic Mutual Benefit Ass'n v. Beck*, 77 Ind. 203, 40 Am. Rep. 295; *Heuston v. Simpson*, 115 Ind. 62, 17 N. E. 261, 7 Am. St. Rep. 409; *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274, 44 Am. Rep. 372. In the last-named case the doctor was asked, "What opinion did you form, based on the general sight of the man, before you made an examination, or before you had any conversation with him?" The court held that the question was properly excluded as privileged within the statute. In the opinion it is said: "We have distinctly held in such a case that the communication to the physician's sense of sight is within the statute, and as much so as if it had been oral and reached his ear." The Missouri statute declares a physician or surgeon incompetent to testify "concerning any information which he may have acquired * * * and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." Rev. St. Mo. 1890, § 4650. The Missouri Supreme Court on page 183 of 208 Mo., on page 714 of 105 S. W. (14 L. R. A. [N. S.] 565, 123 Am. St. Rep. 415, 13 Ann. Cas. 932), in the opinion of *Smart v. Kansas City*, supra, said: "The meaning of this section is not veiled in doubt. It disqualifies the physician and surgeon from testifying to any information acquired by them while attending their patients in a professional capacity. The wisdom of such a law is addressed to the legislative branch of the government, and not to the judiciary. The latter has to deal with its meaning, and not the policy of the statute. That policy is not only well grounded in this state, but is firmly rooted in the jurisprudence of a majority of the states and territories of the Union."

[1] Counsel complain of the ninth instruction. It reads: "Instruction No. 9. The court instructs you, gentlemen of the jury, that, where a person is under the influence of intoxicating liquor to such an extent that it affects him mentally or physically and that such effect resulting from the use of intoxicating liquor is visible to one observing such person, then as a matter of law said person would be in a drunken or intoxicated condition, and it is for you to determine from the evidence whether the defendant in this

case was in a drunken or intoxicated condition at the time of his arrest, bearing in mind that the burden of proof is upon the state to establish such fact of drunkenness or intoxication of the defendant by the evidence beyond a reasonable doubt." In our opinion this instruction is clearly erroneous and prejudicial. It makes the mere fact that the effect resulting from the use of intoxicating liquor is visible, sufficient evidence that the person is drunk. To illustrate: The action of the person is excluded from the consideration of the jury. The condition of the person is also by this instruction excluded from the consideration of the jury. The only thing submitted to the jury is whether the effect "is visible."

[3] In *Standard Life & Accident Ins. Co. v. Jones*, 94 Ala. 434, 10 South. 530, the question of what constitutes intoxication is discussed, and the court says: "To be under the influence of whisky is not necessarily to be intoxicated. One may well be said to be under the influence of strong drink when he is to any extent affected by it—when he feels it; and this condition may result from potations so small as not to impair any mental or physical faculty, and when the passions are not visibly excited, nor the judgment or any physical function impaired. This is far short of 'intoxication,' which is the synonym of 'inebriety,' 'drunkenness,' implying or evidenced by undue or abnormal excitation of the passions or feelings, or the impairment of the capacity to think and act correctly and efficiently." "The word 'intoxicated' is synonymous with 'drunk,' and in the *Standard Dictionary* 'drunk' is defined as under the influence of intoxicating liquor to such an extent as to have lost the normal control of one's bodily and mental faculties, and commonly to evince a disposition to violence, quarrelsomeness and bestiality." 4 Words and Phrases, 3734. "The word 'intoxication' means an abnormal mental or physical condition, due to the influence of alcoholic liquors, a visible excitation of the passions and impairment of the judgment, or a derangement or impairment of physical functions or energies. This implies a condition which would not result from the reasonable, ordinary and moderate use of the most intoxicating liquors." 4 Words and Phrases, 3735. *Wadsworth v. Dunnham*, 98 Ala. 610, 13 South. 597. "Intoxication" is a word nearly synonymous with "inebriety" or "inebriation," and is expressive of that state or condition which inevitably follows from taking into the body by swallowing or drinking excessive quantities of intoxicating liquors. *Commonwealth v. Whitney*, 11 Cush. (Mass.) 477. The instruction set out was erroneous and prejudicial.

The judgment of the district court is reversed.

CUSICK v. BRODSKY et al. (No. 16,783.)
(Supreme Court of Nebraska. Nov. 1, 1912.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 128*)—JUDGMENT
—ACTION FOR EQUITABLE RELIEF—EVIDENCE.

Evidence examined and set out in the opinion held sufficient to sustain the finding and decree of the district court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 402-407; Dec. Dig. § 128.*]

Appeal from District Court, Douglas County; Day, Judge.

Action by Fannie Cusick against Nathan Brodsky and others. From a decree for plaintiff, defendants appeal. Affirmed.

J. E. Von Dorn, of Omaha, for appellants.
J. J. O'Connor, of Omaha, for appellee.

FAWCETT, J. Defendant Brodsky was a retail grocer in Omaha. Among his customers was one Charles W. Ellis, whose wife is a sister of plaintiff. The Ellis family traded with defendant for a number of years. As a result of such trading the Ellises finally became indebted to defendant in the sum of about \$140. Defendant appears to have sold out his business, and placed his accounts in the hands of a collector. Suit was brought in justice court upon the Ellis account against plaintiff, and service of summons was made upon her. At the time set for hearing, neither plaintiff nor defendant appeared at the justice court. Judgment was entered against plaintiff. Upon the judgment thus entered, defendant subsequently had an execution issued, and was about to levy upon property of plaintiff when she brought this suit to restrain proceedings under the execution, and to set aside the judgment upon the ground that she was in no manner indebted to defendant, and that, after bringing the suit against her, defendant told her that it was brought against her by mistake; that she need not pay any attention to the suit, as he would withdraw it; that she relied upon his statements, and for that reason did not appear at the time set for trial; that she never knew that any further steps had been taken in the matter until defendant was about to enforce his judgment by the execution above referred to. There was a trial to the district court for Douglas county, which resulted in a finding in favor of plaintiff and a decree restraining the enforcement of the execution, vacating the judgment of the justice, and ordering that the parties appear before the said justice on March 14, 1910, or before some other justice if the case should be removed, for the purpose of trying the cause of action upon the account upon its merits. From this decree defendant Brodsky appeals.

The only reason assigned for asking a re-

versal of the decree of the district court is the statement in the brief of defendant that the judgment of the district court is not supported "by that preponderance of evidence necessary to sustain an injunction enjoining the enforcement of a judgment at law, where, as is disclosed in this case, the plaintiff had proper notice of the commencement of the suit in which the judgment, which the plaintiff herein seeks to enjoin, was rendered." After a careful reading of the entire bill of exceptions, we are unable to agree with counsel. Plaintiff testifies unequivocally that, when the summons in the justice suit was served upon her, she called defendant, with whom she was well acquainted, by telephone, and asked him why he had sued her for this account; that he told her he had gone out of business, and the bills were all put in a bunch together; that "he didn't intend for that to go in. * * * He said he would call it off, and not to pay any more attention to it, he would go down and see his lawyer, and call it off." It is true defendant denies having made this statement, and says that what he told her was, "If the bill will be paid, we wouldn't sue it. That is all I said." Mrs. Ellis testified that she went to see him about the suit, and asked him why he had brought suit against her sister; that he said, "O, Mrs. Ellis, I will call it off." The evidence does not show that this statement to Mrs. Ellis was communicated to plaintiff before the day set for the trial. Defendant's argument is therefore sound that the statement by defendant to Mrs. Ellis, even if made, which defendant denies, would not afford any excuse for the failure of plaintiff to attend at the time of the trial. But there is one circumstance shown by defendant's own testimony which tends strongly to corroborate plaintiff that he had agreed to call the case off. While upon the stand as a witness in his own behalf, he testified that he did not attend the trial himself, and does not know who made proofs of the account. The record does not enlighten us upon that point beyond the statement by counsel for defendant upon the stand that he made proof. Just how he made it is not shown.

Upon the question as to whether or not plaintiff had any meritorious defense to the action if she had attended at the time of the trial, the evidence is not very satisfactory. There is no dispute but what the debt sued for was the debt of the Ellises. It is conceded that plaintiff never agreed in writing to be responsible for the debt, but defendant and his wife say that, when the account of the Ellises began to grow, they were not willing to continue increasing it, and that plaintiff then came to them and told them to let Mrs. Ellis have what she needed, and that she, plaintiff, would see that the goods were paid for. This plaintiff unequivocally

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
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denies. Defendant places the time when this pledge was made by plaintiff as some two or three years prior to the hearing of this suit, yet he furnishes no evidence that plaintiff had ever paid him anything during all of that time on account of the Ellises except one item of \$50, which plaintiff admits having made, but testifies that, when she made it, she told defendants that she was making the payment on account of her sister as a Christmas present. She denies ever having become security or ever having acknowledged that she was in any manner liable for the debts of the Ellises. Whether she did or not, however, is a question which can be determined when the law action is finally tried in justice court under the decree rendered by the district court in this case. Without pursuing the matter further, we think the evidence is sufficient to sustain the decree as entered by the district court.

Affirmed.

HARDIN v. STATE. (No. 17,564.)

(Supreme Court of Nebraska. Nov. 1, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 284*)—PLEA IN ABATEMENT—DETERMINATION BY COURT OR JURY.

"Where a plea in abatement in a criminal prosecution presents questions of law only, it is proper for the trial court to determine such questions without the intervention of a jury." *Stetter v. State*, 77 Neb. 777, 110 N. W. 761.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 655; Dec. Dig. § 284.*]

2. STATUTES (§ 118*)—SUBJECTS AND TITLES—EXPRESSION OF SUBJECT IN TITLE—CRIMINAL LAW—"BUILDINGS OF ALL CHARACTERS."

The act known as Senate File 150, Laws 1905, c. 184, examined, and *held*, that the enumeration of buildings contained within section 1 of the act, which includes "railroad car," comes fairly within, and is not broader than, the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 158-160; Dec. Dig. § 118.*]

For other definitions, see Words and Phrases, vol. 1, pp. 892-895.]

3. BURGLARY (§ 41*)—EVIDENCE—WEIGHT AND SUFFICIENCY—CORPUS DELICTI.

Evidence examined and set out in the opinion *held* sufficient to establish the corpus delicti.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. § 41.*]

4. INDICTMENT AND INFORMATION (§ 191*)—ELEMENTS—STATUTORY PROVISIONS.

The information examined and set out in the opinion *held* sufficient to sustain a conviction for burglary.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 265, 604-621; Dec. Dig. § 191.*]

5. CRIMINAL LAW (§ 406*)—EVIDENCE—ADMISSIONS—DETERMINATION OF ADMISSIBILITY.

The evidence as to alleged admissions made by defendant examined and set out in the opin-

ion *held* insufficient to show that the admissions, if made, were obtained under threats.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. § 406.*]

6. BURGLARY (§ 41*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

Evidence examined and set out in the opinion *held* sufficient to sustain the conviction.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. § 41.*]

Reese, C. J., and Letton and Hamer, JJ., dissenting.

Error to District Court, Richardson County; Raper, Judge.

James G. Hardin was convicted of burglary, and brings error. Affirmed.

J. E. Leyda, of Falls City, for plaintiff in error. Grant G. Martin and Frank E. Edgerton, both of Lincoln, for the State.

FAWCETT, J. Defendant was convicted in the district court for Richardson county of the burglary of a railroad car in the yards of the Missouri Pacific Railroad Company in Falls City, and sentenced to a term in the penitentiary of not less than one or more than ten years. From such conviction he prosecutes error to this court.

Plaintiff in error, who will be designated as defendant, in his brief presents and argues five specific grounds for reversal, which we will consider in the order in which they are presented. Upon the argument at the bar, counsel argued a further ground that the evidence was insufficient to sustain the verdict. This will also be considered in its order. The information charges that defendant "did on or about the 30th day of July, A. D. 1911, in the county of Richardson and state of Nebraska, aforesaid, then and there being then and there a railroad car of the Missouri Pacific Railway Company, a corporation duly organized under the laws of the state of Missouri, then and there being, willfully, maliciously, forcibly, unlawfully, burglariously, and feloniously did break and enter, with intent the goods and chattels in said railroad car contained * * * to steal," etc.

[1] When arraigned, defendant first pleaded not guilty, but later was granted leave to withdraw this plea and file a plea in abatement, the only allegation in which was, "because the statute under which said information is brought is invalid, in that it was not properly passed by the Legislature which is purported to have enacted it." This plea was overruled, and this ruling forms the basis of defendant's first assignment, viz., "because there was no trial of the issue presented in the plea in abatement." Under our holding in *Stetter v. State*, 77 Neb. 777, 110 N. W. 761, this assignment is without merit. We there held that, "where a plea in abatement in a criminal prosecution presents questions of law only, it is proper for

the trial court to determine such questions without the intervention of a jury."

"(2) Because the Daylight Burglary Act is unconstitutional, in that it is broader than its title." The title to the act (Senate File 150, Laws 1905, c. 184) reads: "An act to provide for the punishment of persons guilty of breaking and entering buildings of all characters, with intent to commit any felony, or with intent to steal property of any value, and to repeal sections 48 and 53 of the Criminal Code of Nebraska, except as to offenses heretofore committed thereunder." Section 1 of the act provides: "If any person shall willfully, maliciously and forcibly break and enter into any dwelling house, kitchen, smokehouse, * * * station house or railroad car, with intent to * * * steal property of any value, every person so offending shall be punished by imprisonment in the penitentiary," etc. It is now contended that a railroad car is not within the title to the act for the reason that it is not a building; and numerous definitions are cited in support of this contention. Is the statute under which the prosecution is brought invalid because in violation of the provision of section 11 of article 3 of the Constitution that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title?" The question is whether the subject of legislation is clearly expressed in the title. The subject is defined in the title of the act as "breaking and entering buildings of all characters," with intent to commit felony or steal. Breaking and entering a railroad car is not a different subject for legislation from breaking and entering a warehouse or other permanent structure. If it were a different subject of legislation, that of itself would prevent its being united with that subject in the same act, as no act can contain more than one subject. The subject of legislation is the breaking and entering with intent to steal or commit felony. Is it clearly expressed in the title? The argument is that, because the title limits the subject of legislation to breaking and entering "buildings of all characters," the breaking and entering of railroad cars is not included, and therefore the subject of legislation being extended in the act to cover the breaking and entering of railroad cars is not clearly expressed in the title. The title names the two former sections covering this subject, and repeals them. In those sections the breaking and entering of a railroad car is included. It is manifest from the title of this act that the purpose was to enact a new law in place of the old, and to make the title general and broad. The words "of all characters" are added to the word "buildings." These words would be wholly unnecessary if it was intended to legislate only in regard to structures of a permanent character. Any one considering this title would necessarily

inquire as to the purpose and force of the added words, "of all characters." The object of the constitutional provision in question is to prevent surreptitious legislation. It is intended to enable members of the Legislature and others interested to know from the title of the act the subject of the proposed legislation. Those interested in defining the crime of breaking and entering, which was substituted for burglary of the common law, would understand that the legislation might be extended to such constructions as were included in the former acts, and which, when we consider the derivation of the word "building," are not necessarily excluded by the use of that term. The Legislature considered this title sufficient to notify all parties of the subject of the proposed legislation. If we adhere to our rule that an act of the Legislature will not be held invalid as violating the Constitution unless it is clearly and unavoidably so, I think we must hold that the subject of this legislation is sufficiently expressed in the title.

[3] "3. Because the corpus delicti of the crime was not proven." Defendant contends that there is no proof in the record showing that a crime was committed within the jurisdiction of the court; that is to say, that there is no proof that the car was broken into in Richardson county. The car was sealed in Kansas City, Mo., which is about 100 miles distant from Falls City, only about 4 miles of that distance lying within Richardson county. It was sealed in Kansas City July 27th and reached Falls City on the evening of July 29th, or the morning of July 30th. The evidence of the state shows that, when the car was first observed by the agent of the railroad company, the seal was broken. Hence it is contended that there is no evidence to show that the seal may not have been broken, and the car entered before it reached Falls City. The trouble with this contention is the evidence shows that the only thing taken from the car was one box of merchandise, which was found in the weeds close to the car, and the testimony of the witness Kendrick, who was a detective in the employ of the railroad company, shows that some time along in the night following defendant's preliminary examination defendant stated to him that "Sheldon (who was jointly informed against with defendant) broke the seal with a piece of iron, and Mr. Cantley (another detective in the employ of the railway company) asked him if it was a brake shoe, and he said, 'I believe it was'"; that the witness then asked him, "What was you doing there?" and he said, "I was looking around to see if any one was coming;" that witness then said, "You were looking out, were you?" and he answered, "You can call it what you please." This testimony by the witness Kendrick is assailed upon the ground that at the time this admission is alleged to have been made the circumstances under which defendant is

alleged to have made the admissions were as follows: During the night following defendant's preliminary hearing the two railroad detectives, Kendrick and Cantley, together with the deputy sheriff and chief of police of Falls City, took defendant from the jail out into the alley between the jail and the courthouse, and there questioned defendant; that it was then that defendant is alleged to have made the admission above referred to. The testimony of Kendrick is contradicted by defendant, who testified that these parties tried to make him admit that he had assisted in breaking into the car in question; that the railroad detective had been drinking; that they had some hot words when he "denounced them as liars and perjurers," and that the deputy sheriff then took him back to jail and locked him up. Counsel for defendant says: "Cantley is not called as a witness, and McFarland and Aldrich only corroborate Kendrick to a very slight degree." Counsel in his brief claims that the defendant asked that his attorney be called in, but no attention was paid to it, and that the railroad detective began to threaten defendant and thereby obtained from him the admission above referred to. This claim of defendant's counsel is not sustained by the evidence, as given in the abstract prepared by him, beyond the single statement that the detectives and officers referred to "tried to make him admit that he had assisted in breaking into the car in question," but no testimony is given as to any threats, nor are any facts given from which his conclusion is drawn, that they tried to make him admit his participation in the breaking. The jury saw the witnesses upon the stand and heard their testimony, and by their verdict have determined that the breaking occurred in Richardson county. The evidence of Kendrick, which, as counsel says, is corroborated "to a very slight degree" by the witnesses McFarland and Aldrich, would seem to be sufficient to sustain that finding.

[4] "4. Because the jury found Hardin guilty of burglary; there being no such offense in the Nebraska Criminal Code." Counsel relies upon *In re McVey*, 50 Neb. 481, 70 N. W. 51, where it was held that, "under an information against a person for the crime of burglary, he cannot be convicted of the statutory offense of breaking and entering buildings in the daytime described in section 53 of the Criminal Code." At the time the opinion in that case was handed down, the crime of burglary was covered by section 48 of the Criminal Code (1903), which limited the breaking and entering to "the night season," and, in order to obtain a conviction under that section, it was necessary to show a breaking and entering in the nighttime, while section 53 covered breaking and entering in the day-time with intent to steal or commit felony, and the court held that, under an information bas-

ed upon section 48, a party could not be convicted for the offense described in section 53. By the act of 1905, sections 48 and 53 were both repealed, and Senate File No. 150, supra, was substituted in lieu thereof; so that the act, as we now have it, covers the breaking and entering at any time whether day or night; the words, "in the night season," having been omitted. The attempted distinction between the terms "burglary" and "breaking and entering" is in our judgment entirely too technical. As applied to our present Criminal Code, it is an attempted distinction without a difference.

[5] "5. Because the admissions of the defendant to the special agent of the railroad were obtained under threats." This assignment is disposed of by our discussion of assignment No. 3.

This brings us to the contention made at the bar that the verdict is not sustained by the evidence. This contention must also be held adversely to defendant. The evidence shows without question that Sheldon entered the car in the afternoon and threw the box of merchandise out into the weeds; that during the evening of that day he and Carlson and defendant went together to the place where this box had been thrown by Sheldon; that Sheldon then took some of the property out of the box and carried it away. It is true all three of the witnesses say that defendant took no part in rifling the box, and it is sought to show that defendant was induced to accompany Sheldon and Carlson to the yards that evening under an intimation that they had some liquor down there. It is also shown that friendly relations existed between defendant and Sheldon, so much so that, after Sheldon was arrested and locked up, defendant took some tobacco and cigarette papers to him; that while there he saw the chief of police and asked if he could talk to Sheldon; that the chief of police asked him a few questions; that defendant told him where he worked, "and that he had come down with this fellow, meaning Sheldon, and was a friend of his." There is also the testimony of the chief of police that on the evening of July 30th he was called to the Missouri Pacific depot where he found a box car open and some goods scattered on the ground, including a pasteboard packing box; that he took possession of the box and contents and brought them to the courthouse, including the invoice for the goods, which he checked up, and found that there were missing from the box a pair of shoes, a fountain pen, and a set of knives and forks; that he afterwards found the shoes in a room occupied by Sheldon; that some days afterwards he received from one Ridley a set of knives and forks; that on the way to the depot that evening he met Sheldon and Carlson between Seventh and Eighth streets as they were coming up town, and west of Chase street he met defendant; that it was

probably a half a block or more from the car to the point where he met defendant; that, when he got to the car, the door was open; that he gathered up the stuff, and was starting to get a lunch when he met defendant and two Mexicans; that he stopped them, told them he was a policeman, and that defendant was under arrest. He says: "I told him to come over to me, and he came over, and I saw a box in his pocket, a pasteboard box, about the length of the knives in question." That he took the box out of defendant's pocket and shook it, told him he was under arrest and for him to stand there. That he put the box back into defendant's pocket, "and told him to line up with the others, three or four fellows and two Mexicans and the boys who had informed him of the car being opened. That as they lined up it was dark, and they couldn't see, and Mr. Hardin (defendant) stepped back of him, and, when he looked back, he couldn't see him, and that he looked over and saw him go at the south end of the coal shed. That was the last he saw of him that night."

The evidence as to defendant's participation in the burglary of the car, outside of his alleged admission to the witness Kendrick, is not conclusive nor very satisfactory, but, when taken in connection with the admission testified to by Kendrick corroborated to some extent at least, as conceded, by the witnesses McFarland and Aldrich, we think it was sufficient to sustain the verdict. Upon consideration of the whole case, we feel that the defendant is probably guilty. The jury who heard the testimony and saw the witnesses have so found. The learned trial court, who also had the advantage of observation, which is denied to us, sustained the verdict.

Under these circumstances, the judgment of the district court must be, and it is, affirmed.

LEITON, J. (dissenting). Section 251, Criminal Code, provides: "This Code and every other law upon the subject of crime which may be enacted shall be construed according to the plain import of the language in which it is written, * * * and no person shall be punished for an offense which is not made penal by the plain import of the words, upon pretense that he has offended against its spirit." To call a railroad car of any description a building is certainly an unusual use of that term. The word "building" if construed according to its plain import as the statute requires would not include an inclosed railway car; because I think no lexicographer has included any type of vehicle within the meaning of the word "building." Suppose that the Legislature in the same act had included carriages, street railway cars, hacks, closed delivery wagons, and automobiles with inclosed bodies, would we say that these came properly within the

term "building"? The Legislature evidently made an oversight. We cannot make a new definition for the word "building" in order to remedy this omission.

HAMER, J. (dissenting). I have carefully read all the evidence. There are 156 pages in the bill of exceptions besides the exhibits. After a careful consideration of the testimony, I do not find it sufficient to sustain a verdict. To understand the evidence it is necessary to quote from the testimony. L. L. Aldrich, the chief of police, testified to finding a box car open and goods taken out and scattered around. A pasteboard box about 2½ feet long by 15 to 18 inches wide was found broken open in the weeds close by the car. There were packages of tea and other articles in the neighborhood of the box. There was an invoice bill, "Exhibit A." When the goods were checked up according to this invoice bill, there was a shortage. The things gone were shoes, a fountain pen, and a set of knives and forks. There was a railroad bill accompanying the bill of lading. The chief of police and his assistant found shoes in the City Hotel. They were in the room occupied by Thomas Sheldon. There was a shoe box and fountain pen and a corset cover, ten boxes of tea, and other articles. When going down to the car Aldrich met "Tom Sheldon and Carlson coming up between Seventh and Eighth on Stone street." He testified: "As I come down west on Chase and Seventh, I met Mr. Hardin," the defendant. Aldrich testified that Hardin was talking to a couple of Mexicans. It was 20 or 30 minutes after 9. When Aldrich first met Hardin, Hardin was going away from the direction of the car, and was not nearer to the car than half a block or more. He was then on the sidewalk. The car that had been opened was "right north of the west end of the depot," and 50 feet or more from the depot on the north side. It was on the north track nearest the tank. On the east side of the tank there is an embankment. The door of the car was open when Aldrich arrived. The car which was open was next to the north track. There were no dwellings north or east of the car until one got on the hill. East of there are the Mausts coal sheds. Aldrich told the defendant, who was then talking with the Mexicans, that he was a policeman, and to come to him. There was a pasteboard box in defendant's pocket that had a heavy cord tied around it. Three or four men and two Mexicans were there; also the boys who told Aldrich of the car being opened. Aldrich testified that Hardin stepped back of him, that, when he looked back, he could not see Hardin, and when he asked where the other man was Hardin said "over there," and when Aldrich went over he found the Mexicans still there, but Hardin had gone over the south end of the coal sheds, and

Aldrich saw him no more that night. East and southeast of the car were some cars and Gillespie's boarding house. There were some knives and forks which were gotten from Joe Ridley, who was arrested by Aldrich. After this the defendant was arrested by Aldrich at the Missouri Pacific shops Friday afternoon. On cross-examination Aldrich testified that it might have been a block away from the car where he met the defendant; that there was no attempt to steal the stuff taken from the car; that the defendant came up afterwards to where Aldrich was at work; that the defendant went back to where Aldrich was when Aldrich was looking at the stuff; that there were seven or eight people around there; that the defendant was not trying to run away; that he went to Gillespie's boarding house and searched the defendant's room. From the depot to the Missouri Pacific shops is a good half mile. Aldrich arrested Sheldon at the northeast corner of Fifteenth and Stone streets, about 10 blocks from the depot. He arrested Carlson at John Wilson's. Aldrich did not know whether the car was broken open where it stood, or whether it was open when it came into Falls City, and did not know that the car had been broken by any of the defendants. There were with Aldrich at the car Rice McDonald, Frank Gamlin, two Mexicans, and two boys who called him down to the depot.

Joseph Ridley, a locomotive fireman, testified that when he went to get his engine that morning, and at just about the middle of the stockyards, he saw and picked up a little box containing a set of silver knives and forks. It was southeast of the Missouri Pacific depot, the direction in which the stockyards lay and where the road ran.

R. R. McNulty testified that the defendant was drunk that night; that the defendant was out in the mud hole and staggered around; that the defendant walked up to where the men were near the car that was open, and then staggered into the mud hole. He does not seem likely he would have done this if he had been guilty.

James Kendrick, the detective in the service of the railroad company, testified in a way that was unsatisfactory. He could not remember whether he was sworn at the preliminary. He seemed to have so many cases on hand that he got confused. There were three cases—Hardin, Sheldon, and Carlson. He could not remember whether he had talked with the defendant. He was not certain of anything except that the defendant told him that he had been in the penitentiary. He was not sure what he had testified to before; and he might have testified that the defendant told him that he saw the seal broken, and then he might not. He denied testifying at the preliminary examination that the defendant had told him that "these parties were down there. The three of them

were down there together, and he started off while they broke the car, and Sheldon jumped in and took the box out, and he saw them taken out to the head of the weeds." Possibly this witness testified to that, but he did not remember whether he did or not; also he did not remember whether he was at Judge Spraggen's court when they were trying Sheldon, but, when asked if he was there at the time they tried Carlson, he testified "the chances are I was." When asked whether he tried to get the defendant to waive his preliminary examination, he did not remember whether he did or not. He finally denied that he had any talk with him personally, and said his talk was with a Mr. Cantley. He could not remember the words used by Mr. Hardin at the preliminary hearing. When asked if he had not testified that the defendant said he was down there with these two people, that he met them down there, that he was standing down there, and that they went to the car and took these boxes and hid them in the weeds, he said he did not remember anything at all about it. When he was further asked about the matter, he said: "I disremember the proceedings down there."

One Ruezsegger testified that he was the clerk at Kansas City, but would not undertake to say where the seal of the car was broken; that the car would stop at several points between Kansas City and Falls City.

Dennis O'Connell, the seal clerk, testified that he did not know whether the car had been in the Kansas City yards.

L. L. Aldrich was recalled as a witness for the state, and testified that the defendant said that he was there when the car was opened, and that Tom Sheldon broke the seal, and he also testified that the defendant said that Tom Sheldon took the goods out of the car.

James McFarland testified that the defendant told him that he did not break into the car, but that Sheldon broke into the car.

Thomas Sheldon testified as a witness for the defendant that he was one of the defendants informed against along with Albert Carlson, and that he had entered a plea of guilty to the charge made against him, that of breaking and entering into this same box car, and that he saw Hardin about 7 o'clock in the evening, which was the first time that he had seen him on that day, and that the car was open when he first saw it; that he took the box and threw it down in the weeds; that Hardin saw the box out there in the weeds, and that that was the first time Hardin had seen it to the best of his knowledge; that Hardin had nothing whatever to do with breaking the car; that he, Sheldon, found the car open at 3 o'clock in the afternoon. And on cross-examination Sheldon testified that Carlson went down with him to the train that afternoon, and

that Carlson took the goods out of the car and that the defendant was not there in the afternoon; that he, Sheldon, and Carlson went down to the car and got the box and threw it in the weeds, and that they did not meet Hardin until 7:30 that night; that he, Sheldon, took the shoes that night, and with Carlson and Hardin went through the box that night, but this was after he had taken the box and had thrown it in the weeds; that when he went up town Carlson went with him; that he met Hardin at Rawlins, Wyo.; and that he afterwards met Hardin in Omaha just before coming to Falls City.

Albert Carlson testified that he and Tom Sheldon went down to the depot about 2 o'clock in the afternoon, and that Hardin was not with them, and they did not see Hardin until 7 or 8 o'clock that evening; that he (Carlson) and Hardin did not take anything from the box; that they went up-town and Hardin went home; that Tom Sheldon went into the car and told him he was looking for a fine suit of clothes, and that, when the stuff was taken out of the car, Hardin "was not around there at all."

O. S. Larson testified that he was the gang foreman at the Pacific shops, and that the defendant worked for him, that he ran a drill press, and that Hardin worked at the shop on the Sunday before the day of his arrest and that he worked there all day. His testimony corroborates the testimony of Carlson and Sheldon that Hardin had nothing to do with the crime of breaking into the car.

S. A. Moore testified to the same thing; that Hardin operated a drill press, and worked that Sunday and up to the day of his arrest; that he worked all that Sunday in the Missouri Pacific shops.

The defendant Hardin testified that he boarded at Gillespie's Hotel; that he met Sheldon that night on Stone street, and that Carlson told him that "he had some stuff planted and he wanted to go and get it"; that he met Sheldon and tried to get Sheldon to pay him \$5 that he owed him; that Sheldon said "come on, let's go down to the depot, I got some shoes down there"; that, when they got down to the depot, they were still arguing about the \$5, and that Sheldon turned off and went down the track and went over in the weeds and got a box and broke it open; that Carlson told him not to do that; that they were not going to have anything to do with it; that he saw Sheldon put the shoes in his bosom, and that they then went to the Gillespie Hotel; that he did not take any of the stuff down at the depot; that he did not stand guard there; that it was Sunday evening and they all had their coats on; that Cantley was the drunkest; that Cantley put his leg on his and leaned over on to him, and prom-

ised that he would see the master mechanic, and would see that he did not lose his job.

The defendant admitted being in the penitentiary in Wyoming for passing a fraudulent check. He seems also to have been in the penitentiary in Texas because of a shooting case, and he testified that he proved by several witnesses that the man in Texas shot the first shot at him, and that he then shot in self-defense. He was a bookkeeper in the penitentiary in Wyoming and received his pardon for good conduct.

We think that it clearly appears from the evidence that the defendant had nothing to do with the breaking. He was not down to the depot that afternoon according to the weight of the testimony, and he had nothing whatever to do with the breaking into the car. That he is innocent of the crime charged seems to be established by the uncontroverted evidence of Larson and Moore, and their testimony corroborates the testimony of Carlson and Sheldon. The defendant may not be a good citizen, but he should not be convicted and sent to the penitentiary unless he is guilty of the crime charged against him.

REESE, O. J. (dissenting). I have read the evidence in this case, and am of the opinion that it falls far short of proving plaintiff in error guilty of any crime.

CROWDER v. TOLERTON & WARFIELD CO. (No. 16,810.)

(Supreme Court of Nebraska. Nov. 1, 1912.)

(Syllabus by the Court.)

1. SALES (§ 23*) — ACCEPTANCE OF OFFER — NECESSITY.

An order for goods, wares, or merchandise sent to a wholesale or jobbing house at the solicitation of its traveling salesman, which provides in express terms that it is subject to the approval of the home office, does not become a binding contract until it is approved and accepted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 44-48; Dec. Dig. § 23.*]

2. SALES (§ 23*) — REQUISITES OF CONTRACT — RESCISSION OF ORDER.

Where the person making the order upon being notified of its nonacceptance demands and receives a repayment of the money forwarded therewith, he thereby rescinds his order, and cannot maintain an action thereon for damages for its nonacceptance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 44-48; Dec. Dig. § 23.*]

Appeal from District Court, Dawes County; Westover, Judge.

Action by Roy Crowder against the Tolerton & Warfield Company. From a judgment for plaintiff, defendant appeals. Reversed.

Albert W. Crites, of Chadron, for appellant. J. E. Porter, of Crawford, for appellee.

BARNES, J. Action to recover damages for an alleged breach of contract for the sale of a soda fountain. The action was commenced in the justice court of Dawes county, where plaintiff had the judgment. Defendant appealed to the district court, where, on a trial without a jury, the plaintiff again had judgment for the sum of \$120, and to reverse that judgment the defendant has appealed to this court.

It appears that on the 9th day of March, 1908, at Crawford, Neb., plaintiff gave an order for a soda fountain to one J. H. Meyer, defendant's traveling salesman, which reads as follows: "Crawford, Neb. 3/9 1908. Manufacturers of and Dealers in Soda Water Apparatus & Supplies. Tolerton & Warfield Co. Please furnish the following goods on the terms and conditions mentioned below: title to said goods to remain with, _____ until all the payments are made. Ship on or about April 1st 08, via. C. & N. W. & Burlington, to Roy Crowder, town — Crawford, State — Neb. As evidence of good faith, I herewith make a cash payment of \$25.00, receipt of which is hereby acknowledged, and upon receipt of bill of lading or tender of goods, I will honor sight draft or other demand for \$_____, and the balance I promise to pay in monthly sums as follows: \$10.00 each month beginning May 1st, 1908, privilege of paying full amount at a discount of 5% by Jan. 1st, 1909, with interest at 6 per cent. on each payment from date of shipment, and for such balance and interest will execute and deliver contract notes of like tenor and form to the one printed on the back of this order and maturing as above set forth, and will execute such other papers as may be necessary under the laws of this state to protect your title to said goods. The delivery of said apparatus, etc., to be conditional upon the compliance with the above terms and conditions. There are no other conditions with your salesman except as herein stated. All goods f. o. b. Decatur, Ill. All orders and contracts secured by any representative of this company are subject to approval by the home office, and contingent on labor difficulties, fires or other unavoidable delays." There followed a description of the fountain and fixtures, and the price thereof was stated to be \$300. The order was signed by the plaintiff, who thereafter forwarded it, together with his check for \$25, to the defendant, and stated in his letter that according to the agreement the fountain was to be in Crawford by the 15th or 20th of April.

On receipt of the order the defendant refused to accept it for several reasons, among which was that the price should have been \$350 for the fountain, instead of \$300, as named in the order, and wrote a letter to their salesman, Meyer, telling him that they could not accept the order, and asked him to take the matter up personally with plaintiff, and readjust the matter in conformity with a

copy of an order which they inclosed to him.

It appears that Meyer called upon the plaintiff and informed him that he, Meyer, had "balled" the order all up, and asked plaintiff to make out a new order; that the defendant on the 8th day of April, 1908, forwarded to the plaintiff a new order, in which the price of the soda fountain was fixed at \$350. On receipt of the new order, the plaintiff refused to sign the same, and sent the following telegram to the defendant: "Crawford, Neb. April 8. Tolerton & Warfield, Sioux City, Ia.—Ship goods ordered or return check. Wire particulars. Something must be done. Waited long enough. [Signed] Roy Crowder." On April 10, 1908, plaintiff wrote a letter to the defendant, in which, among other things, he said: "Now, if you want to sell me this fountain, I want to know what I am getting. Do I get a steel fount with this complete outfit? If I get this I will order this outfit on receipt of message from you to-morrow. If not, return my check at once, as I think you have had it long enough, & I have another place. This fountain is to get here by 1st. of May. [Signed] Roy Crowder." Upon receipt of this letter, the defendant, having cashed plaintiff's check for \$25 pending negotiations, sent the plaintiff a draft for \$25 in a letter apologizing to him for the mistakes and misunderstandings between them, and informing him that they would have Mr. Meyer take the matter up with him again on his next trip to Crawford. Defendant also stated in the letter that it always had the option of whether to ship goods or not when an order was taken by its salesman, and that it had exercised that privilege for the reason that it could not afford to sell him a \$350 outfit for \$300.

We have not stated all of the correspondence that passed between the parties, but have given the substance of it. When the plaintiff received the draft for \$25 in repayment of his check, he wrote the defendant, stating that he refused to accept it, but would sue for damages for failing to comply with the terms of his order. It appears that he kept and cashed the draft, and claimed upon the trial that he had credited the amount of it on his claim for damages. It appears that this was done, however, without the consent of the defendant.

[1] The evidence contained in the bill of exceptions is in no wise conflicting, and clearly establishes the facts above stated. It is contended, among other things, that defendant was entitled to a judgment dismissing plaintiff's action because the evidence fails to show an acceptance of the plaintiff's order by the home office. It appears by a clause contained in the order itself that all such orders were subject to the approval of the defendant. The evidence clearly shows that the defendant disapproved of the order, and notified the plaintiff of that fact. In

the negotiations for a change of the order plaintiff was told the reasons why defendant could not fill it. The clause in the order was a reasonable and proper one, and was made for the protection of the defendant.

[2] No approval from delay can be inferred, and the plaintiff by his acceptance of the draft for \$25 in effect rescinded his order, and he was not entitled thereafter to maintain an action against the defendant for a failure to accept the same and comply with its terms.

For the foregoing reasons, the judgment of the district court is reversed.

STATE ex rel. MURPHY et al. v. GRAVES.
(No. 17,587.)

(Supreme Court of Nebraska. Nov. 1, 1912.)

(Syllabus by the Court.)

1. MANDAMUS (§ 53*)—SUBJECTS OF RELIEF—ACTS OF JUDICIAL OFFICERS.

This court has jurisdiction by mandamus to compel a judge of the district court to vacate an order of injunction, if the district court was entirely without jurisdiction to make such order.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 102-107; Dec. Dig. § 53.*]

2. JURISDICTION OF DISTRICT COURT—ENJOINING ENFORCEMENT OF JUSTICE'S JUDGMENT.

Whether the district court has jurisdiction in an action brought solely for that purpose to enjoin the enforcement of a judgment of a justice of the peace in forcible entry and detainer on the ground that the justice had no jurisdiction because title to real estate was drawn in question is doubted, but not determined; the case being disposed of upon other grounds.

3. INJUNCTION (§ 26*)—SCOPE OF RELIEF—RESTRAINING ENFORCEMENT OF JUSTICE'S JUDGMENT.

The district court has jurisdiction of an action to enforce the specific performance of a contract for the sale of real estate, and in such action may enjoin the prosecution of an action of forcible entry and detainer involving the same premises and pending upon appeal from justice court, and may enjoin the enforcement of the judgment of the justice while such appeal is pending.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24-29, 54-61; Dec. Dig. § 26.*]

Mandamus by the State, on relation of Amy M. Murphy and others, to Guy T. Graves. Proceeding dismissed.

Harry L. Keefe, of Walthill, and Hiram Chase, of Pender, for relators. Curtis L. Day, of Pender, and Brome, Ellick & Brome, of Omaha, for respondent.

SEDGWICK, J. The plaintiffs applied to this court in its original jurisdiction for a writ of mandamus to require the defendant to vacate an order of injunction which he had issued as judge of the district court for Thurston county. The relators Amy M. Murphy, Gertrude Murphy, and Alice Murphy were the owners of the land in dispute, and

the relators Lelsenberg and Litchie claimed an interest in the land under a lease. The Murphys contracted to sell the land to one Harry D. Hancock, who made a substantial payment upon the contract of purchase, and assumed the mortgage upon the land, agreeing by the contract to pay the balance of the purchase money when the abstract was furnished showing title. In the meantime creditors of the Murphys attached the land, and litigation arising upon this attachment appears to have prevented the completion of their contract with Hancock. Afterwards the Murphys made a contract of lease with these other relators, whereby they agreed to lease the land for the term of three years. Hancock claims the right of possession of the land under his contract and made a contract with one Burcham, whereby he leased the land to Burcham. Burcham obtained possession of the land through an assignment of an old lease which was about to expire, and the relators Lelsenberg and Litchie, claiming the right of possession under their lease with the Murphys, began an action of forcible entry and detainer against Burcham, Hancock, and others in justice court, and obtained a judgment of restitution therein. The defendants in that action took an appeal to the district court, but the plaintiffs gave bond under the statute and demanded a writ of restitution to put them in possession, notwithstanding the appeal. Harry D. Hancock then began an action in the district court for a specific performance of his contract, making the Murphys defendants and also these relators Lelsenberg and Litchie and other parties claiming to be interested. In that action the injunction complained of was issued restraining the Murphys and Lelsenberg and Litchie from proceeding further with their action of forcible entry and detainer, and from obtaining possession under their judgment therein. It appears from the return to the alternative writ of mandamus that since the writ was issued the Murphys have completed their contract with Hancock, and have executed to him a deed of the land in controversy. They have filed herein a dismissal of this action so far as they are concerned. The relators Lelsenberg and Litchie insist that they are entitled to a peremptory writ requiring the respondent as judge of the district court to vacate the order of injunction so far as it interferes with their obtaining possession of the premises under their judgment in forcible entry and detainer.

[1] If the district court was entirely without jurisdiction to grant the injunction now complained of, these relators are entitled to the relief demanded. State v. Graves, 66 Neb. 17, 92 N. W. 144.

[2] Two reasons are urged in the briefs for refusing this writ:

First. It is said that the record shows

that in the action of forcible entry and detainer the title to real estate was drawn in question, and that, therefore, the justice of the peace had no jurisdiction, and the judgment of restitution should for that reason be enjoined. The case of *Cobbe v. Wright*, 34 Neb. 771, 52 N. W. 713, is relied upon to support this contention. In that case a judgment had been entered against the plaintiff as garnishee and he brought the action to restrain its enforcement. It appeared that the plaintiff had never been served as garnishee, and had no notice of the proceedings in which judgment was rendered against him. The court, therefore, which entered the judgment had no jurisdiction over the party against whom the judgment was rendered. In this case the justice court had jurisdiction over all the parties interested. It also had jurisdiction to determine the right of possession of the real estate. If the justice found from the evidence before him that the right of possession depended upon the title to the real estate, either legal or equitable, the law required him to enter judgment for the defendant. When the question was presented to him as to whether the right of possession would depend upon the title to real estate, he must determine that question from the evidence as he determined other questions of fact. If he determined that question incorrectly, it could be remedied by appeal. It is therefore by no means clear that, if the sole purpose of the injunction was to prevent the justice from making an incorrect finding of fact and enforcing the judgment based upon such incorrect finding, the district court would have jurisdiction to grant such a writ. The determination of this case, however, does not depend upon the solving of that question.

[3] Second. The petition in the injunction suit and the facts admitted in this record establish that the controversy between the parties was whether Mr. Hancock was entitled to a specific performance of his contract for the purchase of the land, and that the right of possession and the action of forcible entry and detainer in which that right of possession was in controversy were ancillary to and dependent upon the contract of purchase. There can be no doubt that Mr. Hancock was entitled to bring the action in the district court to enforce the specific performance of his contract, and, when that action was brought in a court of equity with general and complete jurisdiction, it would be the duty of that court to determine all ancillary matters affecting the result of that action or necessarily involved in it. If the action in equity resulted in determining that the plaintiff was entitled to a deed of the land which would carry the right of possession with it, it would be the duty of the court in determining the plaintiff's right in the land itself to also determine and enforce

his right of possession. The district court was therefore not without jurisdiction to take full possession of all matters pertaining thereto.

It follows that the relators are not entitled to the peremptory writ, and the action is dismissed.

Dismissed.

OWEN et al. v. MAIN et al. (No. 17,029.)
(Supreme Court of Nebraska. Nov. 1, 1912.)

(Syllabus by the Court.)

1. STATUTES (§ 181*)—CONSTRUCTION—GENERAL RULES—EQUITABLE CONSTRUCTION.

Where the language of a statute is clear and unambiguous, it must be interpreted in its ordinary sense, even though it lead to an injustice; but, if the language is doubtful or obscure, and it is susceptible of an interpretation which will cause a forfeiture or perpetrate an injustice, while another interpretation will avoid such a result, that which is in furtherance of justice will prevail.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

2. AGRICULTURE (§ 3*)—AGRICULTURAL SOCIETIES—COUNTY AID.

A statute authorized county boards in counties where county agricultural societies have purchased or shall purchase real estate for fair grounds to pay out of the county treasury the same amount of money for the purchase and improvement of such sites as paid by such agricultural societies or individuals, and provided, further, that when such agricultural societies should be dissolved or cease to exist "in any county where payments have been made for real estate, or improvements upon such real estate for the use of any agricultural society; then all such real estate and improvements shall vest in fee simple to the county making such payment." The latter provision is construed; and it is held that the words "all such real estate and improvements" refer only to the real estate purchased and improvements made by the money paid out of the county treasury.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.*]

3. AGRICULTURE (§ 3*)—AGRICULTURAL SOCIETIES—COUNTY AID.

The amendment of section 14 made by the Laws of 1879, p. 400, providing that a county board may pay to a county agricultural society owning a certain quantity of real estate for fair grounds a specified amount of money "to be expended by such society in fitting up such fair grounds, but for no other purpose," made no change with respect to the right of the county to recover back the amount of its contribution in case the society defaulted as specified in the statute.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.*]

4. AGRICULTURE (§ 3*)—AGRICULTURAL SOCIETIES—COUNTY AID.

The purpose of the Legislature was to allow such a society formed to aid in the extension of agricultural education the use of the funds of the county to a limited extent, in trust, and to prevent the diversion of public funds to private use, if the society fails to carry out the purpose of its organization.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.*]

Rose, J., dissenting.

Appeal from District Court, Wayne County; Graves, Judge.

Action by Ed Owen and others against D. C. Main and others. From a judgment for plaintiffs, defendants appeal. Reversed and remanded, with directions.

Allen & Dowling, of Madison, and James Britton, of Wayne, for appellants. R. E. Evans, of Dakota City, and A. R. Davis, of Wayne, for appellees.

LETTON, J. In 1885 the Wayne County Agricultural Society was incorporated under the procedure provided for in the general incorporation laws of the state. Stock was issued and subscribed for by the incorporators. Prior to the holding of the first annual fair, which was held in September of that year, it purchased 25 acres of land and fitted up the same for fair purposes by preparing a race track and building fences, grand stands, and other structures necessary for the carrying on of the purposes of its organization. It realized from stock subscriptions the sum of \$1,641, of which \$922 was expended in the purchase of land for the fair grounds.

In September, 1885, the association applied to the board of county commissioners of Wayne county for an appropriation of money to aid the society in fitting up the grounds. A bill was presented for \$300, which was allowed, and on January 4, 1886, a warrant upon the general fund for that amount was paid by the county. The evidence shows that by the middle of January, 1886, \$1,806.25 had been paid for real estate and improvements thereon, apparently from the proceeds of the sale of stock and from the appropriations made by the county. The land had been bought and paid for before any money was received from the county. Premiums and other expenses were paid from other sources. For a number of years between 1885 and 1889 the society held fairs, and received aid from the county board under the provisions of section 12, c. 2, Comp. St. 1881, upon filing the necessary certificate under the act. It held its last fair in September, 1901. On April 25, 1905, the society was dissolved by legal proceedings, and the defendants Main, Bressler, and French appointed trustees for the creditors and stockholders. This action was brought on behalf of the county against the trustees and certain persons claiming under them. Its purpose was, as the prayer shows, to procure a decree "that the aforesaid real estate acquired by said Wayne County Agricultural Society and used for its fair grounds and all improvements by it made thereon has vested in fee simple in said county of Wayne; that the defendants and each of them have no right or title or interest in said real estate; that the title of the said county of Wayne to the said real estate be quieted against the claims of the defendants; that the said plaintiffs be put in possession of

said real estate; and for such other and further relief as may be just and equitable."

A number of defenses are pleaded: The statute of limitations; that the real estate is private property of the corporation and of the individual stockholders; that the provisions of the statute upon which the plaintiffs rely is violative of the provisions of the Constitution of the state of Nebraska and of the federal Constitution and of the fifth and fourteenth amendments thereto, and a denial that any part of the money appropriated was expended in the purchase or improvement of the real estate. The reply practically amounts to a general denial of the new matter in the answer, coupled with a demurrer to the same.

The arguments have taken a wide range; but we think it unnecessary to consider them at length. The plaintiffs' theory, summarily stated, is that the society is a public or quasi public corporation formed to carry on a public enterprise and authorized under the statute to receive aid from the county; that it, quoting from the brief, "acting under the statute, presented its application for public funds to improve the property already dedicated to the public, and by virtue of such application and the payment by the county from the public funds of the sum applied for the county is authorized and charged to hold the land in trust for the inhabitants of the county for county fair purposes. It has by the act of contribution been vested with the right and duty to become an actor in the preservation of the public land dedicated to the purposes prescribed by the articles of incorporation. By the incorporation and purchase of the land, there was a dedication to the public of Wayne county. By the application for and receipt of funds to improve or fit up the grounds, there was a contract that the county should assume the duty of keeping the land for the purpose to which it was dedicated." On the other hand, the defendants insist that the society is a private corporation carrying on a work for the benefit of the public, but having the right to own as its private property the real estate and other property necessary for its proper purposes which had been donated to it, or was purchased by its private funds; that as to such property there was no dedication to the public; and that the provisions as to title vesting in the county on dissolution only apply to property for which payment has been made by the county.

Quite a little testimony was taken as to the payment of money by the county in successive years, under the provisions of the statute allowing a sum equal to three cents for each inhabitant of the county to be paid to any agricultural society which has raised and paid in by voluntary subscription, or by fees imposed upon its members, in each year not less than \$50; but, since the condition expressed in the statute with reference to

the real estate and improvements vesting in fee simple in the county applies only "where payments shall have been made for real estate or improvements upon such real estate," we think none of this evidence has any direct bearing upon the question at issue, except as it tends to show the quasi public character of the corporation.

The decision of this case depends solely upon the interpretation of a statute. In order to ascertain the meaning of the Legislature, a survey of the evolution of the particular provisions involved is needful. The first act in Nebraska relating to county agricultural societies was passed by the territorial Legislature in 1858. Laws 1858, p. 219 (1 Complete Session Laws, p. 530). After providing for the organization of county societies and a territorial board of agriculture, and specifying the respective duties of these organizations, section 8 declared: "That all county agricultural societies which may be organized under this act be and the same are hereby declared bodies corporate and politic, and as such shall be capable of suing and being sued, and capable of holding in fee simple such real estate as they may purchase or receive by donation, not to exceed eighty acres of land and the buildings thereon." Section 9 provides, in substance, that conveyances made to such societies shall vest a title in fee simple. Sections 10 and 11 are as follows:

"Sec. 10. In all cases where such county agricultural societies shall purchase real estate as sites whereon to hold fairs, the county commissioners of such counties may, if they think it for the interest of the counties and societies, pay out of the county treasuries of such counties the same amount of money for the purchase and improvements of such sites as shall have been, or shall hereafter be, paid by said agricultural societies or individuals for such purpose.

"Sec. 11. In all cases when agricultural societies shall be dissolved or cease to exist in any county where payments have been made for real estate or improvements upon such real estate, for the use of any agricultural society, then all such real estate and improvements shall vest in fee simple to the county making such payment."

Though the law was amended in other particulars, these provisions seem to have been carried forward with the language unaltered until 1879, when these sections were changed to read as follows (Laws 1879, p. 400, §§ 13, 14, and 15):

"Sec. 13. Each county society may purchase and hold in fee simple such real estate as they may deem necessary, not exceeding 160 acres of land, for the purpose of holding county fairs.

"Sec. 14. Whenever any county agricultural society, organized by law, shall have procured in fee simple, free from incumbrance, land for fair grounds not less than ten acres in

extent, the county board of said county may, in their discretion, if the finances of the county will admit, appropriate and pay to such society a sum not exceeding one hundred dollars for every thousand inhabitants in said county, to be expended by such society in fitting up such fair grounds, but for no other purpose; but not more than one thousand dollars shall in the aggregate be appropriated in any one county.

"Sec. 15. Each society receiving such appropriation shall, through its secretary, make to the county board a detailed statement, with vouchers showing the legal disbursement of all the moneys received. And in all cases, when such county agricultural societies shall be dissolved, or neglect, for the space of two years, to discharge the duties devolving upon them by law, or cease to exist, in any county where payments have been made for real estate, or improvements upon such real estate for the use of any agricultural society, then all such real estate and improvements shall vest in fee simple in the county making such payment, and the district court of said county, upon proof thereof, shall, upon petition of said county board, make a proper decree vesting the title to such property in said county."

No further amendment was made until 1905; but we think the changes then made were immaterial as affecting the questions here presented.

Sections 8 to 11, inclusive, of the Nebraska act of 1858 are almost a verbatim copy of an act of the Ohio Legislature, passed February 15, 1853. 1 Rev. St. (Ohio) S. & C. c. 2, p. 66 et seq. Several other states have statutes of a similar nature conferring the power upon public authorities to appropriate money in aid of such societies. Some of these statutes make no provision for the return of the money, or the reversion of the property for which it was expended, if the society dissolves or fails to carry out the purpose of its organization; while others provide for the retention of an interest in the grant to the extent that it shall revert in case of such a failure. Among the latter class are the Ohio statute referred to; Laws Washington 1909, c. 62; Laws Maryland 1904, c. 141; Supp. to Code of Iowa 1907, § 1660; Gen. St. Kansas 1868, c. 2. By the Kansas act the county commissioners, if the voters so authorize, may appropriate money to be expended under the direction of the county agricultural society in the purchase and improvement of fair grounds for the use of the society; and the statute provides that all such property shall be held in trust by the board of county commissioners for the use and benefit of the society.

The Iowa law permits the county authorities to appropriate and pay a sum in proportion to population to such societies, "to be expended by it in fitting up or purchasing such fair grounds, but for no other purpose,"

and, if authorized by a vote of the people, to purchase real estate for fair purposes. "The title of such real estate when purchased to be taken in the name of the county," and placed under the control and management of an incorporated county society.

Coming now to a consideration of the Nebraska act. It will be seen that section 10 of the original act did not in terms authorize the county commissioners to pay any money to county agricultural societies, but it authorizes the board, "if they think it for the interest of the counties and societies," to "pay out of the county treasuries * * * the same amount of money for the purchase and improvements of such sites as shall have been, or shall hereafter be, paid by said agricultural societies or individuals for such purpose;" and that by section 11 it is provided that when such societies "shall be dissolved or cease to exist in any county where payments have been made for real estate or improvements upon such real estate, for the use of any agricultural society, then all such real estate and improvements shall vest in fee simple to the county making such payment." There is no direction to whom the money should be paid, or as to how the title should be taken. It might be paid by the county to the landowner and the title taken to the society; or the title might be taken to the county as trustee "for the use of the society," as the statute says. The money might be paid through the society, and the title taken in either way equally as well.

[1] It is a principle of statutory interpretation that, where the language of a statute is clear and unambiguous, it must be interpreted in its ordinary sense, even though it lead to mischief and injustice; but it is also a principle that if the language of a statute is doubtful or obscure, and it is susceptible of an unreasonable interpretation, or one which will lead to a forfeiture or to an injustice, while another interpretation will avoid such a result, that which leads to a reasonable and just result will prevail. *Beal, Cardinal Rules of Legal Interpretation* (2d Ed.) p. 324; *2 Sutherland (Lewis') Statutory Construction* (2d Ed.) §§ 408, 490, 541.

[2] It seems to the writer impossible to believe the Legislature intended that, where public-spirited citizens had engaged in a voluntary enterprise for the public benefit and in aid of agriculture, the county might, by contributing, perhaps, a small amount in proportion to the whole amount invested, on the expiration of the corporate charter, or on the cessation of the undertaking for any other cause, not only reclaim the amount of its own contribution, but take by the strong hand that which had been invested by others. Such a construction should not be adopted, even if constitutional, unless no other reasonable meaning can be imputed to the statute.

The language of section 11 is that "such real estate and improvements" shall vest in the county. What real estate and improvements does this refer to? Plainly that for which payments had been made by the county for the use of the society. If the county has taken the title in its own name for the use of the society, when the society dissolves or ceases to exist the trust relation ends; and under the statute the title to the real estate and improvements vests in the county, in fee simple, without further proceedings. The result would be the same if the county had purchased through the society, and the title had been taken in the name of the society. The use of the property and its control would be in the society, which would hold the legal title in trust for the county; and upon the specified contingency of the society dissolving or ceasing to exist title to such property would vest in the county. The intent that runs through this class of statutes seems to be to preserve that property for the public the use of which it has given to the society, and in this way to prevent the diversion of public funds, either directly or indirectly, to private purposes.

[3] These considerations apply to the statute as it stood before the amendment of 1879. The amendment to section 14 then made changed the law in the respect that it provided that money might be appropriated and paid to the society only, and to no other person, not, as before, for the purchase of real estate or improvements, but for "fitting up such fair grounds, but for no other purpose." Section 15, however, was unaffected, in so far as it provided that on the happening of the specified contingency, "where payments have been made for real estate, or improvements * * * for the use of any agricultural society, then all such real estate and improvements shall vest in fee simple in the county making such payment." Of course, it was necessary to retain these provisions in order to preserve the right of recaption by counties having money invested in fair grounds. The new restrictions in section 14 cannot apply to any such counties.

It is argued that the rapid depreciation in value of improvements of a certain class, and the difficulty of separating other improvements, of the nature of trees, fences, roads, race tracks, etc., from the real estate, in case of a necessity arising, should prevent such a construction of the statute. It is true that conditions may arise which render the statute difficult of application; but, if the evident purpose of the Legislature to preserve for the public the money which had been converted into real estate or improvements is kept in mind, we believe the powers of a court of equity are sufficient to properly guard public interest. On the other hand, if the construction contended for by the county is adopted, it will be possible that a county, by making a contribution of a few dollars for improvements on valuable real

estate belonging to an association of this class, on its failure to hold a fair through unavoidable circumstances, or upon the dissolution of its charter, either by lapse of time or from other causes, may sequester such property without compensation. Such a consequence shocks the conscience.

[4] To conclude, it seems to us that the intention of the Legislature was to preserve the public funds, while at the same time aiding in the extension of agricultural education. We will not lightly impute to that body an intention to take something for nothing from the progressive citizen who, in common with the county, advanced funds for the general welfare.

The improvements made with the county money are not distinguishable and severable from those made by the society from its own funds. The defendants offered in open court to pay the sum advanced, with legal interest. That the public should receive back its own if the enterprise fails is just and right, and we think this is all that the county can justly claim.

The judgment of the district court is reversed and the cause remanded, with directions to enter judgment in behalf of plaintiff for \$300, with interest from the date of payment at 7 per cent. per annum, and to deny the plaintiffs' prayer for a decree quieting title to the real estate involved.

ROSE, J. (dissenting). The Wayne County Agricultural Society was a creature of statute. It came into existence for a definite purpose. It was not a money-making corporation. It was above the aim of pecuniary individual enterprise. Its field of influence was in a farming community. Its object was the promotion of agriculture, stock raising, horticulture, and the mechanical arts. Its principal duties were necessarily of a public nature, and it was properly the object of public solicitude. The Legislature provided for its organization and maintenance. Its technical status is immaterial, since in any view it was in some aspect an agency of government. The county was authorized to appropriate public money for its benefit. Grounds and improvements for holding annual fairs were purchased by joint contributions of private individuals and the public. Some of the expenses of holding fairs were derived from the same source. There was no reason why public-spirited citizens, who were interested in the improvement of a farming community, should not be allowed to make voluntary contributions for that purpose upon terms prescribed by statute. Every item so contributed was, under the statute, voluntary. In making them, each contributor entered into a contract with the public to participate in a public agency, and the statutes were by construction parts of the agreements so made. The statute was an open book. Every contributor knew the terms prescribed

by law and agreed to them. He knew, before generosity prompted him to join in the creation of a public fund, that the property purchased with it would be held in trust for the county, after abandonment of its use for the purposes of a fair. The statute said so, and that provision remained in force during the entire existence of the society named. There is no question of forfeiture or confiscation in the case. The Wayne County Agricultural Society held fairs from 1885 until 1901. Later it abandoned the purposes of its existence, and was dissolved. The trust property, consisting of the fair grounds and improvements, became valuable. What shall be done with it? That was the question to be considered. It seems clear to my mind that the question is answered in unequivocal terms by the statute, which is by construction embodied in all the contracts between the public and those who voluntarily created the fund with which the real estate in controversy was purchased and improved. "In all cases, when such county agricultural societies shall be dissolved, or neglect, for the space of two years, to discharge the duties devolving upon them by law, or cease to exist," says the statute, "in any county where payments have been made for real estate, or improvements upon such real estate for the use of any agricultural society, then all such real estate and improvements shall vest in *fec simple* in the county making such payment, and the district court of said county, upon proof thereof, shall, upon petition of said county board, make a proper decree vesting the title to such property in said county."

In my opinion, this language is too plain for construction. It means, as applied to the facts of this case, that the "real estate and improvements" constituting the fair grounds is, in equity, the property of the county. If any ground for construction existed, however, the interpretation of the majority is erroneous. The statute as a whole shows that the funds with which the fair grounds were purchased and improved were intended for a public purpose. The fund originally contributed by the county for improvements became, for the purposes of holding fairs, as much a part of the real estate as the land itself. When the society and those acting for it appealed to the county for aid, they proclaimed the public character of the undertaking. When the county contributed funds, it asserted the same fact. When the funds were received from the county, they were accepted as public funds. They could not be lawfully collected from taxpayers for a private purpose. The real estate being in fact public property held in trust for the county, it should be decreed to be the county's property upon the extinguishment of the trust by abandonment. The statute, as I read it, says so; but, conceding the language quoted to be ambiguous, all the legislation on the subject indicates an abiding

purpose on the part of the lawmakers to keep public property used for agricultural purposes under the control of a public agency, and to transfer the title to the public after the original use terminates. The Legislature so understood its own enactments, and that intention is shown by the amendment of 1905. Laws 1905, c. 2, p. 53.

A manifest purpose of the statute is the perpetuation of agricultural societies. The act should be construed with this end in view. Increase in the value of land used for fairs was inevitable. If the title is held in trust for the incorporators or stockholders of agricultural societies, there will be a temptation to abandon the fairs, sell the fair grounds, and distribute the profits among themselves. This would defeat the evident purposes of legislation. To prevent such a result and to continue the public agency established to promote the interests of agriculture, the Legislature wisely made provision for decreeing the land to be the property of the county. It is apparent, therefore, that the construction of the majority defeats the legislative will.

Even if the construction of the majority were correct, however, no sufficient reason can be given for allowing the county to recover the amount contributed by it, with interest, while the shareholders are allowed to distribute among themselves the profits on their contributions. In a suit in equity involving property rights, the same rules should be applied to all the parties, though one of them is a county. I do not approve the doctrine which gives the public what it contributed to a common fund, with statutory interest, and distributes the balance, with accruing profits, to individual contributors.

STATE ex rel. NEBRASKA REPUBLICAN STATE CENTRAL COMMITTEE et al. v. WAIT, Secretary of State. (No. 17,841.)

(Supreme Court of Nebraska. Nov. 1, 1912.)

(Syllabus by the Court.)

1. ELECTIONS (§ 126*)—CONDUCT IN GENERAL—POLITICAL PARTIES.

Chapter 26, Comp. St. 1911, clearly recognizes the existence of political parties, and delegates to the members of each party the right to vote at primaries and general elections for candidates of their own party, nominated by themselves without the interference of members of any other political party.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

2. ELECTIONS (§ 131*)—NOMINATIONS—PRIMARY ELECTION—PRESIDENTIAL PREFERENCE VOTE.

The preferential vote given by the voters of a political party at a primary election for a particular person as the party candidate for President, while morally binding upon the delegates of such party to the national convention,

has no relation whatever to candidates nominated at such primary for presidential electors.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 120; Dec. Dig. § 131.*]

3. UNITED STATES (§ 25*)—NOMINATIONS—PRESIDENTIAL ELECTORS.

Persons nominated by a political party at a primary election as candidates for presidential electors are nominated, not as electors to vote for any particular candidate then known, but to vote, if elected, for the persons who may subsequently be nominated by the national convention of such party as candidates for the offices of President and Vice President.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 16; Dec. Dig. § 25.*]

4. OFFICERS (§ 55*)—TENURE—VACANCY.

It is a well-settled rule at common law that if a person, while occupying one office, accepts another incompatible with the first he ipso facto vacates the first office; and his title thereto is thereby terminated without any other act or proceeding.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 76-84; Dec. Dig. § 55.*]

5. OFFICERS (§ 55*)—TENURE—VACANCY.

In such a case one of the tests of incompatibility is whether the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for the incumbent to retain both.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 76-84; Dec. Dig. § 55.*]

6. OFFICERS (§ 58*)—TENURE—VACANCY.

Where it appears that acts or events have occurred rendering an office vacant, the authority having the power to fill such vacancy may treat the office as vacant and proceed to elect or appoint, according to the form of law, another to fill it.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 87; Dec. Dig. § 58.*]

7. ELECTIONS (§ 180*)—CONDUCT—MODE OF VOTING.

By the statutes of this state, every voter has the right, by a single cross, or by one manipulation of the lever of a voting machine, to vote a straight ticket for the candidates of his party; and it is the right of the governing body or committee of a political party to appeal to the court to enforce such right.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-155, 157; Dec. Dig. § 180.*]

8. ELECTIONS (§ 131*)—POLITICAL PARTIES—NATIONAL CONVENTION OR COMMITTEE.

Under the statutes of Nebraska, the national convention of a political party, or, when the convention is not in session, its national central committee, is the supreme governing body of such party as to national affairs, and has full authority to decide which of rival conventions or committees in the state is the regular and duly authorized convention or committee of such party.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 120; Dec. Dig. § 131.*]

(Additional Syllabus by Editorial Staff.)

9. UNITED STATES (§ 25*)—PRESIDENTIAL ELECTORS—VACANCY.

Where the nominees of a party for presidential electors accept the nomination of another party having a different candidate for President and espousing different principles, for the same position, they forfeit the right to remain upon the ticket of the first party as effectually as if they had resigned therefrom.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 16; Dec. Dig. § 25.*]

Appeal from District Court, Lancaster County; Cosgrave, Cornish, and Stewart, Judges.

Mandamus by the State, on the relation of the Nebraska Republican State Central Committee and others, to Addison Wait, Secretary of State. From a judgment awarding a peremptory writ, respondent appeals. Affirmed.

Grant G. Martin, Geo. W. Ayres, and C. C. Flansburg, all of Lincoln, for appellant. John L. Webster, A. W. Jefferis, and Norris Brown, all of Omaha, Aaron Wahl, of Loup City, Amos Thomas, of Omaha, and F. M. Hall, of Lincoln, for appellees.

FAWCETT, J. Appeal from a judgment of the district court for Lancaster county, awarding relators a peremptory writ of mandamus requiring respondent to print upon the official ballot to be used at the general election in November, 1912, the names of certain persons as Republican presidential electors.

This case was decided October 23d, but for reasons well known to the parties the writing of the opinion was left to a later date. The intention of the writer, to whom the case fell in the regular course of assignment of cases, was to write the opinion at his leisure; but upon consultation we all agreed that the writing of the opinion should be hastened, so that the reasons for our decision may be given to the public.

Article 1, § 22, of the Constitution of Nebraska provides: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." Article 2, § 2, of the Constitution of the United States provides for the election of presidential electors in each state, in such manner as the Legislature thereof may direct, the number of electors to equal the number of the state's Senators and Representatives in Congress. Article 12, § 1, provides that such electors shall meet in their respective states and vote by ballot for President and Vice President, make lists of the number of persons voted for, the number of votes for each, and transmit such lists, duly certified, to the seat of government, directed to the President of the Senate.

A large number of voters of Nebraska, regardless of party, having become dissatisfied with the old order of nominating candidates for office by delegate convention, determined, if possible, to change those conditions and secure the nomination of all officers, state, district, and county, by a direct vote of the people, and to that end secured, in 1907, the adoption of a primary law which provided for the nomination of such officers by the various political parties of the state in a state-wide primary. In 1909 the Legislature conceived the idea of having an open primary, and amended the then existing law, so

that the members of one party might, without restraint, vote for the nomination of candidates for office in any other party. One trial of that law satisfied all parties that it was wrong in principle, and the Legislature of 1911 returned to the closed primary idea and enacted the primary and election law now in force. By the terms of that act, this case must be determined. The provisions of the law as it now stands will be found in chapter 26, Compiled Statutes 1911, and the references hereinafter made to certain sections of the law will, without so stating, be understood to be sections of that chapter.

Section 101: "Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office, as follows: 1. The resignation of the incumbent. 2. His death. 3. His removal from office. 4. The decision of a competent tribunal declaring his office vacant. * * * 7. A forfeiture of office as provided by any law of the state."

Section 117d, subsec. 1b: "When candidates for offices of President and Vice President of the United States are to be nominated, every qualified elector of a political party subject to this act shall have opportunity to vote his preference, on his party nominating ballot, for his choice for one person to be the candidate of his political party for President, and one person to be the candidate of his political party for Vice President of the United States. * * * The names of any persons shall be so printed on said ballots solely on the petition of their political supporters in Nebraska, without such persons themselves signing any petition or acceptance. The names of persons in such political party who shall be presented by petition of their supporters to be party candidates for President and Vice President of the United States, shall be printed on the nominating ballot, and the ballot shall be marked, and the votes shall be counted, canvassed and returned in like manner and under the same conditions as to names, petitions and other matters, as far as the same are applicable, as the names and petitions of aspirants for the party nominations for the office of Governor are now or may be by law required to be marked, filed," etc.

Section 117f: "In case a nomination shall be made by electors other than the candidate, said nominee shall within five days after the date said certificate shall be filed with the officer, file a statement in writing, duly verified under oath, stating that he affiliates with the party named in said certificate, that he will abide by the results of said primary, and if elected will qualify and serve as such officer. In case said statement shall not be filed within five days, the name of the candidate in the petition shall not be placed upon the primary ballot."

Section 117r: "Any qualified elector desiring to vote at any primary election held under the provisions of this act shall be entitled to participate in such primary election upon presenting himself at the polling place where he is entitled to vote; but he shall not be entitled to receive a primary ballot, or be entitled to vote at such primary election, until he shall have first stated to the judges of said primary election what political party he affiliates with."

Section 118a: "Vacancies occurring upon any party ticket after the holding of any primary shall be filled by a majority vote of the party committee of the city, district, county or state, as the case may be, and a certificate of such nomination shall be filed as required by section 5776 of Cobbey's Annotated Statutes 1903."

Section 118p: "All certificates of nomination or nomination statements, which are in apparent conformity with the provisions of this act, shall be deemed to be valid, unless objections thereto shall be duly made in writing within three (3) days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all candidates who may be affected thereby, addressed to them at their respective places of residence as given in the certificate of nomination or in the nomination affidavits of such persons, on file in that office. Objections to the use of party name may also be made and passed upon in the same manner as objections to certificates and nomination statements. The officer with whom the original certificate was filed, or who made an affidavit to the original nominating statement, shall, in the first instance, pass upon the validity of such objection, and his decision shall be final, unless an order shall be made in the matter by a county court, or by a judge of the district court, or by a Justice of the Supreme Court at chambers, on or before the second Wednesday preceding the election. Such order may be made summarily upon application of any party interested, and upon such notice as the court or judge may require."

Section 118q: "In case of a division of any party, the secretary of state shall give the preference of party name to the convention held at the time and place designated in the call of the regularly constituted party authorities, and if the other faction or factions shall present no other party name, the secretary of state shall select a name or title and place the same on the ballots before the list of candidates of said faction. The action of the preceding national convention of such party, regularly called, shall determine the action of the secretary of state, or the court in its decision. The secretary of state may be compelled by peremptory order of mandamus proceedings to perform his duty in this regard."

Section 125r: "No voting machine shall be

approved by the state board of voting machine commissioners unless it shall be so constructed as to insure every voter an opportunity to vote in secrecy; that each machine shall be so constructed as to provide facilities for voting for the candidates of at least seven parties or organizations; that a straight party ticket can be voted by the operation of a single device; * * * that the voter cannot cast more than one vote for any candidate, or vote for more than one person for the same office, unless he is lawfully entitled to vote for more than one person therefor, and in that event can vote for as many persons for that office as he is by law entitled to vote for, and no more; that the names of the candidates for presidential electors need not appear on the ballot labels, but in lieu thereof one ballot in each party column, or row, may contain only the words 'presidential electors' preceded by the party name, and the names of the candidates for President and Vice President, and every vote registered for such ballot shall operate as a vote for all candidates of such party for presidential electors."

Section 140: "All official ballots prepared under the provisions of this act shall be white in color, six inches wide, and of a good quality of news printing paper, and the names shall be printed thereon in black ink. At the top and left side of the ballot shall be printed in black-faced capital type, not less than one-eighth of an inch high, the name of each party having candidates on the ballot; and to the right of each party name, a circle one-half inch in diameter, with leaders connecting the party name to the circle. Over the top circle shall appear the following printed instructions: 'To Vote a Straight Ticket Make a Cross Within Your Party Circle.' Every ballot shall further contain the name of every candidate whose nomination for any office specified in the ballot has been certified or filed according to the provisions of this act, and no other names and the name of no candidate shall appear on the ballot more than once."

[1] That the Legislature by the chapter above outlined has deliberately and clearly recognized the existence of political parties and attempted to delegate to the members of each party the right to vote at the primaries and at the general election for candidates of their own party, and nominated by themselves without interference of members of any other political party, is too clear to require discussion. In *State v. Drexel*, 74 Neb. 776, 786, 105 N. W. 174, 178, Mr. Chief Justice Holcomb, speaking for this court, said: "It is quite true, we think, that when the Legislature undertakes by laws of this character to regulate and control the internal affairs of political parties, and to determine the manner and method of making party nominations for public offices, it must do so without discrimination and with equal

consideration and benefit of all. But it is equally necessary to recognize the existence of political parties and to classify them by some convenient standard." In that opinion Judge Holcomb quotes with approval from *State v. Jensen*, 86 Minn. 19, 89 N. W. 1126, as follows: "We are of the opinion that the Legislature may classify political parties with reference to differences in party conditions and numerical strength, and prescribe how each class shall select its candidates; but it cannot do so arbitrarily, and confer upon one class important privileges and partisan advantages and deny them to another class, and hamper it with unfair and unnecessary burdens and restrictions in the selection of its candidates."

[2] At the primary election in April last, the Republican voters were given the opportunity to express their preference for the man whom they desired to have nominated as the candidate of the Republican party for the office of President. By quite a large majority, Theodore Roosevelt was named as such choice. The delegates also elected at that primary to attend the Republican national convention to convene in Chicago in June following were, by that vote, instructed to cast the solid vote of Nebraska for Mr. Roosevelt. Beyond the sitting of that convention and the nomination of a President and Vice President by Republican delegates of the nation there assembled, neither the duties of such delegates, nor the expression of a preference for Mr. Roosevelt by that primary, extended. The preferential vote given for Mr. Roosevelt had no relation whatever to the candidates nominated at that primary for presidential electors. It was not and could not at that time be known who would be the nominee of the national convention.

[3] The candidates for presidential electors were nominated, not to vote for any particular candidate then known, but to vote, if elected at the November election, for the persons who might be nominated by the national convention as the candidates of the Republican party for the offices of President and Vice President. At the primary election A. V. Pease, W. J. Broatch, George S. Flory, W. E. Thorne, A. R. Davis, Allen Johnson, Wesley T. Wilcox, and Alfred C. Kennedy were nominated as Republican presidential electors for the state of Nebraska, to be voted for at the ensuing general election. In behalf of each of the eight persons so nominated, there had, prior to the primary, been filed with the secretary of state a petition, wherein it was represented that: "We, the undersigned qualified electors of _____ county, in the state of Nebraska, affiliating with the Republican party, hereby request that the name of [each of the gentlemen above named] be placed upon the official ballot of said party for the primary election to be held on the 19th day of April, 1912, as

a candidate for the office of presidential elector at large." Each of the gentlemen named filed, over his respective signature, an acceptance of his nomination, as follows: "To the Honorable Secretary of State, Lincoln, Nebraska—Dear Sir: I hereby accept the nomination for the office of presidential elector at large on the Republican ticket in accordance with petition filed in your office." By the acceptance of that nomination at the hands of persons "affiliating with the Republican party," they pledged themselves to discharge their duties, if elected, by voting for the candidates for President and Vice President who should be subsequently nominated by the national convention of that party. We are all agreed that any other construction would be farcical. When the national convention met in Chicago, it transpired that Mr. Roosevelt was not nominated as the candidate of the Republican party for President, but that Mr. Taft became the nominee of that convention for President, and Mr. Sherman became the nominee for Vice President. They thereby became the candidates of the Republican party for those offices, and the gentlemen named, having been nominated as presidential electors upon the Republican ticket, thereby became in honor bound to vote for such nominees.

After the adjournment of the Republican national convention, a new national party was organized, to be known and designated as the Progressive party. At a national convention of that party, subsequently called, Mr. Roosevelt became the nominee of the party for President. Acting under the statutes of this state in that behalf, more than 500 legal voters, largely from the Republican party, duly organized as a new party in this state under the said name of the Progressive party. That convention indorsed the nomination of Mr. Roosevelt and the platform which had been adopted by its national convention in Chicago, which platform, it is conceded by all parties to this action, is in many respects in marked variance from the platform of the Republican party. The state convention of that party nominated candidates for the various state offices, and also nominated eight presidential electors, six of whom were Messrs. Pease, Broatch, Flory, Thorne, Davis, and Johnson. The six gentlemen named have not declined such nomination by the Progressive party, but, on the contrary, by their conduct clearly show that it is their intention, if elected, to vote for the candidates of the Progressive party, to wit, Mr. Roosevelt and Mr. Johnson for President and Vice President, respectively. As an attempted justification of such action on their part, it was argued by counsel at the bar that, as about 80 per cent. of the Republicans who voted at the April primary expressed their preference for Mr. Roosevelt as a candidate for President, the electors were thereby in effect instructed to vote for

him at the November election, and that in the course they are pursuing they are simply carrying out those instructions. It was also said there is no proof in the record that either of these gentlemen has declared an intention to vote for Mr. Roosevelt. In this counsel are in error; but, if proof from witnesses were lacking, the above declaration by counsel at the bar clearly establishes the allegation of the relator that such is their determination.

[9] It is contended by relator that by this action on the part of the gentlemen named the office of each as a candidate upon the Republican ticket for presidential elector became vacant, and his right to remain upon the Republican ticket as a candidate for presidential elector became forfeited as effectually as if he had resigned therefrom. We are all agreed that this contention is not only founded upon high moral grounds, but is also supported by the clear current of authorities. While a nomination as a candidate for election to an office does not make the nominee, strictly speaking, an officer, he is in his relation to the party which placed its confidence in him a quasi officer, and his duties are to be measured by that relation.

[4, 5] In *State v. Anderson* (Iowa) 136 N. W. 128, it is said: "In *Bryan v. Cattell*, 15 Iowa, 538, this court held that, in determining whether a vacancy exists in an office, we are not confined to statutory causes, but may declare it vacant if it is incompatible with the office held. It is a well-settled rule of common law that if a person, while occupying one office, accepts another incompatible with the first he ipso facto vacates the first office; and his title thereto is thereby terminated without any other act or proceeding." [Citing numerous cases.] The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. *Bryan v. Cattell*, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' [Citing cases.] A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both.' [Citing cases.]

In the notes to *Attorney General v. Oakman*, 86 Am. St. Rep. 574, 578 (126 Mich. 717, 86 N. W. 151), it is said: "The rule is well settled at common law that if a person, while occupying one office, accepts another incompatible with the first he ipso facto vacates the first office; and his title thereto is thereby terminated without any other act or proceeding. [Citing numerous cases.]"

"The public has a right to know which office is held and which surrendered. It should not be left to chance, or to the uncertain whim of the office holder to determine. The general rule, therefore, that the acceptance of and qualification for an office incompatible with one then held is a resignation of the former is one certain and reliable, as well as one indispensable, for the protection of the public. [Citing cases.]"

In *State v. Goff*, 15 R. I. 505, 9 Atl. 226, 2 Am. St. Rep. 921, it is held: "An office holder accepting a second office incompatible with the first vacates his first office." In the opinion it is said: "It is well settled that when a person accepts an office incompatible with one which he then holds he thereby impliedly resigns or vacates his former office."

In *Attorney General v. Common Council*, 112 Mich. 145, 168, 70 N. W. 450, 458 (37 L. R. A. 211), it is held: "A person who, while occupying one office, accepts another incompatible with the first ipso facto vacates the first office." In the opinion it is said: "It is the universal rule that, when such incompatibility exists, the acceptance of the latter office vacates the first. *State v. Goff*, 15 R. I. 505, 9 Atl. 226, 2 Am. St. Rep. 921, and authorities there cited. The authorities are in substantial agreement as to the rule of incompatibility, and Mechem states it as follows: 'This incompatibility which shall operate to vacate the first office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both.'"

[6] The situation presented in the case at bar is more than one of mere incompatibility. Here the persons who have been nominated as presidential electors, having, if elected, but a single duty to perform, viz., to vote for the candidates nominated by the party by whose votes they were themselves nominated, openly declare that they will not perform that duty, but will vote for the candidates of another and distinctly antagonistic party. This would make performance of their duty impossible; and a judicial determination of the existence of a vacancy was therefore unnecessary. The candidates had, by their own acts, vacated their places as Republican presidential electors. This action on their part ipso facto created six vacancies on the Republican ticket for electors. These vacancies the duly recognized Republican state central committee had a right to fill, and its action in that behalf is binding, not only on

the secretary of state, but on the court as well.

In *Prather v. Hart*, 17 Neb. 598, 24 N. W. 282, we held: "Where it appears *prima facie* that acts or events have occurred subjecting an office to a judicial declaration of being vacant, the authority having the power to fill such vacancy, supposing the office to be vacant, may proceed, before procuring a judicial declaration of the vacancy, to appoint or elect, according to the form of law, a person to fill it."

In *Bell v. Templin*, 26 Neb. 249, 41 N. W. 1093, Judge Maxwell said: "A tribunal to determine contested elections need not be, strictly speaking, a judicial body; the powers exercised being quasi political and administrative."

In *State v. Drexel*, 74 Neb. 776, 788, 105 N. W. 174, 179, the following language by Mr. Chief Justice Holcomb is instructive: "By section 19 of the act, the right of an elector to vote at a primary is made to depend upon his political affiliation with the party for whose candidates he desires to cast a ballot. It is therein provided that no person shall 'be entitled to vote at such primary election until he shall have first stated to the judges of said primary election what political party he affiliates with, and whose candidates he supported at the last election, and whose candidates he intends to support at the next election.' Provisions are also made for challenging any person offering to vote at such primary election, and for his making oath to the truth of the statements above required as to party affiliation and his support of candidates of the party with whom he is offering to vote. It is difficult to perceive any valid objection to provisions of this character, when applied to a primary election law. These laws replace party nominating conventions. The regulation of the membership of the party and of the right to participate in the nomination of its candidates, in this respect, is taken from the party and placed in the control of the Legislature. The integrity of the party and the success of its principles and policies can be best maintained by the participation in its affairs of those only who are at heart in sympathy with the objects and ends to be attained by the organization, and loyal to its tenets. An indiscriminate right to vote at a primary would tend, in many instances, to thwart the purposes of the organization and destroy the party. A hindrance to one, not a member of a party, from participating in the selection of the party's delegates and candidates can in no proper sense be said to interfere with the free exercise of the elective franchise as guaranteed by the Constitution. All that is required is that the party offering to vote at the primary, in order to be entitled to vote with either of the parties engaged in nominating candidates thereat, shall have affiliated with such party, supported its can-

didates generally at the last election, and intend to do so at the next. Open declaration of allegiance to party is absolutely essential to the proper working of any primary law. 'By his mere offer to vote for delegates to a convention of any party, the elector does, in effect, declare his intention to support the nominees of such convention, and the oath is provided for as a guaranty of the truth of the declaration already made by such offer to vote.' *Rebstock v. Superior Court*, 146 Cal. 308, 316, 80 Pac. 65."

[8] When the Republican state convention assembled in July, it was found to be antagonistic to the nominees of the national convention. Therefore a considerable minority of the delegates withdrew, assembled in another room, organized as a convention, indorsed the nominees of the national convention, and selected a state central committee. A like committee was also selected by the first convention. The central committee of the second convention set actively to work for the nominees of the national convention, while the other committee devoted its energies exclusively to the Republican state ticket. The Republican national committee, on September 18th, by unanimous vote, resolved that the second convention noted "be and is hereby recognized by the national Republican committee as the regular Republican organization of the state of Nebraska," and "that the Republican state central committee, of which Hon. F. M. Currie is chairman, and appointed by the said Republican state convention, be and is hereby recognized as the regular Republican state central committee of the state of Nebraska." On September 11th, the Taft committee, as we may term it, met and adopted a preamble and resolutions declaring that the six electors Pease, Broatch, Flory, Thorne, Davis, and Johnson had, since the holding of the primary, declared their intentions, respectively, if elected as presidential electors, to vote for the nominees of the Progressive party for President and Vice President, and had thereby repudiated their allegiance to the Republican party, repudiated and revoked the certificate of their nomination filed with the secretary of state, repudiated their acceptance of said nomination, and had betrayed their trust as Republican presidential electors; therefore it was resolved that their right to "remain candidates for presidential electors on the Republican ticket has become forfeited, and is terminated and vacated." At a later meeting, on September 24th, the committee nominated C. F. Reavis, George D. Smith, W. H. Kilpatrick, O. A. Abbott, Daniel B. Jenckes, and Vac Buresch as presidential electors in place of Pease, Broatch, Flory, Thorne, Davis, and Johnson. On October 9th they presented to respondent, secretary of state, a petition and certificate of nomination, in which it was recited that Pease et al. had forfeited and vacated their right to appear upon the ballots at the November election

as Republican presidential electors; that by reason of the premises six vacancies existed in the list of Republican presidential electors; that the committee had so declared, and had nominated Reavis et al. to fill such vacancies, and demanded that their names be, by the secretary, printed on the ballots for the November election as Republican presidential electors. The preambles and resolutions of the two meetings of the committee were attached to and made a part of their petition and certificate. No written objections to the certificate of nominations to fill vacancies filed by the committee were filed with the secretary of state in the manner and within the time required by section 118p, supra. The right, therefore, of the committee to act in the premises is not questioned. Their demand was refused by the secretary of state, whereupon relators applied to the district court for Lancaster county for a writ of mandamus to compel him to print the names of the persons so nominated by the committee upon the official ballot as Republican presidential electors. On a hearing before the three judges of that court, a writ was awarded as prayed. We are now asked to reverse that judgment.

[7] At the time the electors were nominated at the April primary, there were but two parties which could hope to succeed in electing a presidential ticket at the November election. Since the holding of the primary and since the national conventions of these two parties, the Progressive party has been organized, and is now competing with the Republican and Democratic parties for the election of its candidates for President and Vice President, with the hope and possibility of its succeeding in so doing. We have recognized that party in *Morrissey v. State*, in a decision rendered by us October 22, 1912. The Progressive party therefore now has the same legal status before the voters of this state as either of the other two parties. Any voter who desires to cast his vote for Mr. Roosevelt for President and for the other nominees of the Progressive party may do so by making a cross in the party circle of that party in precincts where the voting machine is not used, and by a single manipulation of the lever of the voting machine where such machines are used. A voter who desires to vote for the candidates of the Democratic party may register his vote in the same manner. But, if the decision of the respondent be sustained, no voter can so vote for the candidates upon the Republican ticket. By far the greater number of voters do not know the various candidates for electors; but they do know for whom they want to vote for President and Vice President. They have been in the habit in the past of voting a straight ticket, and particularly so for presidential electors. It is rare, indeed, that a voter "scratches"

that part of his ticket. He votes for entire strangers about whom he has never read, or made inquiry, because of the fact that they stand for the candidates whose election he desires. To deprive the voters who desire to vote a straight Republican ticket of the opportunity of doing so, and at the same time afford such opportunity to the voters of the other parties named, would be repugnant to every sense of honor, and would be in defiance of the just rule that important privileges and partisan advantages cannot be conferred upon one class and denied to another class by hampering it with unfair and unnecessary burdens and restrictions.

The right of every voter, by a single cross or by one manipulation of the lever of a voting machine, to vote a straight ticket for the candidates of his party is guaranteed by sections 125r and 140, supra. Any attempt, by deception or otherwise, to deprive him of that right is a violation of both the letter and spirit of our laws. If such an attempt is made, it is the right of the governing body or committee of his party to appeal to the courts, if necessary, to protect him; and when it is made to appear that such an attempt is intended it is the duty of the court to prevent it. To permit the names of the six electors, who will not vote for the candidates of the Republican party for President and Vice President, but will vote for the candidates of another and different party, to be printed upon the official ballot as Republican electors, would be a gross deception, and would, without the possibility of a doubt, cause thousands of voters in this state to cast their votes for President and Vice President for candidates other than their choice, and other than the candidates for whom it is their desire to vote. We cannot permit this to be done.

The judgment of the district court is therefore affirmed.

STATE ex rel. CURYEA v. WELLS, County Clerk. (No. 17,824.)
(Supreme Court of Nebraska. Nov. 1, 1912.)

(Syllabus by the Court.)

1. ELECTIONS (§ 126*) — NOMINATIONS — PRIMARY ELECTION.

The Legislature of this state in providing for the "closed primary" has adopted the policy of allowing each political party to select its own candidates.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

2. ELECTIONS (§ 126*) — NOMINATIONS — PRIMARY ELECTION.

Any one who has the statutory qualifications to fill an office may be a candidate for election to that office. If he affiliates with a political party, he may become the candidate of that party; or he may become a candidate independently of all parties.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. ELECTIONS (§ 126*) — NOMINATIONS — PRIMARY ELECTION.

Under our primary law no political party can be compelled to present as its candidate at a general election one who does not affiliate with the party so presenting him as a candidate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

4. ELECTIONS (§ 147*) — NOMINATIONS — PRIMARY ELECTION—"OCCURRED."

If a political party at its primary makes no nomination of a candidate for election to an office, a vacancy has "occurred," within the meaning of the statute (Cobbey's Ann. St. 1911, § 5838); and the proper party committee may fill that vacancy.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 122; Dec. Dig. § 147.*]

For other definitions, see Words and Phrases, vol. 6, p. 4910.]

Rose, J., dissenting.

Appeal from District Court, Lancaster County; Cosgrave, Judge.

Mandamus by the State, on the relation of George C. Curyea, to Harry E. Wells, County Clerk of Lancaster County. From a judgment for the respondent, the complainant appeals. Reversed and remanded, with directions.

A. S. Tibbets and Sterling F. Mutz, both of Lincoln, for appellant. Jesse B. Strode, G. E. Hager, and C. Petrus Peterson, all of Lincoln, for appellee.

SEDGWICK, J. At the primary election held in April, 1912, Carl O. Johnson was a candidate on the regular Republican ticket for nomination as a candidate of that party at the ensuing general election for the office of county commissioner of Lancaster county. He made the necessary filings, declaring under oath that he affiliated with the Republican party, and procured his name to be printed upon the regular Republican ballot as the candidate of that party. There was no candidate named on the printed ballot of the Democratic primary for nomination to that office as a candidate of the Democratic party. There was a blank space left upon the ballot of the Democratic party for entering the name of a candidate of that party for nomination to that office. Mr. Johnson's name was written in 62 of the Democratic ballots as the candidate of that party. He did not accept the nomination as the candidate of the Democratic party, nor file any statement that he affiliated with that party. There is nothing in the record to show that there is any affiliation between the Republican and Democratic parties for the ensuing election. The proper committee of the Democratic party, considering that a vacancy had occurred upon the ticket of that party, duly certified the nomination of the relator as the candidate of the Democratic party. The respondent, who is county clerk of Lancaster county, refused to enter the name of the relator upon the official ballot for the ensuing

election as the candidate of the Democratic party for the office of county commissioner, and the relator brought this action of mandamus in the district court for Lancaster county to compel the respondent to place his name upon the official ballot as such candidate. The district court found in favor of the respondent and refused to issue a peremptory writ, and the relator has appealed to this court.

[1, 2] Our statute providing for primary elections recognizes the existence of organized political parties, and their right in general to regulate and control their own organizations for the purposes for which they are created. It imposes upon them certain restrictions as to the method of presenting their candidates to the voters at the general election. In the construction of the various statutes involved, we must consider both the right of the voter and the right of the candidate. Every voter has a right to be a candidate for a public office if he possesses the qualification which the law requires. If he possesses the qualifications required to fill the office, can he be the candidate of more than one political party, and, if so, how and under what conditions? The statute provides when and how one may be a candidate of two or more political parties. If he cannot fill the requirement so as to be the candidate of any political party, he may still be a candidate at the general election, by petition. The right of the voter to vote at the general election for whom he pleases cannot be limited. Whether the Legislature can limit the voter in selecting a candidate for the various parties may be a debatable question. The important question here is as to the power of the Legislature to protect the various political parties in their right to present candidates at the general election who affiliate with the party that presents them. And, if the Legislature has such power, has it intended to require, as a qualification of the candidate of a political party, that he shall be in affiliation with that party? After trial of both methods, the Legislature has adopted what is called the closed primary. This contemplates that each political party shall have the right to select its own candidates, and shall have such protection as the law can afford in exercising that right. To this end it was necessary, and no doubt within the power of the Legislature, to prescribe certain qualifications.

It is not necessary, in order to preserve the rights of the voter at the general election, that the name of a candidate should appear on the ballot more than once, nor is it necessary that he should be described on the ballot at the general election as a member of more than one political party; and the Legislature, to carry out the idea of a closed primary, may well provide that the average voter shall not be deceived by a statement on the

ballot at the general election that a candidate belongs to or affiliates with two antagonistic political parties when those parties have not affiliated, and the candidate has declared under oath that he affiliates with one of them, and has refused and neglected to state that he affiliates with the other. In every instance in which the statute, as it now is, mentions the qualifications of a candidate of a political party at the primary election, it prescribes affiliation with the party for which he proposes to be a candidate as a necessary qualification. All provisions of the open primary law which recognize the right to become a candidate of a political party without that qualification were repealed when the closed primary was provided for. Voters must declare their party affiliation when they register, and also when they vote at the primaries; and if their right to vote is challenged they must then declare their party affiliation. If they nominate candidates to be voted for at the primary election they must declare that they affiliate with the party whose candidate they seek to nominate; and the law requires that a record be kept of the party affiliations of the voters. Ann. St. 1911, §§ 5855, 5866, 5878-5881. In all the cases provided in the statute, the candidate for nomination at the primaries must declare his party affiliation. The right to be a candidate at the general election and to have a place upon the printed ballot for that purpose is provided for. He may be such candidate independently of all parties; or, if he affiliates with any political party, he may have his name upon the ballot at the general election as the candidate of that party. If two or more political parties are affiliated for any general election, he may, of course, affiliate with both or all of them and become their candidate accordingly.

[3] But no political party can be compelled to put forward as its candidate one who does not affiliate with it. The voter at the general election may vote for whom he pleases, but may not be deceived by false labels. It surely is within the power of the Legislature to prevent such deception, and we think it as clearly appears that it has intended to do so. It is not necessary to determine in this case whether a blank space should be left upon the primary ballot for inserting the name of the voter's choice as the candidate of his party. Upon this point the court is not entirely agreed. We are determining the qualifications for nominating as the candidate of a political party, and not the right to be a candidate for election to the office. We conclude that one of the necessary qualifications for a candidate of a political party is affiliation with that party. If two political parties have affiliated for the general election, one may affiliate with both and be the candidate of both.

[4] It is said that no vacancy had occurred upon the Democratic ballot; and therefore

the committee of that party was without power to appoint the relator. The statute provides: "Vacancies occurring upon any party ticket after the holding of any primary shall be filled by a majority vote of the party committee of the city, district, county or state, as the case may be, and a certificate of such nomination shall be filed as required by section 5776 of Cobbey's Annotated Statutes 1908." Ann. St. 1911, § 5888.

The statute of South Dakota provided, "if for any reason *after a nomination as party candidate for* * * * *state office has been made* a vacancy shall occur," and the Supreme Court of that state in construing the statute gave great force to the words "after a nomination as a party candidate has been made." It was thought that the use of these words made clear, "that the main purpose of the Legislature in enacting the primary law was to take the making of all nominations out of the hands of conventions and political central committees, and to require that the people themselves, by their direct votes, should name party nominees; and that the only vacancies contemplated by the Legislature to be filled by conventions or central committees are such as may occur after *the people themselves* have made nominations, and vacancies therein have occurred by death, resignation, or otherwise." Stewart v. Polley (S. D.) 137 N. W. 565. It would seem that this construction of their statute is reasonable; as it is difficult to see what other purpose the Legislature could have in inserting the words "after a nomination as a party candidate has been made." These words do not appear in our statute and we must give the ordinary meaning to the word "occur." Webster's New International Dictionary defines this word as follows: "To meet one's eye; to be found or met with; to present itself; to appear; to happen; to take place; as, if opportunity *occurs*; do not let it *occur* again." This seems to be plainly the sense in which the Legislature used it in our statute. A vacancy on the ballot presented itself and appeared, and it was the province of the proper committee to fill such vacancy. If the only candidate voted for had died on primary day before the votes were cast, it will be conceded that a vacancy would occur. If after the primary there is a vacancy, it has "occurred," within the meaning of the statute.

The Democratic committee requested Mr. Johnson to withdraw from the ticket. This, it is urged, estops the relator to dispute his qualifications to be the candidate of the party. In the letter asking Mr. Johnson to withdraw, it was stated that he was not nominated, and could not be the candidate of the Democratic party. This letter must be taken rather as a demand that he withdraw his pretensions to the position than as an admission that he was duly nominated, or was entitled to remain on the ballot of that

party. It cannot be relied upon as an estoppel, even against the committee, much less against this relator.

For the reasons stated, the judgment of the district court is reversed and the cause remanded, with instructions to issue a peremptory writ as prayed.

Reversed.

ROSE, J. (dissenting). As stated in the opinion of the majority, this is an application for a peremptory writ of mandamus to compel the county clerk of Lancaster county to place upon the official ballots for the election to be held November 5, 1912, the name of relator as the Democratic candidate for county commissioner from the First district. After the primary election held April 12, 1912, the Democratic county central committee selected relator as the Democratic candidate for the office named. He traces to that source his right to the relief demanded. He was not nominated at the primary. As a candidate for the same office, the Republicans regularly nominated at the primary Carl O. Johnson, who afterward accepted the Republican nomination and made oath that he affiliated with the Republican party. Among the reasons given by the county clerk for refusing to insert relator's name on the official ballots for the November election are the following: At the primary election in the First commissioner district, the official ballots prepared for Democratic electors did not contain the name of a Democratic candidate for county commissioner. On the official, printed, Democratic primary ballots, however, a blank space had been left, with a view to permitting each Democrat to express his choice by writing in the blank the name of his preferred candidate. In the spaces thus appearing on the Democratic ballots, Carl O. Johnson received 62 votes, being a majority of those cast by Democrats for the nomination of a candidate for county commissioner. The returns were duly canvassed, and the canvassing board certified to the county clerk that Johnson was the Democratic nominee. He has not declined the nomination. No objections thereto were ever filed in the county clerk's office. Johnson is therefore entitled to a place on the official ballots for the November election as the nominee of the Democratic party. The trial court sustained the county clerk's defense as thus outlined and denied the writ. Relator appeals. In my view of the law, the ruling of the district court is right.

Relator argued that there is no authority to nominate candidates by writing names in blank spaces on the primary ballots, and that therefore Johnson is not the Democratic nominee. The primary law does not forbid the making of nominations in that manner. While it does not in the body of the act itself contain in direct terms authority to vote in blank spaces, it provides, "The offi-

cial primary ballot shall be printed substantially as is required by law for official ballots used at November elections," with an exception not material here. Comp. St. 1911, c. 26, § 1171. The general election law to which reference is thus made provides: "Nothing in this act contained shall prevent any voter from writing on his ballot the name of any person for whom he desires to vote, for any office, and such vote shall be counted as if printed on the ballot, and marked by the voter." Comp. St. 1911, c. 26, § 139. That part of the general election law relating to the preparation of the ballots for the November election further declares: "In each division, and beneath all candidates placed there by nomination or petition, a blank space shall be provided, into which electors may write the name of any person for whom they wish to vote, and whose name is not printed upon the ballot." Comp. St. 1911, c. 26, § 140.

The general election law requires instructions to voters as follows: "If you wish to vote for any person whose name is not printed on the ballot, write his name in full in the blank space on the ballot under the proper office you wish him to hold, and make a cross in the square opposite the written name." Comp. St. 1911, c. 26, § 159, subd. 4.

The effect of the statutory references to these provisions of the general election law is to insert them in the primary law, in so far as they are applicable thereto. *Shull v. Barton*, 58 Neb. 741, 79 N. W. 732; *State v. Junkin*, 87 Neb. 801, 128 N. W. 630. In preparing the ballots for the First commissioner district, the county clerk followed the foregoing provisions of statute. A ballot with a blank space for county commissioner was available to each Democratic elector. Under a liberal construction of the primary law and of the constitutional provisions relating to elections, as construed in *State v. Junkin*, 85 Neb. 1, 122 N. W. 473, 23 L. R. A. (N. S.) 839, the primary ballots prepared by the county clerk and the ballots cast by Democrats in favor of Johnson were lawful. Exercising the right to participate at the primary in nominating a candidate to be voted for at the November election, 62 members of the Democratic party voted for him. No other person received so many votes. There is no statute prohibiting those who affiliate with one party from nominating the candidate of another party. By voting for their choice, in doing so they are not disfranchised at a primary election.

Relator further argued that there was a vacancy, because Johnson failed to comply with statutory provisions requiring a candidate to accept a nomination under oath, to pay the filing fee, to declare his party affiliation, and to make a statement that he would qualify and serve if elected. In this connection it is insisted that the vacancy was properly filled by the nomination of relator, and that his name should be printed

on the ballots for the November election. Those statutory provisions evidently apply to a candidate seeking a nomination by the political party with which he affiliates. Johnson, as a candidate of the Republicans, complied with the provisions of statute. His nomination by the Democratic party was voluntary. He did not decline it. As a Republican candidate, he paid his fee, declared his party affiliation, accepted the nomination, and said he would qualify and serve if elected. That he should be required to repeat these acts in relation to a rival party and declare an affiliation having no existence, under penalty of defeating the Democratic nomination lawfully made, was certainly not the intention of the Legislature. The statutes should not be so construed. In this view of the law, there was no vacancy when the Democratic county central committee selected relator as a candidate for county commissioner, instead of Johnson, who had been regularly nominated at the primary by the votes of the Democratic electors. In my judgment, the effect of directing the county clerk to print relator's name on the official ballot is to defeat part of the action of the Democratic primary, which was held by Democrats alone, without interference from Republicans, to create an artificial vacancy in the First commissioner district, and to permit a political committee to set aside the regular action of the voters themselves.

CITY OF GRAND ISLAND v. POSTAL TELEGRAPH CABLE CO. (No. 16,840.)
(Supreme Court of Nebraska. Nov. 1, 1912.)

(Syllabus by the Court.)

1. LICENSES (§ 6*)—POWER TO TAX—CITIES.

Under subdivision 9, § 48, art. 3, c. 13, Comp. St. 1911, each city of the first class having more than 5,000 and less than 25,000 inhabitants has the power to levy a tax upon every business or occupation carried on within the territorial limits of the municipality, excepting alone those enumerated in the proviso clause of said section.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 5, 6, 19; Dec. Dig. § 6.*]

2. LICENSES (§§ 6, 7*)—POLICE REGULATIONS—LICENSE TAX.

A city of the above class may lawfully enact an ordinance imposing on telegraph companies a license tax of a reasonable sum per annum for the privilege of transacting the business of telegraphy within the city, and, where such ordinance imposes a tax equal in amount upon all such telegraph companies, it is not obnoxious to the rule of uniformity and equality under sections 1, 6, art. 9, of the Constitution.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 5, 6, 7-15; Dec. Dig. §§ 6, 7.*]

3. LICENSES (§ 7*)—POLICE REGULATIONS—LICENSE TAX.

The amount of an occupation tax is not to be measured by the profits of the business taxed; but should be considered as one incident to local self government, and when, thus considered, it appears *prima facie* reasonable in

amount, courts of justice should not declare the ordinance void, unless and until it is clearly shown by competent evidence that the license charge is in fact unreasonable or confiscatory.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15; Dec. Dig. § 7.*]

Appeal from District Court, Hall County; Hanna, Judge.

Action by the City of Grand Island against the Postal Telegraph Cable Company. From a judgment for plaintiff, defendant appeals. Affirmed.

O. A. Abbott, of Grand Island, and Wm. W. Cook, for appellant. W. A. Prince and Arthur C. Mayer, both of Grand Island, for appellee.

BARNES, J. This action was commenced by the plaintiff, the city of Grand Island, against the defendant, the Postal Telegraph Cable Company, to recover an annual occupation tax for the years 1904, 1905, 1906, 1907, 1908, and 1909, amounting to \$240, with interest thereon, which was alleged to be due the plaintiff under an ordinance of that city by which it was provided: "That there is hereby levied an occupation tax upon each and every occupation and business carried on within the limits of this city, in this section hereinafter enumerated, to raise revenue thereby in the several different sums on the several different occupations hereinafter specified, and that each and every person or persons, firm, association or corporation carrying on the occupation or business herein mentioned within the limits of the city of Grand Island, shall pay into the city treasury annually the sum named as hereinafter provided as a tax upon said occupation, and for the purpose of raising revenue thereby." It was further provided by section 3 of the ordinance as follows:

"Under the provisions of this ordinance and the authority vested in the city council aforesaid, there is levied upon each and every person or persons, firm, association or corporation carrying on business in the city of Grand Island, Nebraska, an occupation tax as follows, to wit:

"Article 1. The sum of forty dollars per year on the business and occupation of receiving messages in this city from persons in the city and transmitting the same by telegraph from this city to persons and places within this state, and receiving in this city messages by telegraph transmitted within this state from persons and places within this state to persons in this city, and delivering the same to persons in this city, except the receipt, transmission and delivery of any such message to any firm, department or agency or agent of the United States, and the receipt, transmission and delivery of any such which are interstate commerce. The business and occupation of receiving, trans-

mitting and delivery of messages herein accepted are not to be taxed hereby."

The ordinance further provides that: "Whenever the treasurer shall deem himself unable to collect any tax by this ordinance levied after the same is due and payable, he shall so report to the city attorney and the city attorney shall therein bring an action in the name of the city in any court or before any justice of the peace, having jurisdiction, to the amount of the sum sought to be recovered by said action; the remedies hereby prescribed are not exclusive but cumulative and may be prosecuted at the same time."

Upon the trial in the district court of Hall county, without the intervention of a jury, there was a finding and judgment for the plaintiff for the sum of \$245 and costs of suit, and from that judgment the defendant has appealed.

The defendant has assigned and argued three grounds in support of its contention that the judgment of the district court should be reversed. First, the tax demanded is unreasonable and confiscatory; second, the tax violates the rule of uniformity and equality under sections 1 and 6 of article 9 of the state Constitution; third, the occupation tax in question trenches upon the commerce clause of the Constitution and laws of the United States.

[1, 2] We are of opinion that the second and third assignments of error are fully answered by *Western Union Telegraph Co. v. City of Fremont*, 39 Neb. 692, 58 N. W. 415, 26 L. R. A. 698. It seems to be conceded that the occupation tax ordinance in that case and the one in the case at bar are practically the same in form and substance. After citing the principal leading cases upon those questions and discussing the effect thereof, it was there held: "Under section 52, c. 14, art. 2, Comp. St. 1891, each city of the second class having more than 5,000 inhabitants has the power to levy a tax upon every business or occupation carried on within the territorial limits of the municipality, excepting alone those enumerated in the proviso clause of said section." It was further held: "Where a telegraph company is engaged in both interstate and intrastate business, an ordinance levying an occupation tax on that portion of such business which is carried on wholly within the state is not repugnant to section 8, art. 1, of the Constitution of the United States, since it in no way interferes with, or regulates, interstate commerce," and that "an occupation tax may be collected by ordinary suit, where the ordinance imposing the tax so provides." On a rehearing of that case (43 Neb. 499, 61 N. W. 724, 26 L. R. A. 706) the opinion was adhered to by consideration, and on the strength of *Postal Telegraph Cable Co. v. Charleston*, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871, where it was

said: "A city ordinance, made under power conferred by a state statute, imposing a license of five hundred dollars upon a telegraph company, which had accepted the provisions of Act July 24, 1866, c. 230, 14 Stat. 221, upon business done exclusively within the city and not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents, is an exercise of the police power, and is not an interference with interstate commerce." It follows that defendant's last two assignments of error cannot be sustained.

[3] In considering the first assignment, that the tax in question is unreasonable and confiscatory, we find from the record that defendant maintains an office in the city of Grand Island, where it conducts a large amount of interstate business and considerable intrastate business, but neglects and refuses to pay the occupation tax, that defendant's receipts for intrastate business for the years in question herein were \$1,333.17, and that the total tax sought to be collected for those years under the terms of the ordinance was \$240. It further appears that by a system of accounting or bookkeeping adopted by the defendant it was attempted to be shown that for some of the years in question the expense of conducting the intrastate business reduced the gross receipts to a trifle less than enough to pay the tax of those years. It was not shown, however, that the method of apportioning the expenses of defendant's entire business was the correct method, or that such apportionment was either just or equitable, and therefore we conclude that the evidence was insufficient to warrant a court of justice in finding arbitrarily that the tax was either unreasonable or confiscatory. The city clearly had the power to tax the business in question. The tax was uniform, in that it operated alike on all persons or corporations engaged in that business, and we are not aware of any case which holds that when the business transacted by one person or corporation of a class has proven largely remunerative, and the business of another of the same class was less remunerative, or was in fact conducted at a loss, a court of justice can for that reason declare an occupation tax ordinance void. We think no court should say as a matter of law that an occupation tax of \$40 per year upon each and every telegraph company doing business within the limits of the city of Grand Island is as a matter of law manifestly unreasonable and confiscatory. It may be said that the charge is *prima facie* reasonable. *Western Union Telegraph Co. v. Borough of New Hope*, 187 U. S. 419, 23 Sup. Ct. 204, 47 L. Ed. 240. The amount of an occupation tax is not to be measured by the profits of the business, but should be considered as one incident to local self-government—to super-

vision, to the expense incident to the issuing of the license, to the probable expense of inspection, regulation and such police surveillance as the municipal authorities can lawfully give to the location, erection and maintenance of poles and wires as provided by ordinance. In the absence of evidence which clearly shows that the license charge, in general effect, is such as to make it confiscatory, the ordinance must be upheld.

It follows that none of the defendant's contentions can be sustained, and the judgment of the district court is affirmed.

ENTERPRISE IRR. DIST. v. TRI-STATE LAND CO. et al. (No. 17,522.)

(Supreme Court of Nebraska. Oct. 18, 1912.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES (§ 135*)—APPROPRIATION OF WATER RIGHTS—REQUISITES.

Before the 1911 amendment (Laws 1911, c. 153, § 17) to section 18, c. 69, Laws 1895, and under the Irrigation Act of 1889 (chapter 68, Laws 1889), one who has constructed a canal for the purpose of carrying water for hire to be used upon the lands of others, and is ready and willing to furnish the water to such land-owners as will take it, has made the only application of water to a beneficial use that he can make, and his right to an appropriation continues as a developing right until all lands along the canal for which the water was originally appropriated use the same, provided, formerly, that the water be applied to the land within a reasonable time, and, now, within the time limited by statute.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 135.*]

2. CONSTITUTIONAL LAW (§ 80*)—DISTRIBUTION OF GOVERNMENTAL POWERS—JUDICIAL POWER.

The constitutionality of the Irrigation Act of 1895 and the provisions thereof creating the state board of irrigation and conferring on the board the right to determine priorities, reaffirmed, following *Crawford Co. v. Hathaway*, 60 Neb. 754, 84 N. W. 271; *Id.*, 61 Neb. 317, 85 N. W. 303; *Id.*, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; *McCook Irrigation & Water Power Co. v. Crews*, 70 Neb. 115, 102 N. W. 249.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 140, 143-147; Dec. Dig. § 80.*]

3. CONSTITUTIONAL LAW (§ 309*)—DUE PROCESS OF LAW—NOTICE.

Where a statute authorizes a proceeding under the police powers of the state affecting property rights and does not expressly provide for notice to be given to the property owner, the right to notice is implied and where a proper notice has been given, under a procedure authorized by the Legislature, and the party interested has appeared, he has not been deprived of any of his rights without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. § 309.*]

4. CONSTITUTIONAL LAW (§ 281*)—DUE PROCESS—PROCEDURE.

The Legislature has power to delegate the duty of formulating rules of procedure before the state board of irrigation, and the fact that

the method of procedure is not embodied in the statute does not render due process lacking in the proceedings of the board.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 880; Dec. Dig. § 281.*]

5. WATERS AND WATER COURSES (§ 19*) — APPROPRIATION OF WATER RIGHTS—DETERMINATION OF PRIORITIES—"CLAIMS."

In determining priorities of appropriation under the act of 1895, the transcript of posted and recorded notices transmitted by the county clerk to the state board of irrigation constitute the "claims" for adjudication.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 11, 12; Dec. Dig. § 19.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1202-1211; vol. 8, p. 7604.]

6. WATERS AND WATER COURSES (§ 240*) — APPROPRIATION OF WATER RIGHTS—DETERMINATION OF RIGHTS—ISSUANCE OF CERTIFICATE.

The limitation of 30 days within which to issue a certificate by the board of irrigation, under section 21 of the 1895 act, is merely directory. Such certificate does not constitute the adjudication, but is merely evidence thereof.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 240.*]

7. WATERS AND WATER COURSES (§ 19*) — APPROPRIATION OF WATER RIGHTS—DETERMINATION OF PRIORITIES—POWER OF BOARD OF IRRIGATION.

In determining priorities under sections 15-27 of the act of 1895, the board of irrigation, although it might recognize and determine existing conditions and limitations, was without power to impose new.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 11, 12; Dec. Dig. § 19.*]

8. WATERS AND WATER COURSES (§ 32*) — APPROPRIATION OF WATER RIGHTS — EVIDENCE.

Under the facts set forth in the opinion, *held*, that the right of the Tri-State Land Company to an appropriation, as successor in interest of the Farmers' Canal Company and Roberts Walker, was not lost by lack of diligence, nonuser, or abandonment.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 21, 22; Dec. Dig. § 32.*]

9. WATERS AND WATER COURSES (§ 19*) — APPROPRIATION OF WATER RIGHTS—NOTICE—RECORD.

The posting and recording of notices of "claims" to the waters of the state, under the Laws of 1889, c. 68, *held* to be a public record, of which all parties interested were bound to take notice, and with knowledge of which they were chargeable.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 11, 12; Dec. Dig. § 19.*]

10. ESTOPPEL (§ 93*)—APPROPRIATION OF WATER RIGHTS—DETERMINATION—ESTOPPEL.

After it had been adjudged that Roberts Walker had a valid appropriation to 1,142 $\frac{2}{7}$ cubic feet of water per second of time from the North Platte river, with priority dating from September 16, 1887, the Tri-State Land Company purchased all his rights in the appropriation and canal. It immediately began the expenditure of large sums of money in the enlargement and completion of the canal, and carried the same forward with diligence from year to year until it had expended nearly \$2,000,000. In 1906 it applied to and received leave from the state board of irrigation to construct a needle dam in the river for the purpose of conducting water into its head gate, and thereafter erected the same at large expense. There being

insufficient water in the river during the months of July, August, and September to supply the amount claimed by the Tri-State Land Company and also to supply the amount to which the plaintiffs are entitled, plaintiffs began this action in 1909 for the purpose of adjudicating priorities of the respective water users in the river, and procuring a decree that their rights are superior to those of the Tri-State Land Company except as to about 28 second feet, and for an injunction to restrain the use or diversion of more than that quantity of water by the defendants. *Held*, that since the plaintiffs stood by for more than four years with full notice and knowledge of the "claims" of the defendants to an appropriation of 1,142 $\frac{6}{7}$ second feet, and permitted defendants to expend nearly \$2,000,000 without objection or without notice of their claims to a prior appropriation, and without beginning an action to restrain the diversion of the water in excess of the amount which they concede defendants are entitled to, they are estopped, after the substantial completion of the canal and works, to maintain this action.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 264-275; Dec. Dig. § 93.*]

Hamer, J., dissenting in part.

Appeal from District Court, Scotts Bluff County; Hobart, Judge.

Action by the Enterprise Irrigation District against the Tri-State Land Company and others. From the judgment, the Tri-State Land Company and others appeal, and defendant the Mitchell Irrigation District files a cross-appeal. Reversed, and cause dismissed.

C. C. Flansburg, of Lincoln, and Wright & Duffie, of Scotts Bluff, for appellant. E. C. Calkins, of Kearney, amicus curiæ. Thomas M. Morrow, of Denver, Colo., and Wm. Morrow, of Scotts Bluff, for appellee Enterprise Irrigation District. Morrow & Morrow, of Scotts Bluff, for appellee Mitchell Irrigation Dist. H. N. Haynes, of Greeley, Colo., W. W. White, of Gering, G. J. Hunt, of Bridgeport, and Wilcox & Halligan, of North Platte, for other appellees.

LETTON, J. This action was begun on August 23, 1909, by the Enterprise Irrigation District claiming an appropriation of water from the North Platte river, under a claim made by the Enterprise Ditch Company in March, 1899, to whose rights the plaintiff has succeeded by purchase. A large number of other persons and corporations claiming appropriations of water from the North Platte river in Scotts Bluff and Cheyenne counties are made parties defendant. When the issues were finally made up, it appeared that plaintiff and each of the defendants except the Tri-State Land Company and the Farmers' Mutual Canal Company were interested in having the prayer of the petition granted, and that practically the same relief is sought by each of them against two defendants named. There is one exception to this general statement which will be hereafter noted. Throughout the opinion, therefore,

for convenience, the two latter named companies will be designated as defendants and all the other parties as plaintiffs. The state board of irrigation and the secretary of the state board will be hereafter termed the state board or the secretary, as the case may be.

The pleadings are exceedingly lengthy and involved. Therefore no attempt will be made to set them out in detail. The cause was tried upon the pleadings and upon an agreed stipulation of facts, so that the questions presented are practically questions of law.

The dispute may be summarized thus: The defendants claim an appropriation of water to the extent of 1,142 $\frac{6}{7}$ cubic feet prior in point of time to an appropriation by any of the plaintiffs, and an adjudication in their favor by the state board of irrigation to this extent. The plaintiffs' claim is that an appropriation to the extent of more than 28 feet never actually vested in the Farmers' Canal Company or its successors, and that by the actual beneficial use of water by the plaintiffs before the water had been put to beneficial use by the defendants, and before the canals of defendants had been constructed, plaintiffs acquired a prior right to all but 28 second feet of the water claimed by defendants. They further contend that, if the Farmers' Canal Company ever acquired an appropriation for the full amount, it had lost the same by nonuser. The defendants assert the validity of their appropriation, that it is prior in point of time to that of any of the plaintiffs, and deny its loss by nonuser or abandonment. They also plead an estoppel by reason of plaintiffs standing by with knowledge of their claim for years, and allowing them to expend vast sums of money in the carrying out of their enterprise without notice of any hostile or adverse claim of superior right until after the works were practically completed. At the close of the trial, the court found for each and all of the plaintiffs and cross-petitioners except the Mitchell Irrigation District, and rendered a decree which ascertained and adjudged the respective appropriations to which the parties were entitled, and established their respective priorities, without reference to the action of the state board in 1896 and 1897. The Tri-State Company and the Farmers' Mutual Canal Company were adjudged to have an appropriation of 28.57 cubic feet per second only, instead of 1,142 $\frac{6}{7}$ second feet as claimed, with priority dating from September 16, 1887. As to any excess over this amount if an appropriation was ever acquired, it had become lost by failure to apply the same to a beneficial use for a continuous period of more than 10 years. As to the Mitchell Irrigation District, the court found that because its canal heads in the state of Wyoming, and the water is diverted into it in that state, the court had no

jurisdiction of the subject-matter of its cross-petition, and the same was dismissed.

Much abbreviated, but preserving those facts we consider material to the controversy, the stipulation of facts upon which the case was submitted shows: That the lands are in the valley of the North Platte river, and that the amount of water flowing in the bed varies greatly at different times in the year. During April, May, and June the amount usually has been sufficient to supply all water necessary for irrigation to the canals thus far constructed. There are no tributaries between the head gate of defendants' canal and the head gate of the canals of any of the plaintiffs. If no water were diverted at defendants' head gate, the quantity of water flowing would not be materially increased or diminished when it reached the head gate of the lowest canal, belonging to a party to this suit. On the 16th of September, 1887, the Farmers' Canal Company, a corporation, posted a notice at the proposed point of diversion of its intention to divert from the North Platte river for the purpose of irrigation a quantity of water sufficient to fill a canal 40 feet wide on the bottom and carry water to a depth of 4 feet, and on the same day notice was duly filed and recorded in the office of the county clerk of Cheyenne county, which at that time included the territory now embraced in Scotts Bluff county. In March, 1888, the Farmers' Canal Company commenced the construction of the canal, and continued work on it until about the year 1890, at which time it was constructed a distance of about 10 miles. The ditch was then about 12 feet wide on the bottom just below the head gate. The first mile was about 6 feet deep, and was capable of carrying water to a depth of 2 feet. There was not more than 1,500 acres susceptible of irrigation from the canal as then constructed, and the capacity of the canal was not sufficient to carry water for more than 1,000 to 1,200 acres of land. On November 17, 1890, this company posted at the head gate and filed for record in the office of the county clerk of Scotts Bluff county a notice of its intention to divert water in addition to its former claim to the amount of 200,000 miner's or statutory inches. The notice also specified that the canal shall be 80 feet wide on the bottom with a slope of 1 to 1 and a depth of 8.84 feet at the point of the diversion with an average grade of not more than 2 feet per mile. In 1891 the canal company issued bonds secured by mortgage upon all its property, and sold about \$80,000 worth. In the spring of 1892 it resumed work on the canal with the proceeds of the sale, constructed a substantial head gate costing about \$5,000, and excavated the canal to a width of about 100 feet to a point 500 feet below the head gate, and from there to a point about 4,000 feet below to a width of 60 feet on the bottom, and from there to a point about 19 miles below to a width of 30 feet

on the bottom, and water was conducted from the river therein. The canal, as constructed, was capable of carrying water to a depth of 6 feet, and was of sufficient capacity to irrigate 30,000 acres of land. Twenty-five miles of the canal from a point below the 19 miles mentioned had been opened up at various places to the full width, and nearly one-quarter of the work thereon had been performed in detached sections, but had not been connected up with the 19 miles above. All this work was accomplished by June 1, 1893, at a total expenditure of about \$96,000, when the company ceased work on the canal because of inability to procure funds, except that it kept one team employed which continued excavation work until October, 1895. From that time the Farmers' Canal Company did no further work upon the canal. As then constructed, there were 5,661.5 acres of land susceptible of irrigation from the canal and other lands lying under the Enterprise and Ramshorn ditches to the amount of 2,540 acres which were also susceptible of irrigation from this canal had not the Enterprise and Ramshorn ditches been built to irrigate such lands. Prior to 1897 not more than 500 acres had been irrigated annually from the canal, prior to 1907 not more than 2,000 acres, in 1907, 5,000 acres, in 1908, 7,000 acres, in 1909, 10,000 acres, and in 1910, 20,000 acres of land were irrigated from the canal. In 1897 and 1898 work was done by the company and users of water with its consent in repairing the canal and protecting its banks and head gate. After work ceased, the company endeavored to sell its bonds and to exchange bonds with different contractors for the purpose of building a canal, which negotiations continued until after the mortgage upon the property was foreclosed.

The stipulation sets out with much particularity that at various dates in a period extending from January 14, 1888, until the 1895 act took effect, the other plaintiffs or their grantors, except the Steamboat Ditch Company and the Gering Irrigation District, each posted notices and duly filed and recorded the same, claiming various amounts of water from the river, and that each constructed canals and appropriated the amounts of water it now claims in the petition and cross-petition. The Steamboat Ditch Company made application to the state board of irrigation under the 1895 act on October 22, 1895, and the Gering Irrigation District on March 15, 1897, for permits to appropriate water. Permits were granted, their canals were constructed, proofs filed with the state board as to each of said claims, and a certificate was issued to the Gering Irrigation District, the priority dating from March 5, 1897. In May, 1895, the county clerks of the two counties in which the lands irrigated lie made transcripts of the notices of appropriation on file in their respective offices, and transmitted them to the secretary of the

state board, in whose office they were filed on May 31, 1895. After the transcript was filed, the secretary sent to each of the claimants named in the notices a blank claim to be filled out. A copy of this blank is attached to the stipulation. This blank is in form an affidavit, and sets forth the name of the claimant, the purpose for which water is claimed, the name adopted for the ditch, the source of the appropriation, its amount, the location of the head gate, the length of the ditch, the sections of land through which the canal passes, together with a plat showing the same, the portions of the canal completed or not completed, the dimensions of the uncompleted portions, total excavations, length of fluming required, material removed and fluming completed, estimated cost, expenditure thus far incurred, land to be irrigated, time of beginning work, when works were or will be completed, whether claims are made on account of application of the water to a beneficial use without objection or by posting notice and filing the same, when water was or will be turned into the ditch, acres actually irrigated and estimated to be irrigated, and the relation which the affiant bears to the ditch, canal, or other work.

On August 20, 1895, the state board adopted resolutions providing and establishing at large and in detail the procedure and practice of the board in ascertaining and adjudicating water rights already vested, and for the consideration of new applications for the use of water. It also provided for practice and procedure in case of the contest of claims. These rules provided for notice, and for hearings, rehearings, and appeals. Prior to June 5, 1896, the rules adopted by the state board were printed in full in pamphlet form, and as so established and published were accepted by the state board and its secretary in matters of procedure thereafter. On the 5th of June, 1896, the secretary mailed a notice with a copy of the rules to each and all of the parties to this suit or their predecessors in interest. This notice was as follows: "Office of State Board of Irrigation. Lincoln, Nebr., June 5, 1896. Notice. Notice is hereby given that the hearing in the matter of adjudicating rights to the use of water claimed prior to April 4th, 1895, within the watershed of the North Platte and Platte rivers, will be held for the several counties therein, by an officer of the state board of irrigation at the places and upon the dates indicated, as follows: [Omitting other counties.] For Cheyenne and Banner counties, in Bayard, on Tuesday and Wednesday, July 14 and 15, 1896. For Scotts Bluff and Sioux counties, in Gering, on Friday, July 17th, 1896, at office of O. W. Gardner. Claimants are expected to attend at hearings for their respective counties in order to furnish to the officer presiding at said hearing the necessary proofs, if any be required, to sustain their claims; otherwise said claims will be

dismissed. State Board of Irrigation. W. R. Akers, State Engineer, Secretary." This was the only notice forwarded by the board or its secretary to any of the parties to this action. On and prior to the 17th day of July, 1895, the owners of the Brown's creek, Chimney Rock, Castle Rock, and Alliance ditches procured to be filled out, verified, and filed with the secretary by some of the officers of their respective companies the blank forms sent out by the secretary. On July 14th and 15th the secretary at Bayard, Neb., made inquiries and took evidence as to the claims of the owners of Chimney Rock, Nine Mile, Alliance, and Logan canals, and the claim of the Belmont canal was submitted on the record without evidence. On July 17th the secretary made inquiries and took evidence at the office of O. W. Gardner in Gering, Neb., in reference to the claims of Yorick Nichols and Carrol Nichols and the owners of the Enterprise, Castle Rock, Minatare, Central, and Farmers' canals. No contest was made as to any of the claims. The evidence was reduced to writing, and made a matter of record in the office of the secretary.

The stipulation then sets out the evidence offered in behalf of the Farmers' Canal Company. This shows, in addition to the facts already stipulated, that the cash investment was something over \$100,000, and that the canal was designed to irrigate 80,000 acres, that the canal did not strike the large bodies of land until the lower end, and that the company expected to resume work in the near future, and were still negotiating in order to procure money. At this time, the secretary allowed the company 30 days in which to file a claim setting out specifically the lands they expected to water. No other hearing with reference to the above claims or either of them was ever applied for, ordered, or held, except that the Steamboat, Castle Rock, Belmont, and Alliance ditches had rehearings on their respective applications subsequent to April 7, 1897, without notice to other claimants. The Farmers' Canal Company, through an officer, filled out the blank claim affidavit, and filed the same on September 19, 1896, claiming 1,142 $\frac{2}{7}$ cubic feet per second of time with priority from September 16, 1887. On January 7, 1897, the secretary rendered an opinion on the claim of the Farmers' Canal Company, made the same a matter of record in his office, and forwarded a copy to the company, but no copy or notice of the opinion was sent or given to any of the other claimants for water. On the same day the secretary filed written opinions allowing the claims of the Enterprise, Minatare, Castle Rock, and Central ditches, and at various dates from January 8, 1897, to January 28, 1897, opinions were filed allowing the claim of the Nine Mile, Winter's Creek, Ramshorn, and Brown's Creek ditches, and adjudicating their respective priorities. On April 7, 1897,

the state board, without notice other than may be imputed by law, caused a resolution to be entered upon its record affirming the findings of the secretary as to the claims of these parties except Castle Rock, which was finally approved on September 22, 1897. None of the claimants were notified within 30 days of the adoption of this resolution. None of the plaintiffs acquired any knowledge or information concerning the same for several years after the adoption thereof. At various dates in August and September, 1898, other written opinions were filed as to the claims of the Belmont, Alliance, and Chimney Rock Ditch Companies, and on January 2, 1897, these opinions were affirmed by resolution as in the former claims. None of the opinions or resolutions and no certificates as to priorities or any other information with reference to claims was ever transmitted to the county clerk of the respective counties, nor were any of such documents ever filed or recorded, except the opinion with reference to the claim of the Farmers' Canal Company which was filed and recorded in the office of the county clerk of Scotts Bluff county on the 27th of December, 1905.

The stipulation then sets forth at length the default of the Farmers' Canal Company upon its bonds, the foreclosure of the trust deed; and the purchase at the foreclosure sale of all the property of the company by Roberts Walker on December 23, 1901. It also recites the filing of an application in the office of the secretary on April 14, 1902, by one William Frank to appropriate water for a canal to be built along substantially the same line, the filing of protests by that company, intervention by the Farmers' Irrigation District (which had also filed an application in June, 1902, for water to cover a part of the same territory), that a hearing was had, and the applications denied. That appeal was taken to the district court which reversed the board, and that on appeal to the Supreme Court of the state of Nebraska its decision was affirmed. It is also shown that by the final judgment of the district court the findings of the state board, "in so far as it finds the said Roberts Walker as the successor in interest of the Farmers' Canal Company entitled to an amount of water from the North Platte river not to exceed eleven hundred forty-two and six-sevenths (1,142 $\frac{6}{7}$) cubic feet per second of time, is hereby ratified and affirmed." In 1904 the Tri-State Land Company was organized, and in February, 1904, it entered into an agreement with Roberts Walker for the purchase of the property conveyed to him under the decree of the foreclosure, by which agreement \$80,000 was to be paid to him for the property in the event that the adjudication of the state board should be confirmed by the Supreme Court, and \$21,000 should be paid for the property if the judgment of the district court in the Frank Case should be affirmed. After the judgment of the Su-

preme Court, it received deeds and conveyances from Roberts Walker and from the Farmers' Canal Company to the property. In August, 1905, the Tri-State Company began the reconstruction and enlargement of the canal, and also began to excavate, reconstruct, and enlarge that portion of the canal lying below the 19-mile portion through which water had been theretofore conducted. In 1905 it expended in resurvey, reconstruction, machinery, tools, and labor \$133,066.46. In 1906 and 1907 work was prosecuted so that in the spring of 1907 the canal was constructed full size to a distance of 40 miles below the head gate. In September, 1906, application was made to the state board for leave to construct a needle dam across the river, which was granted in October, 1906, work begun, and \$8,000 expended thereon. In that year the company expended in enlargement, construction, deepening, and widening \$499,491.87. In 1907 the amount expended on dams, waste way, construction, etc., amounted to \$323,386.87, and the canal at the close of that year was completed for 60 miles, and was capable of irrigating 60,000 acres of land. In 1908 \$52,410.67 was expended, and in 1909 \$464,535.13 was expended, and at the close of that year the canal was capable of irrigating all of the land described in the opinion of the secretary and the claim of the Farmers' Canal Company. The amount expended in 1910 is also set forth, but this we deem immaterial under the issues. Before this action was begun, the Tri-State Land Company sold and conveyed to the Farmers' Mutual Canal Company all of its property, taking in payment therefor the stock of said latter company. It now controls a majority of the stock, but has sold parties under its canal some 25,000 shares.

The average flow of the North Platte river during the last half of July and in August, September, and October at or near the head gate of the canal of the Tri-State Company does not exceed 800 second feet, and frequently runs as low as 300 second feet; that in those months in 1910 the Tri-State Company diverted from 300 to 400 second feet, and during portions of the time this diversion exceeded all the water flowing in the bed of the river at that point; that while the Tri-State was diverting all the water flowing in the river at its head gate water had come to the surface below and was flowing in the river so that some of the plaintiffs received a specified part of the water they were entitled to. In July, 1910, the state board caused the head gates of the canals of all the parties to this action except the Tri-State Company to be closed, in order to allow the water to flow to an alleged prior appropriator whose canal is located near North Platte, Neb. Because of the rendition of the opinion on the claim of the Farmers' Canal Company and the resolution of the state board, said board refused to

close the head gate on the canal of the Tri-State, and the board claims that the Tri-State has a prior right to any of the parties to this action to divert 1,142 $\frac{1}{2}$ second feet as needed; that, unless restrained, the Tri-State Company will, under the direction and permission of the state board, divert the full amount of water claimed by it, even though the diversion consumes all the water flowing in the river. The irrigated lands have been used for the raising of diversified crops, but certain crops require irrigation during July, August, and September; that the crops which require irrigation during these months are the most profitable and remunerative; that, in case any of the lands under the ditches do not receive water during these months, the owners will be compelled to raise less remunerative crops, or will be compelled to procure reservoir water at an added expense. This terminates the stipulation of facts.

The questions involved in this case are of the deepest importance, not only to the parties actually before the court, but to every owner of irrigated land in the state of Nebraska, since the plaintiffs challenge all right and authority of the state board of irrigation to adjudicate priorities of appropriation under the act of 1895. If this contention be upheld, then more than a thousand adjudications of prior claims which have been made by that board since the time of its first organization until to-day, a period of over 16 years, are absolutely void. Moreover, whatever the conclusion of the court may be, it is almost inevitable under the peculiar circumstances of the case that one party or the other will suffer serious loss. It is therefore with a deep sense of responsibility and a keen appreciation of the serious results, not only to the parties before the court, but to a vast number of water users in the state of Nebraska, that we approach the consideration of the questions involved.

The appellants contend, first, that the district court had no jurisdiction to establish priorities, that being exclusively for the state board; second, that the rights of the defendants were fixed and determined by the state board in the Frank Case as affirmed by the Supreme Court, and that any attack thereon in a collateral proceeding can be of no avail; third, that there was no forfeiture; fourth, that by their own conduct the plaintiffs are estopped to assert any right as against the defendants' claim.

On the other hand, plaintiffs contend that defendants never acquired an appropriation for more than the amount of water allowed by the district court, for the reason that although the preliminary steps—the posting and recording of notice—were taken and the intention to apply water for beneficial use existed, yet the work was not prosecuted to completion with diligence, and water in excess of the amount allowed was not conducted to the place of intended use and

applied within a reasonable time. It is also contended that the Farmers' Canal Company had no vested appropriation at the time the Irrigation Act of 1889 was passed.

With reference to the claimed adjudication by the state board, it is argued, first, that that board never made a final adjudication or an adjudication intended to be final; second, that the board does not possess power or jurisdiction to enter an order or decree conclusively establishing rights acquired prior to the act of 1895, for the reasons that the entry of such an order would require the exercise of purely judicial powers which such board does not and cannot possess, and, further, that, if it is possessed of judicial powers, the method provided by the statute for adjudicating such rights does not constitute due process of law; third, that the manner in which the board proceeded did not constitute due process of law and its proceedings so far as they purport to be conclusive adjudications are absolutely void. It is also contended that the opinion in the Farmers' Canal Company's claim is void because it attempted to award an appropriation in excess of the claim made. The plaintiffs also deny that this proceeding is a collateral attack upon the adjudication of the board, and maintain that this is a direct attack upon an order made in excess of jurisdiction, and that the proceedings of the board were erroneous to the extent that it would be unconscionable to permit them to stand. It is further contended that, if any appropriation in excess of 28 second feet of water was ever acquired by the defendants, the same has been lost and forfeited by nonuser; and, as to the claim of estoppel, it is argued that the mere fact that plaintiffs remained silent and did not assert any hostile claim is entirely insufficient to constitute an estoppel. It is also maintained that the opinion of the state board in the Farmers' Canal Company claim did not purport to adjudicate a vested and completed appropriation for any definite quantity of water, and that the right of that company was limited by the opinion to water acquired for such lands as should be irrigated prior to September 1, 1905; that the limitation of the appropriation, if construed to be in excess of the jurisdiction of the board, if excised from the opinion, radically reconstructs it, and would render it either void or make it reach a result contrary to what was intended and declared; that, if construed as an attempt to adjudicate and perfect an appropriation of more than 7.15 second feet, such excess is unsupported by any recorded statement of claim or evidence, and was beyond the jurisdiction of the board; that, if it be assumed that the adjudication was valid, then the nonuser of any water in excess of 28.57 second feet, together with the use during 10 years by the other parties of all water in the river during low stages, has occasion-

ed by prescription a loss to defendants and a corresponding gain to plaintiffs in the order of their priority.

[1] Much of the argument in behalf of some of the plaintiffs discusses the question as to what constitutes an appropriation, and it is maintained with much force that there can be no valid and vested appropriation until the water diverted has been actually applied to a beneficial use. Many decisions of the courts of Colorado and other states are cited to uphold this contention. A different view is taken in the brief of counsel appearing for the Belmont Company and Alliance Irrigation District. Quoting and construing the statutes of 1889, he says: "The Legislature never meant to encourage any one to invest their money in an enterprise, supposedly for a public good, and then to take away from him or them their appropriation simply because the landowner did not take the water within a specified time. That was a provision of subsequent legislation. The principle of the application of water to land before the absolute vesting of the appropriation was not of the essence of the act."

* * * There is nothing in the act that in any wise indicates that water must be applied to land in order to make the appropriation absolute. The act provides that within a certain time after the posting of the notice actual work of construction must be begun and in good faith carried forward to completion, and that 'by completion is meant conducting the water to the place of intended use,' to such place on the line of the canal as the landowner desires to receive it into and carry it through his laterals. * * * The act of 1895 (section 28) speaks of the application of water to a beneficial use, or for beneficial purposes, but the act of 1889 nowhere does. After a canal was constructed under the prior act, therefore, and the water conducted through the same, if the owner at all times stood ready and willing to carry water for such landowners as would take it, he made all and the only application that he could make, and all that the act expected him to make, and his right to his appropriation continued as a developing right until all lands under the canal were using water, and thereupon ripened into a complete appropriation." Counsel for other plaintiffs also concedes: "In some states, by statute an appropriation is treated as effected when all the works are completed, the water is available for use, and there are lands reached by the system ready to be tilled by its occupants. In other states, by statute, the appropriation is not deemed complete until the beneficial use of water occurs. Such was the rule prior to legislation." See, also, sections 8, 9, 10, c. 68, Laws 1889, defining appropriation and completion of work. This subject is also considered to some extent in the monographic note to *Nevada Ditch Co. v. Bennett*, 60 Am. St. Rep. 777, 816 (30 Or. 59, 45 Pac.

472), where the commentator says: "The appropriation of water for sale to others is authorized by the statutes of the states in which it is valuable for that purpose, and in many instances the chief, and even the sole, object of an appropriator, is not that of any use by him in and upon his own lands or mines, but the sale of the water to others who have mines to be worked or lands to be irrigated. In cases of appropriation for the purpose of supplying water to others, we do not understand how it can be said that the use of the water is an essential element of its appropriation. If the intended appropriator constructs the works and appliances necessary for the diversion of the water and the carrying of it to points where its use is desirable and profitable, and has actually carried it there, or is ready and willing to do so, and offers it to all persons who are willing to pay for its use, we apprehend that his appropriation is complete, though the persons to whom it is thus offered refuse to receive or use it. They certainly cannot thus defeat the rights of the diverter." What the rights of the canal owner or of subsequent takers may be in such case it is unnecessary here to consider. A discussion as to this point may be found in *Sowards v. Meagher*, 87 Utah, 212, 108 Pac. 1112, 1117. This court has repeatedly said that a canal company is to a certain extent a public service corporation; that it does not own the water that it carries, but acquires by appropriation the right to divert the same and to charge a reasonable fee for the carriage of the same to the lands upon which it was designed to be used. *Paxton & Hershey I. C. & L. Co. v. Farmers' & Merchants' I. & L. Co.*, 45 Neb. 884, 64 N. W. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585; *Castle Rock I. C. & W. P. Co. v. Jurisch*, 67 Neb. 377, 93 N. W. 690; *McCook Irrigation & W. P. Co. v. Crews*, 70 Neb. 115, 102 N. W. 249. Without further discussion, we are content to adopt the views as to what constitutes an appropriation under the act of 1889 thus stated by counsel so far as relates to appropriation by a canal owner who is a carrier of water to be applied to a beneficial use upon land owned by others, with the reservation, however, that the water, formerly, must have been applied within a reasonable time in order to retain the first right to take it from the river, and, now, it must be applied within the time limited by the statute. Comp. St. 1911, c. 98a, art. 2, § 18.

One of the principal questions argued in the case is with respect to the validity and effect of the proceedings of the state board of irrigation when it undertook to adjudicate priorities under the command of section 16, c. 69, Laws 1895 (Ann. St. 1909, § 6795). We deem it unnecessary here to set out at length the provisions of the statute with reference to the adjudication of priorities or the order which was made upon the

claim of the Farmers' Canal Company by the state board of irrigation. These are all set out at length in the opinion in *Farmers' Canal Co. v. Frank*, 72 Neb. 136, 100 N. W. 286. In that case it was held: "The powers of the state board of irrigation exercised under section 16, art. 2, c. 93a, of the Irrigation Act of 1895, are quasi judicial in their nature, and an adjudication by it of a right of priority of appropriation of water made before taking effect of the act of 1895, after proper notice, is final, unless appealed from, and cannot be collaterally attacked." That case was an appeal from an order of the board refusing two applications for appropriations on the ground that appropriations already were in existence for the same lands. The court decided in effect that in a matter properly before it the board had allowed an appropriation as claimed, and that it was concluded by its own prior order and adjudication. We are asked by the plaintiff to re-examine this doctrine, which it is earnestly contended is entirely erroneous, and is based upon a misconception of the powers and duties of that board. In view of the fact that only a few pages of the briefs in that case were devoted to the discussion of this question, and that, as the writer recalls, but a short time was spent in oral argument, we have considered the learned and exhaustive arguments presented at this time, and will endeavor to discuss them as succinctly as we may.

[2] It is first contended that the state board does not possess power or jurisdiction to enter such an order or decree. It is argued that under the Constitution the government of the state is divided into three distinct departments—the legislative, the executive, and judicial—and no person or collection of persons being one of these parties shall exercise any powers belonging to either of the others, except as heretofore expressly directed or permitted. The same contention was first made in this court in the case of *Crawford Co. v. Hathaway*, 80 Neb. 754, 84 N. W. 271. The case was decided on another ground, but on this question in the opinion by Norval, C. J., it is said: "It is conceded by appellant that any right it may have in the premises arises out of the Irrigation Act of 1895 (Comp. St. 1897, c. 93a), and that without that act neither the appellant nor the numerous cross-petitioners have any right to the waters by them sought to be appropriated, unless the act of 1877 may have abrogated the common-law rights of riparian owners, a question to which we will advert later. If this irrigation act of 1895 is valid and constitutional, the trial court properly refused to try and determine the right of priority between these litigants, for the reason that the board of irrigation provided by that act is thereby given exclusive original jurisdiction to try those questions, and the same had not been by it heard or in any wise de-

termined. Appellant admits the truth of this proposition, but seeks to avoid it by contending that that portion of the act which erects a board of irrigation, giving it exclusive judicial powers is a derogation of section 1, art. 6, of the Constitution, in that the Legislature by said act sought to erect a new judicial tribunal in place of one of the regularly constituted courts of the state. Without deciding that that portion of the act is unconstitutional, we will assume its invalidity for the purposes of this case, for a cursory examination of the act will convince any one that the board of irrigation was one of the inducements for its passage, and it is so interwoven with the whole act as to make it impossible to declare this portion thereof invalid without also effecting the destruction of the remainder of the act." On motion for rehearing an additional opinion was written by Norval, C. J., 61 Neb. 317, 325, 328, 85 N. W. 303, 307. The opinion discusses, at length, the question as to whether the act is unconstitutional for the reason that judicial powers are conferred upon the board. The writer, though evidently of the opinion that, if the provisions with reference to the board fall, the whole act would fall with them, and implying, at least, that the act is valid, says the court expressly refused to decide this question because it "is not involved in the case at bar," and "it merely decides that, if the act in question is valid, plaintiff proceeded in the wrong forum." And it was said that, if unconstitutional with respect to the judicial powers of the board, it is void as a whole. A rehearing was had, and in an opinion prepared by Holcomb, J., the purpose of the act was stated more fully. 67 Neb. 325, 367, 93 N. W. 781, 795 (60 L. R. A. 889, 108 Am. St. Rep. 647). It seems that the action was brought by the plaintiff below to have adjudicated the rights of 12 persons to the use of water flowing in the White river, and to enjoin Hall, a riparian owner, from interfering with the head gates and works connected with an irrigating canal being constructed by the plaintiff. The trial court refused to try the case on its merits, for the reason that the water rights of the respective parties had not first been determined by the state board of irrigation. This court took a different view as to the rights of riparian owners, and the judgment was reversed and the cause remanded, with directions to try the case. The opinion of Judge Holcomb, after considering the question at some length, says: "Powers of the same general nature and character are conferred upon almost every administrative body known to the statute, and regarding which it has frequently been decided are of a quasi judicial nature, and yet such bodies are invariably held to be administrative, and to in no way conflict with the constitutional provisions regarding officers and bodies upon whom judicial power may be conferred. The state

board of transportation, as heretofore organized in this state, the constitutionality of which has been invariably upheld when attacked, in all respects, save as to the manner of passing the law providing for its creation, is a fair illustration of the validity of legislation of this character. Numerous other boards and offices created by statutes of an administrative character, and yet possessing powers of a quasi judicial nature, might also be referred to if thought to serve any useful purpose. For the reasons given, we are of the opinion that the sections of the act in question are not obnoxious to the Constitution on the objections raised by counsel, and that the authority of the board of irrigation to make the determinations contemplated by the act, and the requirement of its approval as a condition to the right of appropriation under the provisions of the act is a valid exercise of legislative power"—citing *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918. As to this point, Judge Sedgwick concurred, saying: "Those parts of the Irrigation Act of 1895 which provide for a board of irrigation, and the adoption of the rule of ownership of water by appropriation, are constitutional." In *McCook Irrigation & W. P. Co. v. Crews*, 70 Neb. 115, 102 N. W. 249, the constitutionality of the irrigation act of 1895 was again challenged, but the law was again sustained by the court.

In the face of these decisions, it hardly seems necessary to again consider the question but we have done so, and have examined further authorities. It is a matter of common knowledge that both in the administration of the laws of the United States and of the several states boards of individuals for the purpose of exercising executive or administrative functions, are often compelled to inquire into and determine questions requiring the exercise of powers judicial in their nature. Some of such determinations are often, by virtue of the statutes defining the functions and power of the tribunal, final and decisive, and others are made reviewable by appeal to the courts. For example the determination of the General Land Office with respect to controversies over claims to the public lands; the action of boards of medical examiners in granting or refusing diplomas to persons seeking to practice medicine; the determination by boards of county commissioners in this state that the formation of a drainage district will be conducive to public health or that the establishment of a highway is necessary; the judgment of a commission created by Congress to pass upon the validity of private land claims in territory ceded to the United States. Numberless other instances may be adduced. Whether reviewable by the courts or not, the exercise of such powers by tribunals of this nature has seldom been held to be a violation of the Constitution in this respect. *McGehee*, Due

Process of Law, 162, 368; *Reetz v. Michigan*, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563; *Gardner v. Bonestell*, 180 U. S. 362, 21 Sup. Ct. 399, 45 L. Ed. 574; *Bates & Guild Co. v. Payne*, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894; *People ex rel. Deneen v. Simon*, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175; *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; *State v. Thorne*, 112 Wis. 81, 87 N. W. 797, 55 L. R. A. 956; *Gee Wo v. State*, 36 Neb. 241, 54 N. W. 513; *Lincoln Medical College v. Poynter*, 60 Neb. 228, 82 N. W. 855. We are satisfied with the conclusion reached by this court in the cases cited which were followed in *Farmers' Canal Co. v. Frank*, 72 Neb. 136, 100 N. W. 286, and see no reason to change our conclusion in this respect.

[3] On the point that the action of the board in adjudicating priorities does not constitute due process of law for the reason that the statute does not specifically provide for notice to the parties, we are of opinion that, where a statute under the police power of the state authorizes a proceeding affecting the property rights of any person and does not expressly provide for notice to be given, the right to notice is implied, and that, where a proper notice has been given under a procedure authorized by the Legislature and a party has appealed, he has not been deprived of any of his rights without due process of law. And this is more especially the case where the proceedings are not in the nature of proceedings at law or in equity. The Constitution and the statute will be construed together as one law. *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.*, 17 W. Va. 812, 835; *Paulsen v. Portland*, 149 U. S. 30, 13 Sup. Ct. 750, 37 L. Ed. 637; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 334, 6 Sup. Ct. 57, 29 L. Ed. 414. See, also, *McGehee*, Due Process of Law, 82, and cases cited in note to *Sterritt v. Young*, 4 L. R. A. (N. S.) 169 (14 Wyo. 146, 82 Pac. 946, 116 Am. St. Rep. 994), beginning with page 173. Plaintiffs cite *McGavock v. Omaha*, 40 Neb. 64, 58 N. W. 543, to sustain their proposition. Although the writer of the opinion in that case seems to think that the authorities preponderate in favor of the view that notice must be prescribed in a statute in order that it be valid, the court expressly confines the holding to the proposition that, if notice is not given in condemnation proceedings, the right to bring an action for damages is not barred. This case, therefore, is no authority in support of the proposition.

[4] By the act of 1895 the Legislature committed the duty of prescribing the method of procedure with respect to such adjudications to the state board. That board formulated rules providing for notice, and allowing for hearings, rehearings, and appeals. We think the Legislature had pow-

er to delegate this duty to that body, and that the fact that the method of procedure was not embodied in the statute does not render due process lacking in the proceedings.

[5] It is contended that the opinion of the secretary was void because it was in excess of the claim filed by the company. It is assumed by the plaintiffs that the "claim" adjudicated by the board was the affidavit filed by the Farmers' Canal Company, but in this we think they are in serious error. The "claim" which the board investigated and which the statute mentions is "the claim for appropriation now on record" (section 16), and it is as to this claim and other claims based upon actual use without posting that "the method of determining the priority and amount of appropriations shall be determined by the said state board." Moreover, in the 1889 report of the state board the method of adjudicating claims is set forth, and it is shown that the copies of notices posted and filed transmitted by the county clerks and the claims presented to the board by parties who neglected to post notices, but who had previous to 1895 appropriated and used water, constituted according to its practice the claims to be adjudicated. We are of opinion that even if no blank claim affidavit had ever been filed by the company, as in fact none was filed until long after the hearing had been had, the board would still have had power and jurisdiction to determine the validity and priority of claims "now on record." The rules of the board clearly show that the affidavit filed by claimants under recorded notices was intended to be taken as evidence and not as a pleading. The opinion shows that "the claim * * * is made by virtue of posting three notices of appropriation at the proposed point of diversion," setting forth specifically the time of posting and recording each notice. The authorities cited to sustain the proposition that a judgment in excess of the claim made in the petition is void are therefore inapplicable, and the finding was not in excess of the claim made. In this connection plaintiffs' counsel say: "If we assume that the board had jurisdiction to hear and determine the claim of the Farmers' Canal Company as against other claimants to the use of water from said river, then we are perfectly willing to concede that, if the board made an adjudication that the Farmers' Canal Company was entitled to an appropriation greater than it was possessed of at that time, it would be final provided that said company claimed an appropriation to the extent of its allowance by the state board, and other claimants had knowledge thereof; but we do not concede that, if a claimant only asks for an appropriation of 10 cubic feet of water, the state board has jurisdiction to grant to him one thousand cubic feet of water, or, if he makes

application for a permit to appropriate or claims an inchoate or incomplete appropriation, that the state board has jurisdiction to allow a completed appropriation." By this concession in the brief it would seem that plaintiffs themselves take the same view as this court did in the Frank Case, since by the several notices which were matters of public record of which the plaintiffs were charged with notice the Farmers' Canal Company claimed an amount of water greatly in excess of the allowance made to it by the state board. The fallacy in the argument of plaintiffs' counsel is that the posted and recorded claims, which under the statute were the basis and the moving cause for the action of the board, are treated as of no force or effect, and the claim affidavit subsequently filed is assumed to be a pleading by which the authority of the board is limited.

It is insisted that because the act of 1895 provides "when the adjudication of a stream shall have been completed it will be the duty of the state board to make and cause to be entered of record in its office an order determining and showing the several priorities," etc. (section 19), the action of the board upon the claim of the Farmers' Canal Company was void for the reason that the adjudication on the stream had not been completed when the opinion was filed and affirmed. It is shown, however, that hearings had been had upon all the claims to the water from the North Platte river, that the secretary proceeded to examine and render opinions upon each claim, that on January 7, 1897, opinions were rendered by him upon the claims of the Farmers' Canal Company and others, and from time to time opinions were rendered on other claims. On April 7, 1897, the opinions upon these and other claims from which appeals were not taken were affirmed by resolution of the board. A hearing was had as to the claims of several of the plaintiffs, and a subsequent resolution adopted on January 2, 1899, affirming the opinions rendered on rehearing. It would seem that, while the secretary filed his opinion on each claim as soon as he had reached a conclusion with regard to its validity and priority, the board itself took no action in the matter until the investigation was completed, when it affirmed the opinions en masse. The fact that rehearings were granted in a few cases could not operate to divest the board of the power it possessed and had already exercised. Even if the decision was premature, we are inclined to the view that it would be a mere irregularity and not a void act.

Plaintiffs also argue that rule 3 of the board implies that the adjudication provided for was not intended to be final because it provides, "the first adjudication of the rights of claimants shall be conducted for the purpose of determining the validity of

claims," etc. This was what was actually done; that is, the validity of the claims, evidenced by the posted and recorded notices claiming water in specified quantities with priorities dating from the posting and recording thereof, was actually determined, and, when this was done, no further adjudication upon this point could be had. It appears, also, from an examination of the entire body of rules that no other hearing or adjudication is provided for thereby, except in cases of contests or rehearings before the secretary or the board.

[6] It is also contended that, because no certificate was issued within 30 days after the determination of the board, its adjudication was not final, and there was nothing from which any of the parties could have appealed to the district court. The limitation of 30 days in which to issue the certificate we think is merely directory. The certificate required by the statute does not constitute the adjudication, but is merely evidence thereof.

[7] It is next insisted that the language of the opinions themselves shows that they were not intended as final adjudications, that the board and its secretary followed the practice which seems to have prevailed in the courts of Colorado by which in proceedings to settle water rights decrees may be rendered both final and interlocutory in their nature; final and conclusive as to water which the court found had already been applied to a beneficial use, and conditional or interlocutory in that they recognized and declared the capacity of the canal and the quantity of water required for future use, and decreed a right to the same contingent upon the exercise of diligence in constructing the ditch and applying the water from the same to a beneficial use. It is not improbable that the board of irrigation had the Colorado practice in mind. There is no statute in this state authorizing such conditional decrees in a proceeding brought before the state board to ascertain and adjudicate priorities. The statutory duty of the board in this connection was to ascertain the rights which had become vested before the taking effect of the act of 1895 and the extent of such rights. Their powers were special and limited, and could not exceed the statutory grant. After the taking effect of the act of 1895, all water in the streams of the state, the right to appropriate which had not already vested, could only be set apart to individuals by obtaining a permit from the state board under the manner of procedure specified in sections 28 to 31, inclusive, of the act. In so far, therefore, as the board attempted to make a conditional order in such a proceeding, its action was unauthorized and nugatory. But it is contended that the holding in the Frank Case that the adjudication may be upheld with the ultra vires conditions eliminated is erroneous, and should be set aside. In Shaw

v. Kellogg, 170 U. S. 312, 18 Sup. Ct. 632, 42 L. Ed. 1060, the controversy was one with respect to the title to a large tract of land in New Mexico; it being contended it was mineral land subject to entry.* A congressional grant provided that the land should be selected by the grantees, and that it should be vacant and nonmineral. The land was settled by the claimants and the selection reported to the Land Department by the Surveyor General of New Mexico, whose duty it was to make the survey, and see that the lands were such as the grantees were entitled to select. The Land Department approved the survey, field notes, and plat, and noted on its maps that the land had been segregated, but the certificate of approval entered upon the plat filed in the land department by the Surveyor General, under the directions of that department, made the approval "subject to the conditions and provisions of section 6 of the Act of Congress, approved June 21, 1860." This is the act making the grant and providing that the land shall be "not mineral" in character. The court held that the limitation was beyond the power of the Land Department to impose, and that the title was valid, and not affected by the limitation, saying: "What is the significance of, and what effect can be given to, the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of Congress? We are of opinion that the insertion of any such stipulation and limitation was beyond the power of the Land Department. Its duty was to decide, and not to decline to decide, to execute, and not to refuse to execute, the will of Congress. It could not deal with the land as an owner, and prescribe the conditions upon which title might be transferred. It was agent, and not principal. Congress had made a grant, authorized a selection within three years, and directed the surveyor general to make survey and location, and within the general powers of the Land Department it was its duty to see that such grant was carried into effect, and that a full title to the proper land was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time." See, also, *Deffeback v. Hawke*, 115 U. S. 392, 406, 6 Sup. Ct. 95, 101 (29 L. Ed. 423), where it is said: "The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law

and the conditions it prescribed." By a parity of reasoning the only authority which the state board had was to adjudicate the validity of the claims filed and determine their priority, under sections 15 to 27 of the act. This being done, its powers and duties in the matter before it were ended and it had no power to impose conditions; no application for unappropriated water being before it for consideration.

Much is said in the plaintiffs' briefs upon the proposition that the powers and duties of the board are administrative in character, and the point is sought to be made that controversies between rival appropriators are not within the scope of its powers and duties. This may be granted, and yet it cannot help the plaintiffs here. The board was authorized under the statute to fix a time for determining the claims of all persons to the waters of the North Platte river which had become vested prior to April, 1895. Notice was given of the time and place of the hearing. All the parties to this suit or their predecessors in interest appeared. The board examined their claims, passed upon their validity, and fixed their priorities. This was absolutely essential for its own information in order that it might administer and distribute the unappropriated waters. By its rules it provided for the contest of claims made and for a hearing upon the same, and for appeals from the decisions of the secretary and board upon such contests. No contests being made as to the rights of any claimant, and no appeal being taken as to the amount and priority of appropriations the matter became settled so far as the board was concerned, and in its future dealings with the waters of the river, it was bound to follow the adjudications made and distribute the same in accordance therewith. The Supreme Court of Wyoming in *Ryan v. Tutty*, 13 Wyo. 122, 78 Pac. 661, in passing upon the statute of that state which grants powers to water commissioners and superintendents to regulate the use of waters by different appropriators according to their priorities, and provides that from the decisions of such officers an appeal lies to the state engineer, and from his decision to the circuit court, while holding that a decision of the commissioner and superintendent as to the right or use of water, although not appealed from is not an adjudication conclusive on the courts, says: "But it is to be observed that the statute clearly contemplates that such official action shall be based upon a record of adjudicated priorities. They [the officers] are not vested with arbitrary control, but are required to divide the water according to the prior rights of the interested parties. * * * Primarily the commissioner is authorized, whenever legally called upon, and it is his duty, to see that the water of a particular stream is diverted in accordance with the established priorities, and to prevent any one from taking more

water than he is entitled to take to the injury of others. He is not authorized to determine priorities. * * * The only object of his inquiry is that he may justly and fairly make a temporary distribution of the water in conformity with the adjudicated priorities." The italics are ours. It will be seen, therefore, that the question involved here is not decided in that case adversely to the views of this court, though it is cited by plaintiffs as upholding their contention. *Boulder & Left Hand Ditch Co. v. Hoover*, 48 Colo. 343, 110 Pac. 75. The same principle was announced by this court in *Farmers' & Merchants' Irrigation Co. v. Cozad Irrigation Co.*, 65 Neb. 3, 90 N. W. 951.

[8] In considering whether the appropriation had been lost by lack of diligence by nonuser or abandonment these facts must be considered. The stipulation shows that prior to June 1, 1893, about \$96,000 had been expended upon the canal. It was then of sufficient capacity to irrigate 30,000 acres of land within a distance of 19 miles from the head gate. The 25 miles below the 19 miles mentioned had been opened up at various places to a full depth, and nearly one-fourth of the construction work performed, but had not been connected up with the 19-mile section in which water was flowing. The canal was kept in repair until in 1898 by the Farmers' Canal Company, and thereafter by landowners along the canal with the consent of that company, until it was taken possession of by the Tri-State Land Company. Up to the time of the foreclosure of the trust deed, the company endeavored to sell additional bonds or to exchange them with different contractors for the purpose of extending and finishing the canal. The action to foreclose the trust deed securing the bonds was commenced in 1898. On December 23, 1901, the property was sold, and the sale was confirmed in February, 1902. On April 14, 1902, Frank filed his claim, which, if allowed, would have destroyed the appropriation except for water sufficient to irrigate 5,000 acres. This was followed by the claim and intervention of the Farmers' Irrigation District, which, if allowed, would have had the same effect. Protests against Frank's application were filed on behalf of Roberts Walker claiming the prior appropriation. These proceedings before the board and by appeal to the district and Supreme courts continued until November 18, 1904, when they were terminated by the judgment of the district court in pursuance of the mandate. This recites: "The findings and jurisdiction of the state board of irrigation, in so far as it finds the said Roberts Walker as the successor in interest of the Farmers' Canal Company entitled to an amount of water from the North Platte river not to exceed eleven hundred forty-two and six-sevenths (1,142 $\frac{6}{7}$) cubic feet per second of time, is hereby ratified and affirmed." And it was adjudged that Roberts Walker "has appropriated, and is

entitled to divert from the North Platte river for irrigation purposes, eleven hundred forty-two and six-sevenths ($1,142\frac{6}{7}$) cubic feet of water per second of time, and has a vested, subsisting right in and to said appropriation." The Tri-State Company was organized in January, 1904. In February, 1904, it made a contract with Roberts Walker to purchase the canal companies' property, the amount to be paid depending upon the result of the litigation. Relying upon the judgment, the Tri-State Company paid the full amount stipulated for the rights of Roberts Walker, and received a conveyance of the property which was recorded on February 21, 1905, in the office of the register of deeds in Scotts Bluff county. It immediately began the enlargement and construction of the canal, expending over \$100,000 that year. It pursued this work in 1906, and diligently and actively prosecuted the work until its completion, so that the canal is now capable of furnishing water for the entire 80,000 acres of land which it was constructed to serve. On September 13, 1906, it made an application to the state board of irrigation for leave to construct a needle dam across the river below the head gate of its canal. That it had a valid existing right was recognized by the state board at that time, when it granted leave to construct a needle dam in the river below its head gate for the purpose of diverting sufficient water into its canal, and this right has been since recognized by that body in its administration of water from the river.

It seems evident that the purpose to carry on the enterprise and construct the canal in its entirety was never abandoned by the owners, and it has now been carried to completion. It is probably true that no actual construction work was performed upon the canal for about 10 years, but from the time that the foreclosure suit was begun until the final decision in the Frank Case the title to the property and right to the appropriation were in such hazardous and uncertain condition that few men would have had the temerity to invest money to any extent in the further development of the plan. The enterprise was of such a nature as to require large expenditures and years of effort. While recognizing the rule that in the final analysis it is the application of water to a beneficial use within a reasonable time that conditions the power of the appropriator to retain his right to carry water, and that an appropriator of water to be carried to be used by others must carry on his works with diligence or lose his priority, we are convinced that, under all the facts in this case, it would be highly inequitable and unjust at this time to enforce a forfeiture on the ground of lack of diligence, nonuser, or abandonment. We are aware that it has been said that pecuniary difficulties are no excuse for failure to carry on such work, but an examination of the

cases in which this doctrine has been laid down shows that the facts are so dissimilar from the case at bar that we do not feel justified in adopting them as forceful authority in this case. This precise question may never arise again in this state for by an amendment made in 1911 to section 18, c. 93a, Comp. St., a time is specifically limited for the application of water and a method of procedure established by which the question of nonuser or lack of diligence is determined.

[9] Upon the question whether, even if the other questions be decided in favor of plaintiffs and against defendants, plaintiffs are entitled to the aid of a court of equity and are not estopped by reason of their own conduct, it is necessary to examine the facts as admitted by the pleadings and the evidence. All parties who took any part in the hearing knew, or were charged with knowledge, that notices had been posted by the Farmers' Canal Company and recorded in the office of the county clerk prior to the taking effect of the act of 1895. The act of 1889, by authorizing such filing and recording, constituted the same a public record, of which all persons interested were bound to take notice. These notices showed that the Farmers' Canal Company by the first claimed a quantity of water sufficient to fill a canal 40 feet wide on the bottom, and to carry water to a depth of 4 feet, and by the others water in addition to its former claim to the amount of 200,000 miner's inches, the canal to be 80 feet wide and 8.84 feet deep at point of divergence, slope 1 to 1, with an average grade not greater than 2 feet to the mile. Under section 32 of the act of 1895, 50 miner's inches shall be deemed equivalent to a cubic foot of water per second, so that in the aggregate the waters claimed largely exceeded in quantity the $1,142\frac{6}{7}$ cubic feet per second, which were allowed. Indeed, we find no specific denial of this knowledge either in the pleadings or the evidence. After denying knowledge of the filing of the claim of the Farmers' Canal Company with the board, of the hearing thereon, and of the opinion and resolution, the petition alleges, "nor did the plaintiff herein or its grantor acquire any knowledge whatever of the above mentioned transactions of said board and its secretary for several years after they had taken place." This is not a negation of knowledge of the claims of the Farmers' Canal Company, but only of knowledge of the transactions of the board. It also amounts to an admission that it acquired knowledge "several years after" 1896 and 1897 when the transactions mentioned took place. The expression "several years after" is vague and indefinite, and, since the language used must be construed most strongly against the pleader, it cannot we think be taken to mean a space of about nine years from July, 1896, when the hearing was had, and January, 1897, when the resolution passed, and the

time when the defendants began the work of reconstruction and enlargement on a large scale in August, 1905. So that there is no denial of want of knowledge even of the board's action before the latter time.

[16] The petition alleges that the defendants "have, through their duly authorized officers and agents, at various times asserted and declared that they have a right of appropriation of water from the North Platte river to the extent of 1,142³/₇ cubic feet per second of time, * * * which is prior to the right of appropriation acquired by this plaintiff." The time at which these declarations were made is not disclosed. But, if only recently made, the pleader would, no doubt, have taken advantage of the fact. The evidence also shows the mailing of notices and of printed rules of procedure to the plaintiffs and that at different dates from June 24, to October, 1895, the plaintiff's grantor and ten other claimants, including the Farmers' Canal Company, filed claims before the state board, and that on July 17, 1896, another claim was filed by the owners of the Minatare ditch. On the same day that the opinion on Farmers' Canal Company was filed by the secretary, he also filed opinions in the claim of the Enterprise Ditch Company, plaintiffs' grantor, and in those of three of the other plaintiffs. It is apparent, therefore, that all claimants who filed claims with or produced evidence before the board had notice of its transactions at least to the extent of being aware that a hearing would be had, and were also charged with notice of the rules of practice adopted by the board. The evidence also shows that some rehearings, presumably on request, were had upon claims. In April, 1902, the Frank application was filed with the state board. In June, 1902, the Farmers' Irrigation District also filed a like application. These applications were contested before the board. Appeal was taken to the district court and Supreme Court. Judgment was rendered on June 9, 1904, in favor of the Farmers' Canal Company upholding its prior right to the appropriation it claims. In 1905 the Tri-State Land Company expended \$133,066.46 in their work on the canal. In August, 1906, it began work on the enlargement of the 19-mile portion of the canal. In the spring of 1907 the canal was constructed to its full size for a distance of 40 miles below the head gate. In September, 1906, it was given leave by the state board to construct a needle dam across the river below the head gate, and this work was begun in October of that year. In all there was expended in 1906 in these operations the sum of \$499,491.87. In 1907 a new head gate was built, and the canal further extended at an aggregate cost of \$323,386.87. In 1908 the work was continued at a cost of \$52,410.67. In 1909 \$464,535.13 was expended in extension and improvement. In 1910 work was continued

on the head gates, needle dam, waste gate at a total cost of \$198,529.70. The total amount expended by the Tri-State Company in construction from February, 1906, to October 31, 1910, was \$1,651,138.41, of which amount over \$950,000 was expended before the original petition in this case was filed.

The question is whether the plaintiffs could stand idly by while the defendants, openly claiming a prior right to water sufficient to water the lands for which the appropriation had been allowed by the state board, expended nearly a million dollars in the work, and then, after the work was practically finished, enjoin the use of the water which the works were constructed to carry. Under section 10 of the act of 1895, the state board is required to prepare and render to the Governor biennially full reports touching all the matters and duties devolving upon the board by virtue of its office, and it is provided that 2,000 copies of the report should be printed and distributed according to the provision of the law providing for the printing of other state reports. This report is a public document of which we take judicial notice. The report for the years 1897 and 1898 contains a table showing the appropriations from the various streams of the state which had been allowed by the board since its organization in 1895, with the date of priority, and the amount adjudged to each appropriator. This table shows that the Farmers' Canal Company of Omaha had been granted an appropriation of 1,142.87 second feet with head gate located on section 3, town 2, range 58, Scotts Bluff county, with priority of September 16, 1887, with the conditions mentioned, and also shows the amount and priorities awarded other parties to this suit. This table is carried forward in each report published, so that the information therein contained has been available to all parties interested ever since early in the year 1900 until the present time. With all these facts before us, we must find that plaintiffs had knowledge of the posted and recorded claims of the Farmers' Canal Company, of the passage of the law of 1895, and of its provisions requiring the state board at its first meeting to make arrangements for adjudicating the priorities of all "claims for appropriation now on record"; of the notice to appear before the secretary, and of the rules prescribed by the board as to rehearing, appeals, and contests; of the practice of the board in deciding claims by written opinions, copies of which were mailed to each claimant; of the fact admitted in its reply that ever since the Tri-State Land Company became the owner of the canal "it claimed and still claims the right to 1,142³/₇ cubic feet per second"; of the vast undertaking of the defendants in the completion of the canal, of the extensive works of the Tri-State Company in building dams and head gates and in excava-

tion, comparable only to the construction of a railroad, and of the expenditure of hundreds of thousands of dollars in a sparsely settled country. Furthermore, the claims of all the parties except two originated by posting notices on the bank of the stream and recording copies in the office of the county clerk. When the state sought to determine for its own purposes the rights to the use of water which had vested, so that it might apportion that which still flowed in the river bed subject to appropriation, it gave all of these claimants an equal opportunity to assert their claims. They all took advantage of this privilege, their rights were determined, and they all acquiesced. Opportunity for contests of the claims of others which might interfere with the amount of water each claimed was afforded each of them under the rules adopted which were brought to their attention. They filed no contests, took no appeals, but remained apparently content to recognize the authority of the board. Relying on these conditions, as well as upon the adjudication, the defendants purchased the canal, worked upon it for years, and spent vast sums of money in its completion so as to irrigate the specific land which it was originally designed to reclaim. During all these years no claim of superior right to this water seems to have been made, though it must be said that, when the supply was short and while the defendants were not using the water, it was used by some of the plaintiffs, but this is customary, right, and proper when water is flowing in the stream unused. If a prior appropriator for carriage is not ready to use water, the use of it by another is not equivalent to an adverse user which of itself would give notice of a hostile claim. *Smith v. Duff*, 39 Mont. 374, 102 Pac. 981, 133 Am. St. Rep. 582; *Featherman v. Hennessy*, 43 Mont. 310, 115 Pac. 983; *Id.*, 42 Mont. 535, 113 Pac. 751; *Ison v. Sturgill*, 57 Or. 109, 109 Pac. 579, 110 Pac. 535; *Weidensteiner v. Mally*, 55 Wash. 79, 104 Pac. 143. Under these circumstances, and having this knowledge, it would be contrary to the plainest principles of equity if plaintiffs might stand silently by seeing the defendants engage in such a monumental work under claim of right, and utter no word of warning as to their own claims, which, if eventually established, would deprive defendants of the water which the canal was built to carry, condemn the whole enterprise to failure, and result in the absolute loss of the money expended. It would be manifestly inequitable and unjust to allow the plaintiffs after the works were practically finished and the money expended to insist upon claims which had they been asserted in good time would at least have put the defendants upon their guard, and have given them cause to pause and hesitate in their expenditures

until the validity of their title had been determined.

In *Fremont Ferry & Bridge Co. v. Dodge County*, 6 Neb. 18, the facts were that the company sought to enjoin the county from erecting a bridge which would take away tolls from a bridge built by plaintiffs. It was shown by the answer that a bridge had been erected by the county a part of which was out of repair and which it was about to repair. The court said: "The silence of the plaintiff when knowing its own rights, and having full knowledge of the steps taken by the defendants to build the bridge, will estop it after the completion of the work, or after large expenditures of money in construction had been made; for such silence lulls to rest, instead of warning to danger, and, in the language of the books, it becomes a fraud." In a case where a millowner entitled to the use of water as a riparian owner remained quiescent while an irrigation company expended large sums in constructing its canal, this court refused to grant an injunction against the use of the water for irrigation, saying: "It is clearly established by the proofs that the construction of the irrigating ditch was undertaken and carried out by the defendant company in good faith in accordance with the purpose of its creation, at a cost of many thousands of dollars, and in the belief on the part of its promoters and managing officers that it was entitled to divert the water of the Republican river. It is also practically undisputed that the plaintiff was from the first fully advised of both the undertaking and the purpose of the defendant, and it is certain that he interposed no objection thereto until after the substantial completion of the work. The rule which denies relief in equity to one who has slept upon his rights applies in all its force to cases where the defendant is engaged in a work of public interest. In fact, there is no principle more firmly established in the jurisprudence of this country than that a sutor who has by his laches made it impossible to restrain the completion or use of public works without great injury to his adversary or the public will be left to pursue his ordinary legal remedies." *Clark v. Cambridge & Arapahoe I. & I. Co.*, 45 Neb. 798, 64 N. W. 239. See, also, cases cited in each of these opinions. *New York City v. Pine*, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820. We think the cases cited by plaintiffs are so different in the facts before the court that they do not furnish any guide in this case. Whether the original adjudication was more than a mere administrative proceeding for the information of the board or not, and even if it should be held that the right to the full appropriation was lost by nonuser before the Tri-State Land Company fully constructed its canal, we agree that the plaintiffs are estopped to maintain this action.

In concluding, we may remark that the

evidence shows that at the time the state board made the determinations agriculture by irrigation was in its infancy in this state. The volume of water flowing in the North Platte river at various seasons of the year had not been definitely ascertained, and the actual flow was largely a matter of conjecture. A number of the determinations made, therefore, were for water in excess of the actual amount which experience has shown was available for the respective enterprises and which the works could convey. Perhaps this fact should be considered by the state board in times of scarcity, but this question was not presented, and is not decided. The true test of ultimate right to the water is its actual application to a beneficial use. The spirit and the letter of the statute compels the most rigid economy in the use of water so that the full benefit of it may be derived. If not in use by prior appropriators, others may use it. No dog in the manger policy can apply. If the nonuse is continued for the statutory time the right ceases, may be forfeited as the statute provides, and more diligent users may acquire the right to its use under the authority of the board. A landowner taking more than he is entitled to is liable in damages to those injured. No appropriator is entitled to more than can be beneficially used or more than the least amount which experience indicates is necessary for the production of crops in the exercise of good husbandry.

We find it unnecessary to consider the questions presented as to the rights of the plaintiffs and cross-petitioners between each other since the result reached eliminates the same.

The judgment of the district court is reversed, and the cause dismissed, but without prejudice as to any controversy between the plaintiffs and cross-petitioners

HAMER, J. (concurring in part and dissenting in part). I concur in the opinion so far as it reverses the judgment of the district court, and no further. I am unwilling to adopt the views expressed in the opinion, and dissent from them. I am unwilling that the case shall be dismissed, and dissent from so much of the opinion as directs its dismissal. Only that amount of water should be adjudged to the main ditch which can be applied to a beneficial use. The amount of water applied should be with due regard to the rights of other appropriators, and where the first appropriator fails to apply all the water within the limits of his appropriation to a beneficial use, and there is an excess of water which is not applied, the same shall be for the use of the next appropriator in the order of priority, and there should be no appropriation except for an actual beneficial use. The ditch should not be held entitled to appropriate water over and above that which is intended for an immediate beneficial

use, and water not so diverted and used should belong to the next appropriators in order of priority. As between ditches there should be a pro rata distribution of water based upon the amount each ditch has lawfully appropriated and applied to a beneficial use, and not exceeding the limit of each appropriation.

MORRISSEY v. WAIT, Secretary of State
(No. 17,839.)

(Supreme Court of Nebraska. Nov. 1, 1912.)

(Syllabus by the Court.)

1. ELECTIONS (§ 121*) — NOMINATIONS — FORMATION OF NEW PARTIES.

Under the provisions of section 45, c. 52, Laws 1907, providing for the formation of new political parties, it is not essential that the 500 electors who must be present at a mass state convention to form a new party shall be the identical 500 electors who are required to sign an agreement to form such new party and support its nominees at the next election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 115; Dec. Dig. § 121.*]

2. ELECTIONS (§ 120*) — NOMINATIONS — CONVENTION OR COMMITTEE.

Sections 39, 40, c. 52, Laws 1907, providing for the nomination of candidates by a convention or committee of a political party, apply to nominations by new parties for general elections, as well as to nominations made by previously organized parties to be filed at special elections, and for offices excepted from the provisions of the act.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 120.*]

3. ELECTIONS (§§ 125, 139*) — NOMINATIONS — FILING CERTIFICATE OF NOMINATION.

Where a new party is formed after the time fixed by the statutes for the holding of the regular primary elections, nominations for candidates of such party may be made by mass convention held under the provisions of section 45, c. 52, Laws 1907; and certificates of nomination of such candidates may be filed with the proper officer at the time specified in section 40 of the same act.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 117, 127; Dec. Dig. §§ 125, 139.*]

4. ELECTIONS (§ 10*) — CONSTITUTIONAL AND STATUTORY PROVISIONS — RIGHT TO FREE ELECTION.

In construing statutes relating to the exercise of the elective franchise and to the nomination of candidates by political parties, either at primaries or by conventions or committees, the court should construe doubtful or ambiguous statutes in the light of the constitutional provision that "all elections shall be free; and there shall be no hindrance or impediment to the right of the qualified voter to exercise the elective franchise." Const. art. 1, § 22.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 7; Dec. Dig. § 10.*]

(Additional Syllabus by Editorial Staff.)

5. ELECTIONS (§ 120*) — PRIMARIES — "CERTIFICATE OF NOMINATION FOR A NEW PARTY."

The phrase "certificate of nomination for a new party," as used in Laws 1907, c. 52, § 40, providing for the filing of "certificate of nomination for a new party," construed to mean the necessary certificate when nominated by convention and not by direct primary.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 120.*]

Appeal from District Court, Lancaster County; Cosgrave, Judge.

Action by Andrew M. Morrissey against Addison Wait, Secretary of State. From a judgment for defendant, plaintiff appeals. Affirmed.

Morning & Ledwith and A. M. Morrissey, all of Lincoln, for appellant. Grant G. Martin, Jesse L. Root, and C. C. Flansburg, all of Lincoln, for appellee.

LETTON, J. This is an appeal from a judgment of the district court of Lancaster county sustaining the right of the candidates of the Progressive party to have their names printed on the official ballots for the general election in 1912. The facts seem to be as follows: A mass convention to form a new party was held in Lincoln on September 3, 1912. On the afternoon of that day the meeting was adjourned until evening, at which time Governor Johnson of California was advertised to speak. A large number of people gathered and were present at the evening meeting. The chairman of the meeting read the proposed Progressive party platform, which was adopted by a viva voce vote. After the address of Governor Johnson had been delivered and a number of persons had left the hall, the persons whose rights are in dispute in this case were nominated as candidates of the Progressive party. On September 13, 1912, there were filed in the office of the Secretary of State five separate documents, each bearing the following heading: "We, the undersigned, qualified electors of the state of Nebraska, in mass convention assembled, do hereby associate ourselves together, and agree to form a new political party, to be designated the 'Progressive' party, and we do hereby agree to affiliate with said party, and to support its nominees at the next general election." These papers were bound together and filed with the Secretary of State as one document. The total number of signatures thereon exceed 500 in number. There was also attached an affidavit by one Van Meter in substance stating that he is a qualified elector; that at the mass convention at which the Progressive party was organized as a new party he had charge of and witnessed the signatures, and saw the electors sign the same and agree to support its nominees at the next general election; and that he verily believes them all to be qualified electors of the state. On the same day a certificate of nomination and oath in proper form were filed in the office of the Secretary of State, signed by Arthur G. Wray, as chairman, and John C. Sprecher, as secretary of the convention. Within three days after the filing of this certificate of nomination, the plaintiff, who is a candidate for the office of Attorney General on the ticket of the Democratic party, filed written objections challenging the legality of the formation of the new party and the

validity of the certificate of nomination. The Secretary of State fixed a time and place for a hearing and notified the several candidates. At the hearing evidence was taken, and the objections were overruled. A bill of exceptions was prepared and an appeal taken to the district court of Lancaster county, which affirmed and sustained the action of the Secretary of State.

[1] At the hearing before the Secretary of State, it was contended that the Progressive party was not legally organized, because the 500 persons who signed the agreement to form a new party were not identified as being members of the mass convention; but this contention was virtually waived at the argument before this court. There is no definite proof that 500 electors were not present at the convention. The evidence is conflicting on this point, but seems to preponderate in favor of the decision of the Secretary of State. Furthermore, there is no requirement in the statute that the 500 electors who sign the agreement must be the identical persons who were present at the convention. Appellant concedes that the primary law of 1907 is in force, except as modified by chapter 46, Laws 1911, but argues that the Progressive party is not entitled to a place upon the ballot at the 1912 election, for the reason that section 45, c. 52, Laws 1907, provides: "Such new party shall be entitled to have a separate party ballot at the next primary election held thereafter." He says in this connection that "the Legislature did not intend that such new party shall be entitled to a party ticket at the next *general* election," but that it would be entitled to a party ticket "*at the first primary held thereafter*," and that if the party was not organized in time to get its ticket in the field by means of a primary election before the general election it must wait until the next primary, so that it may get its ticket in the field through the regular channel. This view would bar these candidates from the 1912 election.

[2, 3] The provision for the organization of new parties is contained in section 45, c. 52, Laws 1907 (Ann. St. 1911, § 5905; Comp. St. 1911, c. 28, § 118s), which is a part of the law relating to primary elections. The section is lengthy, and will not be copied here in full. It contains the requirement hereinbefore referred to that there shall be 500 electors present at a mass state convention and the same number of signers to an agreement to form a new party. It also contains the foregoing quotation that "such new party shall be entitled to have a separate party ballot at the next primary," etc. This section, when considered with the requirement of the statute that all nominations be made by primary elections, might justify the thought that mass conventions can only form a new political organization, and that its candidates must be named at

the next primary; but a view of other sections of the statute leads to a different conclusion. Section 39 of the same act provides: "All nominations for candidates of any political party for office to be filed at a special election or any other office to be filled by the electors, excepted from the provisions of this act, shall be nominated by a convention or committee of their political party," etc.; and provides further: "It is the intention that the manner provided in this section for the nomination of officers named herein, by a convention or committee, shall apply only where such officers are to be chosen at a special election," etc. Section 40, in substance, provides that when nominations are made by a convention or committee, as provided for in section 39, the certificates of nomination to be filed with the Secretary of State shall be filed not less than 25 days before the election; but it provides further: "*Certificates of nomination for a new party* may be filed with the Secretary of State or the county or municipal clerk twenty-five or twenty or fifteen days before the election, as the case may require."

[8] Construing the several sections of the statute together, it seems clear that the "certificate of nomination for a new party" mentioned in section 40 applies to the necessary certificate when a nomination is made by convention, and cannot possibly apply to a nomination made by a primary election, as shown by the returns thereof, in which latter case no nomination certificate is required. The limit within which such nominating certificate may be filed with the Secretary of State is much later in point of time than that fixed for canvassing the returns and for the certification to the Secretary of State of the results of a primary election. It seems clear, therefore, that a new party may be formed after the time when it is possible for it to participate in the regular primary election.

[4] It is proper to say that it is the duty of the courts, in construing statutes providing for printing the names of candidates of both old and new political organizations upon the ballot, to do so in the light of the constitutional requirement that "all elections shall be free; and there shall be no hindrance or impediment to the right of the qualified voter to exercise the elective franchise." Const. art. 1, § 22. The Legislature may regulate the manner of nomination of candidates whose names shall be printed at public expense upon the official ballot. It may and patently does recognize the existence of political parties and the formation of new parties in this connection. Its regulations in this respect are within its powers, provided that they are reasonable and do not unnecessarily hamper or impede the right of a voter to vote for whomsoever he pleases at the general election.

We are of opinion that under the plain provisions of the sections of the statute re-

ferred to the candidates of the Progressive party are entitled to a place upon the official ballot. The opinion of the Secretary of State and the judgment of the district court are affirmed.

HAMER, J. (concurring). On the 28th day of September, 1912, the appellant, Andrew M. Morrissey, filed his petition in the district court of Lancaster county, alleging: That he was a qualified elector of Nebraska, eligible to the office of Attorney General, and nominated at the primary election, April 19, 1912, as the Democratic candidate for said office, and that he received his certificate of nomination and is entitled to have his name printed on the official ballot. That the defendant, Addison Wait, is the Secretary of State, and that it is his duty, as Secretary, to certify to the several county clerks the nominations of all candidates named by the political parties, in order that the names may be printed on the official ballot to be used at the November election. That at the time he was nominated there was no political party in Nebraska known as the Progressive party. That on September 13, 1912, there were filed in the office of the Secretary of State certain documents, reading: "Agreement to Form New Party. We, the undersigned, qualified electors of the state of Nebraska, in mass convention assembled, do hereby associate ourselves together, and agree to form a new political party, to be designated the 'Progressive' party, and we do hereby agree to affiliate with said party, and to support its nominees at the next general election." That there was appended to the said documents the affidavit of G. O. Van Meter, setting forth "that he is a qualified elector of this state, and that at the mass convention held in the city of Lincoln on September 3, 1912, at which the Progressive party was formed and organized as a new party, that he had charge of and witnessed the signatures, and saw the electors preceding sign the agreement to form said new party and to support its nominees at the next general election, and that he verily believes them all to be qualified electors in the state." That on said 13th day of September, at the time of filing the said alleged agreement, there was also filed in the office of the Secretary of State a document purporting to be a certificate of nomination for the several state offices involved and for presidential electors and for United States Senator, and designating said several candidates. The certificate of nomination certifies that at a mass convention held in the city of Lincoln September 3, 1912, a new party was then and there organized under the name of the "Progressive Party," and that not less than 500 electors participated in the convention. It was further alleged that there was a less number than 500, and that they were composed of persons of both sexes.

It is objected by Mr. Morrissey that there is no legal authority to hold political conventions to nominate candidates for any of said offices, and that the laws of the state prohibit the making of nominations for said offices by political conventions; that said pretended convention did not represent a political party casting 1 per cent. of the votes at the last general election; that the purpose of holding said convention was to disorganize existing political parties and to impair the value of the several nominations given to candidates for said several offices. It was further objected that the names of said candidates so claimed to be nominated should not be certified to the county clerks of the several counties as candidates of said Progressive party, and he objected to any certificate being made by the Secretary of State; that upon the filing of said objections the Secretary of State fixed a time for the hearing at 2 o'clock in the afternoon of September 18, 1912, and at said time and place the objector appeared in person and by attorneys, and said candidates also appeared by attorneys, and evidence was introduced and the matter was argued to the Secretary of State, who thereupon entered an order overruling said objections and filed a written opinion assigning his reasons therefor; that on the 2d day of October said cause was presented for review before the Honorable P. James Cosgrave, one of the judges of the district court of Lancaster county, who, after argument, entered an order sustaining the action of the Secretary of State and denying the relief prayed for in the petition; that it was found upon the stipulation and agreement between the parties that the Progressive party was duly organized, and its nominees duly nominated and legally certified to the Secretary of State; and that they are entitled to a place on the official ballot as the candidates of the Progressive party. It was therefore ordered, considered, and adjudged that the said order of the Secretary of State be in all things confirmed and approved, and that the proceedings of the said objector, Andrew M. Morrissey, be dismissed.

The case comes to this court to review the judgment rendered in the district court. It is contended that the judgment of the district court should have been in favor of said Morrissey and against the defendant, Wait, and that an order should have been entered enjoining the Secretary of State from certifying the names of said candidates to the several county clerks to be placed upon the official ballot.

It appears from an examination of the record that there was a mass convention held in Lincoln, at the city Auditorium, September 3, 1912, and that more than 500 electors were in attendance and participating. It is contended that in the afternoon there were less than 250 voters present in the Auditorium; but it further appears that later in the eve-

ning there was an immense audience. It is alleged that the electors came for the purpose of hearing Governor Johnson of California deliver a speech. It must be admitted that if a large number of electors were there that they may have been there for the purpose of participating in the convention, as also for the purpose of hearing the speech. It being admitted that a large audience had assembled, it is impossible to say for what particular purpose they were there. It is contended that the papers signed were in five separate parts, although they all read, in substance, the same way. It would not be expected that 578 names would all be placed on one long paper, when it would be much more convenient to put them on five papers. This objection is purely technical and without merit.

A consideration of the statute would seem to dispose of the questions presented. Section 118s, c. 26, Comp. St. 1911, would seem to furnish statutory authority for organizing a new party in the state. It provides: "Electors may form a new party. * * * In order to form a new party there shall be present at a mass convention electors to the number of at least five hundred (500) in a state convention." Section 117f, c. 26, Comp. St. 1911, p. 923, provides that "the name of no candidate shall be printed upon an official primary ballot unless at least thirty (30) days prior to such primary" nomination papers be filed.

It is provided by section 118n, c. 26, Comp. St. 1911, that "certificates of nomination for a new party may be filed with the Secretary of State or the county or municipal clerk twenty-five or twenty or fifteen days before the election, as the case may require." The foregoing section provides that this may be done in nominations that are made by convention or committee. The foregoing sections seem to dispose of the matter. It would seem not to be the intention of the primary act to abrogate the right of electors to form a new party; but apparently the thing contemplated is to perpetuate the right to form new parties. Whether it is essential that the particular 500 electors who must be present at a mass state convention to form a new party shall be the identical electors who are contemplated by the act as necessary to sign an agreement to form such new party may be debatable. Section 45, c. 52, Laws 1907, provides, among other things, that "in order to form a new party there shall be present at a mass convention electors to the number of at least five hundred (500) in a state convention," and electors to "at least the number specified shall sign an agreement to form such new party and support its nominees at the next election"; but the act does not say the same 500 at the convention shall sign the agreement. It would be a harsh construction of the act to say that the same 500 who attend the convention shall also sign the agreement.

There is a contention made that the purpose of forming the new party is not to bear immediate fruit, and that the new party is not to have recognition until after it has voted at a primary. This is not according to the American idea, and it would be eminently unjust. It would be directly in conflict with section 22 of the Nebraska Bill of Rights, which provides: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise."

Secretary of State Wait acted upon the evidence brought before him. His conclusion seems to have been a proper one. It was sustained by the district court of Lancaster county. It would be unfair to many thousand electors of the state of Nebraska to prevent them from voting for the candidates of their choice.

HELMING et al. v. FORRESTER et al.
(No. 17,372.)

(Supreme Court of Nebraska. Nov. 1, 1912.)

(Syllabus by the Court.)

1. EJECTMENT (§ 41*) — PROCEEDINGS — PARTIES.

Where parties entitled to the possession of land in arranging for the commencement of an action to recover such possession execute to their attorneys a quitclaim deed to an undivided half of such land under an agreement that such deed is to be held as security only for the services to be rendered by such attorneys in their behalf, such deed is in effect a mortgage, and does not render it necessary to join the grantees therein named as plaintiffs in such action.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 132-135; Dec. Dig. § 41.*]

2. APPEAL AND ERROR (§ 1195*)—REVIEW—SUCCESSIVE APPEALS—LAW OF THE CASE.

"The decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case, and, for the purposes of the litigation, settles conclusively the points adjudicated." *Anheuser-Busch Brewing Ass'n v. Hier*, 61 Neb. 582, 85 N. W. 832.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

3. TRIAL (§ 141*)—DIRECTION OF VERDICT—UNDISPUTED EVIDENCE.

In the trial of an action in ejectment, where the undisputed evidence clearly establishes the right of possession to be in one of the parties to such action, it is not error for the court to direct the verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.*]

4. INSTRUCTIONS BY COURT—NO ERROR.

The instruction given by the trial court examined, and held to have properly submitted to the jury the only controverted question of fact in the case.

Hamer, J., dissenting in part.

Appeal from District Court, Dawson County; Grimes, Judge.

Action by Charles G. Helming and others against Emil O. Forrester and others. From

a judgment for plaintiffs, defendants appeal. Affirmed.

E. A. Cook, of Lexington, for appellants. Douglas Deremore, of Omaha, C. E. Spear and F. J. Mack, both of Albion, and Edwin Vall, of Seward, for appellees.

FAWCETT, J. This case was advanced under our rules; it being its second appearance in this court. Our former opinion will be found reported in 87 Neb. 438, 127 N. W. 373. The facts are therein stated, and need not be repeated here. After the case was remanded, the petition was amended by adding the averment "that said plaintiffs have a legal estate in and are entitled to the possession of said described premises, and said defendants since the 25th day of December, 1901, have unlawfully kept, and still unlawfully keep, the plaintiffs out of the possession of said premises." A jury was impaneled, and the trial proceeded upon the theory that it was an action in ejectment.

The interest of Minnie C. Helming and of her heirs, defendants herein, the void character of the decree of the county court, the right of the plaintiffs to prosecute the action for possession, and the defense of the statute of limitations are all disposed of by our former opinion, which is now the law of the case. The only questions presented here which were not disposed of there, are: (1) The plea of a defect of parties plaintiff. (2) Did the district court err in declining to submit to the jury more than the simple question as to the value of the rents and profits of the land in dispute for the years 1905 to 1908 inclusive?

[1] The contention that there is a defect of parties plaintiff is based upon the fact that about two months prior to the commencement of the action the plaintiffs executed to their attorneys a quitclaim deed to an undivided one-half of the land in controversy. The uncontradicted evidence is that the deed was made and delivered as security only for the services to be rendered by counsel under their contract of employment. The deed was in effect a mortgage, and it was not necessary to join the grantees therein named as plaintiffs.

[3] The evidence being undisputed that the only interest defendants have in the land is as the surviving husband and son of Minnie C. Helming, deceased, who was the surviving spouse of William F. Helming, deceased, in whom the title and ownership of the property was vested at the time of his death, and that the plaintiffs are the heirs at law of the said William F. Helming, the right of possession of the plaintiffs was so conclusively established that there was nothing upon that point to submit to the jury. In the trial of an action in ejectment, where the undisputed evidence clearly establishes the right of possession to be in one of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

parties to such action, it is not error for the court to direct the verdict.

The judgment of the district court being in harmony with our former opinion, and being fully sustained by the evidence, it is affirmed.

HAMER, J. (concurring in conclusion and dissenting as to reasons given). As stated in the main opinion, our former opinion is reported in 87 Neb. 438, 127 N. W. 373, and it would not be necessary to write this opinion if it were not for the fact, as the writer conceives, that material matter is left out of the main opinion. It is stated in the first opinion that William F. Helming died intestate December 5, 1889, without issue, leaving a widow, Minnie O. Helming; that his mother, Charlotte Helming, and his brothers, Charles G. Helming and Otto B. Helming, and his sister Minnie Sill, were his only heirs; that his mother died soon thereafter, and that her interest descended to the brothers and the sister above mentioned, who were the plaintiffs in the action brought in the district court; that the widow made application to the county court under the provisions of chapter 57, Laws 1889, known as the "Baker Decedent Law," to have the homestead assigned to her; that action was taken by said court setting aside and assigning to her the homestead of the deceased, consisting of 160 acres of land; that she afterwards married Emil O. Forrester, and thereafter died leaving the defendant Paul Forrester, a minor, as the sole issue of that marriage; that during coverture Minnie C. Helming Forrester and her husband executed a mortgage on the premises to one Leflang, which mortgage was afterwards assigned by said Leflang to said Emil O. Forrester; that the mortgage and assignment appear on the records of said Dawson county; that the said Minnie C. Helming Forrester and the defendants have had possession of the premises ever since the death of William F. Helming; that the plaintiffs brought their action, alleging that they were the heirs of William F. Helming and the owners in fee of the premises, and that the proceedings by which the county court attempted to assign the title in fee to Mrs. Helming were void; that they prayed that the cloud upon the title created by the decree and the mortgage and assignment might be set aside for an accounting of the money paid by the defendants for the benefit of the estate and for the rents and profits received and for the possession of the premises; that the answer pleaded the decree of the county court, the passage of the curative act of April 9, 1895, the payment of certain mortgage indebtedness upon the land in reliance upon the title of Minnie O. Helming and title by adverse possession ever since the entry of the decree in 1890. The defendants prayed that their title be quieted and for general equitable relief; that the reply alleged that the curative act was void being in violation

of the Constitution of the state, and denied the other allegations in the answer; that, upon the trial in the district court, the court found that the defendants and Mrs. Helming had been in the adverse possession of the land since the 20th day of March, 1890; that since the date of the decree in the county court no right of plaintiffs in the real estate had been admitted or recognized by Mrs. Forrester or the defendants, and that the decree quieted the title in the defendants. The material matter left out of the main opinion is that after the case was remanded by this court to the district court of Dawson county, and there was an amendment thereafter made to the petition by adding the averment, "that said plaintiffs have a legal estate in and are entitled to the possession of said described premises, and that said defendants since the 25th day of December, 1901, have unlawfully kept * * * the plaintiffs out of the possession of the said premises," that the judgment rendered was upon this new state of facts, and therefore the further statement contained in the second paragraph of the syllabus of the present main opinion that "the decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case, and for the purposes of the litigation settles conclusively the points adjudicated," was wholly inapplicable. The old adjudication could not adjudicate a new set of facts. As the prayer to the first petition was to set aside the cloud upon the title created by the decree and the mortgage and the assignment thereof and for an accounting of the money paid by defendants for the benefit of the estate and for the rents and profits received, and for which the plaintiffs would in equity be liable, and to enter a judgment in conformity with such findings, and the prayer of the defendants was that their title be quieted and for general equitable relief, the case then made was one in equity to quiet title, and the amendment thereafter made was for "an execution for the delivery of the possession of said premises and costs" and changed the nature of the case to a law action.

In the present case the defendants' answers were, in effect, general denials and a plea of defective parties plaintiff, and the case was tried before a jury and proceeded apparently upon the theory that it was an action in ejectment, although it had formerly proceeded as an action to quiet title. The defendants requested an instruction submitting the ownership of the land to the jury, but the instruction was refused. The court submitted to the jury but one instruction which was to find the value of the rents and profits of the land in dispute for the years 1905, 1906, 1907, and 1908. There was a finding by the jury under the direction of the court that the plaintiffs were entitled to and should recover possession of the land, and there was also a

finding that the plaintiffs should recover \$800 for rents and profits. There was a judgment on the verdict for the plaintiffs. It will be seen that the action was treated by the parties and by the court as one in ejectment. The judgment rendered is a judgment in ejectment. The main opinion is also inadvertently without a statement that the original case, upon which the former opinion of this court was founded, proceeded as an action to quiet title while the second case after the amendment was made, and touching which the present opinion was rendered, proceeded as an action for the possession of real property.

It is contended by the defendants that it is, not a question whether this court held the decree of the county court to be void, but did Mrs. Helming assert rights under the decree of the county court which were recognized by the district court, however erroneously, and of which facts the plaintiffs, or part of them, had notice at that time. It is contended by the defendants that the statute of limitations would begin to run from that time, and that, if Mrs. Helming asserted her rights by reason of the decree, her adverse possession would begin at that date, not because of the decree, but because of the assertion of the right. It is also contended by the defendants that the second fact which enters into their case is the transfer by the plaintiffs to two of their attorneys of one-half of the land in controversy by quitclaim deed, and before the suit was originally commenced. This seems to be the only contention of the defendants answered by the main opinion. Defendants also contend that the amended pleadings have so changed the issues from what they were at the first trial that the defendants are in no manner bound by the opinion of the court touching the former trial. They earnestly contend that title to the land is in the defendants by adverse possession.

It is contended by the defendants that the petition and answer necessary to a decree in the district court should have been admitted in evidence. They were offered by the defendants and their admission was denied by the trial court. It is claimed that they were competent evidence because they showed an assertion of absolute title to the land in controversy by said Minnie C. Helming under the said decree. It is claimed that by the proceedings of the district court direct knowledge was brought home to the plaintiffs that Minnie C. Helming was not claiming simply a life estate in the land, but that she was claiming an absolute title in fee. It is contended by the defendants that from the time Mrs. Helming filed her answer in the district court in the case brought by Charles G. Helming for an order to sell the real estate to pay debts that the plaintiffs knew that she was holding the land claiming to be the owner in fee, and that this was

sufficient to support the running of the statute of limitations in her favor, except the one concerning the quitclaim deed to counsel Deremore and Mack. These contentions of the defendants do not seem to be answered in the main opinion. There is seemingly a mistake in suggesting that they were adjudicated in the former case, because, for the reasons stated, they would not have been adjudicated. Our court has held that the statute of limitations begins to run as to the right to quiet title as soon as an action might be brought for that purpose; that such action may be brought before the expiration of a life estate and as soon as the right accrues to the remainderman. It is perhaps confusing that there should be such a distinction between the time when the statute begins to run as to the right to quiet title and when it begins to run as to the right to acquire possession. Whether this should be may be debatable. It is clear that the rule laid down by this court provides a time when the statute begins to run as to the right to quiet title, and still a different time when it begins to run as to the right to recover possession, but in each case dependent upon the time when the right accrues. In the instant case it is the opinion of the majority of the court that the statute did not begin to run as to the right to recover possession until Minnie C. Helming died, when her life estate was extinguished. It may be contended with a degree of plausibility and force that as soon as Minnie C. Helming claimed title as against C. G. Helming, who was trying to sell the land as an administrator, and claimed that she was the owner of the property, and that she had acquired it by decree of the county court under the Baker Decedent Act, and that the district court had ratified her claim, that then, because of these things, the statute of limitations should begin to run. It is claimed that the principle announced in *Hobson v. Huxtable*, 79 Neb. 334, 112 N. W. 658, and on rehearing, 79 Neb. 340, 116 N. W. 278, should determine this case. That case involved the consideration of a petition, pleadings, and evidence, showing that one Annie E. Hobson died August 17, 1888, intestate, leaving her surviving husband, John H. Hobson, and her children, John J., aged 1 year, Roy J., aged 7 years, Ida Belle, aged 14 years, and George W., aged 18 years; that at the time of her death she was "seized" of a quarter section of land upon which she had resided with her husband and family for several years preceding her death; that the land did not exceed in value over and above incumbrances \$2,000, and constituted the family homestead, if occupying it as a family residence was a sufficient selection under the homestead law; that on October 27, 1888, one Palmer was appointed as administrator of the estate of the deceased, and in May filed his petition under the statute for license to sell lands to

pay debts; that such license was granted by the district court and the premises were sold October 24, 1890, to one Charles Huxtable, a defendant, and the sale was confirmed and the administrator conveyed the premises to the purchaser who went into possession under his deed; and that his wife remained in actual possession until the final judgment of the court, and the prayer of the petition was for a decree declaring the administrator's deed to be void. The defendants Ida Belle and George W. Hobson filed an answer admitting the allegations of the petition, the death of John H. Hobson, and asserting title in themselves, and asking that their rights be investigated, and that the defendants Huxtable be ejected from the premises. Against these defendants Hobson there was a plea of the statute of limitations by the defendants Huxtable. There was a decree in the district court quieting title in the four Hobsons subject to the lien of a mortgage which had been paid by the money received from the purchaser at the administrator's sale. The Huxtables appealed. They contended that the use of the property as a family home was insufficient to show that the homestead was selected with the consent of the wife, and as to the defendants Ida Belle Hobson and George W. Hobson it was contended by the Huxtables that more than 10 years had elapsed since they became of age, and that, therefore, they were barred by the statute of limitations. This court held that it would be presumed from the use of the property as a homestead that the wife consented to such use, and held that, upon the death of the wife, the homestead descended to the husband during his life, and upon his death in fee to the children, and that the license of the administrator was void, though the proceedings were regular. It was held that section 57, c. 73, Comp. St. 1905, provides "that an action may be brought and prosecuted to final decree, judgment or order, by any person or persons, whether in actual possession or not, claiming title to real estate against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate," while section 59 contains the further provision that "any person or persons having an interest, remainder, or reversion in the real estate shall be entitled to all the rights and benefits of this act." It was contended by the attorney for the defendants Ida Belle Hobson and George W. Hobson that the claim set up in their answer was to be considered as an action in the nature of ejectment, and that such an action could not accrue to them during the life of John H. Hobson, the life tenant. The defendants Huxtable contended that since the Huxtables did not claim under John H. Hobson, and could not claim to be the owners of his interest for life, an action by the heirs to ob-

tain possession could have been as well maintained before as after his death. In the first opinion this court says: "We are, however, unable to regard this suit as an action in the nature of ejectment. The plaintiff's suit was to quiet title, and, if we admit this claim of the defendants Ida Belle and George W., we are committed to the anomalous proposition that two tenants in common can join in an action which shall be on the part of one an action to quiet title, and on the part of the other an action in ejectment." This court then further says in the first opinion that the two actions are incompatible; that they require different methods of trial and a different judgment at the end of the trial. In the first opinion, at considerable length, the court emphasizes the impossibility of joining two such diverse actions, but in the second opinion, delivered on the rehearing, this court said that if a remainderman, not being under disability, failed for 10 years after his cause of action accrued to commence his suit, then that he would be barred by the statute of limitations from maintaining his action to quiet title, and that, if the remainderman should be under a legal disability when the cause of action accrued, the statute would not commence to run against him until the disability was removed, and the court held: "The remainderman's estate in the homestead will not support an action in ejectment during the lifetime of the life tenant, and the statute of limitations will not commence to run against that possessory action until the demise of the surviving spouse." In the seventh paragraph of the syllabus in the second opinion this court announced the doctrine: "In an equitable action to set aside a deed, where the right of possession is in issue and depends upon principles of equity that must necessarily be determined by the court, it is the duty of the court to determine the right of possession, if all parties in interest are before the court, and put the parties entitled thereto into possession." Now, in that case it was not the petition which demanded possession. That seems to have demanded that a deed be declared void, but the defendants Ida Belle Hobson and George W. Hobson in their answer and cross-petition prayed the court to put them in possession. They were in court alleging facts which entitled them to bring ejectment, and they insisted that the court should render a judgment putting them in possession. By the first opinion in the case they were denied the claim which they made and which had been granted them in the district court, and a judgment of the district court was reversed as to them and their action dismissed: the court remarking: "It is a practical as well as a legal impossibility to join two such diverse actions." In the second opinion no such difficulty was encountered, and the opinion was unanimous. The writer of the

former opinion concurred in the opinion upon the rehearing. In the latter opinion it was said that more than 10 years intervened between the majority of the defendants Ida Belle and George W. Hobson on the one hand, and the commencement of the action on the other, and therefore that the statute of limitations barred the action of the said defendants Hobson to quiet their title to the real estate involved (*First Nat. Bank v. Pilger*, 78 Neb. 168, 110 N. W. 704, 126 Am. St. Rep. 592; *Holmes v. Mason*, 80 Neb. 448, 114 N. W. 606), and therefore that the district court erred in quieting their title to the said real estate; but, as they were before the court demanding the possession of their part of the land, the only relief they were entitled to, and the court had the right to award that possession, it would do so (*Albin v. Parmele*, 70 Neb. 746, 99 N. W. 646); that all the allegations in the petition were admitted in the answer and cross-petition; that the claim was made by the cross-petitioners that they were entitled to the immediate possession of the land, and that they were kept out of that possession by their codefendants, the Huxtables, and asking judgment ejecting the Huxtables; that the allegations of the petition and cross-petition were to be considered together, and that, so considering them, the defendants Huxtable were advised of the nature and extent of the claim made by the Hobson heirs, both plaintiffs and defendants; that the plaintiffs prayed for equitable relief and possession and the defendant heirs for possession only, and that the court would read the petition and cross-petition together, and the allegations of the first pleading might be considered to aid the lack thereof in the other. *Railway Officials & Employés' Accident Ass'n v. Drummond*, 56 Neb. 235, 76 N. W. 562. The former opinion in this court was vacated and also the decree of the district court, and a decree was entered in this court and in conformity with the opinion rendered upon the rehearing.

Minnie C. Helming died in December, 1901, and, until that event, an action in ejectment could not be maintained to recover possession of the premises because she had her life estate therein as the surviving spouse of William F. Helming. As the right of any plaintiff to maintain an action for the possession of said premises could not accrue until that time, the statute of limitations did not begin to run until that time was reached. The petition in this case was filed June 25, 1908, and the amendment thereto containing the allegation concerning the plaintiffs' alleged possessory right to the premises was made by leave of the court February 28, 1911. It will therefore be seen that the 10 years required for a bar against the plaintiffs' action had not expired at the time of the amendment to the petition, and the action was therefore well within the time. Under the rule in *Hobson v.*

Huxtable, supra, the cause of action for the possession of the property having been brought within 10 years from the termination of the life estate, it was not barred.

But in the opinion of the writer it is not a question of whether Mrs. Minnie C. Helming had a good title by reason of the proceedings in the county court, and by reason of the proceedings in the district court in which C. G. Helming was prevented from obtaining a license to sell the homestead for the payment of alleged debts against the estate. If Mrs. Helming asserted that she was the owner of the property, and claimed the property by a title ever so inadequate, the statute of limitations ought to have begun running at that time, and in that event her heirs would be the owners of the property. It may be argued that, as her claim was based upon an insufficient and unauthorized proceeding, therefore everybody would take notice that she had nothing. But she did have possession, and she was claiming the title. As this court has construed the law in *Hobson v. Huxtable*, supra, no action for possession could be brought against Mrs. Helming as long as her life estate continued, and therefore no action could be brought for the possession of the premises. That is undoubtedly the law, but that is still not an answer to the question as to whether Mrs. Helming had no right to claim possession by reason of an inadequate and insufficient title, and, if she did exercise such a right, whether the statute would not then begin to run. There is danger that this court may have confused the existence of an actual legal right with the right of an unfounded claim of possession. Mrs. Helming forfeited nothing by reason of making her unfounded claim. The lawful claim of possession may originate in an unauthorized possession which cannot be legally defended. The running of the statute of limitations determines the right and not the legality of the claim.

At the trial of the instant case Charles G. Helming testified, as shown by the abstract, that "on January 4, 1908, myself, my brother, and sister made deed for an undivided one-half interest in this land to Douglas Deremore and Fred J. Mack. We made the deed as a guaranty for the attorneys' pay in this suit and a previous one. We executed and delivered the deed to them to secure the attorneys for their pay in this case. I will say in the previous case and all cases, all cases that might come up concerning this land." This testimony is not disputed in any way. It appears to be a fact that a quitclaim deed was made to secure the attorneys their fee. This deed was made to secure the attorneys their fee in case they succeeded in winning the suit. Unless the defendants have in some way been misled to their prejudice by the quitclaim deed to Deremore and Mack, it is difficult to understand why they have any legal or moral

right to shelter themselves behind the technical alleged rule which would forbid inquiry concerning what the deed actually was as between the parties and the purpose for which it was made. In *Stall v. Jones*, 47 Neb. 706, 66 N. W. 853, this court held: "In this state a deed absolute in form passes the legal title, although intended as security for a debt, and for most purposes treated as a mortgage." In the same case it is said: "But in this state a deed absolute in form, although intended as security and in general treated as a mortgage, passes the legal title to the mortgagee"—citing *Gallagher v. Giddings*, 33 Neb. 222, 49 N. W. 1126, and *Harrington v. Birdsall*, 38 Neb. 176, 56 N. W. 961. But in these the question was not raised as it is raised in this case simply as a bar to prevent the assertion of a right otherwise considered as well founded in law and equity. In this same case of *Stall v. Jones*, Commissioner Irvine, delivering the opinion of this court, cited *Shubert v. Stanley*, 52 Ind. 46, *Trull v. Skinner*, 17 Pick. (Mass.) 213, and *Carpenter v. Carpenter*, 70 Ill. 457, to show that, when the mortgagor voluntarily surrenders the defeasance or abandons the payment of the debt, the conveyance then becomes absolute, and vests complete title in the mortgagee. In *Gallagher v. Giddings*, supra, there was neglect by plaintiff after a decree in his favor permitting redemption to pay the money due and thereupon the petition was dismissed. It will be seen that in all these cases there is something to be done before the title of the mortgagee becomes absolute. Section 10,855, Ann. St. 1911, reads: "In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof." The quitclaim deed given in the instant case was treated by the parties to it as a mortgage, and was so intended by them. We know of no reason why the defendants should be allowed to have it considered as an absolute conveyance contrary to the intention of the parties to it. Section 29 of the Civil Code provides: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 32." The plaintiffs are the real parties in interest, and therefore have the right to prosecute the case.

I dissent from the second paragraph of the syllabus because the same is not applicable to this case. When the former opinion was delivered, the issues under the pleadings were not the same as they are in the instant case.

I dissent as to the time when the statute of limitations should begin to run under the possession and claim of right to possession by Mrs. Helming, but under the rule laid down in *Hobson v. Huxtable*, supra, reluctantly concur in the judgment of affirmance which will have to be rendered.

ARENDS v. GRAND RAPIDS RY. CO.

(Supreme Court of Michigan. Nov. 8, 1912.)

MASTER AND SERVANT (§ 180*)—INJURIES TO SERVANT—FELLOW SERVANT ACT—"RAILROADS"—STREET RAILROADS.

Fellow Servant Act (Pub. Laws 1909, No. 104), abolishing the defense of fellow servant in actions for injuries to railroad employes, is entitled "An act to prescribe the liability of common carrier railroad companies to their employes," and section 1 of the act makes it applicable to every common carrier railroad company in the state. Held that, since street railroads are common carriers, the word "railroad" was sufficiently broad to include street railroads, and that the act was therefore not limited to commercial railroads, but included street railroads as well.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 359-361, 363-368; Dec. Dig. § 180.*

For other definitions, see *Words and Phrases*, vol. 7, pp. 5899-5908; vol. 8, pp. 7777, 7778.]

Error to Superior Court of Grand Rapids; William J. Stuart, Judge.

Action by Richard Arends against the Grand Rapids Railway Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ.

E. A. Maher, of Grand Rapids, for appellant. Kleinhans & Knappen, of Grand Rapids, for appellee.

BIRD, J. While in the service of defendant, as a conductor on one of its street cars in the city of Grand Rapids, the plaintiff was injured. He concedes that his injuries arose through the negligence of the motorman, his fellow servant, but insists that his case does not fall for that reason because it comes within the fellow servant Act No. 104 of the Laws of 1909. The contention of defendant is that the act applies only to railroads that are incorporated under the general railroad act, and that it has no reference to street railways. The sole question, therefore, presented for our solution is whether the act applies to street railways.

The title of the act is, "An act to prescribe the liability of common carrier railroad companies to their employes." The express language of section 1 of the act makes it applicable to "every common carrier railroad company in this state." It has been many times held by the courts that the term "railroad" is broad enough to include street railways. *Johnson's Adm'r v. Railway*, 10 Bush (Ky.) 231; *Lieberman v. Railway*, 141 Ill. 140, 30 N. E. 544; *Mechanicville Street Ry. v. Boston & Maine Ry.*, 171 N. Y. 589, 64 N. E. 511, 59 L. R. A. 489; *Rafferty v. Railway*, 147 Pa. 579, 23 Atl. 884, 30 Am. St. Rep. 763; *Katzenberger v. Law*, 90 Tenn. 235, 16 S. W. 611, 13 L. R. A. 185, 25 Am. St. Rep. 681; *Savannah, etc., Ry. v. Williams*, 117 Ga. 414,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

43 S. E. 751, 61 L. R. A. 249. The last case cited is especially interesting because the act there construed was one which made railroad companies liable to one servant for injuries inflicted by the negligence of a fellow servant. It has also been held that street railways are common carriers. 36 Cyc. 1348; 5 Am. & Eng. Ency. of Law, 481.

I am of the opinion that this construction should prevail in this case, inasmuch as there is nothing in the context of the act to indicate that it is to be restricted to any particular class of common carrier railroads. Had the Legislature simply used the word "railroad" instead of "every common carrier railroad," there might be room to argue from previous legislation in this state that it had reference only to the general railroad act, but, when it in express words includes every common carrier railroad, we must assume that the Legislature intended it to include street railroads. This construction seems to be strengthened by section 3 of the act, wherein the Legislature itself undertook to define what it meant by the term "railroad company": "Sec. 3. The words 'railroad company,' as used in this act, shall be taken to embrace any company, association, corporation, company, or person managing, maintaining, operating, or in possession of a common carrier railroad in whole or in part within this state," etc. It is clearly indicated by this section that the term "railroad company" was not to be construed as applying to companies incorporated under the railroad act only, but was intended to apply to every railroad which is a common carrier. The object of this legislation was to change the fellow servant rule, and make all companies or persons coming within the act liable to their servants for personal injuries inflicted on them by the negligence of their fellow servants. No good reason suggests itself why the act is not as applicable to street railways as steam railways. Counsel argue that the difference in construction, operation, rolling stock, and motive power furnishes a reason for saying it applies to one, and not the other. This argument would have had more force in the early days of street railways when these differences were more marked than they are at the present time. With the adoption of a dangerous motive power, heavier rolling stock, and increased speed by the street railways has come an army of employes who are daily subjected to hazards not unlike those encountered on steam railroads. It is not unreasonable to assume that the Legislature in the passage of this act recognized these changes, and the added risks which have come with them and used the term "every common carrier railroad" to include them within the protection of the act. If the Legislature did not so intend, it was most unfortunate in using a term within which street railways could be so easily included. Further, it is reasonable

to conclude that, had the Legislature not intended the act to apply to street railways, it would have made an exception of them. It failed to do so, and it is not the province of this court to make an exception where the Legislature has made none. The rule of construction is that the exception, if any, shall appear in the act. *Johnson v. Railway*, 10 Bush (Ky.) 231.

The judgment of the trial court will be reversed, and, as the question was raised by demurrer, the defendant will be given an opportunity to plead.

DEAKE et al. v. UNITED STATES EXPRESS CO.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. CARRIERS (§ 228*)—FREIGHT—ADMISSION OF EVIDENCE.

In an action for the value of a bull calf shipped by express, in which the evidence showed that the calf made a lunge while in the crate, broke it and escaped, evidence that the calf was quiet and gentle while on plaintiff's farm, and that a bull calf did not become vicious until two years of age, was material on the question whether the escape was due to innate viciousness.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.*]

2. CARRIERS (§ 228*)—FREIGHT—ACTIONS FOR LOSS—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

In an action for the loss of a bull calf shipped by express which broke out of the crate en route, evidence held not to show negligence in accepting the calf for shipment in an insufficient crate.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.*]

3. CARRIERS (§ 215*)—FREIGHT—LOSS—NEGLIGENCE.

Plaintiff shipped a bull calf by express, which broke out of its crate en route, and was lost. The express company had carried calves to other points in similar crates constructed by plaintiff without injury, and carried the calf in question safely a part of the way, when it became restless and broke out of the crate and escaped. Held, that failure to tie the calf at such time was not negligence of the express company.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 923; Dec. Dig. § 215.*]

Error to Circuit Court, Washtenaw County; Edward D. Kinne, Judge.

Action by Clayton E. Deake and others against the United States Express Company. Judgment for plaintiffs, and defendant brings error. Reversed without new trial.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, BLAIR, STONE, and OSTRANDER, JJ.

E. B. Norris, of Ann Arbor, for appellant. J. F. Lawrence, of Ann Arbor, for appellees.

KUHN, J. This action was brought to recover the value of a bull calf shipped by plaintiffs from Ypsilanti for delivery to one Gardner at Barryton, Mich. It was agreed that the calf was of the value of \$80, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

freight was paid on that valuation. The calf escaped at the city of Detroit on the evening of the 9th day of March, 1911, and was not delivered to Gardner nor returned to the plaintiffs. The calf was delivered to the defendant in a crate constructed by plaintiffs, at which time they received a receipt for the calf, and signed a live stock contract, section 6 of which contains the following: "The shipper hereby agrees that the responsibility of the express company shall be that of a forwarder only, and not that of a common carrier, and that the express company shall not be liable for the conduct or acts of the animals to themselves, or to each other, such as biting, kicking, goring or smothering, nor for loss or damage arising from the condition of the animals themselves, or which results from their nature or propensities, which risks are assumed by the shipper. The shipper hereby releases and discharges the express company from all liability from delay, injuries to or loss of said animals and paraphernalia, from any cause whatever, unless such delay, injury or loss shall be caused by the negligence of the agents or employes of the express company, and the shipper agrees that in no event shall the liability of the express company exceed the following amounts." The calf went safely from Ypsilanti to Detroit over the electric line, and was transferred to the union station for shipment over the Pere Marquette Railroad to Barryton. When the calf arrived at the Union station, one of the defendant's employes moved a hand truck to the express wagon backed to the platform, and, having mounted the express wagon in front of the calf, placed his hand on the crate, intending to draw the crate and the calf off the express wagon to the hand truck, when the calf made a lunge towards him, and then, striving to turn about in the crate, broke the crate, and fell off the express wagon to the ground, and, regaining his feet, ran down Third street, and was wholly lost.

The calf was 10 months old, and weighed about 400 pounds. The crate was made after the pattern of one received by plaintiffs from Pennsylvania, and, when they delivered it to defendant, they considered it was a safe and secure crate, but upon seeing it upon the dock thought it was a little too large. They have shipped two other animals. "I shipped one to Sturgis, Mich., and also one to a place beyond Lansing. The bull I shipped to Sturgis was five to six months old, and the one shipped to Lansing was just a little over a year old. I shipped them in crates by the United States Express Company." One of defendant's witnesses testified: "They drove up there with the wagon, and this crate on the wagon. The calf was not tied in the crate, and the crate was a little large. The calf could turn around and get a pry on the crate, not clear around, but partly round. He did turn

partly around, and, as soon as pressure was made on the crate, it went to pieces. * * * The driver attempted to get up on the wheel to push him off, and he tried to turn around to get the driver and burst the crate. Q. Can you state what the condition of this bull was at this time as to excitability or viciousness? A. He was in a very high state of excitement, very vicious." Another testified: "Q. State how the bull appeared to you? A. He acted vicious when he came there, when I got onto the truck he made for me. Q. In a mild or savage manner? A. In a savage manner. * * * Q. You think he turned around and broke the crate? A. Yes, sir. Q. So that crate was too large, was it? A. A little bit." Defendant's witness H. D. Schantz testified: "I live in Detroit. I am master of transportation of the United States Express Company, and I have been in that position for a year and a half. It is the custom of the defendant when it transports animals to have the shipper crate them. It is our custom and practice not to tie animals in the crate for the reason that the animal is liable to choke itself. * * * We are not in the habit of accepting animals not crated. I would have refused to accept the animal if it had not been crated. If the crate was not properly put up, I would have refused to accept it. If the crate was a good substantial crate, we would have paid no attention to the size of it."

Plaintiffs gave testimony tending to show that this bull calf was quiet and gentle on the farm, and that a bull did not become ugly under two years of age.

At the close of the testimony, counsel for defendant made the following motion: "I ask the court to direct a verdict for the defendant for the following reasons: (1) The defendant was not an insurer of the animal that was shipped from Ypsilanti to Detroit, and is only liable to ordinary care and diligence. (2) There is no evidence in the case that goes to prove that the defendant is guilty of any negligence whatever. It appears by the uncontradicted evidence in the case that the bull became excited and broke from the crate and ran away. This act on the part of the animal was an inherent vice and proper to his nature and the defendant is not liable therefor." The motion was denied and exception taken. The case was submitted to the jury and a verdict returned for plaintiffs.

[1] Defendant relies for a reversal upon the first, second, and seventh assignments of error. "First. The court erred in allowing the witnesses Oliver L. Deake and Mrs. Clayton Deake to testify as to the disposition of the bull calf while on the farm of the plaintiffs." It is argued that the character and conduct of the bull upon the farm had no bearing upon whether he became ugly and vicious when he arrived at Detroit. We think the testimony was material upon the

question whether the conduct of the bull at Detroit was due to an innate, vicious tendency, or to the natural inclination of a confined animal to escape, particularly when being handled by strangers in a wholly unaccustomed manner. Second. The court erred in refusing to grant the motion made by the defendant.

The court substantially instructed the jury that defendant was not liable as an insurer, but was only required to use ordinary care and diligence. The court further instructed the jury as follows: "The Express Company is not an insurer against loss and injury resulting from the inherent nature, viciousness, or habits of the animals themselves. In the transportation of live stock, the rule of liability is varied somewhat, yet the defendant is always bound to take notice of and recognize the known habits, propensities, and disposition of the animals, and that they will constantly endeavor to escape and they may escape, and the carrier is bound to take measures and use all reasonable effort to prevent injury or escape; and, if the injury or escape of any such animal could have been prevented by ordinary care, then the defendant would be liable. Where it is contended that the loss, injury, or escape was the result of the vice of the animal so being transported, then it must be made to appear that such vice of the animal was the sole proximate cause of such loss or injury. Now, gentlemen, there has been some evidence that there was a shipping contract made between the parties here at the time of the shipment. I don't think that is of any particular importance in this case, and I say to you, if no contract of this kind had been made between the parties, nevertheless the defendant would not be liable if the bull broke the crate by reason of his inherent vice and propensity." If there was any negligence upon the part of the defendant, it consisted in accepting the calf improperly crated or in failing to properly tie the calf in the crate. As to the crate, counsel for plaintiffs say: "No one contended that the defendant had furnished or was obligated to furnish the shipping crate in question, only this and nothing more. The defendant, if it found the crate on inspection to be insufficient, was bound to reject the shipment or abide the resulting consequences." Plaintiff Clayton Deake testified: "When the bull got to Ypsilanti, after being transported from my farm, he got a little nervous. He seemed to be all right while I was transporting him, and his condition when I left him at Ypsilanti was all right, for he had quieted down. I helped put him on the car. One of the express company's men assisted me. All the railroad men were there. He was a little nervous when he got to Ypsilanti. He tried to get out of the crate, and tried to turn around. Mr. Norris: The crate seemed to be

strong enough to hold him? A. It did hold him. Q. He did nothing at Ypsilanti which would indicate that your crate was not sufficient to carry him through to Detroit? A. No, sir. I believe one of the express company's men was there when I put the calf in the car. The agent did not tell me to put him in the car, but that was according to the contract. I helped load him, but the consignee was to help unload him. What I saw there did not excite in my mind the necessity for taking any further precautions about the crate in any way. One of the defendant's men knew about whatever was exhibited there."

[2, 3] There was no defect in this crate other than its size, and, when the calf "tried to get out of the crate and tried to turn around," it held him, and plaintiff Clayton Deake did not think there was any necessity "for taking any further precautions about the crate in any way." Instead of supporting a finding of negligence in accepting the crate, the plaintiffs' testimony tends to disprove such negligence. The defendant had carried a calf to Sturgis and one to Portland for plaintiffs, in similar crates constructed by plaintiffs, without injury to the animals. It carried the calf in question safely to Detroit, and failure to tie the bull after arrival at Detroit, where it was noticed it was restless and excited, and practically at the same time broke away, is not, in our opinion, an act of negligence on the part of the defendant. The circuit judge should have granted defendant's motion to direct a verdict on the ground that there was no evidence in the case to prove that the defendant was guilty of any negligence whatever. It is unnecessary, in view of the foregoing, to consider the other assignments of error.

Judgment should be reversed, and no new trial granted.

ONEN v. HERKIMER, Mayor, et al.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. MUNICIPAL CORPORATIONS (§ 739*) — INVADING PRIVATE PROPERTY—LIABILITY.

A municipality may not invade or cause the invasion of private property.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1556, 1557; Dec. Dig. § 739.*]

2. MUNICIPAL CORPORATIONS (§ 846*)—INJURIES FROM SEWAGE—"IRREPARABLE INJURY"—INJUNCTION.

A city actually appropriating a narrow strip of land of an individual, and casting on his land the entire sewage of the city, having a population of 5,000, causes "irreparable injury," justifying relief in equity (citing 4 Words and Phrases, p. 3772).

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1772-1795; Dec. Dig. § 846.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. INJUNCTION (§ 135*)—APPEAL AND ERROR (§ 954*)—TEMPORARY INJUNCTION—REVIEW—DISCRETION.

Ordinarily the granting of a temporary injunction rests in the exercise of a sound discretion, and orders are not reviewable in the absence of an abuse of discretion; and a complainant denied a temporary injunction need not appeal therefrom, but may obtain appropriate relief by appeal from an adverse decree.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 304; Dec. Dig. § 135; Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954.*]

4. MUNICIPAL CORPORATIONS (§ 846*)—SEWERS—IRREPARABLE INJURY—INJUNCTIVE RELIEF.

Where a city appropriated to its own use a strip of land of an individual, and expended upwards of \$50,000 on a sewage system, notwithstanding it received notice from the individual objecting to the appropriation and the throwing of sewage on his premises, equity, at the suit of the individual, would grant an injunction, though great loss and inconvenience to the city would result therefrom; but the injunction would not be made operative until the expiration of a fixed period, to enable the city to take steps to protect its rights.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1772-1795; Dec. Dig. § 846.*]

Appeal from Circuit Court, Cass County, in Chancery; L. Burget Des Voignes, Judge.

Suit by Anna F. Onen against George R. Herkimer, Mayor, and others. From a decree of dismissal, complainant appeals. Reversed.

Complainant is the owner of an 80-acre farm, located some distance outside the corporate limits of the city of Dowagiac, through which runs a stream known as Dowagiac creek. Defendants are, respectively, mayor, aldermen, members of the board of public works, of said city, and contractors engaged in constructing a public sewer for the use of the inhabitants of said city. The farm in question has been in the possession of complainant or members of her family since 1883. Complainant owns the entire bed of the stream at the point where the sewer enters.

Upon learning of the intention of the defendants to construct said sewer and discharge its contents upon her land, complainant caused notice to be given to defendants that she would resist the right of the city to so locate its sewer, and would enjoin such action. Defendants paid no attention to complainant's protest, but commenced the construction of the sewer.

The first work was done at the outlet, where a retaining wall was built in the bed of the stream. This wall is constructed upon land owned by the complainant for a distance of from two to three feet. As soon as the work was started, complainant, by her duly authorized agent, ordered the contractors to desist, and, no attention being given the warning, she filed her bill of complaint in this cause, in which she set up her ownership of the land upon which the retaining wall

was being built, alleged the destruction of a valuable water power, averred irreparable injury if the trespass were permitted to continue, and prayed for an injunction and for general relief.

Upon the filing of this bill, an order to show cause why an injunction should not issue was made. Upon the hearing several affidavits, filed by defendants, were read, the general tenor of which was that the proposed outlet for the sewer was the only practicable one; that a change in the route would involve a very large additional outlay and considerable delay in making the improvement; that the sewer was badly needed; and that to build it as proposed would cause no irreparable injury to complainant. The court thereupon declined to issue a preliminary injunction, the work proceeded, and the sewer is now completed, and is discharging all the sewage from a city of 5,000 inhabitants upon the lands of the complainant.

Upon the final hearing the court determined as follows:

"First. That complainant is the owner of the soil or bed of Dowagiac creek at the point whereon is built the retaining wall, and as is described at that part of the plans and specifications in Exhibit K, which comprehends a projection and emptying of said sewers into the Dowagiac creek.

"Second. That the elements of irreparable injury are wanting to this case; that the complainant can be fully compensated for all damages which may have been sustained by the acts of defendant.

"Third. That, under the general prayer for relief, the court finds it has jurisdiction, under this finding, to determine the question of the damage complainant may be entitled to recover by referring the same to a jury, or by reference to one of the circuit court commissioners of this county to take proofs, or by a proof in open court, as complainant may elect.

"Fourth. That such election may be made in writing by the complainant not later than the first day of the February term of court next.

"Fifth. In the event that complainant shall fail to so elect, the court to make such further order or disposition of the matter as may seem meet and proper.

"Sixth. That defendant city, having had notice that complainant claimed title to the premises in dispute, and not having taken steps to acquire title, either by purchase or under the statute, is required to pay the costs of complainant to be hereafter taxed."

Complainant refused to elect as directed; whereupon the court made the following order: "A finding of the court heretofore having been made in this cause, wherein certain contentions in said cause were determined, and the question of damage, if any, not having been heard or determined. and the complainant not having elected as in said

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

opinion permitted to do, but standing mute: It is therefore hereby ordered that the matter of damages, if any be suffered by said complainant by reason of the alleged injuries complained of, be and the same heard, assessed, and determined by a jury to act as an advisory of the court in determining the said damages, if any, as prescribed by the statute in such cases. That said cause be heard at the next April term of this court and placed on the calendar by the clerk of said court in the order of causes for hearing. Further, that a copy of this order be forwarded by the register in chancery of this court to James H. Kinnane, Esq., solicitor for complainant, and John Wooster, Esq., solicitor for defendants, on or before March 25, 1909. Dated, March 10, 1909."

To this order the complainant entered the following objections: "The complainant hereby objects to the order heretofore entered in said cause, referring the matter of complainant's damages to a jury, for the reason that the court has no right to divest possession in advance of condemnation, or to legalize it, nor by its decree grant to the defendants rights which it cannot obtain under the power of eminent domain; and for the further reason that the order permits the city of Dowagiac to go outside of its city limits and take the property of complainant and then pay to her such sum as a jury may award her; and for the further reason that the order is a justification of a trespass which was made after the city of Dowagiac had been fairly warned and notified that if they entered the creek at the point where they afterwards did enter, with their sewer, they would be trespassing upon the land of complainant; and the complainant hereby excepts to the order heretofore made in said cause, referring the matter of complainant's damages to a jury, for the reasons above stated."

Thereafter the court impaneled a jury. Complainant appearing specially filed a further protest to the proceeding, and fully protected her rights by exceptions duly taken from time to time.

Defendants offered testimony tending to show that complainant had suffered no irreparable damage—in fact, no damage at all—and, the question being submitted to the jury, a verdict was returned in favor of defendants; complainant having offered no testimony upon the question of damages. A final decree was thereupon entered, dismissing complainant's bill of complaint, but with costs to complainant. From this decree complainant appeals.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ.

James H. Kinnane, of Dowagiac, and Bernard J. Onen, of Battle Creek (George W. Mecham, of Battle Creek, of counsel), for appellant. Charles E. Sweet, of Dowagiac, for defendants.

BROOKE, J. (after stating the facts as above). We find no authority, and we are referred to none, justifying the course pursued in this cause.

[1] It is well settled that a municipality has no more right to invade or cause the invasion of private property than an individual. *Rice v. City of Flint*, 67 Mich. 401, 34 N. W. 719; *Defer v. City of Detroit*, 67 Mich. 346, 34 N. W. 680; *Seaman v. City of Marshall*, 116 Mich. 327, 74 N. W. 484; *Ferris v. Board of Education*, 122 Mich. 315, 81 N. W. 98, and cases cited.

In the case of *Wilmarth v. Woodcock*, 58 Mich. 482, 25 N. W. 475, this court said: "The defendant claims that the bill states no case for equitable relief, first, because it appears by the bill that there is a dispute about the boundary; and, second, complainant has an adequate and complete remedy at law in an action of trespass or trespass upon the case, and because the injury does not appear to be irreparable, since she states the depreciation in the market value of her homestead will be at least \$500, and it is not alleged that defendant is pecuniarily irresponsible and unable to respond in damages at least to that amount. * * * The bill states a case for equitable relief. The continued invasion of complainant's rights of property by the maintenance of the projection of the cornice over her north line, constituting a permanent injury to and depreciation of her property, addresses itself to and calls in exercise the equitable jurisdiction of the court. No remedy at law is adequate, owing to the uncertainty of the measure of damages to afford complete compensation. In one sense it is taking from complainant her property without condemnation, and without due process of law. No person can be permitted to reach out and appropriate the property of another, and secure to himself the adverse enjoyment and use thereof, which, in a few years, will ripen into an absolute ownership by adverse possession. * * * Irreparable injury, in the sense in which it is used in conferring jurisdiction upon courts of equity, does not mean that the injury complained of is incapable of being measured by a pecuniary standard."

[2] What does constitute "irreparable injury," as the term is used in injunctive proceedings, has been the subject of much judicial comment and determination, which is not altogether harmonious. One definition, given in *Words and Phrases*, vol. 4, p. 3772, is as follows: "Irreparable injury," as used in the law of injunction, does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great; and the fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a

court of equity should interfere in a case where a nuisance is a continuous one."

There is abundant authority supporting this view of the law; but it is unnecessary that we should here adopt it. Whatever the true meaning of the term may be, we have no hesitation in determining that the actual appropriation of a strip of complainant's land from two to three feet wide, and the casting upon her premises the entire sewage from a city of 5,000 inhabitants, are such acts as peculiarly call for the interference of a court of equity, and which, if permitted to continue unrestrained, would unquestionably result in "irreparable injury" to complainant, within any reasonable definition of that term.

[3] Counsel for defendants contend that it was the duty of complainant to have appealed from the order of the court denying a temporary injunction. Ordinarily the granting of a temporary injunction rests in the exercise of a sound discretion by the trial judge. Such orders will not be reviewed in the absence of an abuse of discretion.

It is urged here, as it was urged in the case of *Rhoades v. McNamara*, 135 Mich. 644, 98 N. W. 392, that complainant should be remitted to her legal remedy. We there said: "Defendant insists that this decree should be reversed, on the ground that the complainant, by recovering damages in a suit at law, has an adequate remedy. Defendant persisted in using this road, contrary to complainant's will, under an unfounded claim of right. Under these circumstances, must the complainant quietly submit to this invasion of his rights, and content himself with suing for damages? Clearly not. He has a right to have this continuing trespass stopped by injunction. [Citing cases.]" See, also, *F. H. Wolf Brick Co. v. Lonyo*, 132 Mich. 162, 93 N. W. 251, 102 Am. St. Rep. 412; *Saginaw Lumber, etc., Co. v. Griffore*, 145 Mich. 287, 108 N. W. 681, 116 Am. St. Rep. 297; *Detroit Mineral Bath Co. v. Ströh Brewery Co.*, 151 Mich. 555, 115 N. W. 717; *Cullen v. Ksiazkiewicz*, 154 Mich. 627, 118 N. W. 496.

[4] The action of the defendants, under the circumstances disclosed by this record, was clearly without warrant of law, and has resulted in placing the municipality in the position of having expended upwards of \$50,000 upon an enterprise the use of which, as now located, can and should be enjoined at the instance of complainant. This expenditure was made, practically in its entirety, after the city had received notice of complainant's rights, and in utter disregard thereof. Defendants proceeded advisedly, and are therefore in no position at this time to urge that it would be inequitable to grant to complainant the relief sought, because to do so would entail great loss and inconvenience upon the city.

The writ of injunction will issue as prayed; but it will not be made operative until the expiration of six months from the date of the entry of the decree of this court, in order that defendants may take such steps as seem advisable to protect the rights of the city. Complainant will recover the costs of both courts.

HILBERG et al. v. GREER et al.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. FRAUDS, STATUTE OF (§ 106*)—SUFFICIENCY OF WRITING—SUBJECT-MATTER IN GENERAL.

A written instrument giving an option on described premises for 60 days, "purchase price to be five thousand five hundred dollars. Int. 5% easy terms," is not indefinite as to whether it is an option to purchase or to lease so as to be insufficient under the statute of frauds, being clearly an option to purchase.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 193, 210, 211; Dec. Dig. § 106.*]

2. FRAUDS, STATUTE OF (§ 110*)—SUFFICIENCY OF WRITING—DESCRIPTION OF REAL PROPERTY.

A description of real property in a written agreement for its sale as "building and lot known as No. 20 S. St. Pontiac, Mich.," is sufficient under the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 225-236; Dec. Dig. § 110.*]

3. FRAUDS, STATUTE OF (§ 113*)—SUFFICIENCY OF WRITING—TERMS AND CONDITIONS OF CONTRACT—"EASY TERMS."

An option to purchase real property "purchase price to be five thousand five hundred dollars. Int. 5% easy terms," is insufficient under the statute of frauds for indefiniteness as to the terms and time of payment, since no inference can be drawn that the purchase price is to be paid in cash, and the expression "easy terms" has no well-defined and accepted meaning, but is absolutely indefinite.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 239-241; Dec. Dig. § 113.*]

Appeal from Circuit Court, Oakland County, in Chancery; George W. Smith, Judge.

Bill for specific performance by George J. Hilberg and others against Charles H. Greer and others. From a judgment sustaining a demurrer to the bill, complainants appeal. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ.

A. L. Moore and Patterson & Patterson, all of Pontiac, for appellants. James H. Lynch and Peter B. Bromley, both of Pontiac, for appellees.

McALVAY, J. Complainants filed their bill of complaint to enforce the specific performance of the following written option: "Pontiac, Mich., Apr. 21, 1910. For and in consideration of the sum of one dollar, I hereby give to Hilberg & Doerr an option on building and lot known as No. 20 South Sag-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

inaw St., Pontiac, Mich., for a period of sixty days. Purchase price to be five thousand five hundred dollars. Int. 5% easy terms, Charles H. Greer." The bill avers that, after this option was signed and delivered to complainants, the parties met by agreement at the office of A. L. Moore, in Pontiac, for the purpose of preparing proper instruments to transfer the title of the premises to complainants in accordance with the option. Complainants aver that they had given defendant Charles H. Greer notice of their election to accept and carry out the terms thereof, that the terms of the transfer were all agreed to between the parties, and, while the said papers were being prepared, the fact was stated that defendant Greer had married since giving said option, and that it would be necessary for his wife to join in the execution of a deed. For this reason the matter was postponed until the following day. On the next day defendant Greer came to complainant's place of business, and stated to one of them that he did not wish to make the sale, and that he would not unless complainants could compel him to do so. They went together to the office of Mr. Moore where he repeated said statement; that he was shown the deed, mortgage, and note, which had been drawn, and again repeated that he would not transfer the property. Later complainants changed the date in said mortgage to June 8, 1910, and on that date signed and executed the same with the note, and caused them, together with the deed and \$500 legal tender, to be tendered to said defendant Greer, and requested him with his wife to execute the deed. This he refused to do, and later a tender of the full sum of \$5,500 was made to said defendant with the request to make transfer, which he also refused to do. The tender is also made into court. Defendant Greer never signed any instrument except the option above set forth. Defendants demurred to this bill of complaint upon the ground that the writing sought to be specifically enforced is not sufficient to bind the defendants to make such sale, because it fails to express the time or terms of payment of the price for said premises. The demurrer was sustained, and complainants have appealed.

[1] The only question in the case to be determined is whether this option given by defendant Greer is sufficient to satisfy the requirements of the statute of frauds. We do not agree with the defendant that the option is indefinite as to whether it is for the purchase or leasing of the property. We think it clear that the option was given to complainants for the purchase of the property as the purchase price is definitely stated.

[2] The description of the premises is also sufficient.

[3] The infirmity of the writing, if any,

depends upon its construction as to the time and terms of payment of the purchase price of the premises. The statute provides: "Every contract for the sale of lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized by writing." Compiled Laws 1897, 9511. The question of the sufficiency of such writings has been frequently before this court. In an early case in an opinion of this court written by Mr. Justice Cooley, where the question involved was almost identical with that in the instant case, the court said: "There was no written evidence of the sale of the lots except the receipt which was given for the \$75, and that was insufficient to answer the requirements of the statute of frauds, for, though it specified the purchase price, it failed to express the time or terms of payment and there is no known and recognized custom to fix what is thus left undetermined. A memorandum to be sufficient under the statute must be complete in itself, and leave nothing to rest in parol." *Gault v. Stormont*, 51 Mich. 636, 17 N. W. 214. The writing in question in this case reads, "Int. 5% easy terms." No inference can be drawn from this writing that the purchase price was to be paid in cash. Interest is fixed at a certain rate per cent., and "easy terms" are given. As to the length of time and the amounts of the payments—whether in one sum or in different amounts—the writing is absolutely silent. The words "easy terms" have no well-defined and accepted meaning, but are absolutely indefinite. In our opinion the court was correct in sustaining the demurrer upon the authority of the decisions of this court. The case of *Gault v. Stormont*, supra, has been cited and affirmed repeatedly by this court, the last instance being *Ebert v. Cullen*, 165 Mich. 75, 130 N. W. 185, 33 L. R. A. (N. S.) 84, where most of the cases relied upon by complainants in the instant case were considered. Of these cases the court said: "They do not in our opinion modify or cast any doubt upon the correctness of the rule laid down in *Gault v. Stormont*."

The decree of the circuit court is affirmed, with costs.

RODGERS v. BECKEL et al.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. QUIETING TITLE (§ 34*)—PLEADING—POSITION—CLAIM TO PROPERTY.

A bill could not be sustained as a bill to quiet title authorized by Comp. Laws, § 448, where there was no allegation that defendants were setting up a claim to the property in opposition to complainant's title, and complainant claimed that it was not seeking to take anything from defendants that they had in their

possession or that they prior to the filing of the bill made any claim to.

[Ed. Note.—For other cases, see Quietting Title, Cent. Dig. §§ 69, 71, 72, 76, 77; Dec. Dig. § 34.*]

2. LIMITATION OF ACTIONS (§ 180*) — DEFENSES—DEMURRER.

That complainant's right of action is barred by limitations may be raised by demurrer, where it appears on the face of the bill, and no explanation or excuse is alleged in extenuation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 670-675, 681; Dec. Dig. § 180.*]

3. EQUITY (§ 87*) — LACHES — FOLLOWING STATUTE OF LIMITATIONS.

While in suits for specific performance courts of equity will conform as a general rule to the statutes of limitations in considering and applying the doctrine of laches, they are not bound to do so, but may declare complainant barred by laches on account of delay far less than that specified by statute, or, in case equitable reasons for delay are shown, relief may be granted notwithstanding a delay longer than the statutory period.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242-244, 395; Dec. Dig. § 87.*]

4. ADVERSE POSSESSION (§ 63*)—ENTRY UNDER CONTRACT OF PURCHASE.

Where complainant entered under a contract of purchase and continuously maintained such possession thereafter and made further payments, such holding and occupancy could not ripen into an adverse holding, however long continued.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 333-357; Dec. Dig. § 63.*]

5. SPECIFIC PERFORMANCE (§ 105*)—RIGHT TO SUE—LACHES.

Where a vendee takes and retains possession with the vendor's consent and makes payment, mere delay in suing for specific performance, however long continued, will not defeat his remedy unless special conditions intervene, and the relations of the vendor to the land have so altered that a specific execution of the agreement becomes impossible or inequitable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 325-341; Dec. Dig. § 105.*]

6. SPECIFIC PERFORMANCE (§ 114*) — BILL — REQUISITES.

Where a bill for specific performance of a contract to convey land asserted claims by contract rights and adverse possession, but failed to allege that defendants ever owned, held title to, or acquired title, and did not show that the vendor ever owned or held any title to the property except as it might be inferred from an allegation that she contracted to sell it through her agent, it was demurrable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356-370, 372; Dec. Dig. § 114.*]

Appeal from Circuit Court, Kent County, in Chancery; William B. Brown, Judge.

Suit by Harry E. Rodgers, as administrator of the estate of Flora A. Yates, deceased, against Susan H. Beckel and others. From an order overruling defendants' demurrer to complainant's amended bill, defendants appeal. Reversed, with leave to file an amended bill.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ.

Gleason & Lee, of Grand Rapids, and Gottschall & Turner, of Dayton, Ohio, for appellants. Rodgers & Rodgers, of Grand Rapids, for appellee.

STEERE, J. This is an appeal from an order of the circuit court of Kent county, in chancery, overruling defendants' demurrer to complainant's amended bill filed to perfect title to a certain tract of land in said county. The original bill of complaint was filed July 21, 1910. Defendants were either non-residents or their residence unknown, and on proper showing, by affidavit, an order of publication was made. Before the expiration of said order defendants appeared and moved the court to set the same aside, which was done and a general appearance was entered by defendants. Thereafter, on March 28, 1911, complainant filed an amended bill, to which defendants demurred on various grounds, appealing from the decision of the court overruling the same as stated.

The original bill alleges: That on June 12, 1883, Susan H. Beckel, of Dayton, Ohio, was the owner of a certain described 40 acres of land in Kent county, Mich., and on that day sold the same on contract, by her authorized agent, N. B. Hill, to Millard E. Yates for the sum of \$800, receiving \$100 down, the balance to be paid at the rate of \$100 annually, with interest at 7 per cent. That immediately on delivery of said contract said Yates went into possession of said land. That he and his wife, Flora A. Yates, as his subsequent grantee, continued thereafter in open and peaceful possession of the same, claiming ownership, until the death of said Flora A. Yates, paying all taxes assessed against said land, and greatly increasing the value thereof by clearing and improving the same. That said Millard Yates deeded said property on October 5, 1905, to his said wife, Flora, who died leaving an indebtedness, including funeral expenses, of over \$200, and insufficient personal property to pay the same. That complainant, a creditor, was duly appointed administrator of her estate. That her debts cannot be paid except from said real estate. That said Susan H. Beckel died some number of years ago, leaving as heirs at law Charles B. Beckel, of Dayton, Ohio, and Susan H. Beckel, Mary G. Beckel, Fannie (Beckel) Conklin, and Anna (Beckel) Huffman, whose residences are unknown. It is also alleged on information and belief that Charles B. Beckel, of Dayton, Ohio, has had charge and management of the said Susan H. Beckel estate, and that complainant caused a letter to be written to him on June 23, 1910, asking if the heirs of said Susan H. Beckel made any claim to said real estate, and if they would quitclaim their interests

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in said property to complainant as administrator. That complainant is informed and believes payments were made upon said land from time to time, but whether in full or not he is unable to learn. That he is informed and believes nothing has been paid within the last 15 years, and that no claim has been made on the part of said Susan H. Beckel or any of her heirs in the last fifteen years that any money was due on said contract. The bill prays for an answer, without oath, that defendants be decreed to convey said land to complainant as administrator, and if the court find that defendants have any interest in the same an accounting may be had, and if anything is found due, complainant be permitted to pay the same and a decree be entered for a deed from defendants upon such payment.

The amended bill is substantially the same as the original, except it alleges the possession under claim of ownership was adverse, that Susan H. Beckel died in Dayton, Ohio, March 9, 1890, fails to allege that she was ever owner of the land in question, alleges on information and belief that the purchase price was paid in full more than 20 years prior to the death of said Flora Yates; that Susan H. Beckel in her lifetime, and defendants since, have neglected and refused to convey said property according to the terms of the contract; that neither said Susan H. Beckel nor any of said defendants have, within the last 25 years, made any claim there was anything due on said contract, or brought action to recover possession, or attempted to make entry thereon. Answer under oath is demanded, no offer is made to pay any sum found due and prayer for an accounting is omitted. Decree for conveyance is asked, in default of which it is prayed that the decree, when properly recorded shall operate as a conveyance. The bill also contains a general prayer for relief.

Defendants set up 16 separate grounds of demurrer, some special and ultra technical; others, more general and comprehensive, directed against the merits and equities of the bill as a whole. Epitomized they are as follows: Unexcused laches for 25 years; statute of limitations; title to contract and right of action, if any, in Millard E. Yates and not in complainant; no allegation Mrs. Beckel or her heirs ever owned the land or made claim thereto; allegations of amended bill repugnant to substantive allegations of original bill; new controversy; adequate remedy at law; no offer to pay if anything found due; no allegation Mrs. Beckel died intestate, or that defendants have any title to or interest in the contract or the land, or have ever made any claim thereto; inconsistent claim of adverse possession for twenty-eight years.

Complainant's bill presents a somewhat double aspect, inconsistently alleging possession taken and held under a land contract

and full performance of that contract on his part, entitling him to specific performance by defendants, and also adverse possession ripening into a title under which it is claimed the bill should be maintained as one to quiet title. Counsel say: "This bill could be maintained under section 448 of Miller's Comp. Laws providing for quieting titles in courts of chancery. This court in passing upon this statute has held the object is to reach cases like the present."

[1] In this case there is no allegation that defendants make, or have set up, or are "setting up a claim thereto in opposition to the title claimed by complainant." The contrary appears from the language of the bill. Counsel for complainant in confirmation of this state in their brief: "The complainant is not seeking to take anything from defendants that they have in their possession, or have had in their possession, or that they prior to the filing of the bill in this case made any claim to." A bill to quiet title cannot be successfully launched against defendants not charged and shown to hold or claim any title or interest in the property involved. The only recognizable equitable allegations to be traced in complainant's bill tend to mark it as a bill for specific performance of contract. The story told, much of it on information and belief, is that 28 years before the bill was filed a contract for the sale of this land was given Millard E. Yates by Mrs. Beckel, through her agent, \$100 paid on the contract, and possession taken of the property, which has been maintained since, under claim of ownership by Yates and his successors, who made improvements on and greatly enhanced the value of the same; that Yates quitclaimed his interest to his wife; that his wife is dead and Mrs. Beckel is dead (we are not advised as to what became of Yates and Hall, the agent, between whom the contract was negotiated); that the contract price was fully paid; that no claim of any kind, either to the land or for payment, has been made by Mrs. Beckel or her representatives for more than 25 years; that she died in Dayton, Ohio, leaving certain heirs; that a letter was written to one of them on the subject. What answer, if any, was made to such letter, is not stated. By the terms of the contract it should have been fully paid and Yates entitled to a deed in 1888. The bill alleges full payment was made 20 years prior to its filing. Yates' right of action to enforce specific performance would arise when full payment was made. Counsel on each side seek to make against the other a somewhat strict and technical application of the statute of limitations. It is argued by complainant that it required 15 years after 1888 to bar defendants' right of entry; that the statute of limitations would not run against Yates' right of action until their right of entry was barred, and that this suit was begun only "seven years and one month after the statute had barred

defendants from making entry or claiming any right under the land contract"; that, defendants not having attempted to make entry or claimed any rights under the contract for more than 25 years, they are now barred by the statute from doing so.

[2] It is argued by defendants that the allegations in complainant's bill on their face raise the statute of limitations against him, and in this state a general demurrer will lie where such infirmity appears on the face of the pleading; no explanation or excuse being stated in extenuation. In that connection it is not to be overlooked that payment and possession are alleged.

[3] In bills for specific performance, while courts of equity have regard to statutes of limitation, and by analogy are inclined, as a general rule, to conform therewith when considering and applying the doctrine of laches they are by no means absolutely conclusive and are often disregarded. Laches may be declared to be a bar long before the statute has run, or, where equitable reasons for delay have been shown, relief may be granted at a time beyond the statutory period.

[4] Under complainant's allegations of purchase, possession taken under such purchase, and continuously maintained since, and full payment of the purchase price, the statute of limitations becomes of minor significance either way, and his claim of adverse possession is wholly untenable. "Such holding and occupancy could not in an hundred years ripen into an adverse holding and the complainant would be equitably estopped from so claiming." *Township of Jasper v. Martin*, 161 Mich. 336, 126 N. W. 437, 137 Am. St. Rep. 508.

[5] On the other hand, it is well settled, as applied to the remedy of specific performance, that, if the vendee of land takes and retains possession of premises with the vendor's consent and makes payment therefor, mere delay in bringing suit, however long continued, will not defeat his remedy, unless special conditions have intervened and the relations of the vendor to the land have so altered that a specific execution of the agreement becomes impossible or inequitable. *Pomeroy on Spec. Perf. of Contracts*, § 404; *Waterman on Spec. Perf. of Cont.* § 468; 36 Cyc. 732. The principles applicable to such a case are very succinctly stated in an opinion written by Justice Cabell in the early case of *Williams v. Lewis*, 32 Va. 686. Williams filed a bill in 1822 for specific execution of a land contract made with Lewis' father in 1774. Williams had been in possession of the premises since the latter date, and had paid for same by surrendering certain claims to other property. The court said: "Still less does it become him or them to set up the defense of the length of time in bar of this equitable title. It is not admissible on the part of a vendor against his vendee. The relation in which they stand to each other forbids it.

The former is a trustee for the latter; and the trust can never be determined but by a conveyance of the title. The vendor can never be permitted to set up his own omission to make a deed against the right of the vendee to demand one. Yet less can he invoke the aid of those cases, which discountenance the assertion of a stale equity, by a party out of possession, against an adversary claimant in possession, for here Williams has been in continued and uninterrupted possession from about the year 1774 to the present day, in the peaceful enjoyment of this equitable right, which has thus acquired strength by the lapse of time and acquiescence, instead of being weakened and impaired. If, indeed, we could look upon the parties in the light of adverse claimants, Williams' possession alone would sustain him in a writ of right. But, as he is in fact a claimant under Lewis, he could not at law be permitted to defend himself, as an adverse claimant, by the statute of limitations. It is, then, but just that in this court the same relation should protect him from a similar defense on the part of Lewis."

[6] This bill of complaint is, however, in its present form contradictory, wanting in specific allegations and averments and clearly demurrable. It does not state a cause of action against these defendants in law or equity. It makes claims by contract rights and by adverse possession. It fails to allege that defendants ever owned, held title to, or claimed the land in question. It is silent as to the present condition of the record title, and does not show that Susan H. Beckel ever owned or held any title to the property, except as the fact might be surmised from her having, through her agent, contracted to sell it. No liability or obligation under the contract could attach to defendants except as traced through title to, or interest in, the land as her heirs. "The bill must show such a relation of defendants to the subject-matter as to charge them with the liability or some interest in the subject-matter which will be affected by the decree." 16 Cyc. 235.

We are of the opinion that the demurrer should be sustained.

The order overruling the same is reversed, with costs, and the case remanded with leave to file an amended bill within 30 days.

IN RE FIDELITY & DEPOSIT CO. OF MARYLAND.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. TRUSTS (§ 237*)—MANAGEMENT OF TRUST ESTATES—SETTLEMENT OF ACCOUNTS.

Where a trustee empowered to sell and re-invest invested a part of the trust funds in a business at the request of an infant beneficiary, who, after attaining full age, failed for 2½ years to question the propriety of the act, the investment must be allowed as a credit in the account of the trustee, together with the sum paid out by the trustee as interest on a loan

from the proceeds of which the advancement was made.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 325, 344; Dec. Dig. § 237.*]

2. TRUSTS (§ 218*)—MANAGEMENT OF TRUST ESTATES—SETTLEMENT OF ACCOUNTS.

Where a trustee, with power to sell and re-invest, made an investment at the request of an adult beneficiary, who knew that her estate was used for the purpose of raising the money for the investment, and the investment was made for her benefit, the amount must be allowed as a credit in the trustee's account.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 310-313; Dec. Dig. § 218.*]

3. TRUSTS (§ 315*)—COMPENSATION OF TRUSTEE.

Where a trustee for 6½ years made no demand for compensation for her services, and the trustee was a relative of the beneficiary, and the relationship between the parties was intimate, the disallowance of a claim for compensation was within the court's discretion, and would not be disturbed on appeal.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 433-443, 474-479; Dec. Dig. § 315.*]

Error to Circuit Court, Bay County; William G. Gage, Judge.

In the matter of the trust created by the will of Harriet C. Shaller, deceased, Matilda E. Daglish, trustee. From a decree settling the accounts of Matilda E. Daglish as trustee, the Fidelity & Deposit Company of Maryland brings error. Reversed and remanded.

The matter in issue in this proceeding arises out of the trust created in the will of Harriet C. Shaller. The important provisions follow:

"I appoint Henry R. Wooster, of Saybrook, trustee of all the residue of my estate to be held in trust for my grandchildren, to-wit: Harry Wilmot Bradley, Harriet Wilmot Bradley and Rose Wilmot Bradley, each to receive one-third of the income thereof, or so much as may be necessary to be used for their support and education, and if the income shall be insufficient, then so much of the principal as may in the discretion of said trustee or his successor in said office be necessary for that purpose, and to this end I do hereby devise and bequeath to said trustee all the residue of my estate aforesaid, vesting in said trustee full power to sell, exchange all or any portion of said property and to re-invest the same as will in his judgment be for the interest of said legatees.

"Upon reaching the age of twenty-one years of either of my said grandchildren, the income of his or her share shall be paid directly to said legatees, and upon attaining the age of twenty-five years, respectively, the full share, including principal and income, shall be paid or transferred to said legatees.

"Said trustee is required to make annual returns of the condition of said estate to the probate court, and he is also to give suitable bond for the faithful discharge of the duties of said trust, and said bond may be furnished by any of the surety companies of this

state and the costs thereof to be paid from my estate.

"In the event of the death of either of my grandchildren before the age at which the estate is to vest, viz: twenty-five years, said share is to go to and vest in the survivors absolutely."

The will was duly admitted to probate, and the trust was executed in so far as it related to Harry Wilmot Bradley and Harriet Wilmot Bradley. On March 26, 1902, Matilda E. Daglish, a sister of the testatrix, and therefore a grandaunt of the remaining cestui que trust, was appointed trustee of the trust created by the will. She qualified as such trustee, and gave a bond in the penal sum of \$8,000, with the appellant as surety thereon. At the time of her appointment, the trustee recelpted to the judge of probate for personal property valued, according to the inventory, at the sum of \$6,980.73. From 1902 to 1907 Mrs. Daglish seems to have handled the estate without rendering any account of her dealings to the probate court. On September 19, 1907, she filed an account with that court which showed alleged disbursements (exclusive of any compensation to herself as trustee) on behalf of her cestui que trust to an amount upwards of \$600 in excess of the value of the estate which she had received including the income thereof. No hearing was had upon this account before the death of Mrs. Daglish, which occurred October 28, 1908. After her death, one Albert Miller was appointed trustee of the estate, and upon his petition the account of Mrs. Daglish was heard and passed upon without notice to the surety upon her bond. Upon this hearing the probate court found that Mrs. Daglish as trustee was chargeable with a balance amounting to \$6,483.23. Thereafter the Fidelity & Deposit Company appealed from said order.

The circuit court restated the account finding a balance due from the estate of Mrs. Daglish to the trust estate in the sum of \$5,831.91. Upon this hearing the court filed findings of law and of fact. Appellant proposed amendments thereto, and, after considering the same, the court filed his findings as to the facts and the law as follows:

"Findings of Fact.

"(1) The court finds: The value of the 200 shares of capital stock of the Iron-Silver Mining Company of Colorado, being certificates Nos. 18,079 and 18,080, at the time of the sale and conversion thereof, was \$180, or 90 cents a share.

"(2) That the income and dividends received by the trustee Matilda E. Daglish during the period of her trusteeship was \$1,294.

"(3) That Matilda E. Daglish was appointed trustee of the trust created by Harriet C. Shaller, deceased, and qualified as such on March 26, 1902, the appointment being made

by the probate court of Bay county. That Harriet C. Shaller died on January 23, 1893, leaving a last will, which was admitted to probate, and is in evidence in this case. That of the three beneficiaries named in said will Harry W. Bradley died while a minor without issue. Harriet W. Bradley, another beneficiary, received her share of the estate and trust funds on arriving at the age of 25 years. That Rose Wright West, who prior to her marriage was Rose Willmot Wright, was the sole remaining beneficiary under the will. That Matilda E. Daglish was a sister of said Harriet C. Shaller, and Rose W. West was a granddaughter of said Harriet C. Shaller. Said Rose West was about nine years of age when Mrs. Shaller died, and from that date she made her home with, and lived with, Mrs. Daglish, and the two lived and treated each other practically as mother and daughter until the marriage of Rose West. That after the marriage of Rose West in 1903 she and her husband, and later her two children and Mrs. Daglish, lived together a considerable portion of the time until Mrs. Daglish died October 28, 1908, and were furnished with money by Mrs. Daglish at frequent intervals.

"(4) That in December, 1905, Mrs. Daglish, on the request and solicitation of Rose West, purchased a store and business in Cleveland, Ohio, for Rose West, and she and her husband took possession of the business and ran it until July, 1906. That the money for the purchase of the business was borrowed from the Commercial Bank in Bay City, and the following trust property was pledged by said trustee to said bank as security for the money so borrowed, viz., bond No. 1,329 of Ohio & West Virginia Railroad Company, five shares of stock of the National Shoe & Leather Bank, 200 shares of the capital stock of the Iron-Silver Mining Company. The money so borrowed, amounting to \$1,900, was sent to Rose West in Cleveland by Mrs. Daglish in New York drafts, payable to the order of Rose West, and was used by her in the purchase of the said store and business. That \$100 more was advanced by Mrs. Daglish about the time of the purchase of the store. That in June, 1906, Mrs. Daglish took \$200 from Bay City to Cleveland to pay indebtedness accruing in Cleveland store and business. In July, 1906, Mrs. Daglish took possession of the store, and closed it out, and settled up the indebtedness and liabilities in connection with it, and received, after the payment of all of the liabilities, the sum of \$200, which was all that she saved out of the venture. That Rose West became 21 years of age on the 80th day of May, 1906. That she became 25 years of age on the 30th day of May, 1910, and that she was married in the fall of 1903. That after becoming 21 years of age in May, 1906, she and her husband continued to operate said store and business in Cleveland, and

she made no objection to the action of her trustee in making such investment. That she first knew that the money that went into the Cleveland store business was borrowed by her trustee at the Commercial Bank, and property from the trust funds pledged to secure the repayment of the same, when she was with Mrs. Daglish at the times when said notes were renewed. After the death of Mrs. Daglish in October, 1908, she was personally notified by the Commercial Bank that said notes were past due, and that the securities would be sold if payment was not made; said letter being dated November 25, 1908. That no action of any kind was taken by Rose West objecting to or disaffirming the Cleveland store investment.

"(5) In January, 1909, Albert Miller, who was appointed trustee to succeed Mrs. Daglish, demanded the surrender of the securities held by the Commercial Bank for the above loan, and later in the same month brought suit in chancery in the circuit court for the county of Bay to compel said bank to surrender said securities, on the ground that they were unlawfully pledged by the trustee, and that such pledging was unauthorized and invalid. Said cause was heard on pleadings and proofs and the bill dismissed, the ground for such dismissal being set forth in the opinion of Judge Sharpe filed in said cause, and which is in evidence in this case. Said decree has not been appealed from nor set aside.

"(6) That the investment and expenditure in the purchase of the Cleveland store and business was made solely for Rose West, at her request, with the expectation on the part of all that it would be successful and furnish employment for Rose West and her husband and benefit them and the trust funds. That Rose West knew all about the transaction, and urged Mrs. Daglish to buy the store and business for her with the understanding that the money put into it would come out of Rose West's share of the Shaller estate in the hands of Mrs. Daglish as trustee.

"(7) In April, 1908, Rose West sought to persuade Mrs. Daglish to assist her and her husband to invest in a limekiln at Omer, Mich. The purchase price of said limekiln was to be \$7,000. Two thousand dollars was required to make the first payment. Mrs. Daglish raised \$1,400 in some manner, and then negotiated the purchase of the property at the above price for and in the name of Mrs. West's husband and one McDonnell. Mrs. Daglish then took back from this firm a mortgage for \$2,000, and put that up with the Arenac Exchange Bank for a loan of \$600, which she then turned over to be applied by West and McDonnell as the balance of the \$2,000 advance payment on the purchase price of the limekiln property. After the death of Mrs. Daglish, the mortgage in question was foreclosed by the Arenac Exchange Bank, and the property was

purchased by said bank on the foreclosure for the amount of its mortgage. A couple of months after the original purchase of the limekiln property, Mrs. Daglish again hypothecated the \$2,000 mortgage to the Arenac Exchange Bank for an additional loan of \$600. This \$600 was raised for the purpose of building a new kiln on the limekiln property, and a considerable portion of it was used for that purpose; the same being advanced by Mrs. Daglish as needed. This investment of Mrs. Daglish in said limekiln property was induced by the solicitation and persuasion of Rose West and her husband.

"(8) That while Rose West and Mrs. Daglish were living at Omer, and while the limekiln was being operated, Mrs. Daglish was taken sick and died on October 28, 1908. After her death a fire occurred which destroyed a considerable portion of the limekiln property, and it was abandoned. The Arenac Exchange Bank foreclosed the mortgage which Mrs. Daglish had hypothecated to it for the loans aforesaid, and the limekiln property was sold on the foreclosure for the amount due said bank.

"(9) That Mrs. Daglish paid in interest to the Commercial Bank of Bay City on the loan which she made in 1905, on the trust securities in her hands as above stated, for the purchase of the Cleveland store and business, the sum of \$400.99. That the original note given when the loan was made in 1905 was renewed from time to time, and in 1907 \$1,000 was paid upon said loan by the sale to said bank of the Ohio & West Virginia Railway bond, which was one of the securities hypothecated for the loan. Interest was paid at the time of the several renewals during the lifetime of Mrs. Daglish of the balance of said loan which remained unpaid. That, after the death of Mrs. Daglish, Albert Miller was appointed to succeed Mrs. Daglish as trustee of said trust, and he brought suit against the Commercial Bank to recover the securities so hypothecated, which suit was commenced in January, 1909, and was finally decided about one year later. Shortly after this decision, the securities which had been hypothecated to the bank were sold, and the indebtedness of the bank, together with the interest and costs of the suit by Albert Miller, trustee, were satisfied and paid out of the proceeds of such sale. That the costs of the suit brought by Albert Miller against the Commercial Bank were taxed at the sum of \$47.27, and were paid out of the proceeds of the sale of the securities hypothecated to the bank as above set forth.

"(10) That Mrs. Daglish was appointed trustee in March, 1902, and continued to act as trustee until her death on October 28, 1908, a period of 6½ years. That on September 21, 1908, Rose West started on a trip to Coneautville, Pa., and received from Mrs. Daglish on the Arenac Exchange Bank a check for \$100, which was indorsed by said

Rose West, and paid through said bank on said day. That said Rose West on the last-mentioned date received for her own purposes the sum of \$50 from said trustee, as part of said check.

"(11) Proposed finding of fact No. 11 is refused. All of appellant's proposed findings of fact that are not embodied and found in the foregoing findings are refused by the court.

"Findings of Law.

"(1) Appellant's proposed finding of law No. 1 is refused, and the court finds that said trustee is not entitled to any credit on account of the Cleveland store and business.

"(2) Appellant's proposed finding of law No. 2 is refused, and the court finds that said trustee is not entitled to any credit on account of the limekiln investment at Omer, Mich.

"(3) Appellant's proposed finding of law No. 3 is refused, and the court finds that said trustee is not entitled to any credit for interest paid on the Commercial Bank loan, or for cost taxed in the suit brought by her successor against the Commercial Bank.

"(4) Appellant's proposed finding of law No. 4 is refused, and the court finds that said trustee is not entitled to any compensation for her services as trustee in said estate.

"(5) Appellant's proposed finding of law No. 5 is refused, and the court finds that said trustee is not entitled to any credit on account of the 50 shares of stock of the Concrete Machinery Company of Detroit.

"(6) Appellant's proposed finding of law No. 6 is refused, and the court finds that said trustee is entitled to credit of fifty dollars (\$50.00) only for said check of September 24, 1908."

Appellant claims that the balance found against the estate of Matilda Daglish should be reduced by the following items:

The item for the Cleveland store and business	\$2,000 00
The item for the Omer Lime Kiln matter	2,600 00
For services of trustee during the period of said trust, 6½ years at \$50 per year.....	325 00
The sum paid for interest to the Commercial Bank on the loan made to purchase the Cleveland store and business.....	400 99
The item of costs in the suit of Albert Miller, Trustee, v. Commercial Bank	47 20
The excess charged against said trustee on account of the Iron & Silver Mining Co. stock.....	220 00
Addition credit on account of \$100 check on Omer Bank.....	50 00

If these items are allowed, a balance against the trustee would still remain in the sum of \$188.79.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ.

Curtis B. Pierce and John E. Kinnane, both of Bay City, for Surety Company. W. A. Collins, of Bay City, for Shailer Estate.

BROOKE, J. (after stating the facts as above). [1] We will consider the claimed items of credit in their order. At the outset it is pertinent to observe that the powers conferred upon the trustee by the instrument creating the trust are peculiarly broad. The beneficiaries are each to receive from the trust fund "one-third of the income thereof, or so much as may be necessary to be used for their support and education, and if the income shall be insufficient, then so much of the principal as may in the discretion of said trustee or his successor in office be necessary for that purpose, and to this end I do hereby devise and bequeath to said trustee all the residue of my estate aforesaid, vesting in said trustee full power to sell, exchange all or any portion of said property and to reinvest the same as will in his judgment be for the interest of said legatees." Acting under the powers conferred by this instrument, the trustee, who was the sister of the grandmother of the cestui que trust, allowed Mrs. West, her ward, to persuade her to make the Cleveland investment in December of the year 1905. At the time the investment was made, Mrs. West was between 20 and 21 years of age. As soon as the business was purchased, Mrs. West and her husband went into possession, and management thereof, and so continued until about July of the year 1906. In the meantime Mrs. West became of age on May 30, 1906. Upon reaching her majority, Mrs. West did not attempt to disaffirm or repudiate the act of her grandaunt and trustee, but by continuing in possession and control of the business thereafter tacitly affirmed the transaction. It is to be noted, further, that though her trustee, Mrs. Daglish, lived about 2½ years after she (Mrs. West) became of age, no steps were taken to question the transaction. The relationship between Mrs. West and her trustee was of a peculiarly intimate character. They lived together from the time Mrs. West was nine years old until the death of Mrs. Daglish, and during all that period, even after the marriage of Mrs. West, Mrs. Daglish contributed largely to the support of Mrs. West and her children. When Mrs. Daglish died, it was found that she had made Mrs. West the sole beneficiary under her will; the inventory of the estate showing it to be of the value of about \$1,000. These two people seem to have sustained toward each other the sentiments of a fond and perhaps overindulgent mother and a loving daughter. Had Mrs. Daglish continued to live, it is only fair to Mrs. West to say that it is believed no steps would ever have been taken by her or in her behalf to compel her aunt and trustee to pay to her again money which had once been paid at her earnest solicitation, and the

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benefit of which she had enjoyed. The fact that Mrs. Daglish is now dead should not be permitted to weigh in the consideration of the question. It should be treated exactly as if Mrs. West herself were now seeking to recover from her trustee this sum which she has already succeeded in persuading that trustee to turn over to her in person and which she has used.

In *Quimby v. Uhl*, 130 Mich. 198, at page 212, 89 N. W. 722, at page 728, it is said: "Where beneficiaries either expressly or impliedly assent to the action of their trustee in managing their property not in strict accord with the terms of the trust, they will be held to have acquiesced in such action"—citing cases. See, also, *Skelding v. Dean*, 141 Mich. 143, 104 N. W. 410, and authorities there cited and reviewed.

It is urged that, when the Cleveland investment was made, Mrs. West was an infant, and therefore incapable of consenting to an unlawful use of the trust estate. This is true, but, as already pointed out, she became of age a few months later, and by her acts thereafter clearly implied her consent. Her failure to disaffirm the acts of her trustee during the 2½ years following, while said trustee was alive, is also significant. We must hold that the \$2,000 constituting the Cleveland investment should have been allowed as a credit in the account of Mrs. Daglish. It necessarily follows that the item of \$400.99 paid out by the trustee as interest upon the loan from the proceeds of which this advancement was made should likewise have been allowed.

[2] The Omer limekiln item of \$2,600. We are unable to discover from the record that the trustee advanced for this purpose more than \$1,400, either from her own estate or that of her cestui que trust. The balance of \$1,200 was raised by hypothecating a mortgage for \$2,000 upon the property itself. This investment was unquestionably made by the trustee for the benefit of Mrs. West and at her request. Mrs. West was at the time about 23 years of age, and knew that her estate was being used for the purpose of raising the money. This item to the amount of \$1,600 should have been allowed.

[3] Touching the demand for an allowance for compensation of the trustee, we are of opinion that it should be denied. During the 6½ years the trustee acted she made no demand for compensation for her services in that capacity, and, considering the facts in the case, we have no doubt she had no intention of ultimately making such a demand. In any event, the allowance of a claim to compensation by a trustee is a discretionary matter, and we have no disposition to disagree with the finding of the learned circuit judge upon this point. *Henderson v. Sherman*, 47 Mich. 267, 11 N. W. 153. The item of \$47.20, costs in the suit of *Miller, Trustee, v. Commercial Bank*, should have been cred-

ited. We think the other claimed credits were properly denied. Deducting from the balance found by the circuit judge the sum of the credits above allowed will leave a balance of \$1,983.72.

The judgment is reversed, and the case is remanded to the circuit court, with directions to enter a judgment in accordance with this opinion. Appellant will recover costs of the appeal.

McGOUGH v. HOPKINS.

(Supreme Court of Michigan. Nov. 8, 1912.)

VENDOR AND PURCHASER (§ 215*)—PURCHASER FROM PURCHASER—MISREPRESENTATION AS TO PRICE.

Where plaintiff, obtaining an option to purchase for \$2,000 certain land, represented to defendant, whom he induced to purchase for \$2,500, that the property cost \$2,500, and that defendant would have to pay only the amount demanded by the owner, and the parties, during the negotiations, dealt with the property as that of the owner, plaintiff was bound by his representations and could not recover anything from defendant, who paid \$2,000 to the owner for the premises.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 449-452; Dec. Dig. § 215.*]

Error to Circuit Court, Grand Traverse County; Frederick W. Mayne, Judge.

Action by Joseph H. McGough against James Hopkins. There was a judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, BLAIR, STONE, and OSTRANDER, JJ.

John W. Patchin, of Traverse City, for appellant. Covell & Cross, of Traverse City, for appellee.

BROOKE, J. This action is in assumption; the plaintiff filing the following bill of particulars: "April 21, 1911, \$500 balance due on sale of real estate, to wit: Lots 35, 36, 39, 40, and 43 of Hannah & Lay Company's 11th addition to the village, now city, of Traverse City, from the plaintiff to the defendant, at his request."

The plea was the general issue. The circumstances giving rise to this action are somewhat unusual. The parties had been business acquaintances for many years; the plaintiff being engaged in the business of selling coal, hay, and feed in the city of Traverse City, and the defendant being likewise engaged in business in said city. One Mrs. Larkins was the owner of the lands described in the plaintiff's bill of particulars at the time relations arose with reference thereto between the parties. Prior to negotiating with the defendant, the plaintiff seems to have written Mrs. Larkins with reference to the property, and received from her the following letters:

"Grand Haven, January 27, 1911.

"Mr. McGough—Dear Sir: Your letter regarding property received. Will not dispose of it to any one else before March 1, and cannot give possession to any one until May 1, as the C. B. Taylor Coal Co. don't relinquish possession until that time. I will accept two thousand dollars for the three lots with the alley and coal sheds and if it will make it more convenient to you, you can pay \$500 down and I will take a mortgage upon the property for the balance. Interest at six per cent. and you can name your own time. You make the payments anywhere from one to ten years. You can make the payments in three \$500 payments. I wouldn't wish to accept less at one time, as it doesn't seem to amount to anything if invested in smaller amounts. If mortgage is given, shall require that the building be kept insured for amount sufficient to cover indebtedness which amount in case of fire shall be turned over to me to discharge the mortgage. If you desire the papers to be made out before April 15th, you can notify me and I will come home; otherwise we shall not return before that time.

"Respectfully, Mrs. J. M. Larkins."

"Grand Haven, Jan. 31, 1911.

"Mr. McGough—Dear Sir: Yours received. Yes, the three lots includes all of the property north from the alley extending as far north as the oil works and the coal sheds, except the portion that the C. B. Taylor Coal Co. have added since in their possession, and which, according to the contract, they have the right to remove, are included in said property. The sheds, as you undoubtedly know, are partly on the P. M. H. R. property. I will be at home about the middle of April and will then make out the papers. The delay will give you more time to make arrangements for the first payment which I feel should be five hundred dollars, after that, as long as the interest is promptly paid, you can take your own time to pay the principal.

"Respectfully,

Mrs. Larkins."

"February 2, 1911.

"J. H. McGough—In reading your letter, I made a mistake in reading undoubtedly because I read it without my glasses. I had read it one hundred where you had written one thousand. Your proposition as stated is more than satisfactory and will make out the papers for the same as soon as we return home, and, after the first payment, you can have as much time as you desire for the balance.

"Respectfully,

Mrs. Larkins."

Plaintiff testified that these three letters constituted an option to him from Mrs. Larkins. After he had secured this so-called option, he entered into negotiations with defendant, in which he offered to sell the property in question to the defendant for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

\$2,500. The defendant knew the property did not belong to the plaintiff, but did belong to Mrs. Larkins. He agreed to take the property at the sum of \$2,500, paying \$1,000 down and the balance in three notes of \$500 each, due two, three, and four years after date. Upon Mrs. Larkins' return, the plaintiff instructed her attorney to prepare the deed directly from her to the defendant, which was done; the plaintiff paying the \$500 cash payment to Mrs. Larkins' attorney. After this was done, he saw the defendant and instructed him to go to the lawyer's office and get his deed, sign the three notes, and to leave \$1,000 in the bank for him, to all of which he testifies the defendant agreed. On arriving at the lawyer's office, the defendant learned for the first time that the purchase price of the property from Mrs. Larkins was \$2,000, instead of \$2,500; whereupon he signed the notes and took away his deed, but did not deposit the \$1,000 in the bank, as he had agreed with the plaintiff. After some talk between the parties, defendant did pay and plaintiff accepted \$500, the amount which plaintiff had paid on account of the purchase price to Mrs. Larkins, and thereafter plaintiff brought this suit to recover the other \$500.

On cross-examination plaintiff testified: "Q. Now, you agreed with Mr. Hopkins, didn't you, in your talk—the first talk you had with him—that you didn't want that property, and that you would let him have it at the same price that you were to pay for it, isn't that true, Mr. McGough? A. I told Mr. Hopkins I would sell him the property for \$2,500, and that that was what it cost me. That is what I told him, when, as a matter of fact, I had an option on it for \$2,000. Q. And you led him to believe that you were paying \$2,500 for it? A. That is what I told him. Q. And now that wasn't true, was it, Mr. McGough? A. What I am telling you now is true, but I did not pay \$2,500 for it; that wasn't so. I did tell Mr. Hopkins that \$2,500 was what it cost me. I never gave him to understand anything different. I calculated to make \$500 out of the deal. Q. You knew the first time you talked with Mr. Hopkins that you would get the property for \$2,000 by paying \$500 down? A. I had an option on the property before I ever said a word to Mr. Hopkins about it."

Plaintiff further testified that he never had any conversation with defendant about a commission or an agreement with him for a commission, but considered the \$500 as a commission on the deal. Defendant testified, and this is not denied by plaintiff, that plaintiff told him that "he was afraid Mrs. Larkins would flunk out of the deal," and for that reason he wrote his own check for the first \$1,000; whereas, as a matter of fact, he gave his check for \$500 only. Defendant further testified that after the difficulty had

arisen he paid the \$500 to the plaintiff in settlement, with the understanding between them that it should be accepted in full settlement of plaintiff's claim. This was denied by plaintiff. In submitting the case to the jury, the court instructed the jury that the plaintiff was entitled to recover, unless the jury should determine from the evidence that the plaintiff was acting throughout the transaction in the capacity of defendant's agent, in which event the plaintiff could not recover. He further instructed the jury that the plaintiff would have the same right to recover as against the defendant as though he had had a deed from Mrs. Larkins; the evidence showing that she had made a proposition to sell the property in question to him, and that he had accepted such proposition.

We are of opinion that upon the facts disclosed these instructions were erroneous. Plaintiff never actually possessed the title to the property and confessedly agreed that defendant should pay only the amount demanded by the owner, Mrs. Larkins. That amount defendant has already paid.

In *Hokanson v. Oatman*, 165 Mich. 513, 181 N. W. 111, 35 L. R. A. (N. S.) 423, we held that, where a broker fraudulently misrepresented that the owner's price was \$1,200, where in fact it was but \$900, the purchaser could recover the difference in an action in assumpsit for fraud and deceit. See, also, *Strachan v. Meyering*, 168 Mich. 253, 134 N. W. 11.

While, technically, it may be said that plaintiff was not acting as a broker representing either party, we think the record clearly establishes the fact that in the transaction both he and defendant dealt with the property as belonging to Mrs. Larkins during the negotiations. Under these circumstances the plaintiff should be held to be bound by his representations of facts within his own knowledge and unknown to defendant. A verdict should have been directed in favor of defendant.

The judgment is reversed and no new trial will be granted.

DETROIT UNITED RY. v. BARNES PAPER CO.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. STATUTES (§ 161*)—AMENDMENT OF STATUTE—CONSTRUCTION.

Where two acts of the same Legislature amend the same section of a statute, and each provides that the section shall be amended "to read as follows," the later act repeals the former, leaving the section to stand as last amended.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.*]

2. EMINENT DOMAIN (§ 243*)—RES JUDICATA—QUESTIONS CONCLUDED.

A decision that a street railway company has no authority, under Public Acts 1905, No. 101, to condemn land for an overhead embank-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ment crossing streets and a railroad track is not *res judicata* in a subsequent proceeding by the company to condemn the same land for the same purpose, as authorized by Public Acts 1905, No. 133, thereafter passed at the same session.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 551, 627-629, 700; Dec. Dig. § 243.*]

3. EMINENT DOMAIN (§ 10*) — EXERCISE OF POWER—STATUTORY AUTHORITY.

The right of a street railway company to condemn land for its uses is conferred by Public Acts 1905, No. 133, conferring on street railroads the right of eminent domain.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 35-48; Dec. Dig. § 10.*]

4. STATUTES (§ 46*) — SUFFICIENCY OF PROVISIONS.

The reference in Public Acts 1905, No. 133, conferring on street railroads the power of eminent domain, to the provisions of another statute, making it, and the procedure indicated by it, applicable in proceedings by a street railroad company to condemn land, does not invalidate the legislation.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 46; Dec. Dig. § 46.*]

Certiorari to Circuit Court, Oakland County; George W. Smith, Judge.

Petition by the Detroit United Railway against the Barnes Paper Company to condemn land. There was an order dismissing the petition, and petitioner brings certiorari. Reversed.

Plaintiff in certiorari filed its petition for the purpose of condemning a strip of land 120 feet in width and about 500 feet long belonging to defendant. Objections thereto were filed, brought on to be heard, and after a hearing the petition was dismissed. It was made to appear that plaintiff was organized under the provisions of chapter 168 of the Compiled Laws of 1897, commonly known as the street railway act, and was operating its road through the village of Rochester, Oakland county, under an ordinance granted by the village authorities, pursuant to which its track was carried upon a trestle and bridges for a distance of about 1,000 feet in a street of the village; the purpose being to cross the tracks and right of way of the Michigan Air Line Railroad. Plaintiff proposes to condemn land adjacent to the street and build an embankment, with openings therein for two intersecting streets, to carry its track over the said railroad. The difference between the present and the proposed method is that, instead of carrying its track upon a trestle in the street, it will carry it on an embankment and bridges upon its own private right of way. The objections of the defendant are (1) that the plaintiff is not authorized to maintain condemnation proceedings; (2) that its right to maintain a railway in the village is derived from an ordinance which permits it to carry its tracks upon a trestle in the street; (3) that its right to build and maintain the embankment in question has been determined ad-

versely to its present contention and effort by the final judgment of this court; (4) that under the provisions of Act 101 of the Public Acts of 1905 the authority of the village to permit the construction of overhead or elevated tracks is limited to a permission to carry them upon a trestle. It is matter of history, evidenced by the records of this court and of the court below, that plaintiff at one time filed a petition to condemn 90 feet in width of the same strip of land here involved, proposing at the same time to use 30 feet in width of the street, in addition to said 90 feet, as the base for an embankment to support its tracks. The proceeding then instituted was dismissed, and the determination of the court below was affirmed. *Detroit United Ry. v. Barnes Paper Co.*, 149 Mich. 675, 113 N. W. 285. It is this judgment which defendant presents as *res adjudicata* the present proceeding and contention of plaintiff.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ.

James H. Lynch, of Pontiac, for appellant. Davis & Bromley, of Pontiac, for appellee.

OSTRANDER, J. (after stating the facts as above). [1] While I participated in the decision and approved the opinion handed down in *Detroit United Ry. v. Barnes Paper Co.*, 149 Mich. 675, 113 N. W. 285, I am now convinced that this court was in error, and that the decision should be overruled. The decision rested primarily upon the idea that when the Legislature passes two inconsistent acts at the same session, each amendatory of the same section of an existing statute, and each providing that the section shall be amended "to read as follows," both acts may be regarded as in force. The Legislature of 1905 passed and gave immediate effect to Acts No. 101 and No. 133. They are set out in the margin.¹ Both purport to amend 2 Comp. Laws, § 6446, and both provide that said section shall be amended "to read as follows." In the two acts the section amended is made to read very differently. But, however much or little the difference, the authorities, agreeable with what now appears to me to be the clearest reason, regard the last act as repealing the earlier one, leaving the section to stand as last amended. Endlich on Interpretation of Statutes, § 196, and cases cited; *People v. Hiller*, 113 Mich. 211, 71 N. W. 630; 23 Am. & Eng. Enc. Law (1st Ed.) 488; *Cooley*, Const. Lim. (7th Ed.) 215, 216; *People v. Pritchard*, 21 Mich. 236. Act No. 101, Public Acts of 1905, expressly limited the powers of the municipal authorities to permitting street railways to be constructed and operated "above the streets and highways by means of trestles, at points where such construction and operation are

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indices

¹ See note at end of case.

deemed to be necessary by reason of such railway crossing highways, streets or other railways." Act No. 133 of the same session contained no such limitation, and did confer upon street railway companies the right to construct, use, maintain, and own a street railway upon private rights of way with "the same power and right of eminent domain as is now possessed by railroad companies."

[2] It is therefore apparent that if Act No. 101 was repealed by the later act the former decision of the court is wholly unsupported, since it determined that an ordinance of the village, relied upon by plaintiff, was invalid, because power to enact it was expressly withheld by the terms of said Act No. 101. No question was considered, and no point decided, except the one that the ordinance of the village which permitted the defendant to construct an embankment and to carry its tracks thereon, instead of on trestles, was invalid because of the express limitations of the power of the village found in said Act No. 101. It followed as of course that, having no right to carry its tracks over streets and other railways, except upon trestles, the plaintiff could not condemn land for the purpose of enabling it to carry its tracks upon an embankment to be constructed upon the land sought to be condemned. The present proceeding concerns the same parties, and is instituted to take a portion of the same land, and more. But it is a new proceeding; and the former decision of this court is not res adjudicata the rights of either party any more than it would have been if said Act No. 101 had been expressly repealed by the Legislature since that decision was made.

[3, 4] The right of plaintiff to condemn private property for its uses is conferred, in terms, in said Act No. 133. The reference in the act to the provisions of another statute, making them, and the procedure indicated by them, applicable in proceedings of this nature, does not invalidate the legislation. *Clay v. Penoyer Creek Imp. Co.*, 34 Mich. 204, 208, 209.

The plaintiff nowhere avers that it has secured the permission of the village of Rochester to lay its tracks and operate cars upon the land sought to be condemned. The failure to do so is not made the ground of objection. It was and is objected that plaintiff is now operating its road in the village by permission of the village, which permission relates to and provides for the operation of the road in the street upon a trestle. In the former record it appeared that permission had been given to plaintiff to build an embankment to take the place of the trestle. Whether that ordinance is now in force does not appear. The defendant does not make, and its argument does not suggest, the point that a street railway may not, after securing the permission of, or a franchise from, a municipality to operate a railway in

a highway, and after laying its tracks therein, move them, or a portion of them, without permission, to land adjacent to the highway and operate the road over its own land. The subject is not referred to in the brief for plaintiff appellant. It is sufficient, for the purposes of this opinion, to indicate that the point is not presented or considered.

The objections which were made should have been overruled and the petition retained for further proceedings. The order of the circuit court dismissing the petition is reversed, without costs to either party.

STEERE, McALVAY, BROOKE, STONE, and BIRD, JJ., concurred with OSTRANDER, J. MOORE, C. J., concurred in the result.

NOTE.

The acts referred to in the opinion as being set out in the margin are as follows:

No. 101.

An act to amend section thirteen of act number thirty-five of the Public Acts of Michigan for the year eighteen hundred sixty-seven, as amended by act number twelve of the Public Acts of Michigan for the year eighteen hundred ninety-three, and act number two hundred thirty-four of the Public Acts of Michigan for the year nineteen hundred one, being section six thousand four hundred forty-six of the Compiled Laws of eighteen hundred ninety-seven.

The people of the state of Michigan enact:

Section 1. Section thirteen of act number thirty-five of the Public Acts of Michigan for the year eighteen hundred sixty-seven, as amended by act number twelve of the Public Acts of Michigan for the year eighteen hundred ninety-three, and act number two hundred thirty-four of the Public Acts of Michigan for the year nineteen hundred one, being section six thousand four hundred forty-six of the Compiled Laws of eighteen hundred ninety-seven, is hereby amended to read as follows:

Sec. 13. Any street railway corporation organized under the provisions of this act may, with the consent of the corporate authorities of any city or village, given under and by an ordinance or ordinances, duly enacted for that purpose, under such rules, regulations and conditions as in and by said ordinance and ordinances shall be prescribed, construct, use, maintain and own a street railway for the transportation of passengers, in, upon, above or under the lines of such streets and ways in said city or village as shall be designated and granted from time to time for that purpose in the ordinance or ordinances granting such consent; but no such railway company shall construct any railway in, upon, above or under the streets of any city or village until the company shall have accepted in writing the terms and conditions upon which they are permitted such use of such streets; and any such corporation may extend, construct, use and maintain its road in, along, above or under the streets or highways of any township adjacent to said city or village, upon such terms and conditions as may be agreed upon by the company and the township board of the township, which agreement, and the acceptance of the company of the terms thereof, shall be recorded by the township clerk in the records of his township. Any company organized under the provisions of this act may construct, use, maintain and own a street railway for the transportation of passengers in, along, above or under the streets and highways of any township, upon such

terms and conditions as may be agreed upon by the company and the township board, which agreement, and the acceptance by the company of the terms thereof, shall be recorded by the township clerk in the records of the township: Provided, that such company may construct, maintain and own a street railway as is herein provided along, above or under any highway heretofore laid out or constructed, or hereafter to be laid out or constructed by the board of county road commissioners, or any highway adopted as a county road by the board of county road commissioners and under their control, upon such terms and conditions as may be agreed upon by the company and the said board of county road commissioners, which agreement, and the acceptance by the company of the terms thereof, shall be recorded by the county clerk in the records of said board: And provided further, that this section shall confer no authority to construct and operate elevated railways, so-called, but shall only give to municipalities the right to authorize the construction and operation of street railways above the streets and highways by means of trestles, at points where such construction and operation are deemed to be necessary by reason of such railway crossing highways, streets or other railways, and in all cases where any street railway company has heretofore constructed its railway upon trestles above any street or highway or other railway, with the knowledge and consent, express or tacit, of the municipal authorities, such trestles shall be deemed legal structures, the same in all respects as if such railways had been constructed upon the streets or highways at such points: Provided further, that nothing in this section contained shall be in any way construed so as to in any way affect any rights which abutting property owners may have to damages or additional damages by reason of the erection or maintenance of trestles or other structures above the street heretofore or hereafter erected or maintained under this section.

This act is ordered to take immediate effect.
Approved May 10, 1906.

No. 133.

An act to amend section thirteen of act number thirty-five of the laws of eighteen hundred sixty-seven, entitled "An act to provide for the formation of street railway companies," being section six thousand four hundred forty-six of the Compiled Laws of eighteen hundred ninety-seven, as amended by act number two hundred thirty-four of the Public Acts of nineteen hundred one.

The people of the state of Michigan enact:

Section 1. Section thirteen of act number thirty-five of the laws of eighteen hundred sixty-seven, entitled "An act to provide for the formation of street railway companies," being section six thousand four hundred forty-six of the Compiled Laws of eighteen hundred ninety-seven, as amended by act number two hundred thirty-four of the Public Acts of nineteen hundred one, is hereby amended to read as follows:

Sec. 13. Any street railway corporation organized under the provisions of this act, may, with the consent of the corporate authorities of any city or village, given in and by an ordinance or ordinances duly enacted for that purpose, and under such rules, regulations and conditions as in and by such ordinance or ordinances shall be prescribed, construct, use, maintain and own a street railway for the

transportation of passengers in and upon the lines of such streets and ways, in said city or village, as shall be designated and granted from time to time for that purpose, in the ordinance or ordinances granting such consent; but no such railway company shall construct any railway in the streets of any city or village until the company shall have accepted in writing the terms and conditions upon which they are permitted to use said streets; and any such company may extend, construct, use and maintain their road in and along streets or highways of any township adjacent to said city or village, upon such terms and conditions as may be agreed upon by the company and the township board of the township, which agreement, and the acceptance by the company of the terms thereof, shall be recorded by the township clerk in the records of his township. Any company organized under the provisions of this act may construct, use, maintain and own a street railway for the transportation of passengers in and along the streets and highways of any township upon such terms and conditions as may be agreed upon by the company and the township board of the township, which agreement, and the acceptance by the company of the terms thereof, shall be recorded by the township clerk in the records of the township; and any such company may construct, use, maintain and own a street railway upon private rights of way and all such companies shall, when necessary to enter upon and use private property in such construction and operation, have the same power and right of eminent domain as is now possessed by railroad companies. All proceedings at law or in equity necessary to give this section effect shall be the same as proceedings for the condemnation of property for companies organized under the general railroad law and all statutes relative to the exercise of the right of eminent domain for railroad purposes are hereby made applicable to proceedings under this act: Provided, that any such company may construct, use, maintain and own a street railway as is herein provided along any highway heretofore laid out or constructed or hereafter to be laid out or constructed by the board of county road commissioners or any highway adopted as a county road by the board of county road commissioners and under their control, upon such terms and conditions as may be agreed upon by the company and the said board of county road commissioners, with the approval of a majority of the board of supervisors, which agreement, and the acceptance by the company of the terms thereof, shall be recorded by the county clerk in the records of said board. Excepting, however, that whenever the right of way for such railways is acquired by the exercise of the power and right of eminent domain, the person, association or corporation acquiring the same under and by virtue of such power and right, shall not thereby acquire any right, title or interest in and to any ores or minerals either upon or beneath the surface of such part of the right of way, but the same shall remain the property of the owners of the land or ores and minerals at the time the right of way is so acquired. And said owners may, without let or hindrance, mine, take and carry away all such ores and minerals, and in doing so the said owners shall not be required to protect the surface of such right of way from being damaged or endangered by the removal of such ores and minerals.

This act is ordered to take immediate effect.

AUSTIN v. AUSTIN.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. DIVORCE (§ 49*)—DEFENSES—CONDONATION—ACTS CONSTITUTING.

Where a strong case of cruelty on the part of a husband is made out, a divorce will not be denied on the ground of condonation merely because the wife has made several efforts to get along with the husband.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 171-179; Dec. Dig. § 49.*]

2. DIVORCE (§ 308*)—ALLOWANCE—AMOUNT—EXCESSIVENESS.

In an action for divorce, an allowance of \$20 a month to the wife for the support of a child four years old was not excessive.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 801, 802; Dec. Dig. § 308.*]

Appeal from Circuit Court, Van Buren County, in Chancery; L. Burget Des Volgnes, Judge.

Action by Myrtle Austin against Merle Austin. From a decree for complainant, defendant appeals. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OS-TRANDER, and BIRD, JJ.

Cole & Goembel, of Kalamazoo, and David Anderson, of Paw Paw, for appellant. Thos. J. Cavanaugh, of Paw Paw, for appellee.

MOORE, C. J. This is a divorce proceeding. The parties were married February 23, 1902, and lived together until March 8, 1911. One child was born to them, and this child at the time the bill was filed was four years of age. From a decree in favor of the complainant the case is brought here by appeal.

The charge in the bill of complaint is extreme cruelty, alleged to be evidenced by beating complainant, by calling her vile names, by dragging her out of bed and striking her, and by other acts of cruelty not necessary to state here. Complainant also charges defendant with infidelity to her. The defendant answered, denying the charges. The case was put at issue and tried in open court. The testimony was very conflicting. The defendant was a witness, and among other things drawn out upon the cross-examination was the following: "I told him (a brother of complainant) like this: She told around I pounded her. I says, if she is going to tell those things, I might as well have the game as the name. I did slap her. I don't know how many times. I can't tell how many times. I can't count them to-day. I didn't slap her every time I felt like it. I felt like it a lot of times I didn't. I have slapped her with my hand, not always across the face, have slapped her arms, and sometimes I have slapped her on the face. I don't know where I have slapped her. Wherever it came handy I would strike or slap her." At another place he said: "I kicked off my rubber boot, and it flew off and hit her. I didn't have any intention of

hurting her. Q. What did you want to kick a rubber boot at her if you didn't? A. Why because I was—she was nagging at me. I told her to keep still, or I would throw it. I was in anger, mad." Again: "I don't remember any occasion on Christmas eve. I don't remember of pulling her hair on that night. I have pulled her hair sometimes when she had both hands clawed into mine to make her let loose. I slapped her because she was nagging me." His excuse was that he was nagged beyond endurance.

Counsel claim that what occurred were mere wrangles that should not be regarded as a cause for divorce. It is further claimed (we quote from the brief): "Some things that counsel does not say in his brief are impressive. For example, why does he ask for a divorce on the ground of contracting a venereal disease when his client swears that this occurred in December, 1909, that she fully and freely forgave, and she saw no evidence that he ever repeated that offense. The record demonstrates, further, that, if he ever was guilty of any pounding or slapping or harsh language, she forgave that. Why does not counsel discuss the proposition of condonation, and show either that there was no condonation or that the offenses were legally revived. Where is there any evidence in this record to show revival of these forgiven offenses?" The case was argued orally at great length, counsel insisting that no case had been made, but if, admitting for the sake of the argument that it was established, then it was contended the offenses had been condoned.

[1] We have read this record with care. It is not necessary to recite its contents. A very strong case is made for the complainant which is not wiped out by the several efforts of complainant to get along with defendant.

Complaint is made as to the provisions of the decree in regard to the little property and an allowance for the support of the child. The decree as to the property follows an agreement made between the parties, and is not unreasonable.

[2] The allowance of \$20 a month for the support of the child is not excessive.

The decree is affirmed, with costs.

CITY OF DETROIT v. DETROIT UNITED RY.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. STIPULATIONS (§ 14*).

In mandamus by a city to compel a street railway to put in brick pavements between tracks, a stipulation was entered into between the city and the street railroad, by which the proceedings were suspended until a date certain, in order to test macadam pavements, instead of that demanded by the city, and "until such a time as the village council may direct; it being understood between the parties hereto that neither party shall gain nor lose any of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

its substantial rights by this agreement, and that it is without prejudice to the rights of said village and said railway, as asserted in the petition and answer above referred to." *Held*, that both parties contemplated determination of their rights upon the petition and answer in the same manner as if the macadam pavement had not been constructed; and hence that the railway could not claim that the city was estopped to compel the substitution of brick for macadam pavement.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24-37; Dec. Dig. § 14.*]

2. STREET RAILROADS (§ 24*)—MAINTENANCE OF STREETS—POLICE POWER.

A municipality, in granting franchises to a street railroad company to construct and maintain its roads in and upon the streets and highways, cannot surrender or circumscribe its right to exercise its general police powers, and such grants must be accepted upon the implied condition that they are subject to such power; and a municipality is the judge of the necessity for repairing the pavement or repaving its streets, and it may require such grantee to conform to any reasonable changes which may be determined to be necessary for the protection of the public.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 34-38, 43, 50-55, 60-76; Dec. Dig. § 24.*]

3. STREET RAILROADS (§ 24*)—MAINTENANCE OF STREETS—POLICE POWER.

The requirement of a municipality that a street railroad company shall pave between the rails similarly to the balance of the street, and to cut the ties projecting beyond the stringers, was not an unreasonable and unnecessary exercise of the police power.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 34-38, 43, 50-55, 60-76; Dec. Dig. § 24.*]

Certiorari to Circuit Court, Wayne County; Joseph W. Donovan, Judge.

Mandamus by the City of Detroit to compel the Detroit United Railway to put in certain pavements. The petition was dismissed, and relator brings certiorari. Reversed.

Argued before MOORE, C. J., and STERRE, MCALVAY, BROOKE, STONE, OSTRANDER, and KUHN, JJ.

Bernard F. Weadock, of Detroit (Richard I. Lawson, of Detroit, of counsel), for appellant. Brennan, Donnelly & Van De Mark, of Detroit (John J. Speed, of Detroit, of counsel), for respondent.

MCALVAY, J. This case is before the court upon a writ of certiorari to mandamus proceedings to the Wayne circuit court. Relator asked for a writ of mandamus to compel the paving with brick the space between its tracks by respondent, as required by resolution of the village of Delray. In such proceedings, by reason of the fact that the territory in question had been annexed to the city of Detroit, by an order of the court made in this case the city was substituted for the village. Before such annexation and after issue joined in the mandamus proceedings, an agreement was entered into between the village authorities and the respondent, without prejudice to the continuance of the mandamus suit or to the rights of either

party, under which a macadam pavement was laid. Later the common council of the city of Detroit, by resolution, directed its officers to bring these proceedings to a hearing as soon as possible. Upon a hearing of the case before Judge Donovan, an order was granted that respondent repair this macadam pavement within 30 days, and upon proof of such repair the petition be dismissed.

The franchises to respondent's predecessor in title were granted by resolutions adopted by the township of Springwells, dated, respectively, July 23, 1886, December 14, 1891, and December 26, 1891. The requirements as to pavement between the tracks were as follows: In the first grant to be paved in the same manner and maintained as certain other portions of its track described; and in the second and third grants "to be paved with cobblestones in the same manner as the balance of the track is now paved." The portions of the track mentioned in the first grant were also paved with cobblestones.

The petition for mandamus sets up the facts above stated, and, further, the adoption by the village of Delray of a certain pavement—brick with a concrete foundation—and the contract entered into for the purpose of constructing the same, and shows that for that purpose it will be necessary to bring the tracks of the railway to the grade established, to cut off the ties projecting beyond the other rail, in order to prevent injury to the new pavement by vibration; that under the grant to respondent it was its duty to pave between the outer rails of the tracks operated by them, and was and is its duty to observe and obey the reasonable orders of the council in respect to such paving; that it was originally paved in cobblestone, which, for the purposes of the new pavement, are no longer practicable or proper by reason of the soft foundation and vibration; that originally the road was operated by horse cars of light weight and but little used; that the railway at present is operated by electricity, by suburban passenger and freight cars of very great weight; that River street, where this railway is located, is the main street through Delray, which had a population in 1905, when these proceedings were begun, of 6,000 inhabitants. Due notice was given of this action taken by the village of Delray, and of the requirements under it to be performed by respondent.

In its answer to this petition, respondent admitted the material facts above stated as to the origin of its franchises and its duty under its franchises to pave between the outer rails of its tracks operated by it, and also admitted the later action relative to requiring brick pavement upon a concrete foundation to be put in by respondent, and admitted notice of such requirement and its refusal to comply with the resolution. It

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

denied that the ties were laid, as alleged, upon a poor foundation, and are appreciably of different lengths, and denies that, in order to properly grade and pave the street, it is necessary that any portion of the ties be cut off, and that the passage of cars will, by vibration or otherwise, injure the concrete pavement alongside of the rails, or destroy the same, or make the highway dangerous for passage. It denies that cobblestone construction is obsolete, or that the foundation is poor, and that the contractor is unable to lay the concrete and brick pavement by reason of the refusal of the respondent to conform with the requirements of the council; and it claims that, while admitting it is its duty to raise its tracks to the proper grade and repave between the outer rails with the material mentioned in the grants, it is not its duty to cut off the projecting ends of the ties, which, it claims, is unnecessary, as it has learned from long experience to allow them to so project, and that if cut, as required, it will be impossible to spike, brace, or adjust its rails to the ties supporting the traffic, and work irreparable injury; that its rails are from 77 to 100 pounds weight to the yard, and the track would collapse in case the ties were cut off as required. And, further answering, says that it has been willing, and is now willing, to place its tracks upon a foundation of crushed stone, extending the full width of its ties, of about 21 inches deep, thoroughly tamped and rolled, between the ties, and to fill the space between the outer rails and the ties with macadam pavement of first-class construction, which, it alleges, is demonstrated to be the best pavement now in use for such purposes. And, further, that the expense of such pavement, as contemplated by the city, will be \$40,000 in excess of the cost to it of the construction as contemplated by respondent, and is not as serviceable or durable; and further claims that the requirement of the village to make this pavement different from that required by the terms of such grants is in violation of its rights under the Constitution of the United States, by impairing the obligation of existing contracts.

It appears from the record that under a temporary agreement respondent brought its tracks to grade on this street and constructed a macadam pavement the entire distance between the outer rails of its two-track system, and also a foot of brick pavement on each side, beyond such rails, the same as the brick pavement, with concrete foundation, upon the remaining portion of the street.

[1] The claim is made and strongly urged by counsel for respondent that, by reason of the fact that under the agreement entered into between the parties, without prejudice, respondent proceeded to and did put in the macadam pavement, that conditions are so changed from those existing at the time of

joining issue in this case that any determination by this court of the rights of the respective parties to this proceeding can or ought to be made, but that the petition should be dismissed without prejudice to relator. This contention does not appeal to us, under the circumstances upon which the macadam pavement was put in by respondent. In making such claim it appears to the court that counsel for respondent have overlooked the terms and conditions of the agreement entered into between the parties. By its express terms the mandamus proceedings were suspended until a date certain, "and until such time as the village council may direct; it being understood between the parties hereto that neither party shall gain nor lose any of its substantial rights by this agreement, and that it is without prejudice to the rights of said village and said railway, as asserted in the petition and answer above referred to." This agreement was entered into May 13, 1905. The proceedings under it were suspended until September 19, 1911, when the city of Detroit, successor to the village of Delray, directed its proper officer to proceed to a hearing of the case. Under these facts the court must hold that both parties contemplated a determination of their rights upon the petition and answer, in the same manner as if the macadam pavement had not been constructed. It is claimed by the relator that it was put in as a test pavement, and we do not find such claim to be contradicted by respondent; and the court, upon the case presented by the record before us, will proceed as if no such agreement had been entered into.

It is the contention of respondent that under its franchises, the requirement as to the kind of pavement authorized having been complied with, such requirement cannot be changed, and that to do so would be in violation of the Constitution of the United States, in that it would impair the obligation of an existing contract. In other words, that by these franchises respondent acquired a vested right to always maintain a cobblestone pavement.

[2] It is not contended directly that a municipality cannot retain that control over the public streets and highways which is necessary for the protection and proper use of the public; but by indirection the contention of respondent goes to that extent. A municipality, in granting franchises and privileges to public utility corporations to construct and maintain their roads in and upon the streets and highways, does not and cannot surrender or circumscribe its right to the exercise of general police powers. If the contention of respondent in this respect should be accepted, such would be the result, regardless of the change of conditions and circumstances, or the requirements necessary to maintain the streets and highways of a municipality in a reasonably safe con-

dition for the use of the public. It would be impossible, during the life of the franchise, to make the necessary changes required for the public use and safety.

In our opinion, the great weight of authority is against such contention. The law upon this proposition is well stated by an eminent text-writer, as follows: "It is a general rule that the right to exercise the police power cannot be alienated, surrendered, or abridged, either by the Legislature or by the municipality acting under legislative authority, by any grant, contract, or delegation, because it constitutes the exercise of a governmental function without which the state would become powerless to protect the public welfare. Hence, when a franchise or privilege is granted to use the city streets for a public service, the grantee accepts the right upon the implied condition that it shall be held subject to the reasonable and necessary exercise of the police powers of the state, operating either through legislative enactment or municipal action." Dillon, *Municipal Corporations* (5th Ed.) § 1269. To the same effect are the decisions of this court.

A case in point is where a street railway had used a T-rail, claimed to be unsuitable for streets paved with brick, and the municipality, by ordinance, required the railway to substitute a grooved rail. We quote from the opinion: "Under respondent's contention, it could practically prevent any improvement in paving, or the adoption of new and better material, unless it could be used in connection with the T-rail, which the respondent had the right to lay when the road was constructed, and which it now claims the right to relay and maintain. It could not be compelled to substitute the grooved rail for the T-rail, even if the city should offer to pay the expense; for it claims the right to lay the T-rail was a part of the contract, which cannot be taken away. The amended ordinance does not impair the franchise conferred upon the respondent. The city recognizes respondent's right to the use of the street, to run its cars, and to charge the fares fixed by the ordinance. It only claims that conditions have changed, requiring essential changes in the character and manner of paving, and that the respondent must so construct and equip its road as to meet these changed conditions. In other words, the relator only claims that the respondent is deprived of none of its property, unless the increase in consequence of the improvement amounts to such deprivation. It is essential that municipalities retain that control over the public streets and highways which is necessary for the protection and proper use of the public. Courts will jealously guard the right of such control. It must be a very plain provision, indeed, in a contract, which will justify the courts in holding that this power has been conveyed

away. Where doubt exists, such contracts will be construed against the surrender of such power." *City of Kalamazoo v. Traction Co.*, 126 Mich. 525, at page 531, 85 N. W. 1067, at page 1070; *Taylor v. Street Railway*, 80 Mich. 77, 45 N. W. 335; *People v. Detroit Citizens' Ry.*, 116 Mich. 132, 74 N. W. 520; *Detroit, etc., Ry. v. Commissioners*, 127 Mich. 219, 86 N. W. 842, 62 L. B. A. 149; *City of Detroit v. Ft. Wayne & Elmwood Ry.*, 90 Mich. 648, 51 N. W. 688.

It is suggested that these cases depended upon a construction of ordinances which, unlike the grants in the instant case, reserved certain rights, and are therefore not in point. The grants in those cases were with reservations of rights in the municipalities; but it is evident from the opinions that this court decided the cases upon the ground that the grants were accepted "subject to the reasonable and necessary exercise of the police powers of the state." We are convinced that the trend of the authorities and the attitude of this court is favorable to the protection of the rights of the public in the reasonable and necessary exercise of such powers, and hold in the instant case that these grants to use the public streets were accepted upon the implied condition that they should be held subject to such power, the necessity for the exercise of which is to be determined by the municipal authorities. In the exercise of its powers reserved to it to maintain its streets in a safe condition for the public use, the municipality is the judge of the necessity for repairing the pavement and repaving its streets, and its rights to do so cannot be surrendered; and it may impose such reasonable requirements upon the grantees of franchises given to street railways as to conform with changes which may be determined to be necessary and essential for the protection of the public.

[3] The remaining question to be considered is the question of the unreasonableness of the requirement of the municipality in the changes imposed upon the respondent. Considering the situation as of the time when the respondent was notified and requested to conform with these requirements, this court cannot hold that they were unreasonable. Clearly not as to the requirement to put a pavement between the rails similar to that on the balance of the paved street, for the reason that it is apparent that to have a uniform pavement the whole width of the street would be the most satisfactory and safe. It is conceded that to bring the track to a uniform grade with the new pavement was not unreasonable. The other requirement, relative to cutting the ties projecting beyond the stringers under them, was before this court in the case of *Detroit v. Ft. Wayne & Elmwood Street Railway*, 90 Mich. 648, 51 N. W. 688, which is now a portion of respondent's system, where the same conten-

tion of unreasonableness was made; and it was held by the court that such requirement was not unreasonable. It is true that that decision might have been based partly upon a concession made in the case; but the same conditions upon which the court then acted are present in the instant case. In our opinion, the requirement was not unreasonable.

The order of the court dismissing the petition is reversed, and a writ of mandamus will issue according to the prayer of the petition.

PINEL et al. v. PINEL et al.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. APPEAL AND ERROR (§ 460*)—FAILURE TO GIVE APPEAL BOND—RELIEF BY INJUNCTION IN SUPREME COURT.

Where a defendant appealing from an adverse decree did not give the statutory appeal bond provided for by Pub. Acts 1909, No. 209, as amended by Pub. Acts 1911, No. 160, the decree was not stayed, and complainant could proceed at his peril to enforce his rights thereunder, and the Supreme Court would not be because of defendant's poverty restrain enforcement of the decree pending the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2217-2226, 2245-2246; Dec. Dig. § 460.*]

2. APPEAL AND ERROR (§ 773*)—DISMISSAL FOR WANT OF PROSECUTION—RULES OF COURT.

Where appellant perfected his appeal and printed the record, the duty to serve the first brief rested on appellee under Supreme Court rule 41 (90 N. W. v.), and appellee's motion to dismiss the appeal for want of prosecution must be denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

3. APPEAL AND ERROR (§ 468*)—LEAVE TO FILE APPEAL BOND NUNC PRO TUNC.

The Supreme Court on appeal from a decree may permit appellant on a proper showing to file an appeal bond nunc pro tunc in the Supreme Court staying proceedings under the decree, and appellant's application for an injunction restraining enforcement of the decree will be denied without prejudice to the right to apply for leave to file an appeal bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2229; Dec. Dig. § 468.*]

Suit by Thomas F. Pinel and another against Charles W. Pinel and others. From a decree for complainants, defendant Rachel Pinel appeals. Motion to dismiss appeal denied, and motion of appellant for an injunction denied.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

Devine & Snyder, of Detroit, for the motion. Lynn M. Johnson, of Mt. Clemens, opposed.

STONE, J. In this case, pending an appeal by the defendant Rachel Pinel to this court from a decree entered in the court

below on January 15, 1912, the said defendant has filed her petition here praying for an injunction to restrain the complainants from prosecuting a suit commenced by them before a circuit court commissioner for the recovery of possession of certain premises consisting of a farm, in which the said defendant had a life tenancy under the will of her deceased husband. By the terms of said will the complainants were left the remainder of a part of the premises at the termination of said defendant's life estate. At the time of the death of the testator, there was a mortgage upon the farm, upon which there remains unpaid the sum of \$2,500 of principal. In 1901, the said defendant as life tenant having failed to pay the interest on the mortgage and the taxes on the farm, the complainants filed a bill praying that the duty of the said defendant be determined, and that she be ordered to keep down the interest and taxes aforesaid, or, in default thereof, that her interest and estate be sold, the proceeds of such sale to be used in the payment of said interest. On January 8, 1902, a decree was entered defining the duty of said defendant as life tenant, and requiring her to pay the said interest and taxes during the continuance of said life estate as the same became due. The decree also provided that, in case the said defendant should fail to comply with the terms thereof, the complainants were authorized to apply to the court in said cause for such other and further order and decree as might be necessary to fully protect and preserve their remainder interest in said premises. On August 14, 1911, complainants filed their petition in said cause, representing, among other things, that on August 16, 1910, they had become the purchasers of said mortgage, and that two years interest on said mortgage had not been paid by said defendant, and that the same was then past due. The petition prayed that the said defendant be ordered and decreed to forthwith pay said interest so due and unpaid, and that, if she neglected so to do, then that her life estate, or so much thereof as might be necessary, be sold, and the moneys obtained thereby be decreed to be used in the payment of said interest unpaid by said life tenant. An issue was joined, testimony taken, and the matter was brought to a hearing, resulting in the decree of January 15, 1912, aforesaid. In and by said decree, it was found that the two installments of interest on said mortgage which fell due February 9, 1910, and February 9, 1911, of \$125 each, were past due and unpaid, and that said defendant Rachel Pinel refused to pay either or both of said installments of interest, and that demand had been made for the same, and that said \$250 was a lien upon the life estate of said defendant. It was therefore ordered, adjudged, and decreed in said cause that said defendant should pay the said two installments of interest

amounting to \$250 within four months from the service upon her of a copy of said decree, and, if said defendant did not pay said amount within said four months, then in such case the sheriff of the county should sell her interest in said premises, as near as may be, in the manner provided for the sale of real estate on execution, at public vendue, after giving the same notice thereof as is required in sales of real estate upon execution, etc. From this decree the said defendant appealed, filing her claim of appeal on February 29, 1912. She did not, however, give or file the appeal bond provided for by Act No. 299, Public Acts of 1909, as amended by Act No. 160, Public Acts of 1911.

[1] No stay of proceedings having been asked for, and it appearing by the answer of said complainants to the petition of defendant for an injunction that a copy of the decree was duly served on said defendant on or about January 18, 1912, and she having failed to pay the amount due or any part thereof, the sale was advertised, and on July 10, 1912, was made, and the life estate of said defendant was sold and bid in by the complainants for \$250. The merits and regularity of said decree and the rights thereunder are questions which are involved in said appeal, and we shall not attempt to dispose of them on this petition. The complainants, claiming that their deed upon such sale became absolute at once, and that defendant has no right of redemption from such sale, have taken proceedings to obtain possession of said premises. We are asked to restrain such proceedings. The defendant having failed to give and file the statutory appeal bond, the proceedings under the decree are not stayed, and the complainants may proceed, at their peril, to enforce their rights thereunder, as they understand them; and we cannot relieve the defendant because of her alleged poverty.

[2] Coupled with their answer to the petition of defendant, complainants move to dismiss the appeal for want of prosecution. It appears that defendant and appellant has perfected her appeal, and has printed the record. As, under rule 41 (90 N. W. v) of this court, the duty to serve the first brief rests upon complainants and appellees, the merits of their motion are not apparent, and must be denied.

[3] The petition of defendant for an injunction must also be denied, but as under the holdings of this court in *Coeling v. Barnard*, 159 Mich. 634, 124 N. W. 533, and *Commercial National Bank v. Gaukler*, 164 Mich. 215, 129 N. W. 195, we have the right to permit the defendant, upon a proper showing, to file an appeal bond nunc pro tunc, in this court, staying proceedings under the decree, the petition will be denied without prejudice to her right to make such application.

No costs are allowed to either party.

ALBERT v. PATTERSON et al.

(Supreme Court of Michigan. Nov. 8, 1912.)

LIMITATION OF ACTIONS (§ 13*)—ESTOPPEL TO PLEAD STATUTE.

On November 29, 1909, a petition returnable December 6th was filed for leave to issue execution for a deficiency under a decree rendered December 11, 1899. On the return day, defendant appeared and obtained an adjournment until the next day, when the matter was argued and taken under advisement. On December 9th defendant's solicitor induced the circuit judge to grant an ex parte order for leave to file a bill of review, which order stayed proceedings on the petition for leave to issue an execution. Although it was understood that such solicitor would immediately give notice of the order to complainant's solicitor, no notice was given, and complainant's solicitor did not learn thereof until December 13th, when he called the court's attention to the fact that the order and the application therefor were irregular, and not in accordance with the rules and practice of the court, whereupon the petition for leave to issue execution was granted. It was alleged in a bill in aid of such execution and admitted by demurrer that the judge would have granted the petition for leave to issue execution in time for such execution to issue within the 10 years after the entry of the decree if he had not been induced to grant the ex parte order for a bill of review. *Held*, that defendant's solicitor having by irregular practice induced the circuit judge to grant an improvident and irregular order, and having induced him to fail to take any action on complainant's petition, defendant was estopped from pleading the statute of limitations against the enforcement of the execution, although complainant might have sued at law within the 10 years, and was not misled in any way by the ex parte order, not having learned thereof until after the lapse of the 10 years.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 56-58; Dec. Dig. § 13.*]

Appeal from Circuit Court, Kent County, in Chancery; Willis B. Perkins, Judge.

Action by Margaret Albert against Clara Patterson and another. From a judgment sustaining a demurrer to the amended bill, complainant appeals. Reversed and remanded.

See, also, 167 Mich. 162, 132 N. W. 548.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, BLAIR, STONE, OS-TRANDER, and BIRD, JJ.

Wm. Wisner Taylor, of Grand Rapids, for appellant. Walker & Fitzgerald, of Grand Rapids, for defendants.

STONE, J. This case is here upon appeal by complainant from a decree sustaining the demurrer of defendants to the amended bill of complaint, and dismissing such amended bill, which was filed in aid of execution. The following statement of facts, contained in the amended bill, shows the history of the case, and the proceedings which led up to it. On May 26, 1899, complainant filed her bill in the circuit court for the county of Kent, in chancery, against the defendant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep's Indexes

Clara Patterson and others to foreclose a certain land contract. A subpoena was duly issued, and personally served upon the said Clara Patterson and all the other defendants, except one, who was brought in by due order of publication. The subpoena, in the underwriting, stated that a personal decree was sought against the defendant Clara Patterson, and that the bill was filed to reach interests in property, and not to obtain any further relief against the remainder of the defendants. None of the defendants appeared in said cause, and the bill of complaint was duly and regularly taken as confessed, in accordance with the practice of the court. On December 11, 1899, a final decree was duly made and entered in said cause in favor of complainant, and against all of the defendants. The decree referred the case to the circuit court commissioner to make sale of the premises, and to report any deficiency that might arise on the sale. The decree was duly enrolled on February 26, 1900. On March 3, 1900, the commissioner made sale in pursuance of the decree and filed his report, which showed a deficiency on such sale of \$563.16. The land contract sued upon drew interest at the rate of 6 per cent. per annum. No payment of such deficiency, or any part thereof, has ever been made, or tendered by said Clara Patterson, or by any one in her behalf. On November 29, 1909, complainant filed her petition praying for leave to have execution issue against said Clara Patterson for such deficiency. Copy of said petition and notice of the hearing thereof were duly personally served on said Clara Patterson on said November 29th; the hearing being on December 6, 1909. On the last-named day said Clara Patterson appeared by her solicitors in opposition to granting the prayer of the petition. At the request of the solicitors for said Clara Patterson, the argument of the petition was adjourned to the next day, December 7th. On the last-named day, said petition and matter were fully argued by the solicitors for the respective parties, and the court took the same under consideration and advisement. On December 9, 1909, without any notice to complainant, one of the said solicitors for the defendant Clara Patterson, and acting for her, induced the said circuit judge, at chambers, by an ex parte application, to grant an order for leave to file a bill of review in said proceedings, which order, among other things, provided: "That no further proceedings be had in the original cause of Albert v. Patterson, pending hearing of same." Said petition of Clara Patterson for leave to file bill of review was verified by her on December 6, 1909, and certified by her said solicitors on December 7, 1909. Said order so made by said court at chambers, December 9, 1909, in the caption thereof purports to have been made in open court, whereas in fact it was made in chambers,

and without notice to the complainant, her solicitor, or any one in her behalf.

When said order was made as aforesaid, the circuit judge inquired of one of the solicitors for said defendant Clara Patterson having the matter in charge whether the said practice in the said matter of said ex parte application for leave to file a bill of review was regular, and in accordance with the statutes of the state, and the rules and practice of the court, and was then and there assured by said solicitor that said practice was regular and in accordance with the statutes and rules and practice, and said circuit judge relying on said assurance of said solicitor, and not having time to examine therein, improvidently granted and made the said order. The said circuit judge, having made the said order, which by its express terms stayed all further proceedings in the original cause of Albert v. Patterson wherein execution for deficiency was sought by complainant, deemed it unnecessary to give an opinion in, or decide the matter of, the petition for leave to issue execution submitted on December 7th, and then pending before him, as he otherwise intended to have done, and would have done, in favor of the petitioner Margaret Albert, and in ample time on or before December 10, 1909, so that the execution prayed for by the complainant could issue and be levied within 10 years from December 11, 1899. At the time said circuit judge made such ex parte order, it was then and there understood and agreed by said solicitor for defendant Clara Patterson with said circuit judge that he, said solicitor, should immediately, and on said December 9th, notify the said solicitor for complainant of the making thereof, and serve said complainant's solicitor with a copy thereof. Said order so made at chambers ex parte, and without notice to complainant, or any one in her behalf, was prepared and drafted by said solicitor for said defendant Clara Patterson. Defendant's said solicitor utterly failed to give any notice, whatever, verbal or otherwise, of the granting of said order to the solicitor for complainant, or to the complainant, or to any one in her behalf. Complainant's said solicitor did not learn of the making of the said order until late in the afternoon of December 13th, when the said circuit judge called said solicitor to the bench of the court, and inquired of him whether he had been informed by said defendant's solicitor of the making of said order. Complainant's said solicitor then immediately called the court's attention to the fact that the granting of the order, and the application therefor were irregular, and not in accordance with the rules and practice of the court. Thereupon said circuit judge sent for the said solicitor for defendant to at once appear in open court, and, upon his doing so, the circuit judge informed said defendant's solicitor that the court had been

misled to improvidently grant said petition, and make said order, and then and there granted said petition for execution for deficiency, and directed said solicitor for complainant to prepare the proper order therefor. Said order was prepared and signed late in the afternoon of December 13, 1909. Execution was taken out and a levy made on defendant Clara Patterson's property December 14, 1909. On February 5, 1910, complainant filed a bill in aid of said execution so levied. To this bill defendants demurred on the ground that at the time the execution was issued and levied the statute of limitations had run, the original decree having been made as heretofore stated, on December 11, 1909. This demurrer was overruled by the court below, but was sustained on appeal to this court in *Albert v. Patterson*, 167 Mich. 162, 132 N. W. 548, in which this court said: "A question is raised by complainant as to the estoppel of defendants against presenting the above ground of demurrer by reason of their alleged conduct in delaying the issuance of the execution and procuring a stay of proceedings, which we do not deem it proper to determine upon this record." The order was therefore reversed, and the demurrer sustained, with leave to complainant to amend her bill so as to set up the claimed estoppel. An amended bill was accordingly filed, setting up in full the granting of the ex parte order, and the conduct of defendant's solicitor, as hereinbefore stated. To this amended bill defendants demurred; the sole ground of the demurrer being the running of the statute of limitations, and that the reasons set up in the amended bill, for failure to issue the execution within 10 years from the decree, are wholly insufficient. The court below sustained the demurrer and dismissed the bill, and the complainant has appealed.

The important question here presented is, Are not the said defendants estopped from demurring to the amended bill of complaint for the reasons set forth therein? We are here dealing with a demurrer to an amended bill of complaint, the material allegations of which must be considered as true. One of the allegations is that the circuit judge, having made the ex parte order, deemed it unnecessary to give any opinion, or decide the matter of the petition then pending before him, as he otherwise intended to have done and would have done in favor of the petitioner Margaret Albert, in ample time, on or before December 10th, so that the execution prayed for could have been issued and levied within the 10 years. It appears, then, that the solicitor for the defendants by irregular practice induced the circuit judge to grant an improvident and irregular order author-

izing the defendant Clara Patterson to file a bill of review which said order restrained all further proceedings in the original case of *Albert v. Patterson*.

It is contended by counsel for defendants:

(1) That as knowledge of this order did not come to complainant's solicitor until December 13th, after the 10 years had elapsed, it could not have operated on the actions of complainant's solicitor. (2) That the order did not operate to prevent complainant from proceeding to sue at law upon the decree within the 10 years. In our opinion the question is not what effect the irregular order had upon complainant or her solicitor, but what the effect was upon the action of the circuit judge. Clearly, by the allegations of the amended bill, the circuit judge was misled, and lulled into inaction upon the petition, by the irregular practice of defendants' solicitor. He did not act upon the petition within the statutory period as he otherwise would have done. Neither is it an answer to say that complainant might have sued at law on the decree. She was proceeding in a legal manner to enforce her rights, but was prevented from doing so by the inaction of the circuit judge, which inaction had been brought about by the irregular practice of defendants' solicitor. Should not defendants under such circumstances be held to be estopped from pleading the statute of limitations? We think so. See *Steele v. Bliss*, 166 Mich. 593, 132 N. W. 345, 37 L. R. A. (N. S.) 859, and the cases there cited, especially *Wakefield v. Brown*, 38 Minn. 363, 37 N. W. 788, 790, 8 Am. St. Rep. 671, where this language is used: "On the same principle, if the defendant brought a writ of error, and thereby hindered the plaintiff from taking his execution within a year, and the plaintiff in error was nonsuited, or the judgment affirmed, the defendant in error might proceed to execution after the year, without *scire facias*, because the writ of error was a supersedeas to the execution, and the plaintiff must acquiesce until he hears the judgment above. The reason for this is that the stay of execution being with the consent and for the benefit of the judgment debtor, and the injunction or writ of error being his own act, he should not take advantage of them, nor could he be surprised or prejudiced by the delay, because that delay was in fact referable to himself." If leave to file bill of review had been regularly granted, and such bill had been dismissed at the hearing, still said defendant would be liable for the deficiency. The demurrer should have been overruled.

The decree below is reversed, and the cause will be remanded, with leave to defendants to answer. The appellant will recover her costs in this court.

CRANE v. READ et al.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. MORTGAGES (§ 38*)—CHARACTER OF INSTRUMENT—EVIDENCE—WEIGHT AND SUFFICIENCY.

In a suit brought by a person claiming to have purchased land, and that on his request it was deeded to a third person as security for the purchase price advanced by such third person, to have such deed declared a mortgage and a conveyance to complainant decreed, the proof must be sufficient to overcome the presumption that the instrument in question truly represents the transaction in its entirety.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 108-111; Dec. Dig. § 83.*]

2. TRUSTS (§ 83*)—RESULTING TRUST—PAYMENT OF CONSIDERATION FOR CONVEYANCE TO ANOTHER.

Complainant took a lease of property with an option to purchase, giving a note for the rent. He afterwards assigned the lease and option to a third person to secure a loan of the amount necessary to meet such note. Subsequently, as claimed by him, he purchased the property, procured such person to advance the purchase money, and had the premises conveyed to the third person as security for such advance. The conveyance was by a deed absolute in form, making no reference to complainant's rights. *Held*, that Comp. Laws, § 8835, providing that, when a grant for a valuable consideration is made to one person and the consideration paid by another, no use or trust shall result in favor of the payor, but that the title shall vest in the alienee named, applied, and complainant was not entitled to have such conveyance declared a mortgage or to a conveyance of the property to him.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 121-124; Dec. Dig. § 83.*]

Ostrander and McAlvay, JJ., dissenting in part.

Appeal from Circuit Court, Washtenaw County, in Chancery; Edward D. Kinne, Judge.

Bill by George C. Crane against George Read and others. From a judgment dismissing the bill, complainant appeals. Affirmed.

Argued before MOORE, C. J., and STEER, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

John W. Dwyer and Frank A. Stivers, both of Ann Arbor, for appellant. J. F. Lawrence, of Ann Arbor, for appellees.

STONE, J. The bill of complaint in this cause was filed to have a certain deed construed to be a mortgage, and that the complainant be decreed to have all the rights, claims, and privileges of a mortgagor, and be permitted to redeem therefrom in accordance with the terms of an alleged agreement entered into with the defendant George Read, and that the defendants may be decreed to execute and deliver to complainant a deed of the farm in question according to the terms of an alleged agreement and understanding between complainant and defendant George Read. The parties are all residents of the township of Pittsfield, Washtenaw county. The complainant resides upon

the farm in question, and the defendants own and occupy a farm across the highway from the farm occupied by complainant. On February 3, 1909, the complainant entered into a written lease of, and option to purchase, with one Charles F. Pardon, administrator of the estate of Gustav M. Wiederhofs, deceased, the said Wiederhofs farm (being the farm in question) for one year beginning March 15, 1909, and ending March 15, 1910, at the rental of \$150, to be paid on September 15, 1909. The party of the first part reserved the right to enter and remove gravel from gravel pit. The said lease contained the following provision: "Said party of the second part shall have the privilege of purchasing said above-described lands and premises, within the term of this lease, for the sum of \$3,300.00, and if he so purchases, the rent stipulated in the lease to be paid by him shall apply as a part of said purchase money above agreed upon; and it is also agreed that, in case of said purchase, the amount of money received by said party of the first part for gravel sold from said gravel pit as aforesaid shall also be applied as a part of the purchase money." Complainant immediately took possession of the farm in accordance with the terms of said lease and option, and he is still in possession. Complainant gave his note to said Pardon for the rental of \$150, with interest at 6 per cent. payable in six months. When this note became due, complainant, not having the money with which to pay it, applied to defendant George Read to borrow the money. The latter agreed to loan the money to complainant, providing complainant would give him his note for the amount, and secure it by an assignment of the lease and option. This was done. The following assignment was indorsed upon said lease and signed by complainant: "For value received I hereby assign unto George Read the within lease and option. Dated Sept. 20, 1909. George C. Crane." The note of complainant was made and delivered reading as follows: "\$150.00. Ann Arbor, Mich., Sept. 20, 1909. On or before ninety (90) days after date I promise to pay to the order of George Read one hundred and fifty dollars at First National Bank, Ann Arbor, Mich., with interest at the rate of six (6) per cent. per annum after date. Value received. This note is secured by assignment of lease and option dated Feby. 3, 1909 on farm in Pittsfield township, said lease to be assigned to maker on payment of this note." The \$150 was accordingly loaned to said complainant, and the rental paid and indorsed on the lease.

It is the claim of the complainant that he, desiring to purchase the said farm under the terms of the lease and option, before said option expired, applied to defendant George Read for a second loan, this time for a loan sufficient to purchase the farm; that said defendant consented to loan the amount

necessary, providing said complainant would permit said defendant to take the deed of the farm in the latter's name as security for the total amount advanced, said defendant stating that he preferred to loan in this way rather than take a mortgage. It is claimed that complainant agreed to this proposition, it being understood between them that said defendant would convey the said farm to complainant on payment of the amount of the loan with interest; that, in accordance with this agreement, Charles F. Pardon, administrator of the Wiederhott estate, deeded the said farm to George Read, defendant, understanding that said conveyance was for complainant, and that said defendant was to hold the deed as security until such time as complainant would pay the amount due to said defendant; that the deeds from the Wiederhott estate to said defendant were made upon the understanding that they should be considered as security for the payment of the money, which said Read then and there advanced to enable the complainant to secure the said farm under the option; that in taking the said deeds the said defendant agreed with complainant to reconvey the said farm to complainant within one year, or before that time, if complainant had the money ready to pay the amount due said defendant because of his advancements; that complainant permitted the farm to be conveyed to said defendant because he had confidence in the latter and trusted him to do as he agreed on account of being neighbors and friends; that, although the deed to said defendant is absolute on its face, yet, in fact, it was intended as a security for the payment of the money advanced by said defendant for the benefit of complainant; that ever since the delivery of the lease and option complainant has been, and still is, in the actual possession and occupation of said farm without objection or hindrance from said defendant, or from any other person; and that complainant has always been ready to perform his part of the agreement, and for that purpose, on March 18, 1911, he presented to the defendants a deed for them to sign, and at the same time tendered the full amount due them in cash, to wit, \$3,536.90, and that said sum was the amount due said defendant George Read according to his own figures, and that said defendant refused to sign said deed or accept the money tendered.

We have here stated the position and claim of complainant as set forth by his solicitor. It may be said in brief that each and every material claim of the complainant is denied by the defendants. There is an absolute and direct contradiction in the testimony in the case in relation to the taking of the deed by the defendant Read of the land in question as security. It is conceded by said defendant that the lease and option were assigned to him to secure the loan of the \$150. It is the claim of defendant

George Read that complainant, not only did not pay the \$150 note when due, but that he has never paid it; that the lease and option expired on March 15, 1910, and that about four days later, and on March 19, 1910, Mr. Pardon being at liberty to sell the property to him, the defendant Read purchased the farm and paid for it; that the deeds were drawn and delivered in the probate office, and that complainant had nothing to do with the transaction, and was not even present; that said defendant bought the farm absolutely; and that complainant had nothing to do with the transaction. Among other things, the defendant George Read testified as follows: "Towards the time that the option would expire, I cannot remember dates, Mr. Crane came up occasionally, and he wanted to know one day if I would buy the place and sell it to him on contract. I told him that I did not like to do that, I did not like to deal in contracts, and I would not do it. Then he wanted to know how much money I would put into it and take a mortgage on it. I told him I would put in \$2,000, and take a mortgage on it, and, if he could raise the rest, he could do it in that way. He could not do that, or did not. Some time after that, when he was dealing with those parties in Ohio, he came to me and wanted to know if I would lend \$1,000, and take a mortgage on the place. I told him I would, but I never heard any more of it, never any more was said to me about a mortgage. Q. Finally you had a talk with Mr. Crane about buying this place, what was that over in your house when you said you would rent it to him? A. I told him then it was either the time he wanted me to put up \$2,000, and I told him I would, or the time we were talking about the land contract. I told Mr. Crane that, if he could not buy the place, I would buy it and rent it to him for \$150 the same he was paying, 'and I will give you this \$150 that you are owing me for the note for your bargain.' That is what I told him." Without quoting further from the testimony, it is sufficient to say that it is the claim of the defendant Read that nothing came of these conversations, but that, after the lease and option had expired, he purchased the property absolutely from the estate, and that there was no understanding between him and complainant, nor between him and the grantor or grantors of the farm, that the purchase was in any way or manner for the benefit of complainant. The evidence of Mr. Pardon tends to support the claim of the defendant Read. That the complainant has persisted in remaining in possession of the farm is not denied, but it is the claim of said defendant that complainant is there without right. Every claim of the complainant material to his recovery is denied by the defendants, except the facts of the tender and refusal to make a deed. The circuit judge who heard and saw the witnesses testify dismissed the bill of complaint.

[1] A careful reading and consideration of the record have brought us to the conclusion that the complainant has not made out his case by even a preponderance of the evidence. In this class of cases the proof ought to be sufficient to overcome the presumption that the instrument in question truly represents the transaction in its entirety. *Schmidt v. Barclay*, 161 Mich. 1, 125 N. W. 729, 20 Ann. Cas. 1194.

[2] So far we have treated the case as presenting a question of fact only. It is the contention of defendants' counsel that a fundamental and fatal objection to the complainant's claim is the fact that the statute is a complete bar to his right to recover. Section 8835, Comp. Laws, provides as follows: "When a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section." It is urged that in this case the complainant advanced no money whatever for the purchase of the land in question, but the whole consideration was advanced by the defendant Read; and there was no writing in relation to the transaction outside of the deed from a third party which was absolute on its face. It is said that this section of the statute proceeds on the assumption that the person requesting and directing the conveyance furnished and supplied the consideration for the purchase of the land; that the fact that the defendant supplied the purchase money, and that such purchase money was paid by him, does not in any way change or alter the rule that brings this case within the statute; and that an express direction does not, and will not, result in favor of the complainant, although he requested and directed the conveyance to be made to the defendant, which claim, however, is expressly denied by the defendants. It is claimed that this doctrine finds support in the recent cases of *Halliday v. Basil*, 136 N. W. 354, and *Longe v. Kinney*, 137 N. W. 119. See, also, *Taylor v. Boardman*, 24 Mich. 287; *Tiffany v. Tiffany*, 110 Mich. 219, 68 N. W. 127; *Desmond v. Myers*, 113 Mich. 437, 71 N. W. 877; *Chapman v. Chapman*, 114 Mich. 144, 65 N. W. 215, 72 N. W. 131; *Hamilton v. Wickson*, 131 Mich. 71, 90 N. W. 1032.

Counsel for complainant claim that section 8835 has no application in this case, that complainant is not seeking to establish a trust, and that in all cases that have been before this court it has been held that a deed absolute in form may be proved by parol to have been intended as a mortgage—citing many familiar cases. Complainant's counsel further claim that in *Gamble v. Ross*,

88 Mich. 315, 50 N. W. 379, exactly the same state of facts existed; that *Gamble* had a contract with *Wehber*, who owned the lands in fee. At *Gamble's* request, *Wehber* conveyed the lands to *Ross*, and the conveyance was held to be a mortgage from which *Gamble* might redeem. We think that the case cited can be distinguished from the instant case in this: In that case the written assignment of the contract to *Ross* contained this language: "And hereby authorizes said *Wehber* to make, execute and deliver to them (the *Rosses*) the warranty deed of said land specified in said contract to said first parties in said contract of December 30, 1889, for the purposes aforesaid." Upon that subject this court said at page 330 of 88 Mich., at page 383 of 50 N. W.: "These papers must be construed together. While the deed is absolute in form, yet the contracts with it clearly evidence the intention of the parties. It was not intended by *Gamble*, nor understood by the *Rosses*, that the *Rosses* were to have the title absolutely in fee. The deed was intended as a mere security, and the conditions upon which the *Rosses* took it are clearly indicated in the assignment of the contract executed on the same day—I. e., a reconveyance of the land upon the performance of these conditions. It must therefore be trusted on a security, or, in other words, a mortgage." In the instant case, construing all the papers together, the deed coming from a third party to defendant *George Read*, who paid the consideration, the transaction considered as a whole, is more consistent with the claim of said defendant than with the claim of complainant. We think that the statute cited applies in this case. So, in either view of the case, we are of the opinion that the circuit judge reached the correct result, and the decree below is affirmed, with costs to the defendants.

MOORE, C. J., and STEERE, BROOKE, KUHN, and BIRD, JJ., concurred with STONE, J.

OSTRANDER, J. I concur upon the ground that the evidence does not support the complainant's case.

McALVAY, J., concurred with OSTRANDER, J.

GRADYSZEWSKI v. DETROIT UNITED RY.

(Supreme Court of Michigan. Nov. 8, 1912.)
1. STREET RAILROADS (§ 114*)—INJURIES TO PEDESTRIANS — ACTIONS — EVIDENCE — SUFFICIENCY.

Where plaintiff's evidence showed that, when he left the curb about 12½ feet from the nearest rail of defendant's street railroad track, an approaching car was 100 feet dis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 138 N.W.—15

tant; that, when he reached the middle of the track, the car was 12 or 14 feet distant; that his cap fell off, and in attempting to recover it he sustained injuries; and that the car was not going very fast, but was going "kind of fast"—the verdict for defendant was properly directed for lack of proof of defendant's negligence, since its motorman could not anticipate the contingency which caused the injury, and was not bound to operate the car so as to be prepared for a contingency so remote.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-250; Dec. Dig. § 114.*]

2. STREET RAILROADS (§ 93*)—OPERATION—DUTY TOWARDS PEDESTRIANS.

The motorman of a street railroad car when running at proper speed is not required to check the car whenever a pedestrian approaches the track, but may assume, if the distance is sufficient for a crossing to be made safely, that he will so cross, and if it is insufficient that he will maintain a position of safety and not place himself in a position of danger by attempting to cross, but when he becomes advised, or in the exercise of due care, should become advised, of the pedestrian's peril, he must use all means within his control to avert injury.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 195-200; Dec. Dig. § 93.*]

Error to Circuit Court, Wayne County; James O. Murfin, Judge.

Action by John Gradyzewski, Jr., by John Gradyzewski, Sr., his next friend, against the Detroit United Railway. Judgment for defendant on a directed verdict, and plaintiff brings error. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

August Cyrowski, of Detroit (Felix A. Doetsch, of Detroit, of counsel), for appellant. Corliss, Leete & Joslyn and Frederic T. Harward, all of Detroit, for appellee.

BROOKE, J. Plaintiff, a boy seven years and five months of age at the time of his injury, was proceeding southerly along the east side of St. Aubin avenue in the city of Detroit. He desired to cross Forest avenue upon which defendant operates a double-track electric line. The paved portion of Forest at this point is 40 feet wide. The distance from the north curb on Forest avenue to north rail of defendant's tracks is 12.05 feet. As plaintiff left the curb and started to cross the street, he saw one of defendant's cars approaching from the east. The car was then a little east of the alley, which is 100 feet east of the east line of St. Aubin avenue, where the plaintiff was. When plaintiff reached the middle of the track upon which the car was approaching, his cap fell off. He attempted to recover it, and while so doing was caught and run over by the car, sustaining injuries for which recovery is sought.

Plaintiff testified that he had been going to school about a year, that he was familiar with this crossing, and knew that cars ran east and west on Forest avenue. On cross-

examination he further testified: "Q. You saw the car coming down, then, on the north track? A. Yes, sir. It was going kind of fast. I know it was going kind of fast, because I seen it coming. I didn't see any cars coming in the other direction. That was the only car I saw. Q. You saw that coming. It was about opposite the alley? A. Yes, sir. Q. You were then on the curb on the corner of Forest and St. Aubin? A. Yes, sir. Q. How far was the curb from the track that the car was on? A. Oh, about six or seven feet. Q. And this car was coming—was it coming very fast? A. Yes; it was going pretty fast. I didn't, it didn't go very fast, but it was going kind of fast. Q. You walked along in front over the track? A. No; I didn't walk over the track. Q. What did you do? A. I walked up and I happened to stoop down and pick up my hat. The Court: I understood him to say that he walked onto the track, not over it. Q. You walked onto the track? A. Yes; onto the track. Q. You didn't go right onto the track, did you? A. Yes, sir; I went onto the track that the car was coming on. Q. Did you go right to the middle of the track? A. Yes; in the middle. I don't know how my hat happened to fall off. I don't remember if it was windy or not. My cap fell off. Q. Why didn't you go and leave your hat there in the street? You knew the car was coming fast, didn't you? A. Yes, sir; I did. I thought I would get past. Q. How far was the car from you when your hat fell off? A. It was about a little—half ways of that house. Q. You know how much 10 or 15 feet is, don't you? A. Yes, sir. Q. Speaking of feet, about how far was the car from you when your cap fell off? A. Oh, it was about 12 feet. Q. It hadn't slowed up any, had it? A. No; it didn't slow up. Q. When the car was about 12 feet from you, you went to get your hat which was in the middle of the track? A. Yes, sir. Q. You had been in the middle of the track before, hadn't you, or your hat wouldn't have been there would it? A. No; it wouldn't have been there. Q. Your hat dropped off, and then you walked back. A. No; I didn't go back at the same time. I picked it up. It fell off frontways. Q. And the car was about 12 feet away from you when you picked the cap up? A. Yes; may be about 14, I don't know. Q. Twelve or 14? A. Yes, sir. Q. Didn't you know that the car that near—you knew if you got in front of a car it would hurt you, didn't you? A. Yes; but I knew I would get past it. Q. You didn't get past it, did you? A. No; it must have started faster. Q. Did you notice it start up faster? A. No; I didn't notice it. Q. When you stooped over, was your back to the car or were you facing the car? A. I was in the middle of the track. Q. Your back to the car? A. Yes; I was this way.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Q. You were not looking at the car when you picked your cap up? A. Yes; I was looking at it, picking up my hat. Q. Were you looking at your hat or at the car? A. At the car. Then I looked at my hat and picked it up. Q. Which did you look at first—the car or your hat? A. The car. Q. Suppose the car was coming about here, where the jury is—you turned around this way? A. Yes, sir. Q. You were back to the car? A. No; towards the car, I looked. Q. Were you facing the car when you picked it up? A. Yes; I faced it—not all. I faced, as though the car was coming from that way, and I faced. I tried to pick my hat up. Q. You stooped over that way in front of the car? A. No; I had my face towards the car, and I was then, I was standing this way, looking at the car that way, and trying to pick up my hat. Q. Had you your hat in your hand when the car struck you? A. No; I don't remember that, if I had it in my hand. Q. How did you know where your hat was; were you groping around to find your hat? A. Yes, sir; I was looking. Q. You couldn't look at your hat and the car, the same time, could you, John? A. No. Q. How did you arrange that? A. I seen my hat fall off. Q. You knew your hat was falling off, you felt that? A. Yes, sir. Q. You say you didn't look at the hat while you picked it up, you looked at the car? Is that right? A. Why, yes; I looked at the car. Q. But you didn't look at the hat? A. Yes; I looked at the hat too. Q. The hat was on the pavement, and the car was along about 12 feet from you? A. I looked at the car first, then at the hat. Q. You looked at the car first, then at the hat? A. Yes; then at the hat. Q. You were not looking at the car when you were struck? A. Then, no; because I couldn't. Q. You say, when you first saw the car, it was right opposite the alley? A. Yes, sir. Q. You walked along, and the car kept right along, coming towards you? A. Yes, sir. Q. You were going across the track? A. Yes, sir. Q. You intended to get across the track, didn't you? A. Yes, sir. Q. Isn't that right? When you got in the middle of the track, your hat fell off? A. Yes, sir. Q. And you didn't go on; but then the car was 12 feet from you? A. Yes, sir. Q. Coming along pretty fast? A. Yes, sir. Q. You saw the car? A. Yes, sir. Q. Looked at the car coming along pretty fast, 12 feet from you, and you stooped over to pick up your hat? A. Yes, sir. Q. That is all you remember? A. Yes, sir; that is all. I don't remember how far the car went after it hit me, because I never seen anything."

On redirect: "Q. When you say 12 or 14 feet, John, how far do you think it is? Can you tell me here in this room on the floor? A. It is further than that there side. Q. Here? A. Yes; it is further than that. Q. How far do you think 12 feet is—about here? A. Yes; about that far. Q. That is

the distance you saw the car when your hat fell off. A. Yes, sir."

On recross: "Q. How much is a foot? Put your hands up for a foot. A. About that much. Q. You think 12 of those would take you down there where he is? A. I don't know the difference. I never measured. Q. What? A. I never bothered myself measuring. Q. You said 10 or 12 feet. A. I don't know how much it is. Mr. Doetsch: He said 12 or 14. Q. If the car was 12 or 14 feet, and was down where Mr. Cyrowski stood, you were pretty slow in picking up your hat, weren't you. A. No; I wasn't slow. I took it as fast as I could. Q. And yet the car came down on you in that distance? A. Yes, sir; struck me. Q. You were looking at the car all the time? A. No; not looking. I looked at the car. Then I went and took a chance at my hat. Q. That is how you got hurt? A. Yes, sir."

Upon this testimony the court directed a verdict for defendant, holding that plaintiff had failed to show any negligence on the part of the defendant company. A motion for a new trial was thereafter denied, and error was assigned upon such denial.

The only error argued in the brief for appellant is that the court erred in directing a verdict.

[1] We are of opinion that the direction was warranted by the testimony. There is nothing in the record to indicate that defendant's car was operated at an excessive rate of speed or in any manner negligently.

[2] It is obviously impossible to demand that motormen when running at proper speed should check their cars whenever they see a pedestrian in front approach the track. If the distance is sufficient for a crossing to be made safely, the motorman has the right to assume that the pedestrian will so cross, if the distance is insufficient he has a right to assume that the pedestrian will maintain a position of safety at the side of the track. The motorman is not bound to anticipate that the pedestrian will place himself in a place of danger; indeed, he has the right to assume the contrary. When, however, he becomes advised, or in the exercise of due care should become advised of the peril of the pedestrian, it is his duty to use all means within his control to avert injury. When plaintiff's hat fell off and he attempted to recover it, the car was so close to plaintiff that to stop it before collision was clearly impossible. This conclusion is based upon the assumption of the truth of plaintiff's testimony as to the rate of speed. Had plaintiff's hat not fallen off and had he not stopped to recover it, he could have crossed the track in safety. The motorman could not anticipate that this would occur, nor was he bound to operate his car so as to be prepared for a contingency so remote. The facts in this case bring it within the principle of several of our own decisions. *Fritz v. Railway Co.*, 105 Mich. 50, 62 N. W. 1007;

Merritt v. Foote, 128 Mich. 367, 87 N. W. 262; Coessens v. Rapid Railway, 136 Mich. 481, 99 N. W. 751; Rollo v. City Electric Railway Co., 152 Mich. 77, 115 N. W. 727; Stenzhorn v. City Electric Ry. Co., 159 Mich. 82, 123 N. W. 621. No negligence on the part of defendant having been shown, the question of plaintiff's contributory negligence becomes unimportant.

The judgment is affirmed.

DOANE v. ALLEN et al.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. AFFIDAVITS (§ 7*)—ENTITLING—RULES OF COURT.

The purpose of circuit court rule 37 (b), made applicable by chancery rule 15 to chancery cases, that all papers, except process and pleadings by which the cause is commenced, shall be entitled in the court and cause, provided that affidavits annexed to and referring to another paper so entitled need not be entitled, being that it shall be possible to easily identify all papers filed in a cause as connected therewith, it is satisfied by an affidavit, which, though not entitled in the cause, is attached to a cover properly entitled therein.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. §§ 29-34; Dec. Dig. § 7.*]

2. INJUNCTION (§ 38*)—TEMPORARY INJUNCTION—PREVENTING DISPOSSESSION.

Injunction will lie to prevent forcible dispossession of, and irreparable injury to, one who has long been in peaceable possession, and has prima facie right of possession under a lease, till he may be heard and given opportunity to establish his rights.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 86-90; Dec. Dig. § 38.*]

Appeal from Circuit Court, Sanilac County, in Chancery; Watson Beach, Judge.

Action by Silas Doane against Carrie Allen and another. From an adverse order, defendants appeal. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

Gates & Simonson, of Sandusky, for appellants. H. O. Babcock, of Sandusky, for appellee.

KUHN, J. An appeal is taken from an order denying a petition to dissolve an injunction which has been issued in this cause.

The bill of complaint alleges that the complainant on the 11th day of October, 1909, obtained a lease for one year of 40 acres of land in the county of Sanilac, in this state, and further alleges:

"That your orator occupied and cropped said premises for the years 1910 and 1911, paying \$100 per year rental in advance according to the terms of said lease. That during the fall of 1911 your orator, continuing the occupancy and rental of said premises, put in five acres of wheat and two acres of rye on the said premises and on January 20, 1912, paid the sum of \$100, being the rent in full for said land under the terms

of said lease for the year ending October 15, 1912, taking a receipt therefor, a copy of which is as follows: 'Sandusky, Mich., Jan. 20, 1912. Received in full \$100. One Hundred Dollars, when paid. For rent of 40 acres from Silas Doan. 'Thos. Allen.' That Thomas Allen is the agent of William J. Allen, and that your orator has transacted all of the business in connection with the rental of said land with Thos. Allen, the agent of said William J. Allen. That your orator has performed all the conditions and covenants mentioned in said lease to be done for or on his behalf, and that under the terms of such lease your orator is entitled to the undisturbed possession and use and occupation of said premises, until the 15th day of October, 1912.

"That there are 14 acres of meadow upon said premises which with the wheat and rye your orator has sown thereon, and the use and occupation of the remainder of said premises yet to be worked and cropped. Said use and occupation is worth to your orator upwards of \$600 above the necessary expense and labor in caring for, harvesting, and marketing the crops which your orator expects to reap and harvest from the said above-described land. That on or about the 20th day of February, 1912, one Carrie Allen and Alexander Allen, who are made parties defendant to this your orator's bill of complaint, claims to have purchased said land from the said William J. Allen, the owner thereof. That the possession of your orator of said premises has been known to the above-named defendants Carrie Allen and Alexander Allen, who are husband and wife. That the said defendants resided within one-half mile of the above-described land, and owns land adjoining it, and saw your orator while he was in the act of putting in the wheat and rye now upon said land above described, and that said defendants were informed and knew at the time they purchased the said above-described land that your orator had paid the rent for the year ending October 15, 1912, and that he had put in the five acres of wheat and two acres of rye above described. That there are no buildings upon the above-described land.

"That the above-named defendants now threaten to turn their cattle in upon the crops and meadow of your orator upon said land, and have told your orator that, if he does not leave the said premises for their use and occupation, during the summer of A. D. 1912 they will turn their cattle in upon the said land, and destroy the crops and grass of your orator. That the said defendants have interfered with the possession of your orator of the said premises. That on, to wit, the 25th day of April, A. D. 1912, said defendants committed trespass upon the said premises, and removed a disc and harrow belonging to your orator from said premises which your orator was then intending to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

use in cultivating the unseeded portion thereof. That the said defendants have locked up the gates leading from the highway to said premises, torn out the culverts, and forbid your orator entering said premises and otherwise annoying your orator and interfering with his rights. That your orator resides a distance of $1\frac{1}{4}$ miles from the above-described premises, and it is very inconvenient for your orator to continually watch his crops growing thereon, and that it would be very expensive for your orator to so watch said crops to prevent them being destroyed by the defendants' cattle. That the said defendants above named reside on an adjoining 40 acres of land, and that it is their intention expressed to your orator as aforesaid to turn their cattle upon said premises during the nighttime when it would be impossible for your orator to look after the same. That your orator fears that said defendants Carrie Allen and Alexander Allen will execute their threat, and, unless restrained by the order of this court, will destroy the grass, wheat, and rye above mentioned, and also destroy any other crop your orator may plant thereon.

"That if said defendants do execute their threat, and are not restrained from trespassing upon the said premises, irreparable mischief and injury will be done to your orator. That your orator is without remedy except in a court of equity where matters of this kind may be fully adjudicated. That since the 1st day of April, 1912, the said Carrie Allen and Alexander Allen have committed several acts of trespass upon the said above-described land, for each one of which your orator would have an action, and that, if said above-described defendants do what they say they will and carry their threats into execution and turn their cattle in upon said premises, your orator, in order to protect his rights, would be compelled to resort to numerous suits of law. That your orator resorts to a court of equity for the purpose of preventing a multiplicity of suits, and also for the purpose of preventing irreparable injury to your orator.

"Your orator further shows on information and belief that the said Alexander Allen has no property and is execution proof, that a judgment for damages or costs could not be collected against him, and that the defendant Carrie Allen owns some property in her own right, but that it is heavily mortgaged, and your orator fears and alleges the truth to be that she is not collectible, and has no property subject to execution, and that, unless the said defendants are restrained as herein prayed for, your orator will be damaged and lose a large sum of money, to wit, the sum of \$600 or upwards."

The defendants filed an answer, denying the principal allegations of the bill of complaint, and state: "These defendants admit: That on the 18th day of March, 1912, defendant Carrie Allen purchased the land

described in paragraph two of the bill of complaint of the owner, William J. Allen, paying him therefor the just and full sum of \$3,000, and receiving therefor a warranty deed, which said deed was duly recorded in the office of the register of deeds of said county on the 30th day of March, A. D. 1912, in liber 129 of Deeds, on page 359, a true copy of said deed being hereto annexed, marked 'Exhibit A,' and made a part hereof. That, after receiving said deed, these defendants went into possession of said land, and commenced to prepare the same for cropping the land for the season, cleaning up the rubbish, cutting down trees that needed removing, for the successful cropping of said land, fixed up the fence enclosing the land, put on a gate, and took such steps as a thrifty farmer would naturally take in and about said land at the season of the year. And these defendants went into the possession as aforesaid after receiving said deed, and remained in the full and absolute possession of said land until ousted by the preliminary injunction issued by this court in this cause. That on the 29th day of April, 1912, and for the 30 days immediately preceding that day, these defendants were in the full, complete, and absolute possession of said premises, and so remained, and such possession has not been disturbed since the said 29th day of April, 1912, and since the service of the injunction in this case said complainant broke into said premises and remained thereon without right, but under the guise of acting under said injunction for several hours. And, in order to break into said premises, said complainant forcibly opened a gate that had been before and was at that time securely locked by these defendants. These defendants having maintained their possession at all times after they were put into possession of said premises by their grantor, William J. Allen, in the month of March, 1912."

This sufficiently states the claims of parties so as to understand the questions before us.

[1] The complainant filed an affidavit on May 23, 1912, which affidavit, on its face, is not entitled in the cause, but in the original returns it appears that on the cover to which it is attached appears the cause and the following: "Affidavits in opposition to motion for dissolution." The petition to dissolve was not filed until June 1, 1912, but we will assume that the affidavit in question was considered by the judge on the hearing of the petition to dissolve. Counsel for defendants in their brief contend that this affidavit is of no value or effect because it was not entitled in the cause, relying upon circuit court rule 37 (b), which provides: "All papers, except process and pleadings by which the cause is commenced, shall be entitled in the court and cause, and the plaintiff's name shall be placed first. Provided, that affidavits annexed to and referring to another

paper which is properly entitled in the court and cause need not be entitled." By chancery rule 15 this rule is made applicable to chancery cases. In the case of Beebe v. Morrell, 76 Mich. 119, 42 N. W. 1121, 15 Am. St. Rep. 288, this court held: "If there be no suit pending at the time, of course, the affidavit must not be entitled. If a suit be pending, and the affidavit is entitled in a suit not pending, the affidavit is a nullity. * * * Our attention has not been called to any authorities, in our own state or elsewhere, where it has been held that an affidavit filed in a pending suit not entitled is a nullity. The inquiry in such cases is, Has the affidavit been fully identified as having been filed in that cause? If it has, then the want of the formality of a title is of no consequence, since the title is for the purpose of identifying the suit in which the affidavit is designed to be used. * * * In civil proceedings courts may, and often do, refuse to hear affidavits that are not properly entitled in a cause read, because practice requires papers read in a cause to be correctly entitled." It is contended that this case is not applicable because the decision was had before the rules referred to were adopted. It seems to us, however, that the purpose of the rule is that it should be possible to easily identify all papers filed in any cause as connected therewith. As the affidavit in question is attached to a cover properly entitled in the cause, it cannot be said that it could not easily be identified as connected with the cause, and we therefore consider it a substantial compliance with the rules. The affidavit should not be held to be a nullity for that reason.

[2] More seriously, however, counsel contended that the preliminary writ of injunction is void because it undertakes to change possession of the premises without a hearing on the merits and by an ex parte proceeding to decide the entire controversy between the parties.

Complainant contends that the injunction should stand to prevent irreparable injury, to restrain threatened trespass upon a clear right of the complainant, to prevent a multiplicity of suits, and because complainant has no other adequate remedy. There is no dispute in this case that the complainant was in possession of the premises, undisturbed for a period of three years. The question of the validity of the lease, the authority of the agent, and other matters in controversy can properly be determined at the final hearing. Upon the allegations made in the bill, it seems to us that the court had the power to issue the injunction and to continue it until the final hearing. An injunction is the appropriate remedy as to those holding adverse claims and even against trespassers in case of irreparable injury. 2 Story's Eq. Jur. par. 918; Puter-

baugh's Mich. Chancery Prac. (3d Ed.) 614. The complainant having been in peaceable possession of the premises under color and claim of right, and because of the fact that, there being no buildings on the land, it was impossible for him to be at all times in actual occupation, it is not consistent with legal policy to allow him to be forcibly ejected without legal process, and before he can have his rights determined in court. This court has held that the court of chancery has no more power than any other to condemn a man unheard, and to dispossess him of property *prima facie* his, and hand over its enjoyment to another on an ex parte claim to it. *Arnold v. Bright*, 41 Mich. 207, 2 N. W. 16. It must necessarily follow that it should have the power to prevent a person with a *prima facie* claim of legal possession from being dispossessed without being heard and given the opportunity to establish his rights. In the instant case the refusal of the circuit judge to continue the injunction would have resulted in turning the complainant out of the possession of the premises, of which he was *prima facie* in legal possession under a lease.

Order is affirmed, with costs.

KIPLINGER v. KIPLINGER.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. DIVORCE (§ 231*)—"PERMANENT ALIMONY"—"WHAT CONSTITUTES."

"Permanent alimony" is a gross sum awarded to the wife on dissolution of a marriage to aid in her support. Primarily it signifies not a certain portion of the husband's estate; the controlling element being a compulsory contribution on his part for her support and maintenance under the obligations of the marriage contract.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 658-661, 664; Dec. Dig. § 231.* For other definitions, see Words and Phrases, vol. 6, pp. 5310, 5311.]

2. DIVORCE (§ 240*)—ALIMONY—ALLOWANCE.

Plaintiff and defendant were chiropractors. They had no children. Defendant had \$7,000 in cash and a good business, with an income of \$300 or \$400 a month. Most of defendant's property had been earned by the joint efforts of plaintiff and defendant since their marriage. Before marriage, plaintiff had certain real estate in Scotland, on which there was a mortgage of \$5,000, which was about all that could be realized therefrom on foreclosure. She also had some personal property to the amount of about \$4,000. At times their necessities required her to use a part of her own means. She was a woman of refinement and in broken health, and was granted a divorce for cruelty. *Held*, that an order declining to award plaintiff permanent alimony, and permitting the husband to retain all the household furniture and effects, was erroneous, and that plaintiff was entitled to \$3,500 permanent alimony.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 675-678, 680; Dec. Dig. § 240.*]

3. DIVORCE (§ 270*)—ALIMONY—INJUNCTION.

It appearing that a large portion of defendant's property consisted of money in a

bank, plaintiff, on instituting a suit for divorce, was granted an injunction restraining the withdrawal of such funds. A decree of divorce was granted, but the court declined to grant any permanent alimony, whereupon, before the decree was drawn or signed, an order was granted dissolving the injunction. Two days thereafter plaintiff applied for an order setting aside the order of dissolution, and more than six weeks thereafter the motion was heard before another judge and denied. *Held* that, the court having erred in refusing to grant permanent alimony, it was also error to vacate the injunction, and that plaintiff was entitled to its reinstatement.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 742; Dec. Dig. § 270.*]

Appeal from Circuit Court, Wayne County, in Chancery; Joseph W. Donovan, Judge.

Action by Grace Rodger Kiplinger against Charles E. Kiplinger. From a decree awarding complainant a divorce but denying alimony, and dissolving an injunction restraining defendant from withdrawing his funds from certain banks, plaintiff appeals. Reversed and injunction reinstated.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

M. J. Lehman & Sons, of Detroit, for appellant. Harry H. Wait, of Detroit, for appellee.

McALVAY, J. Complainant filed her bill for divorce against defendant in the circuit court for the county of Wayne on the ground of extreme cruelty, and also charging adultery. The Detroit United Bank of Detroit and the Old National Bank of Battle Creek were made parties defendant, and an injunction was prayed and granted against all the defendants for the purpose of preventing the principal defendant from interfering with complainant or her property and from disposing of the household goods and furniture; and from disposing of his moneys of which about \$7,000 consisted of cash on deposit in said banks. Defendant Kiplinger answered at length, denying all extreme cruelty and any illicit relations with the woman named in the bill of complaint, or any other woman. The banks answered, admitting the amount of cash on deposit at the time. Issue was joined, and the case was heard upon pleadings and proofs taken in open court. A decree of divorce from the bonds of matrimony was granted complainant on the ground of extreme cruelty, and a small amount of temporary alimony was allowed, but the court denied complainant any permanent alimony. An opinion was filed November 10, 1911, granting a decree of divorce on the ground of extreme cruelty, and later, on December 4th, further proofs having been taken upon the question of alimony, no change was made in this decision, and a decree was settled, signed, and filed December 9th. On December 5th, before this decree was signed, an order was made by the judge who heard the cause dis-

solving the injunction which restrained defendant from withdrawing his funds from the banks named, or otherwise disposing of his property. On December 7th complainant moved to vacate and set aside such order, claiming, among other things, that it had been made without notice to complainant or any of her solicitors, and because they had no opportunity to be heard upon the motion granting an absolute dissolution of the injunction. This motion did not come on to be heard until after the expiration of the term of the said judge, and was heard by another member of that court and denied. Complainant has appealed from the decree of the court, the order dissolving the injunction, and the order denying the motion to vacate such order for dissolution.

Complainant upon this appeal asks for a modification of the decree in the matter of the disallowance of permanent alimony, claiming that, under the evidence and the decisions of this court, permanent alimony should have been allowed, and also claiming that the order dissolving the injunction should not have been granted, and that such order should have been set aside.

These parties were married in Pretoria, South Africa, February 22, 1906. Shortly afterward, they came to the United States, and resided for a time in Davenport, Iowa, where they attended a chiropractic school, from which they graduated, since which time the defendant has been engaged in practice. After leaving Davenport, Iowa, they resided for a brief time in several places and finally came to Detroit where they lived for three years prior to their separation. They have no children. From the undisputed evidence in the case, as appears from the record, this defendant prior to the time of the separation and filing this bill by complainant was guilty of extreme cruelty toward her, and on many occasions assaulted her violently in a brutal and inhuman manner, from which she suffered mentally as well as physically, and has on account of such treatment been on the verge of nervous collapse. His conduct with reference to other women was reprehensible. He was in correspondence with a woman who wrote love letters to him, and he met her in her room at a hotel in Detroit, where she was registered under an assumed name, under such circumstances as to leave no doubt in the mind of the court that he sustained illicit relations with her.

Upon the matter of permanent alimony, which was denied by the court, it appeared that defendant Kiplinger had about \$7,000 in cash, a good business as a practitioner, with an income of \$300 or \$400 a month and no children; that most of his property had been earned by their joint efforts since their marriage. It appears he also retained all of the household furniture and effects. Before her marriage with defendant, complainant had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

some property in her own right. The real estate was situated in Leith, Scotland, and consisted of a building from which but a small income was realized, and upon which there was a mortgage of \$5,000, which the record shows is about all that could be realized from a foreclosure. She also had some personal property to the amount of about \$4,000, and the record shows that at times their necessities required that she should use, and did use, her own means. It would appear that, because complainant had some means of her own and because of a claimed antenuptial agreement, the court who heard the case refused to grant permanent alimony. The record shows that there was an agreement between these parties before marriage relative to her individual property which she desired to keep and control; but the record as clearly shows that no agreement in writing was ever entered into by complainant, and that no antenuptial agreement was ever made between the parties which should be taken into consideration in determining the question of her right to permanent alimony.

[1] In a recent case before this court the question of permanent alimony was fully considered, in which Mr. Justice Steere, speaking for the court, said: "While this is a statutory award of permanent alimony in a gross sum, under a decree of absolute divorce ending the domestic relations and community of interests, the significance of such an award should not be lost sight of. Alimony, by whatever authority it is conferred, is an incident of marriage, and based on the underlying principle that it is the duty of the husband to support his wife, not necessarily to endow her. Primarily, it signifies, not a certain portion of his estate, but an allowance or allotment adjudged against him for her subsistence, according to his means and their condition in life during their separation, whether it be for life or for years. In practical application an award of permanent alimony in a gross sum may result in a division of the husband's estate; but the controlling element not to be lost sight of is his compulsory contribution for her support and maintenance under obligations of the marriage contract." *Bialy v. Bialy*, 167 Mich. 559, 133 N. W. 496.

[2] The complainant in this case, a woman of refinement in broken health, is not only not at fault, but she has suffered at the hands of this defendant irreparable injury, and is entitled to permanent alimony for her support and maintenance in a gross sum in such an amount as this court, in the exercise of its judicial discretion, taking into consideration all the circumstances of these parties, may determine, and such amount is fixed at the sum of \$3,500.

[3] Complainant also upon this appeal asks this court to set aside the order heretofore

mentioned dissolving the injunction, and also the order made later in said cause denying the motion to vacate and set aside such order. From this record it appears that there is no doubt that the order dissolving the injunction was improvidently made under the circumstances of this case where defendant has no real estate and all his available personal estate was safeguarded to her by the injunction. It was made on the day following the final decision of the court relative to permanent alimony and before the decree had been drawn, settled, and signed. In making the motion to set aside this order December 7, 1911, two days after it was made, complainant acted with due diligence. The counter affidavit of the solicitor for the defendant was not filed until more than a month and a half after the term of office of the circuit judge who made the order expired, and on the same day upon which said motion was heard before another circuit judge of said circuit court and denied. Both of these orders should be and are hereby vacated and set aside, and the said injunction in all respects is reinstated and given full force and effect, leaving complainant to such remedy as she may have in the premises to enforce this decree. The decree of the circuit court, as indicated by the foregoing opinion, is modified and a decree will be entered according to the terms of this opinion, complainant to recover the costs of both courts, to be taxed.

MOORE, C. J., and STEERE, BROOKE, STONE, and OSTRANDER, JJ., concurred with McALVAY, J.

BIRD, J. In view of all the circumstances of this case, I think the award of permanent alimony is too large. The parties had been married but a few years, and complainant has an estate nearly as large as defendant's. The award should not exceed \$1,000.

GILDEA v. WARREN.

(Supreme Court of Michigan. Nov. 8, 1912.)

ADVERSE POSSESSION (§ 43*)—TACKLING SUCCESSIVE POSSESSIONS.

Where a plaintiff, suing in ejectment, showed that she and her predecessors in title took possession of the strip of land in controversy with other premises, regarding the strip as having been conveyed by the deeds, and that such possession continued for over 30 years, the successive possessions could be tacked to acquire title by adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 213-224; Dec. Dig. § 43.*]

Error to Circuit Court, Wayne County; Henry A. Mandell, Judge.

Action by Mary Gildea against Mary B. Warren. There was a judgment for defend-

ant, and plaintiff brings error. Reversed, and new trial granted.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

Sloman & Sloman, of Detroit, for appellant. Campbell, Bulkley & Ledyard, of Detroit (Joel H. Prescott, of Detroit, of counsel), for appellee.

MOORE, C. J. Plaintiff brought this action of ejectment to recover possession of a strip of land, which is described as follows: "Commencing at a point on the north line thereof, as above described, about thirty-five and $\frac{21}{100}$ feet west of the west street line of said Twelfth street; thence running southerly and at right angles to said line one and $\frac{22}{100}$ feet; thence westerly about nine and $\frac{26}{100}$ feet; thence on a curve northerly to a point on the said north line of said plot of ground about ten and $\frac{23}{100}$ feet from the place of beginning; thence easterly along said north line of said plot of ground ten and $\frac{23}{100}$ feet to the place of beginning." This description is between the residences occupied by the parties to this litigation.

At the close of plaintiff's testimony, the court directed a verdict for the defendant, basing such direction upon the decision of this court in *Sheldon v. M. C. R. R.*, 161 Mich. 503, 126 N. W. 1056.

Title to the premises of plaintiff is traced back to ownership by one Mary Ann Ockford, who, by warranty deed, dated June 8, 1875, granted to John T. Martin and James Martin lot No. 39, in block 3, of part of the Thompson farm, so-called, according to the recorded plat. By warranty deed, dated February 17, 1886, John T. Martin and his wife conveyed to James Martin the north half of this property, which includes the plaintiff's premises, but not the strip in dispute, which appears to be a part of the adjoining lot 40. By warranty deed, dated March 8, 1886, James Martin and his wife conveyed the north half of this property to Patrick Sullivan, who by warranty deed, dated September 7, 1887, conveyed the same to Carl D. Brandt and Rosa Brandt, his wife. By warranty deed, dated May 9, 1889, Brandt and wife conveyed the same description to the plaintiff, Mary Gildea, and her sister, Catherine Gildea. By warranty deed, dated August 14, 1892, Catherine Gildea conveyed her interest in the premises to her sister, the plaintiff. All the conveyances included the hereditaments and appurtenances thereunto belonging or appertaining.

It is the claim of the plaintiff that her house was built where it now stands more than 50 years ago, and that the strip of land in controversy had been occupied as part of the yard surrounding the residence for more than 30 years, and up to the time in 1901 when she was dispossessed by the defendant. She offered testimony tending

to support her claim. It will be noticed by referring to the date of her deed that her own possession did not continue for 15 years. Was the court right in holding that the case of *Sheldon v. M. C. R. R. Co.*, 161 Mich. 503, 126 N. W. 1056, was controlling? A reference to that case will show it is clearly distinguishable. In the prevailing opinion in that case, the court used the following language: "It is important to bear in mind that in every conveyance of the several grantors of the complainant, after the deed of right of way was given to the defendant Jackson, Lansing & Saginaw Railroad Company, there was the following exception: 'Except, however, all that part of said above-described piece or parcel of land heretofore conveyed by Stanislaus Legault and wife to the Jackson, Lansing & Saginaw Railroad Company by deed, dated the 18th day of September, 1880.' It clearly appears from this record that there is no evidence of any parol permission, or authorization of any kind, given by the grantor, Bell, to the complainant, to take the place of the said Bell in the wrongful possession which Bell held of the strip of land in controversy in this case. Nor is there any evidence in the record of any parol permission or authorization of any of the grantors in the deeds hereinbefore referred to to their grantees to take the places of their grantors in the wrongful possession of said described strip of land. The record also shows that there was no parol agreement, understanding, permission, or authorization respecting the premises which complainant's grantor had held, or would deliver."

In the case before us, there is no exception of the disputed strip in the various conveyances, and there is an abundance of testimony that the several grantees took possession of the disputed strip with the rest of the premises, regarding it as conveyed.

In *Dupont v. Starring*, 42 Mich. 492, 4 N. W. 190, this court held: "It has been repeatedly held by this court that a boundary line long treated and acquiesced in as the true line ought not to be disturbed on new surveys. *Smith v. Hamilton*, 20 Mich. 438 [4 Am. Rep. 398]; *Joyce v. Williams*, 26 Mich. 332. Fifteen years' recognition and acquiescence are ample for this purpose (*Stewart v. Carleton*, 31 Mich. 270); and, in view of the great difficulties which often attend the effort to ascertain where the original monuments were planted, the peace of the community requires that all attempts to disturb lines with which the parties concerned have long been satisfied should not be encouraged. *Diehl v. Zanger*, 39 Mich. 601." See, also, *Greene v. Anglemire*, 77 Mich. 168, 43 N. W. 772; *Sauers v. Giddings*, 90 Mich. 50, 51 N. W. 265; *Flynn v. City of Detroit*, 93 Mich. 590, 53 N. W. 815; *Lamoreaux v. Creveling*, 103 Mich. 501, 61 N. W. 783; *Darrow v. Village of Homer*, 122 Mich. 229, 81

N. W. 262; *Lang v. Osceola Mining Co.*, 145 Mich. 370, 108 N. W. 678; *Trice v. City of South Haven*, 154 Mich. 129, 117 N. W. 555.

We think the case comes within the reasoning of these cases, and that the case should have been submitted to the jury under proper instructions.

Judgment is reversed, and a new trial is granted.

SNYDER et ux. v. MARKHAM.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. FRAUD (§ 59*)—MEASURE OF DAMAGE.

In a case to recover the value of an automobile and an equity in land, given for the right to sell a patent, because of defendant's false representations, as well as certain moneys expended in carrying out the undertaking, the court charged that defendant was liable in such damages as proximately resulted from the fraud, and was bound to make good the loss sustained, as well as such money as plaintiffs paid out in carrying out the transaction, with interest thereon, which would include the fair market value of the property turned over to defendant and any other outlay attributable to the fraud, but that the value of the rights of property secured by plaintiffs in the transaction, if any, must be applied in reduction of plaintiffs' damages, which includes the machines sold by plaintiff and the money received therefrom, but that these instructions exclude from consideration the value of machines on hand at the time the contract was claimed to have been repudiated, together with the value of the right secured under the contract. *Held*, that the instruction stated the correct measure of damages.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 60-62, 64; Dec. Dig. § 59.*]

2. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR.

In an action for damages caused by defendant's fraud in inducing plaintiffs to purchase the right to sell patented articles, it was immaterial that the court instructed that plaintiffs could recover the necessary and reasonable expenses paid out in endeavoring to carry out the contract, even if there was no evidence that plaintiffs were put to any expense by reason of the contract before they attempted to rescind, where the sum awarded was the exact value of the property turned over to defendant by plaintiffs with legal interest.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

3. SALES (§ 392*)—RESCISSION BY BUYER—TENDER OF CONSIDERATION—NECESSITY.

Where, upon discovering part of the fraud by which plaintiff was induced to buy the right to sell a patented article, plaintiff offered to rescind and return the property received, but defendant said he would not do it, any other tender back of consideration by plaintiff was not necessary to entitle him to sue for the value of the property received by defendant.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1128-1131; Dec. Dig. § 392.*]

Error to Circuit Court, Kent County; *Willis B. Perkins*, Judge.

Action by George O. Snyder and wife against Lester B. Markham. Judgment for plaintiffs, and defendant brings error. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OS-TRANDER, and BIRD, JJ.

Dunham & Dunham, of Grand Rapids, for appellant. Swarthout & Master, of Grand Rapids, for appellees.

BROOKE, J. This is an action of trespass on the case upon promises, in which plaintiffs seek to recover the value of an automobile (worth about \$600) and an equity in a land contract (valued at \$200), together with certain moneys expended by them in undertaking to carry on the business contemplated by them in making the deal in question.

It appears that plaintiffs sold said automobile and assigned their interest in said land contract to defendant in consideration of an exclusive right to sell "butter doublers" in the counties of Ottawa and Allegan, Mich., together with 100 of the machines, known as "butter doublers." Plaintiffs charged that they were induced to negotiate the deal in question by reason of false and fraudulent representations made by defendant to them.

It is testified by plaintiff that after the discovery of the alleged fraud "I told him here I had not got the territory, and, another thing, the machine is not any good. It don't do the business represented to do. And I said: 'It simply mixes that milk in there, and the milk came right out again; and when it comes warm the milk sours. That the electric battery does not have anything to do with it. It does not sterilize the milk anyway, and you told me it would keep it sweet; it would sterilize the milk, so that the milk would keep sweet and keep the butter as nice as fresh butter until used, or at any time, and now it does not do that.' I said: 'I cannot handle that thing, or do anything with it.' And I says: 'I want my automobile back, and the equity in that lot, and you can take your counties and the machines.' Q. Would he do it? A. No; he said he would not do it. Mr. Swarthout: While Mr. Snyder is doing that, there is a tender I desire to make in furtherance of the tender that Mr. Snyder has already made to the defendant. I, at this time, tender in court the remaining numbers of this apparatus which Mr. Snyder got from Mr. Markham. I think there are 73 of them left, and these 2 I tender as samples of the bunch, and Mr. Markham is at liberty to get the others, as he has been all the way along. They are too bulky to bring into the courtroom, and I also tender back, as we have heretofore done, the contract of February 14, 1910, given by Mr. Markham and Stebbins to George C. Snyder and Edna Snyder, covering these two counties of Ottawa and Allegan, and also the subjoined contract in regard to the sale of 100 doublers."

[1] The court charged the jury in part as

follows: "The defendant, therefore, is liable to respond to the plaintiffs in such damages as naturally and proximately resulted from the fraud. He is bound to make good the loss sustained by the plaintiffs, as well as such moneys as the plaintiffs may have paid out in carrying out this transaction, together with interest thereon, which would include the fair market value of the property turned out by the plaintiffs to the defendant in the transaction, and any other outlay legitimately attributable to the defendant's fraudulent conduct. What the plaintiffs actually paid the defendant for the right and property secured may be considered by you in determining the loss the plaintiffs have sustained. If the rights or property secured by the plaintiffs in the transaction have any value in fact, that value must be determined by you, under the evidence, and applied in reduction of the plaintiffs' damages. This includes the machines sold by the plaintiffs and the moneys received therefor before the commencement of this suit. The plaintiffs will also be entitled to recover such damages as would be the natural and proximate consequence of the fraud complained of, and which the defendant, from his position, must have contemplated as the probable consequence of his fraud. This would include the necessary and reasonable expenses paid out by the plaintiffs in an endeavor to carry out, in good faith, the purposes of the transaction. You will therefore determine, under the evidence, the value of the property turned over by the plaintiffs to the defendant, together with the necessary expenses paid out by them in carrying out this contract before its repudiation, and the value of the property and rights secured from the defendant by the plaintiffs, strike a balance, and render your verdict accordingly, adding interest at 5 per cent. from March, 1910, to date. These instructions, gentlemen, exclude from your consideration the value of the machines on hand at the time the contract is claimed to have been repudiated, together with the value of the rights secured under the contract in Allegan and Ottawa counties. The plaintiffs claim that they tendered back to the defendant the contracts delivered to them, securing the exclusive right to sell these machines in these two counties, and also tendered back the machines left on hand at Holland, which had been delivered under the contract, and that the defendant refused to receive them, denying substantially the right of the plaintiffs to terminate the contract. There is some question there, growing out of the fact that at the time this tender was made the plaintiffs had not discovered the falsity of the representations as to the sale of the Kent county rights to Mr. Vanderveen, and as to the effect of the dry cell battery upon the product of these machines. But I instruct you that it makes no difference, so far as the measure of damages in this case

is concerned. The offer to turn the property back was made and refused, and the plaintiffs are entitled to the benefit of that offer in this action. So in striking this balance, or rather in determining the amount paid out by the plaintiffs in property and money in this transaction and the amount received by them before the repudiation, you will take into consideration the value of the property turned out, the automobile, and the equity in this lot, and such necessary and reasonable expenses as were paid out in an attempt to carry out the intent and meaning of the contract, on the one hand. On the other hand, such moneys as the plaintiffs may have received by the sale of these machines, or otherwise, if there is any testimony to that effect, in an attempt to carry out the terms and conditions of the contract. The balance will represent the amount you should find for the plaintiffs, if any. Upon this balance you will reckon interest at 5 per cent. from March, 1910, to date. If there is no balance, your verdict will be 'No cause of action.'"

Plaintiffs recovered a judgment in the sum of \$873.73.

The record contains the evidence of but one witness, plaintiff George C. Snyder.

Defendant asserts that there are two questions involved: (1) Whether or not the trial judge correctly stated the law upon the measure of damages. (2) Whether or not the court correctly stated the law upon the question of tender.

We are of opinion that the correct measure of damages was laid down in the charge of the court, above quoted.

[2] It is said by defendant that there is no evidence that the plaintiffs had been put to any expense by reason of the contract between the parties up to the time the plaintiffs attempted to rescind. The plaintiff did testify that he went to Holland and advertised for agents; that he again went to Holland the next week to see the agent in regard to delivering orders; and that he spent money for advertising and hotel bills. The amount of such expense is not given by the witness; but that fact is not important, as it is apparent from an examination of the verdict that the sum awarded is exactly the value of the automobile and land contract, together with legal interest thereon from the date of the contract to the time of trial.

[3] It is urged that no sufficient tender of the property was made. Under the evidence in this case, we think no more formal tender was required. When plaintiff offered to rescind and turn back the contract and the "doubtless," defendant "said he would not do it." It is obvious that any further tender would have been an idle formality, which the law does not require. *Lacy v. Wilson*, 24 Mich. 479; *Witt v. Dersham*, 146 Mich. 68, 109 N. W. 25; *Fournier v. Clutton*, 146 Mich. 298, 109 N. W. 425, 7 L. R. A. (N. S.) 179.

117 Am. St. Rep. 638, 10 Ann. Cas. 392. See, also, Cyc. p. 134 et seq., and cases cited.

The judgment is affirmed.

BLANKSMA v. KING.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. FRAUD (§ 41*)—DECLARATION.

A declaration clearly averring that defendant made certain false and fraudulent representations, that they were believed and relied on by plaintiff, and that as a result defendant wrongfully and fraudulently received a certain sum of money, the property of plaintiff, is sufficient.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 36, 37; Dec. Dig. § 41.*]

2. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—IMPROPER QUESTIONS—INSTRUCTIONS TO DISREGARD.

Defendant's rights are fully protected, where, being asked on cross-examination if he had not offered a certain amount to settle the matter, objection thereto is sustained, and the jury instructed not to consider it, or let it influence them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4153-4160; Dec. Dig. § 1048.*]

3. NEW TRIAL (§ 108*)—NEWLY DISCOVERED EVIDENCE—MATERIALITY.

Newly discovered evidence which would not change the result is not ground for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

Error to Circuit Court, Kent County; John S. McDonald, Judge.

Action by Peter Blanksma against George W. King. Judgment for plaintiff. Defendant brings error. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, BIRD, and KUHN, JJ.

Charles A. Watt, of Grand Rapids, for appellant. Linsey & Shivel, of Grand Rapids, for appellee.

BROOKE, J. In this suit plaintiff declared as follows: "For that whereas, at the time of committing of the several wrongful acts by the said defendant hereinafter mentioned, and for a long space of time immediately previous, the said defendant professed and practiced medicine and surgery in the city of Grand Rapids, in the county of Kent, and state of Michigan; and whereas, on, to wit, the 1st day of May, 1910, said defendant was called professionally to treat one Henry Blanksma, brother of this plaintiff, and treated the said Henry Blanksma from that time on, to wit, the 5th day of May, 1910, when he, the said Henry Blanksma, died, and that on, to wit, the 7th day of May, 1910, said Henry Blanksma, deceased, was buried by and under the direction of one Charles A. Humphrey, an undertaker, residing and doing business in the city of Grand Rapids,

Mich., who furnished the necessary furnishings, paid the funeral expenses, and performed the services of directing the funeral and interment of the remains of said deceased, that the said Charles A. Humphrey was procured at the request of this plaintiff to take charge of the burial of said deceased, as aforesaid, and, for the expense and charges of said Charles A. Humphrey therefor, this plaintiff became and was responsible to pay the same to him, that said charges and expenses on the part of the said Charles A. Humphrey were in the sum of \$161: The plaintiff alleges that on, to wit, the 12th day of May, 1910, the said defendant, intending to injure and defraud the said plaintiff, did go to the said Charles A. Humphrey, and fraudulently represent and pretend to the said Charles A. Humphrey that he wanted a bill of the services of the said Charles A. Humphrey, as aforesaid, in order that he, the said defendant, might present the same to this plaintiff at the time that he, this defendant, presented his bill for professional services. And the plaintiff alleges that the said defendant did procure from the said Charles A. Humphrey a bill for the services of the said Charles A. Humphrey in the sum of \$161, and did on, to wit, the 12th day of May, 1910, with the intent to defraud and injure this plaintiff, present to this plaintiff a false and fraudulent statement of the claim of the said Charles A. Humphrey, in the sum of \$352; that the said defendant, falsely and fraudulently with the intent to defraud this plaintiff, did claim and represent to this plaintiff that the bill of the said Charles A. Humphrey was the sum of \$352, as aforesaid, and by such false and fraudulent representations did induce this plaintiff to make out his personal check on his account in the Madison Square Bank of Grand Rapids in the sum of \$352, payable to the said Charles A. Humphrey, and delivered the said check to the said defendant for the said Charles A. Humphrey, and in payment of the charges and expenses of the said Charles A. Humphrey for the burial of said deceased, as aforesaid, and for no other purpose. Plaintiff further alleges that the said defendant, with the intent to defraud and injure this plaintiff, did take said check to the said Charles A. Humphrey, and fraudulently and falsely represent and pretend to the said Charles A. Humphrey that the said sum of money represented by said check was in payment of his, the said Charles A. Humphrey's claim of \$161, and the claim of this defendant of \$191 for professional services performed, as aforesaid; that upon the representations of the said defendant, as aforesaid, the said Charles A. Humphrey presented said check for payment at the Branch Commercial Savings' Bank, West Side, and received the sum of \$352; that the said Charles A. Humphrey then paid this defendant upon his representations as afore-

said the sum of \$191; that said check was presented to the Madison Square Bank in due course, and the said sum of \$352 was paid from the account of this plaintiff. The plaintiff further alleges that he believed these representations and statements made by the said defendant, as aforesaid, and relied thereon, and that, by reason thereof, he was induced to deliver to the said defendant his check as aforesaid, and that the said defendant did wrongfully and fraudulently receive the said sum of \$191, and has converted the same to his own use. Plaintiff alleges that, by reason of premises as aforesaid, he has been deprived of said sum of \$191 and the use thereof, and has been greatly injured and damaged to the amount of, to wit, \$500, and therefore he brings suit." To this declaration a plea of the general issue was interposed by defendant. The jury rendered a verdict against defendant in the sum of \$197.37, upon which judgment was entered. Defendant reviews that judgment in this court by writ of error.

[1] Defendant's first assignment of error is based upon the action of the court in refusing to sustain his objection to the introduction of any testimony under the pleadings; it being his claim that the declaration does not state a cause of action. In support of his contention defendant cites and relies upon *Parker v. Armstrong*, 55 Mich. 176, 20 N. W. 892. We are unable to find that the declaration in the case at bar presents the infirmity pointed out in that case. This declaration clearly avers that the defendant made the false and fraudulent representations, that they were believed and relied upon by plaintiff, and that as a result the defendant wrongfully and fraudulently received the sum of \$191, the property of the plaintiff. Defendant's objection was properly overruled. *Hopkins v. O'Neil*, 46 Mich. 403, 9 N. W. 448, and cases there cited; 20 Cyc. 98.

[2] In the course of the trial, defendant upon cross-examination was asked if he had not offered \$100 to settle the matter. The question was objected to and the answer excluded. In addition thereto the court said: "Mr. Watt may have an exception, and the jury is instructed that they must forget the testimony or the question. It was not answered. Don't allow it to influence your verdict in the least." There is no merit in this exception. We are of opinion that defendant's rights were fully protected.

[3] Error is assigned upon the denial of a motion for a new trial principally based upon the fact that defendant had discovered new evidence. Touching this assignment, it is sufficient to say that we agree with the finding of the learned circuit judge that the evidence referred to would not change the result upon a new trial. *Morin v. Robarge*, 132 Mich. 337, 93 N. W. 886.

We find no error in the record, and the judgment is affirmed.

AUSTIN v. AUSTIN.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. DIVORCE (§ 200*)—JURISDICTION—STATUTORY PROVISIONS.

The jurisdiction of the circuit court in chancery in divorce proceedings is wholly statutory; and the court has no inherent power to decree permanent alimony.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 587-590, 658; Dec. Dig. § 200.*]

2. DIVORCE (§ 289*)—CUSTODY AND MAINTENANCE OF MINOR CHILDREN—JURISDICTION OF COURT—STATUTORY PROVISIONS.

Comp. Laws, § 8631, authorizing the court decreeing a divorce to make such further decree concerning the custody and maintenance of the minor children as it shall deem proper, authorizes the court granting a decree to make a proper order as to the custody and maintenance of the minor children, whether mentioned in the pleadings or not, or whether there has been any underwriting on the subpoena, or whether the parties have agreed, or attempted to agree, as to the children, who become the special wards of the court.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 773; Dec. Dig. § 289.*]

3. DIVORCE (§ 202*)—APPEARANCE BY SOLICITOR—AWARD OF ALIMONY—JURISDICTION.

Where defendant, in a suit for divorce, appeared by his solicitor, the court had jurisdiction to award alimony or allowance.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 593; Dec. Dig. § 202.*]

4. DIVORCE (§ 168*)—DECREE—COLLATERAL ATTACK.

A divorce decree cannot be collaterally attacked for mere irregularities not affecting the jurisdiction of the court; and the failure to file an affidavit of regularity and to enter a formal order pro confesso does not go to the jurisdiction of the court, and cannot be raised collaterally.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 549, 550; Dec. Dig. § 168.*]

5. DIVORCE (§ 162*)—DECREE NUNC PRO TUNC—STATUTORY AUTHORITY.

Under Comp. Laws, § 557, authorizing the court to order the recording and enrolling of decrees nunc pro tunc, the court has authority to order the recording and enrolling nunc pro tunc of a decree of divorce.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 527; Dec. Dig. § 162.*]

Appeal from Circuit Court, Calhoun County, in Chancery; Walter H. North, Judge.

Proceedings by Alice M. Austin to establish a claim against the estate of Frank Austin, deceased. From a judgment of the circuit court allowing the claim, rendered on an appeal by Lola M. Austin, executrix, from an allowance of the claim by the commissioners on claims, she appeals. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OS-TRANDER, and BIRD, JJ.

J. M. Hatch & Sons, of Marshall, for appellant. J. L. Hooper and L. E. Stewart, both of Battle Creek, for appellee.

STONE, J. The claim of Alice M. Austin against the estate of Frank Austin, deceased,

was presented in the probate court of Calhoun county, where ancillary administration was had in said estate. The claim was for the support, care, and maintenance of the two children of said parties, to wit, Helen and Pearl. The claim was allowed by the commissioners on claims, and an appeal was taken by Lolf M. Austin, executrix, to the circuit court, where the decision of the commissioners was affirmed; the circuit judge having filed findings of fact and conclusions of law therein.

The claim grows out of a decree of divorce which was granted upon a bill filed by Alice M. Austin against Frank Austin, now deceased, on the 11th day of August, 1894, alleging extreme cruelty, desertion, and non-support, and praying for the custody of Pearl Austin, 14 years of age, and Helen M. Austin, then 7 years old, until they should severally attain the age of 14 years. The bill also prayed for absolute divorce, but contained no prayer for alimony, and no prayer for expenses or allowance for support of the children, but contained the usual prayer for general relief. The bill of complaint set forth no facts showing what property either the complainant or defendant had, and no facts showing the earnings of either party. At the time of the filing of the bill of complaint, Frank Austin, the defendant therein, was residing in the state of Ohio. A subpoena was issued upon the filing of the bill, directed to Frank Austin; but the underwriting on the said subpoena was not filled out or signed by the solicitor of Alice M. Austin. On the 1st day of September, 1894, Frank Austin admitted service of the subpoena in the state of Ohio. His appearance in said cause, by H. E. Winsor, his solicitor, was entered by the clerk in the common rule book. There is no proof on file in said cause of any service of a copy of the bill of complaint upon H. E. Winsor, and no waiver of such notice appears of record. No affidavit of default or affidavit of regularity was ever filed in said cause, and no order pro confesso was ever entered, so far as the records show. The case was heard before the circuit court in chancery, and on March 21, 1895, a decree was made and entered in said cause, purporting to have been upon the bill taken as confessed, and granting Alice M. Austin an absolute divorce from Frank Austin, which decree contained the following: "And it is also further ordered, adjudged, and decreed that said complainant, Alice M. Austin, shall have the care, custody, and maintenance of said minor child, Helen M. Austin, and that said child shall remain with said complainant, Alice M. Austin, until she shall have attained the age of 14 years, or until the further order of the court. And it is further adjudged and decreed, it sufficiently appearing, that said defendant, Frank Austin, shall pay to Theodore N. Austin, as trustee, the sum of ten dollars per week, the same to be

paid weekly, for the use, care, and support of the minor children of said complainant, Alice M. Austin, and said defendant, Frank Austin, viz., Pearl Austin and Helen M. Austin, such payment to continue until said children arrive at their majority, or are married, said moneys to be paid to the said complainant so long as said children remain with and are cared for by her, but to wholly cease when they marry or reach their majority, the same to be adjudged as permanent alimony to the complainant, Alice M. Austin, during the time aforesaid; and said trustee may take her receipt for the same."

Upon the trial of the case in the circuit court, the evidence tended to show that Frank Austin continued, after the divorce, to reside in the state of Ohio, and finally died at Cleveland, in that state. It also appeared that both children married before reaching the age of 21 years; Pearl having married November 14, 1900, and Helen having married on the 11th of September, 1902—each having lived with her mother until such marriage. It further appeared that no portion of the alimony, save the sum of \$25, was ever paid to apply upon the decree. It also appeared that Theodore N. Austin died before the death of Frank Austin. The court found the following facts from the evidence:

(1) "I find that complainant filed a bill of complaint against Frank Austin for the purpose of obtaining a decree of divorce, which bill of complaint is hereby made a part of this finding by reference."

(2) "I find that on the 20th day of August, 1894, subpoena was issued in said cause, which subpoena and indorsements thereon are hereby made a part of this finding by reference."

(3) "I find that on the 21st day of March, 1895, a decree was entered in said cause referred to in findings Nos. 1 and 2, which decree is made a part of this finding by reference."

(4) "I find that there was no prayer in said bill of complaint in said case of Austin v. Austin for alimony, but I do not find that there were no facts set up showing any necessity for alimony, or that there were no facts set up showing the ability of Frank Austin to pay alimony, or that there were no facts showing his property or earnings; but I do find that no facts are alleged in said bill of complaint which showed that the question of alimony had been settled, and I also find that no amendment to said bill of complaint was ever filed in said cause."

(5) "I find that there was no underwriting, signed by the solicitor for the complainant in said cause, upon the subpoena issued in said cause."

(6) "I find that the defendant in said cause of Austin v. Austin for divorce entered his appearance by Hon. H. E. Winsor, his solicitor, in the common rule book." (A copy of said order is inserted in the finding.)

(7) "I find that no answer by the defendant was filed in said cause."

(8) "I find that the decree in said cause is one taken by default."

(9) "I find that said cause was not put on the calendar for hearing, at least so far as appears by any notice of such hearing being filed in said cause; and also that no waiver of notice, or any other waiver, appears in the files of said cause."

(10) "I also find that no entry or any order for default appears ever to have been made in said cause, and no affidavit of default and no affidavit of regularity were ever filed in said cause."

(11) "I also find that no claim was ever filed by said claimant, Alice M. Austin, against T. N. Austin in his lifetime, or against his estate after his death, for the alimony provided for in the decree in the case of Austin v. Austin, payable to him, and to be paid by him to claimant."

(12) "I do not find, as I am requested in proposed finding No. 12, 'that there was no evidence in the case of nonpayment, except that of Alice M. Austin, whose evidence was taken under objection and exception, and that the same was inadmissible, being equally within the knowledge of Frank Austin, deceased,' but, on the contrary, I do find that testimony was taken to the effect that Alice M. Austin was not paid the alimony by the trustee, T. N. Austin, through whose hands payment was to be made, and this is not testimony concerning facts equally within the knowledge of the deceased; and I also find that the testimony of the two daughters of the complainant, who lived with her during the period for which the alimony was ordered to be paid, is of some evidentiary force touching the question as to whether or not their mother did receive assistance during said period by payment of installments of alimony."

"In addition to the foregoing findings of fact covering the phases of the case suggested by the appellant's proposed findings of fact, I find that the docket entries in the divorce case in question are as follows: [Here follow the calendar entries, which we omit.]"

The following findings of law were made by the circuit judge:

(1) "That the evidence of Alice M. Austin as to nonpayment by Frank Austin of alimony is admissible."

(2) "I do not find 'that the decree, so far as it attempted to grant any alimony for support of the children and for wife, the claimant, was void.' In connection with this finding of law, it should be noted that the decree does not award any alimony for the support of the wife, the claimant, but, on the contrary, the award made was 'for the use, care, and support of the minor children of said complainant.'"

(3) "I do not find, as matter of law, 'that the claim of Alice M. Austin is (or should be)

disallowed, with taxable costs to the estate of Frank Austin, deceased.'"

"So far as the defense urged by appellant's attorney, that proof of payment made was equally within the knowledge of the deceased, it seems to me that, in addition to what has been said hereinbefore touching this matter, this is a defense of an affirmative character, and that when the claimant established the fact that a decree had been taken or ordered against the appellant, in which she was entitled to the payment of certain sums of money for the use of her children, that she thereupon established her case, and the burden of proving the defense of payment would be upon the appellant. The only person who could possibly give positive testimony as to whether or not the claimant has been paid is the claimant herself; and surely it would be a preposterous proposition of the law to say that, notwithstanding she is the only person who can give positive proof of nonpayment to her, still the statute closes her lips, and she cannot testify. Such a position would necessarily defeat this claim, and every one of like nature, by cutting off the only source from which competent proof could be secured."

Then followed the order allowing the claim as presented, and directing the same to be certified to the probate court, with the usual taxable costs in favor of the claimant and against the estate of the deceased. The above findings were duly excepted to, and error has been assigned thereon, and the case is here for review.

Counsel for appellant have discussed the questions raised by the assignments of error under certain heads, which we will consider in the order in which they have been discussed:

(1) It is first claimed that the decree in the divorce case, in so far as it attempted to grant any allowance for the support of the children, was void, because no claim therefor was set up in the bill of complaint, and the underwriting on the subpoena not having been signed by the solicitor for complainant. It is urged that no facts were set up in the bill of complaint showing the ability of Frank Austin to pay alimony, or the amount of his property.

(2) It is claimed that alimony and allowances must be prayed for to entitle the court to grant the same.

(3) That no decree could be taken in the divorce case upon default for want of answer, or default for want of an appearance, excepting such a one as was authorized by the pleadings at the time of default.

These three grounds may be considered together.

[1] It is urged by counsel that the holding of this court in *Maslen v. Anderson*, 163 Mich. 477, 128 N. W. 723, is controlling of this case upon this question. This court there held, as had been held before, that the

jurisdiction of the circuit court in chancery in divorce proceedings in strictly statutory, and that the court has no inherent power to decree permanent alimony. We do not think that case decisive of the question here involved. It is also well to bear in mind that distinction has been made by this court between alimony, strictly so called, and allowances for the maintenance of minor children. See *Brown v. Brown*, 135 Mich. 141, 97 N. W. 396; *Pingree v. Pingree*, 135 N. W. 923.

[2] Our statute provides (section 8631, Comp. Laws) as follows: "Upon pronouncing a sentence or decree of nullity of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board, the court may make such further decree as it shall deem just and proper, concerning the care, custody and maintenance of the minor children of the parties, and may determine with which of the parents the children, or any of them, shall remain."

In our opinion, a fair and practical construction of the above section authorizes the court to make a just and proper order respecting the care, custody, and maintenance of the minor children in a divorce proceeding, even though the pleadings may contain nothing in reference to those subjects. We think that they are, by the statute, made incidents to the divorce; and that upon the making of a decree for a divorce full power is given for the custody, care, and maintenance of children. This view finds support in the following authority: "On granting a divorce, it is the duty of the court to protect the interest of the state by providing for the custody and support of the children; and this may be done, although neither has prayed for such relief." 9 Am. & Eng. Enc. of Law (2d Ed.) p. 866, citing the following authorities: *Ex parte Gordon*, 95 Cal. 374, 30 Pac. 561; *Zuver v. Zuver*, 36 Iowa, 190; *In re Morgan*, 117 Mo. 249, 21 S. W. 1122, 22 S. W. 913; *Snover v. Snover*, 10 N. J. Eq. 261; *Parker v. Parker*, 8 Ohio Cir. Ct. R. 363. An examination of the above-cited cases shows that they fully sustain the position claimed for them in the citation. See, also, 14 Cyc. 804, and cases cited.

We think that the position of counsel for appellee, where they claim that in every divorce case, whether mentioned in the pleadings or not, or whether or not there be any underwriting on the subpoena, or whether or not the parties agree, or attempt to agree, as to the minor children, such children have become, by statutory enactment, the special wards of the court, is supported by authority; and this matter is not only within its jurisdiction, but it becomes the duty of the court to safeguard the interests of the minors against improvidence or carelessness of one or both parents.

[3] It is next urged by appellant's counsel

in their fourth position that, in order to warrant alimony or allowance, there must have been personal service of the subpoena upon the defendant in the divorce case; and, fifth, that no personal decree, such as a decree for alimony or allowance, can be based upon proof of service outside of the state, or upon publication.

It is a sufficient answer to these positions to say that the circuit judge found, as matter of fact—and we find that the evidence fully supports such findings—that the defendant in the divorce case appeared by his solicitor; and whether Frank Austin was ever served with a subpoena or not becomes wholly unimportant. "An attorney who has entered an appearance is always presumed to have authority to do so until the contrary is shown." 3 Cyc. 531, and cases cited in note 86. And it also appears that Mr. Winsor was present at the hearing of the divorce case.

[4] It is next contended by counsel for appellant that the decree in the divorce case, so far as it granted any allowance for the support and maintenance of the children, was void for want of jurisdiction, and could be attacked collaterally or in any other way, and that it furnished no legal evidence of any claim against the estate of Frank Austin, deceased, and this embraces the argument with reference to the irregular default and subsequent proceedings. We cannot agree with counsel in this contention. We think that the failure, if such there was, to file an affidavit of regularity and to enter the formal order pro confesso were mere irregularities, and did not affect the jurisdiction of the court. *Ireland v. Woolman*, 15 Mich. 253; *Torrans v. Hicks*, 32 Mich. 308.

In the last-cited case it is held that the validity of the decree cannot be attacked collaterally for mere irregularities which do not go to the jurisdiction. *Ruggles v. First Nat. Bank of Centerville*, 43 Mich. 192, 196, 5 N. W. 257; *Carpenter v. Ingersoll*, 43 Mich. 433, 5 N. W. 457. See collection of authorities in note to *Bigalow v. Barre*, 30 Mich. 1.

These questions might have been successfully raised in the divorce case on appeal or otherwise; but, not going to the jurisdiction of the court, they cannot be raised collaterally, as they are sought to be raised here.

[5] We have examined the other questions urged by appellant, including the one with reference to the enrollment of the decree nunc pro tunc, and are of the opinion that they are without merit. We think that, under section 557 of the Comp. Laws, the court had full power and authority to order the decree in the divorce case recorded and enrolled nunc pro tunc.

We find no reversible error in the record, and the judgment of the circuit court is affirmed.

CARPENTER v. HOOD et al.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. EQUITY (§ 50*)—REMEDIES FOR COLLECTION—ACTIONS TO OFFSET.

If, by an agreement between a plaintiff in an ejectment suit and her attorneys to the effect that for their professional services they were to have any costs recovered and a specified portion of any land recovered, the attorneys became liable for costs accruing in favor of an adverse party, such adverse party had a clear, adequate, legal remedy for their collection under Comp. Laws, § 11,281, providing that, when any action shall be brought in the name of another by an assignee, such assignee shall be liable for costs in the same cases and to the same extent in which a plaintiff would be liable, and the payment may be enforced by attachment in all cases where judgment is not by law required to be rendered therefor against such assignee, and hence equity had no jurisdiction of a suit to offset such costs against costs of another action accruing in favor of such plaintiff or her attorneys.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 146-150; Dec. Dig. § 50.*]

2. EXECUTION (§ 349*)—SATISFACTION—SET-OFF OF EXECUTION.

Under Comp. Laws, § 10,348, relative to offsetting executions, which provides that such set-off shall not be allowed when the creditor in one of the executions is not the debtor in the other in the same capacity and trust, an execution under a judgment for costs could not be enjoined and the costs set off against those accruing in favor of the execution debtor in another action, where the parties to the two actions were not the same.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1068; Dec. Dig. § 349.*]

3. EQUITY (§ 46*)—REMEDIES FOR COLLECTION—ACTIONS TO OFFSET.

In an action to enjoin the collection of an execution on a judgment for costs to set off such costs against those accruing to the execution debtor in another action, and to require the payment of the balance found due the execution debtor, where an offset cannot be had, the payment of the costs due the execution debtor will not be decreed; such decree affording no more adequate remedy for their collection than is afforded by the judgment at law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 151, 152, 157, 159-163; Dec. Dig. § 46.*]

4. MALICIOUS PROSECUTION (§ 25*) — CIVIL ACTIONS—PROOF OF MALICE.

Where first one party and then the other to litigation was successful in the circuit or Supreme Court, this negated the claim of one party that the rights of the other were of such a doubtful character as to warrant the belief that she and her attorneys were engaged in a fraudulent and malicious attempt to oppress and harass the party setting up such claim by bringing foundationless actions.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 56-58; Dec. Dig. § 25.*]

Appeal from Circuit Court, Kent County, in Chancery; Chas. A. Withey, Judge.

Bill by Frank L. Carpenter against Oscar J. Hood, Shubal Hammond, Cora M. Carpenter, John I. Carpenter, and Herbert M. Rogers, executor of Quincy A. Smith, deceased. From a judgment dismissing the bill, complainant appeals. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, and BIRD, JJ.

Frank L. Carpenter, of Grand Rapids, in pro. per. Gardner & Hood, of Lansing, for appellees. John I. Carpenter, of Lansing, in pro. per.

BROOKE, J. The bill of complaint in this cause sets out an extremely complicated state of facts. The pleadings and proofs thereunder are so well digested and set forth in the opinion of the learned circuit judge who heard the case that we print it in full, together with his conclusions of law thereon:

"This is a bill filed upon the part of the complainant for the purpose of restraining the sale on execution of certain premises situated in the city of Lansing, and for an accounting between the parties and for some other incidental relief. In 1887 the complainant, Frank L. Carpenter, with his sister, Lucy Jones, as plaintiffs, began a suit in ejectment against the complainant's brother, John I. Carpenter, and his tenant in possession of the premises, for the purpose of recovering the possession of the premises and settling the title thereto. The case was tried in the Ingham circuit court before a jury, and judgment passed for the plaintiffs. The case was never appealed. At the trial, the wife of the defendant John I. Carpenter, Cora M. Carpenter, appeared as a witness and testified in the case that she, and not her husband, owned the premises in question, and that the tenant was her tenant, and not the tenant of John I. Carpenter. In fact, she took such a position and such a part in the trial of that case that the Supreme Court afterwards held that, though not a party of record, she was a party in interest, and was bound by the result of the trial. Later Cora M. Carpenter began a suit in the same court in ejectment against August D. Carpenter and Josephine Carpenter for the same premises, or a portion of them, and still later Cora M. Carpenter began another suit in ejectment in the same court against the complainant Frank L. Carpenter and his sister, Lucy Jones, for the same premises, or a portion of them. These cases are known in the bill in the case at bar, for convenience, as cases Nos. 1, 2, and 3.

"Cases Nos. 2 and 3 had a very tortuous history; there having been various trials in both cases in the circuit and Supreme Courts, and many interlocutory proceedings. The complainant, Frank L. Carpenter, during the course of the law proceedings referred to became the owner of the interest of his sister, Lucy Jones, and he finally recovered in the law cases, and is now, and has been for a long time, in possession of lot 10. During this legal warfare and internecine strife, which seems to have extended over a period

of nearly 20 years, judgment for costs sometimes went to one side, sometimes to the other. In case No. 1, decided 1888, costs were taxed in favor of the complainant, Frank L. Carpenter, and his sister, Lucy Jones, and the complainant now owns that judgment amounting to about \$130. The defendant Cora M. Carpenter recovered costs somewhere along the history of case No. 3 amounting to about \$116. She was represented during this long litigation in the law courts (at least as to cases Nos. 2 and 3) first by Smith, Lee & Day, later by Smith & Hood. The attorneys first named made a contract with her to the effect that they were to do the professional work in the cases in question and furnish the money necessary to maintain them, except the witness fees, and possibly clerk and stenographers fees, for which they were to have any costs recovered and 35 per cent. of any land recovered. That this contract was made and all the business in regard to the several law suits referred to done under it is undisputed in the case at bar. The complainant, although entitled to do so, has never taxed any costs in any of the law cases, except No. 1. Recently an execution was issued in case No. 3, and the premises in Lansing in question, or some portion of them, were levied upon and advertised for sale. Knowledge of that fact came to the complainant, Frank L. Carpenter, whereupon he filed the bill in this case to restrain the sale and to compel an offset and balancing of the costs pro and con between the parties to this suit, but in the aforesaid cases at law he secured a temporary restraining order issued by Judge McDonald of this court, and the question here is primarily whether that order should be made permanent and an offset and balancing of accounts as to costs in said suits at law compelled.

"The complainant claims, and the proofs tend strongly to show, that Cora M. Carpenter is not, and never has been during the litigation referred to, collectible, and he asks that the defendants Smith & Hood, or to speak correctly, the representative of the estate of Smith, who is now deceased, and the defendant Hood, may be required to respond to him and pay any costs found due in the premises. As I understand complainant's bill, he bases his supposed rights against John I. Carpenter, Smith's estate, and Hood upon the alleged collusion, fraud, and oppression claimed to have been practiced by Cora M. Carpenter and her attorneys in the several lawsuits referred to herein, and upon an alleged agreement with said Smith during his lifetime while case No. 3 was in course of litigation that neither side should attempt further to collect their costs until the litigation was concluded, when they would offset the costs to one side against those going to the other and pay the balance which might appear either way. This

agreement is claimed to have been verbal. Upon the hearing the complainant conceded that he was not competent to testify to that agreement, and no evidence was given concerning it, but he claims that the allegations of the bill wherein the conversation between him and Smith are set forth are not specifically denied, and that, therefore, the agreement should be found to exist as alleged.

"I understand complainant to claim, further, that the general aspects of the case as disclosed by the proofs raise sufficient equities in his behalf to support a decree in his favor; that the existence of the cross-demands is sufficient in itself for this court to act upon and afford the relief asked for. On the other hand, the defendants claim that the agreement between Cora M. Carpenter and her attorneys referred to above constituted an assignment to Smith & Hood or their representatives of any judgment for costs which accrued in her favor. They deny that there was any collusion, fraud, or oppression in any of the proceedings, and claim to have acted in the utmost good faith from first to last. John I. Carpenter and the other defendants as well contend that the costs taxed in complainant's favor in case No. 1 are barred by the statute of limitations, and that nothing appears in the case to relieve from that bar. They further claim that this court has no power to compel an offset or balancing of costs in the various suits at law, because the parties are not the same in the various suits, that there were various parties plaintiff and defendant in the lawsuits who are not parties in this case at all, upon which point there is no dispute as to the facts.

"There seems to me to be a great deal of irrelevant matter in the bill, and the court became somewhat restive and perhaps a little impatient because of the irrelevant testimony produced in the case, particularly upon the part of the complainant, but more or less on both sides. Notwithstanding this, the sympathy of the court, if I am permitted to indulge such a sentiment, is with the complainant. The costs are largely in his favor, and many of the proceedings in law cases Nos. 2 and 3 appear to have been inexplicably unjust to him, and, if I could see my way clear in the faithful administration of the law, I would grant complainant at least some of the relief prayed for; but I am constrained to hold:

"First. That the parties are not the same, and that I have no power to compel the offset or balancing of the costs in the several suits at law. In addition to the main defendants, there were in some and perhaps all of the law cases various persons named as defendants who were in possession of the premises, and therefore necessary defendants. In each case the costs were taxed against them as well as the other defendants, and they could have been made to

respond, if collectible. When the side of the case where they appeared was successful, costs were taxed in their favor, and they could have enforced collection and contribution. None of this class of numerous litigants are before this court, and I am satisfied that the situation is such that an offset or balancing of costs and claims cannot be enforced.

"Second. I hold that the agreement between Cora M. Carpenter and her attorneys was legal and valid and constituted an equitable assignment of all costs awarded to her to her attorneys, and that neither she nor they can be restrained from their collection.

"Third. I find that the proofs do not show any fraud, collusion, or oppressive conduct upon the part of Cora M. Carpenter or her attorneys, although some of their actions might be subject to criticism from an ethical standpoint, and that the proofs do not show such equities in a general way as entitle the complainant to the relief prayed for.

"Fourth. That the allegations of the bill wherein it is claimed and the agreement is set up with the late Quincy A. Smith that costs should be offset or balanced is sufficiently denied by the answer, and, there being no proof at all of such an agreement or conversation, complainant's case fails on that point, especially as no compliance with court rule 39 is claimed to exist.

"Fifth. The judgment for costs in case No. 1 is barred by the statute of limitations, and I think the bar is sufficiently pleaded. Whether so or not, the proofs show without dispute that the claim is stale and dead both at law and in equity.

"Sixth. The complainant had and yet has his remedy at law by taxation of costs, executions therefor, and proceedings under the special statute securing to him the offset he here prays for. This adequate and unquestionable remedy he has neglected for years, and cannot now well ask the court to do what he should have done for himself.

"This court has no power to review the proceedings of law courts had long years ago, nor the unprofessional conduct, if any, indulged in by counsel at that remote period. Here, too, the remedy was in the hands of the trial court and if complainant neglected to enforce his rights or thought success unlikely, this court cannot now assist him.

"It follows that the bill should be and is hereby dismissed, but without costs to either side."

We understand complainant's contention to be that the six findings of mingled fact and law above set forth are erroneous, and, further, that under chancery rule 10 (d) it should be held that by the answer filed the defendants admitted facts sufficient to entitle complainant to the relief prayed. The pleadings alone occupy some 34 pages of the record. To set them out in full is obviously

out of the question, and would serve no good purpose. It is sufficient to say that, after carefully examining the bill and answer, we are of opinion that both answers fairly meet the requirements of the rule invoked.

It is next urged by complainant that the court should have decreed Smith & Hood to be liable for costs taxed against Cora M. Carpenter in cases Nos. 2 and 3 upon the theory that, though the cases were brought in the name of Cora M. Carpenter as plaintiff, Smith & Hood were interested in the result of the litigation by reason of the contract between Cora M. Carpenter and Smith.

[1] Assuming that the contract relations between these two parties were such as to render Smith & Hood liable for costs upon an adverse determination of the litigation (which it is not necessary to determine), complainant had a clear legal remedy under section 11,281, C. L. His remedy at law being clear and adequate, equity should not interfere. *Beecher v. Mead*, 49 Mich. 162, 13 N. W. 498.

[2] Complainant says as to the first conclusion of the court below that "the court based his inability to compel a set-off upon a diversity of the parties to the judgments; and his language shows that he was mistaken as to the facts." An examination of the record shows that the parties to the three suits were as follows: In case 1 the parties were Frank L. Carpenter, Lucy Jones, Myra, Lucy, and L. Victoria Harris, Plaintiffs, v. John I. Carpenter and Luellyn Sawtelle, Defendants. In case 2 the parties were Cora M. Carpenter, Plaintiff, v. Augustus D. Carpenter and Josephine Carpenter, Defendants. In case 3 the parties were Cora M. Carpenter, Plaintiff, v. Frank L. Carpenter, Lucy Jones, John Blankenberg, Charles Seigler, Augustus Seigler, and Mary Blankenberg, Defendants. This, we think, shows that the learned circuit judge was not in error as to the facts upon this point. With such diversity of parties no set-off of costs in one suit could be made against costs in one or both of the others. C. L. 10,348. In the case of *Wells v. Elsam*, 40 Mich. 218, a bill was filed to obtain an offset of judgments. The court denied the relief sought, and, in commenting upon the statute of which this section is a part, said: "It is difficult to see what occasion there is, with such a statute, to resort to any other remedy. Without deciding how far it has abrogated other remedies, we are clearly of opinion that no other remedy can place the moving party in any better position than where that law places him." The decision of the court below might well have rested upon his first conclusion.

Complainant discusses at great length the other findings of the circuit judge, but in our view of the case the arguments pro and con need not here be considered.

Complainant asked relief in three particulars: (1) That defendants be enjoined from

selling, under the execution for costs, his property. (2) That his costs be taxed by this court and set off against the costs awarded to Cora M. Carpenter. (3) That the balance of costs found in his favor be decreed to be personally paid to him by said defendants or some of them and that such balance be declared a lien upon lot 12, the same to be sold in satisfaction thereof, if not paid within a certain time. A preliminary injunction issued at the time the bill was filed was dissolved by stipulation on December 11, 1909. This was two months after the case was heard, and a few days before it was decided on December 27, 1909. There remains now, therefore, no question relative to the injunctive relief sought.

[3] As no offset can be had under the facts disclosed for the reasons pointed out, a discussion of the other matters briefed would be without value. Complainant is still entitled to proceed at law for the collection of his costs against all those liable therefor, except so far as that right may have been lost by his failure to act seasonably. A judgment at law affords quite as adequate a remedy for the purposes of collection as a decree in chancery.

[4] It is perhaps pertinent to add that the history of this litigation, disclosing as it does that first one party then the other was successful in the circuit or Supreme Court, negatives the conclusion of the complainant that the rights of Cora M. Carpenter were of such a doubtful character as to warrant the belief that she and her attorneys were engaged in a fraudulent and malicious attempt to oppress and harass complainant by bringing against him foundationless actions. The fact that complainant finally prevailed does not necessarily lead to that conclusion.

The judgment is affirmed, with costs.

OSTRANDER, J., being disqualified, took no part in this decision.

ROULO v. SCHILLER BUND.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. INSURANCE (§ 693*)—MUTUAL BENEFIT INSURANCE—BY-LAWS AND CONSTITUTION—CONFLICT.

In case of a conflict between the constitution of a mutual benefit association and its by-laws, the constitutional provision will govern.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1833; Dec. Dig. § 693.*]

2. INSURANCE (§ 756*)—MUTUAL BENEFIT INSURANCE—CONSTRUCTION OF BY-LAWS.

The constitution of a mutual benefit association provided that "every member is obliged to pay all assessments called by the executive committee promptly, and failure to do so forfeits all rights and privileges as a member," and a member failing to pay dues within the prescribed time shall lose benefits, as well as a member not paying the assessments, and further provided that, should a member neglect to

so pay assessments, it shall become the duty of the secretary to notify the member before the 28th of the second month by registered letter to pay the assessment with costs within 10 days after such 28th day, otherwise the member should be stricken from the roll, and that the executive committee might grant 30 days further time to a member about to be stricken. The by-laws provided that every member was obliged to pay quarterly the sum of 50 cents to the financial secretary, and, upon failure to do so, should lose the benefits accruing from the society, and that all members should make all payments promptly within the time specified—that is, every month up to the 28th—"otherwise they shall be out of benefit without special notice." It was not required as a matter of practice that dues be paid earlier than assessments; both being payable on or before the 28th of each month. *Held*, that the by-laws did not conflict with the constitution, and, in order to forfeit a member's rights for nonpayment of an assessment, affirmative action on the part of the order was necessary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1817, 1818; Dec. Dig. § 756.*]

Error to Circuit Court, Wayne County; Henry A. Mandell, Judge.

Action by Elizabeth Roulo against Schiller Bund. From a judgment for plaintiff, defendant brings error. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, and BIRD, JJ.

John H. Dohrman, of Detroit, for appellant. Charles L. Coulson, of Detroit (George X. M. Collier, of Detroit, of counsel), for appellee.

McALVAY, J. Plaintiff, the beneficiary named in a certain beneficiary fund certificate issued to her husband by the defendant, a mutual benefit insurance society, organized and doing business under the laws of the state of Michigan, brought suit against defendant to recover the amount claimed to be due her as such beneficiary. Joseph Edward Roulo, the deceased husband, was received as a member of the local Verein or lodge No. 3, in Detroit, of the Schiller Bund. February 28, 1907, and the following certificate was issued to him: "Schiller Bund. German Life Insurance Society of the city of Detroit, county of Wayne and state of Michigan, incorporated under the laws of the state. Beneficiary Fund Certificate. Know all men by these presents, that Joseph Edward Roulo, has been accepted as a member in the Schiller Bund, Schiller Verein No. 3, and that as such member, he is entitled to all the rights and privileges of the bund, and that after his demise an amount not exceeding the sum of one thousand dollars shall be paid out of the benefit fund of the society to his wife, Elizabeth Roulo, in conformity with paragraphs 18 and 19 of the constitution of the society. This obligation is only valid and in force if the above-named member of the society has in every respect complied with the laws of the Schiller Bund,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and in case of his failure to do so this obligation to become null and void and of no effect. In testimony whereof, we, as officers of the executive committee of the Schiller Bund, have hereunto affixed the seal of the bund, as well as our own signatures at Detroit, this 28th day of February, A. D. 1907. The President of the Executive Committee of the Schiller Bund, Julius Sommerfeld. The Secretary of the Executive Committee of the Schiller Bund, William Haase. Signature of the member: Joseph Edward Roulo. Witness to above signature: August Sievert, President of Verein No. 3; Ernest Voss, Secretary of Verein No. 3." He died September 14, 1910. The last payment made by him to the society, as appears from his passbook, was on July 28, 1910. The trial resulted in a judgment in favor of plaintiff upon a directed verdict for \$997.60. A like motion made by defendant at the same time was denied, and later a motion for a new trial was also denied.

The case is here for review upon a writ of error. The brief of defendant and appellant is confined to a discussion of the error assigned upon the direction of a verdict for plaintiff. The determination of this question rests entirely upon the construction given to the provisions of the constitution of the above corporation and the by-laws of the verein or local lodge No. 3, of which deceased was a member. It appears from the notice attached to the plea that defendant relies upon the claimed failure by plaintiff's decedent to pay assessment No. 180 of the month of August, 1910, before the 28th day of said month or at any time, and that thereby at the time of his death he was not entitled to any benefit under his certificate which had become null and void by his failure to comply with the requirements of the constitution and by-laws of the defendant. It is an admitted fact upon the record that plaintiff's decedent died on the date mentioned, and no question is raised as to proofs of death or proper presentation of plaintiff's claim under this certificate as beneficiary, or that he was in arrears for nonpayment of any other assessment, and one payment of 50 cents for quarterly dues. The following provisions of the constitution and by-laws require consideration:

"Article 17.—Membership.

"Subsec. m.—Every member of the bund shall receive, after initiation, a certificate of his or her class, duly executed, and shall signify his or her acceptance of the laws of the bund with his or her full signature.

"Subsec. n.—Every member is obliged to pay all assessments called by the executive committee promptly, failure to do so forfeits all rights and privileges as a member."

"Subsec. v.—A member failing to pay dues to the society within the prescribed time shall lose benefits in the bund as well as a member not paying the assessments."

"Article 20.

"The assessments are called by the executive committee and not more than one assessment shall be called for each death. The executive committee shall, however, have power to call an assessment every six months for the purpose of establishing a reserve fund. One assessment per month shall be levied without further notice until the reserve fund shall have reached the required amount. After the reserve fund has reached the required amount the executive committee may relinquish this rule. Should a member fail to pay an assessment within the time specified, such member shall be out of benefit, but thirty days time may be given to pay the arrearages and if paid within this time the member shall again be considered in good standing from the date of such payment. Should a member neglect to pay the assessments during this time it shall become the duty of the secretary to notify the member before the 28th day of the second month by registered letter to pay the assessment together with 50c for costs within ten days after the 28th day of the second month, otherwise, the member shall be stricken from the roll. The executive committee may grant thirty days further time to a member about to be stricken. The executive committee shall have power to call assessments in all cases where it shall consider it for the benefit of the bund to see that two full assessments be on hand and ready for payment at all times in the beneficiary fund. The final accounting of an assessment, or determining the amount of the respective beneficiary shall take place 60 days after calling the assessment through the secretary of the bund."

The following by-laws of Verein No. 3, Schiller Bund, were put in evidence and are material:

"Paragraph 15. To cover the necessary cost of management, every member is obliged to pay quarterly in advance the sum of 50c to the financial secretary. Upon failure to do so the member loses all benefits accruing from the bund.

"Paragraph 16. All members are to make all payments promptly to the financial secretary within the time specified, that is, every month up to the 28th, otherwise they shall be out of benefit without special notice."

The record shows from the passbook of plaintiff's decedent that from the time of his initiation, February 14, 1907, up to and including July 28, 1910, his initiation fee and all assessments in serial number from 134 to 179, inclusive, and all quarterly dues which were charged against him, with the exception perhaps of the quarter beginning July 1, 1910, were paid and receipted for by E. Voss, financial secretary of verein No. 3. These payments are not disputed. They were made by the deceased at his house to a Mr. Schultz, at the time vice president of the above verein, who took the book and

the money to the secretary, who entered the payments and signed his name.

Appellant claims that under the provisions of the by-laws above quoted deceased, not having paid assessment No. 180 when due on the 28th day of August, 1910, forfeited all right and privilege of benefit as a member; that these provisions are self-executing. Subsection "n" of article 17 of the constitution, already quoted, makes provision for the payment of all assessments promptly, and failure to do so forfeits all rights and privileges as a member. Subsection "v," also above quoted, provides that failure of a member to pay dues "within the prescribed time shall lose the benefits in the bund as well as a member not paying assessments." Article 20 of the constitution of the bund, above quoted, provides explicitly for all assessments which may be called by the executive committee, the only body authorized to make any assessments, as follows: (1) Not more than one assessment shall be called for each death. (2) The executive committee shall have power to call an assessment every six months for the purpose of establishing a reserve fund. (3) "One assessment per month shall be levied without further notice until the reserve fund shall have reached the required amount." Then said committee may relinquish its rule. Article 20 of the constitution also provides that "should a member fail to pay an assessment within the time specified such member shall be out of benefit, but thirty days time may be given to pay the arrearages and if paid within this time the member shall again be considered in good standing from the date of said payment." Further provision is made as follows: "Should a member neglect to pay the assessments during this time it shall become the duty of the Secretary to notify the member before the 28th day of the second month by registered letter to pay the assessment together with 50c for costs within ten days after the 28th day of the succeeding month, otherwise the member shall be stricken from the roll." By this constitutional provision a positive duty is imposed upon the society through its secretary to notify a delinquent member in the manner pointed out to pay such assessment with costs before his benefits become forfeited. In this case this duty was not performed. *Petherick v. Order of Amaranth*, 114 Mich. 420, 72 N. W. 262; *Dick v. Order of Amaranth*, 150 Mich. 215, 113 N. W. 1125.

The whole contention of appellant rests upon the provisions of the by-laws 15 and 16, above quoted, regarding payment of dues and assessments; it being claimed that, if such payments are not made on or before the 28th of the month, all benefits are forfeited. If this contention is correct, these by-laws are directly in conflict with the provisions of article 20 of the constitution,

which we have restated at length for the purpose of ascertaining whether there is a conflict between these provisions, or whether they can be reconciled. Paragraph 15 of the by-laws quoted fixes the quarterly dues at 50 cents, payable quarterly in advance. "Upon failure to do so a member loses all benefits accruing from the bund." Paragraph 16 requires members to make all payments promptly within the time specified; "that is, every month up to the 28th, otherwise they shall be out of benefit without special notice."

[1] The clear provisions of the constitution of the order of which deceased was a member must be considered as its fundamental law, and if by a fair construction the provisions of these by-laws cannot be reconciled therewith the fundamental law must govern. These provisions of the constitution require affirmative action on the part of the local body. In the instant case no such action is claimed to have been taken. On the contrary, it is insisted that no action is required.

[2] In our opinion the by-laws may be construed to be in harmony with the fundamental law of the order. In support of this construction we find that the two by-laws relied upon by appellant are upon the same subjects as subsections "n" and "v" of article 17 of the constitution, above quoted, and in terms they are very similar. It is evident that the local body had in mind in the enactment of these by-laws the provisions of the constitution upon these matters, and it will be presumed that the intention was to be in accord with such provisions. The constitutional provisions of article 17, being subdivisions "n" and "v" must be read together and in connection also with the provisions of article 20, relative to the necessity of notice to be given to a delinquent member. These paragraphs of article 17 of the constitution provide that a member delinquent in payment of assessments and one delinquent for nonpayment of dues are to be treated alike before rights to benefits are forfeited. This is made clear from a reading of the subsection relative to dues, which provides that a delinquent "shall lose benefits in the bund as well as a member not paying assessments," a reasonable interpretation of which would be "in the same manner," or "under the same conditions," "as a member not paying assessments." In further support of this construction we find that payments under both by-laws were treated exactly alike. Attention is called to the evidence in the record, which shows that it was not expected or required that dues should be paid earlier than assessments, but both were paid and accepted on or before the 28th of each month. This has been the practical construction given to these by-laws by the officers and members of this order.

In the instant case, as already determined, affirmative action on the part of the order was required to be taken before the right of a member to benefits could be forfeited. It is admitted that no such action was ever taken.

We agree, therefore, with the conclusion of the trial court that the right of the deceased and his beneficiary to benefits under the certificate in question had not been forfeited, and that plaintiff was entitled to recover. The trial court was not in error in directing a verdict for the plaintiff for the amount stated.

The judgment of the circuit court is affirmed.

BOWEN v. CHANDLER.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. TRIAL (§ 90*)—EVIDENCE—MOTION TO STRIKE OUT—NECESSITY.

A party who desires to have a part of an answer of a witness stricken out must make a motion therefor, and a mere exception is insufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 235, 236, 238-240, 252; Dec. Dig. § 90.*]

2. FRAUDS, STATUTE OF (§ 130*)—EVIDENCE—ADMISSIBILITY.

In an action in assumpsit for the value of an engine which plaintiff delivered to defendant in exchange for real estate based on the failure of defendant to convey the real estate, evidence of an oral contract for the conveyance of the real estate in exchange for the engine was admissible as bearing on the relations of the parties and on the question of delivery to, and acceptance by, defendant of the engine, though the contract was void because not in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 280-282; Dec. Dig. § 130.*]

3. APPEAL AND ERROR (§ 743*)—QUESTIONS REVIEWABLE—RECORD.

Where no reference is made to the record, a criticism based on the conduct of counsel will not be considered by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2999, 3011; Dec. Dig. § 743.*]

4. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE—CONCLUSION OF WITNESS.

Where, in assumpsit for the value of an engine which plaintiff had delivered to defendant in exchange for real estate which defendant had failed to convey, the issues involved acceptance by defendant of the engine, the admission of the testimony of a witness as to a conversation between the parties that defendant seemed desirous of buying the engine, that the parties spoke about a deal for some land, that defendant stated he would have his foreman look at the engine and if it was satisfactory he would make the deal, and that that was the way the witness understood it, was not reversible error on the ground that the testimony stated the conclusion of the witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

5. PLEADING (§ 369*)—ELECTION OF COUNTS—FAILURE TO REQUIRE.

Where the counts of the declaration were good, there was no error because of plaintiff's failure to elect on which count he would rely for a recovery.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.*]

6. SALES (§ 182*)—DELIVERY—ACCEPTANCE.

Whether the acts of a buyer of an engine done after delivery thereof amounted to an acceptance *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 492-495; Dec. Dig. § 182.*]

Error to Circuit Court, Cheboygan County; Frank Shepherd, Judge.

Action by David Bowen against Merritt Chandler. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OS-TRANDER, and BIRD, JJ.

Henry, Henry & Henry, of Alpena, for appellant. C. S. Reilley, of Cheboygan, for appellee.

KUHN, J. This is an action brought in assumpsit to recover the value of an engine and boiler, which, it is claimed, was exchanged by the plaintiff with the defendant for certain real estate. The declaration filed in the cause contains the following count: "For that whereas, said defendant, before the commencement of said suit, was indebted to plaintiff in the sum of \$300 lawful money of the United States for divers goods, wares, and merchandise of the said plaintiff, to wit, one engine and boiler, theretofore delivered to the defendant at his special instance and request under contract of exchange of property in that said defendant then and there promised to deed to said plaintiff certain real estate situate in the county of Cheboygan and state of Michigan, and in exchange therefor plaintiff was to deliver said engine and boiler, and that said plaintiff did deliver said engine and boiler to said defendant, and then and there on numerous occasions requested said defendant to transfer said real estate to said plaintiff, and that he then and there neglected and refused so to do, and has ever since retained said engine and boiler, to plaintiff's damage of \$300, and therefore said suit is brought." In addition to this, the declaration contains the common counts. The bill of particulars filed also claimed taxes for the year 1885 amounting to \$55. The defendant pleaded the general issue and the statute of limitations as to the item of taxes. No evidence was offered with reference to the taxes. On trial had a verdict was rendered in favor of the plaintiff in the sum of \$280.25, and defendant reviews judgment had thereon in this court by writ of error. The deal which gave rise to this controversy was had some time in 1908. There is considerable conflict in the testimony as to what the understanding of the parties was. At

that time the engine and boiler was at the foundry and machine shop of Henry Deane for repairs.

David Bowen testified with reference thereto as follows: "I met Mr. Chandler, and I told him that I would like to trade him this engine for a quitclaim deed of the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 36, town 35 N., range 1 E. He said he would send Mr. Minnick to look at the boiler and engine, and, if it suited Mr. Minnick, that he would make a trade. He sent him, and I went down with Mr. Minnick, who looked it over and said that he would take it out and try it for five or six days, and, if it did the work, that they would keep it, and they did keep it for about three years. I was not there at the time Mr. Chandler's man took the boiler and engine away. I told Mr. Deane to deliver it to him. The boiler and engine was at the foundry, and Deane was the foundry man. It has been there practically all winter. * * * I agreed, if he would deed this land over to me, to turn over to him this engine and boiler any time for it. That was the talk I had with him. That contract between Chandler and myself was not in writing. I expected him to turn the deed over every day. I never had any contract in writing with him in regard to the engine and boiler. When I had this talk with Chandler, there was nothing said about the price of the engine. He was to deed me that piece of land, and give me enough to straighten up with Deane if it suited him. And he kept it."

Merritt Chandler, the defendant, testified as follows: "Q. Did you ever have an agreement with Bowen by which you were to deed him a description of land which he mentioned and take in pay therefor this boiler and engine? A. Not completed; no, sir, not completed. Q. Did you ever have any agreement by which you purchased this boiler and engine? A. No, sir; anything further than talking of doing it, or taking it. Q. What talk did you have with Mr. Bowen in regard to the engine and boiler, and this land? A. I don't remember that we had any until after the engine had been taken out to the farm; but it was about that time—soon afterwards, and possibly before, as he states. Q. Do you remember the circumstances? A. Oh, yes; I remember the circumstances. I know it was to be taken there—I don't know when it was taken—didn't know until it had been there several days. Q. Go on with your statement of your talk. A. Why, after, if the engine proved satisfactory, we was to make a deal on the land. The engine was tried for about a week, or three or four days, sawing wood, and then my foreman told me, I asked him if it was satisfactory, and— The Court: State whether or not it was satisfactory to him. A. It was not satisfactory. The Court: I quote his testimony correctly, do I—that his conversation with Mr. Bowen

was that it should be satisfactory? Is that what Mr. Chandler swore to? What did he say his conversation with Mr. Bowen was? Mr. Hull: That the engine was to be satisfactory? . Yes, sir; that the engine was to be satisfactory. I never had a contract with Bowen in writing. Q. Was there anything further said in regard to this deal of the land? Was that the complete deal which you have stated? A. No, sir; there was an after consideration. On account of this engine not being satisfactory, I proposed to Mr. Bowen that he deed me the water privileges, water rights of flooding certain lands that he had along Black river, and that was it. I said: 'As soon as you get that deed so that you can give me a good deed.' (He only had a tax title at that time on part of the land.) I said: 'As soon as you get that completed and right, we will make the deal. I will make the deed to you for the other land, and the engine could be put in as part of the deal.' That is, it would be considered in the deal. Q. Do you know how much the engine was used on your farm? A. I don't know of its being used only 3 or 4 days in sawing wood. Q. Why wasn't the engine returned? A. Nobody asked me to return it. I was not requested to return it." The defendant asks for a reversal of the judgment rendered, alleging by assignments of error that the court erred in four particulars: (1) In respect to the admission and rejection of evidence. (2) Because he denied the motion on behalf of the defendant for a direction of a verdict. (3) Because the court erred in not requiring the plaintiff to elect whether recovery should be had under the special or common counts. (4) Because the court erroneously charged the jury with respect to the law involved in the cause.

Admission and Rejection of Evidence.

[1] (a) Plaintiff, while being cross-examined, was asked: "Q. Did you ever tell Mr. Minnick not to turn this engine over to any one while it was? A. No. Why didn't you bring Minnick down or give us a chance to get him?" The latter part of the answer was excepted to, but no motion was made to strike it out. Such a motion should have been made if counsel desired to have it stricken.

[2] (b) Counsel moved to strike out all the testimony relative to the sale of real estate because it was not in writing. This testimony was brought out when witnesses were testifying as to the verbal agreement, and, while it is true that no recovery could be had on the contract itself and the verbal contract is void because not in writing, still it was proper to show what the verbal contract was as bearing upon the relations of the parties and upon the question of a delivery to and the acceptance by the defendant of the property in controversy.

[3] (c) Criticism is made of conduct of

counsel in asking of the defendant why a witness was not brought to court. No reference is made to the record, and we will not consider it. Zimmerman Mfg. Co. v. Dolph, 104 Mich. 281, 82 N. W. 339.

[4] (d) Tilden Ratliff, a witness, in testifying as to a talk between plaintiff and defendant, said: "Mr. Bowen: Mr. Chandler seemed to me he wanted to buy the engine, and they spoke something about a deal for some land, and Mr. Chandler said he would have his foreman, Mr. Minnick, look at the engine, and, if it was satisfactory to him, he would make the deal, is the way I understood it." The refusal of the court to strike out this testimony on motion made by counsel because it stated a conclusion is not reversible error.

Election of Counts.

[5] Counsel for appellant in his brief says: "Undoubtedly, if both counts were good, plaintiff would have a right to rest on either or both." Both counts are good, and no error was made because of failure to elect.

Failure to Direct Verdict and Charge of the Court.

[6] As there is no question about the delivery of the property to the defendant, it seems to us that the sole question involved in this controversy was whether the conduct of the defendant or his agents with reference to the boiler and engine after delivery amounted to acceptance. It is unquestioned that they were in possession of the defendant for about three years, and the plaintiff testified: "Up to March, 1911, Mr. Chandler used the engine on his farm pumping water and cutting wood, and doing anything he wanted to use power for. Mr. Chandler's farm is a mile and a half north from the foundry. I saw it at his farm at different times. Up to the time that I commenced suit, Mr. Chandler used the boiler and engine on the farm, pumped water with it, and cut wood—anything that he wanted to use power for." Tilden Ratliff testified: "I have seen the engine in Mr. Chandler's barnyard in 1906 and 1909 cutting wood." While the defendant testified that he only knew of the engine being used three or four days in sawing wood, still the question of whether his acts amounted to an acceptance was properly submitted to the jury.

"If one sends or delivers goods to another, under circumstances which indicate that a sale is intended, but no price is named, and the other uses or otherwise deals with them as his own, a sale for a reasonable price is implied." 35 Cyc. 59. In the case of *Caulkins v. Hellman*, 47 N. Y. 452, 7 Am. Rep. 461, cited by counsel for appellant, the court said: "The receipt of the goods, without an acceptance, is not sufficient. Some act or conduct on the part of the vendee, or his authorized agent, manifesting an intention

to accept the goods as a performance of the contract, and to appropriate them, is required to supply the place of a written contract." This question has been passed upon by this court in the case of *Photographic Co. v. Fisher*, 81 Mich. 137, 45 N. W. 661, and cited with approval in the case of *Kendrick v. Hochradel*, 167 Mich. 179, 132 N. W. 521. It is practically a parallel case. There was in that case a verbal agreement for the exchange of personal property exceeding \$50 in value for real estate. The court said at page 142 of 81 Mich., at page 663 of 45 N. W.: "It is conceded that the contract for the exchange of the real estate is void, because not in writing. It is also conceded that the contract for the exchange of the goods is void, not being in writing, and the value being above \$50, and no part of the purchase price paid, unless there has been a delivery of the whole or a part of the goods and an acceptance. It is clearly settled that both acceptance and actual receipt are necessary, and the burden of proving them rests upon the person trying to set up the contract. They are both facts, and the circumstances which go to make up acceptance and actual receipt are for the jury. 8 Cyc. 730." We have carefully examined the instructions to the jury of the learned trial judge, and cannot find any ambiguity which could mislead them as to matters submitted to them for their determination.

We find no reversible error in the record, and the judgment is affirmed, with costs.

LAKE v. HOUGHTON CIRCUIT JUDGE. (Supreme Court of Michigan. Nov. 8, 1912.)

1. MANDAMUS (§ 164*)—ANSWER—CONCLUSIVENESS.

Where, in mandamus, no issue of fact is made, the respondent's answer must be accepted as true.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 344-360; Dec. Dig. § 164.*]

2. MANDAMUS (§ 26*)—REMEDY—IRREGULARITIES IN PROCEEDINGS.

Mandamus will not lie to set aside the action of the lower court on account of irregularities in proceedings which were waived in that court, or for defects which are not jurisdictional, or which do not otherwise affect the very right of relator.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 62; Dec. Dig. § 26.*]

3. DIVORCE (§ 269*)—ORDER FOR ALIMONY—VALIDITY—OBJECTIONS—WAIVER.

A defendant in a suit for divorce who on order to show cause why he should not be adjudged guilty of contempt for failing to pay alimony as ordered does not question the form of the order for alimony, the form of the demand on him, or the validity of any of the items for payment of which the demand was made, must be deemed to have waived such objections, and he cannot complain of an order adjudging him guilty of contempt on such grounds.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 756-763; Dec. Dig. § 269.*]

4. DIVORCE (§ 269*)—ALIMONY—ORDER—REQUISITES.

An order in a suit for divorce for the payment by the husband of necessary court expenses and witness fees as they shall accrue is sufficiently definite to sustain an order for contempt for failure to make such payments.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 756-763; Dec. Dig. § 269.*]

5. DIVORCE (§ 269*)—NONPAYMENT OF ALIMONY—PROCEEDINGS TO PUNISH FOR CONTEMPT.

The court in a suit by a wife for divorce made an order for alimony and allowance for expenses of the suit. The husband did not comply with the order, and, on order to show cause why he should not be adjudged guilty of contempt, he defaulted, and the court announced that an order might be prepared convicting the husband of contempt. Thereafter the judge stated to the husband's solicitor that he might have a specified time in which to file an answer. An answer attempting to excuse nonpayment by showing payments out of his money on hand to his solicitors and creditors was filed. *Held* that, though it be assumed that the answer was seasonably filed, the court was authorized to adjudge the husband guilty of contempt under Comp. Laws, §§ 312, 10,891, 10,893, 10,894, authorizing punishment for contempt for violation of orders of court.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 756-763; Dec. Dig. § 269.*]

Mandamus by John Lake against the Houghton Circuit Judge. Denied.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ.

Burritt & Burritt, of Hancock, for relator. Galbraith & McCormack, of Calumet, for respondent.

OSTRANDER, J. Relator's wife filed a bill for divorce, and an injunction was issued restraining relator from disposing of his property, which consisted, in part, of \$260 in bank. Relator was employed and earning \$55 per month. The bill was filed in December, 1911, and in January, 1912, the wife of relator (complainant in the divorce suit) petitioned the court for alimony and for an allowance for the expenses of her suit. The petition was brought on for hearing on February 15, 1912, when the court made and entered the following order: "That the defendant, John Lake, alias Jarvi, pay forthwith to Messrs. Galbraith & McCormack, solicitors for the complainant, the sum of twenty-five (\$25) dollars as a reasonable retainer fee, and that he pay to the complainant or to her solicitors the further sum of twenty (\$20) dollars per month on or before the 20th day of each and every month commencing on the 20th day of February, A. D. 1912, for the support and maintenance of the said complainant and her minor child, during the pendency of this suit, and it is further ordered that he pay to Messrs. Galbraith & McCormack all necessary court expenses and witness fees as they shall accrue and on demand." The injunction was so modified as to release the money in bank,

and thereafter relator paid to complainant's solicitors \$20 in compliance with the order for alimony. He also paid his own solicitors \$150, a doctor's bill of \$25, other debts to the amount of \$50, purchased for himself clothing valued at \$15, and sent to Finland \$35 to persons who are there caring for his, or one of his, children. A demand in writing and a certified copy of the order granting alimony were served on relator March 27, 1912, but no other demand was made for payment. The demand was itemized as follows:

"Calumet, Michigan, March 27, 1912.

John Lake, alias John Jarvi, To Galbraith & McCormack, Solicitors, Dr.	
To retainer fee by order of court.....	\$25 00
To filing fee, N. F. Kaiser.....	3 00
To James Byers, serving writ of injunction on Superior National Bank.....	1 00
To serving writ of injunction and subpoena on John Lake, alias John Jarvi.....	1 75
To serving writ of injunction, on Copper Country Building & Loan Ass'n.....	1 75
To serving petition for temporary alimony and notice of hearing on same.....	1 75
To two certified copies order for alimony, pendente lite, N. F. Kaiser.....	3 00
To Ellen Lake, complainant, alimony to March 20, '12.....	20 00
	\$57 25"

Relator did not pay, and was served on April 16, 1912, with a certified copy of an order to show cause why an attachment should not issue and he be punished for contempt of court. Copies of the affidavits upon which the order was based were not served. Relator appeared in person and by solicitor on the return day of said order.

The foregoing statement of facts is from the relator's petition for mandamus, and no part of it is in dispute. What occurred on April 23, 1912, and thereafter, is not much but is somewhat in dispute.

[1] No issue of fact having been made, the respondent's answer must be accepted for the facts. No written answer to the order to show cause had been filed when the parties appeared in court on April 23, 1912, and none was filed that day. Relator's solicitor stated that he had known nothing about the pendency of the proceeding until 11 o'clock of that day; that relator could not speak English. There was no interpreter present. He asked permission to get an interpreter and to have relator sworn and give his testimony concerning his reasons for not complying with the order for alimony. The court declined to permit such proceeding, and announced that an order might be prepared convicting relator of contempt of court. Thereafter, and after respondent had left the bench, he stated to relator's solicitor, in response to his request, that he might have until 9 o'clock the next morning to file an answer, and, if respondent desired to hear argument, he would notify counsel. The answer was filed, and no further proceedings were had until respondent, at his

office, signed the order adjudging relator to be guilty of contempt. Court was not in session from April 23, 1912, until May 4, 1912. The order adjudging relator guilty was signed April 26, 1912. A warrant was issued April 28, 1912, and the relator was taken into custody by the sheriff April 30, 1912, and committed to the county jail, where he was when the petition for mandamus was filed in this court. Relator moved to set aside the contempt proceedings, and the motion was denied. Later relator was admitted to bail upon his own recognizance pending the proceedings in this court.

We set out here relator's answer in the contempt proceeding:

"(1) Defendant, answering, says that at the time the order was made for the payment of temporary alimony, namely, \$25 solicitor's fee and \$20 a month during the pendency of this suit, and other costs which might accrue, this defendant had in the Superior National Bank of Hancock the sum of \$260; that said money was tied up by injunction which was modified on or about the 15th day of February, 1912, the date of said order; that defendant drew said money from the bank, paid his solicitors, Burritt & Burritt, a solicitor's fee of \$150, paid a doctor bill of \$25, paid the complainant the sum of \$20, purchased some clothing for himself which cost him \$15, and used the balance of said amount—\$50—in payment of debts then due.

"(2) Defendant, further answering, says that he is in the employ of the Quincy Mining Company, and earns \$55 a month; that he is keeping house and employs a servant girl to do his work; that he has used all of his wages in the payment of expenses; that he has sent \$35 to Finland to the people who are bringing up his child.

"(3) Defendant further says that he has some building and loan stock which is tied up by injunction of this court, and a quantity of household furniture which is also tied up by injunction; that he has \$2.05 in money; that the only other personal property he has not tied up by injunction is a watch of the value of \$10, which he hereby tenders into court.

"(4) Defendant further says that he is now under the treatment of a physician."

It is contended in this court that the contempt proceedings are irregular and void. The first objection made is that the order for alimony is uncertain in part and being in the nature of an interlocutory decree and judgment, upon the nonperformance of which further proceedings may be grounded, certainty in the thing to be done or performed is essential. It is objected, further, that no oral demand was made upon relator for payment of the money, and that the order to show cause was not served with copies of the affidavits upon which it was based. A third objection is that permission to file an answer amounted to a continuance of the

proceeding, and that no judicial determination or pronouncement of relator's guilt appears. Finally, it is urged that the answer furnishes adequate reasons for failure to perform the order for payment of alimony. Substantially the same objections were urged upon the motion to set aside the order adjudging relator guilty.

[2] We are disposed, over the objection of respondent, to entertain this proceeding; it appearing when the writ was applied for that relator was imprisoned. *Dillon v. Shiawassee Circuit Judge*, 131 Mich. 574, 91 N. W. 1029. But the writ of mandamus will not be issued to set aside the action of the lower court on account of irregularities in the proceedings which were waived in that court, or for defects which are not jurisdictional, or which do not otherwise affect the very right of relator.

[3, 4] It will be noticed that in his answer to the order to show cause why he should not be adjudged guilty of contempt relator does not question the form of the order for alimony, the form of the demand which was made upon him, or the validity of any of the items for payment of which the demand was made. Consequently, in this proceeding, such objections will be treated as having been waived, and nothing need be said about them beyond this, that we do not regard an order for the payment of "necessary court expenses and witness fees as they shall accrue" as so indefinite as to affect the validity of the order. It was said in *Froman v. Froman*, 53 Mich. 581, 19 N. W. 193, which was an appeal from an order adjudging defendant guilty of contempt: "The order of the court in such cases should be promptly complied with; and when the court makes an order to show cause why such compliance has not been made, and insufficient cause is shown, and the court finds, as in this case, a willful disobedience of the order on the part of defendant, technical irregularities in complainant's proceedings will not be held a sufficient excuse for such noncompliance, or allowed to defeat the enforcement of the order."

[5] Was the determination of relator's guilt extrajudicial? It is undisputed that the court, in effect, pronounced judgment at the hearing, directing complainant's solicitor to prepare the proper order. Relator was then in default for want of an answer. No cause was shown when the answer was filed; all of its statements being regarded as true. Treating the case, as we do, as if the answer had been seasonably filed, the order which was made was warranted and, indeed, was required. Relator was in contempt. The power of the court to punish him therefor is undoubted. 1 Comp. Laws, § 312; 3 Comp. Laws, §§ 10,891, 10,893, 10,894.

No substantial right of relator has been invaded, for which reason the writ of mandamus is refused with costs.

RICE v. CITY OF PONTIAC.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. MUNICIPAL CORPORATIONS (§ 281*)—SIDEWALKS—ACTION AGAINST CITY FOR PART OF COST—INSTRUCTIONS.

Instructions in an action against a city by an assignee of property owners for part of the cost of constructing sidewalks, provided by ordinance to be paid under certain circumstances, in which were involved the questions of the right of an assignee to recover, and necessity of the contractor having his bond to the city approved, *held* to submit the case in a way of which the city could not complain.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 745-749; Dec. Dig. § 281.*]

2. APPEAL AND ERROR (§ 1005*)—REVIEW—REFUSAL OF NEW TRIAL.

The evidence being in sharp conflict, refusal to grant a new trial, on the ground that the verdict was against the weight of evidence, cannot be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.*]

Error to Circuit Court, Oakland County; George W. Smith, Judge.

Action by John W. Rice, for himself and as assignee of F. Ross and others, against the city of Pontiac. Judgment for plaintiff. Defendant brings error. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

Peter B. Bromley, of Pontiac, for appellant. Pelton & McGee, of Pontiac, for appellee.

MOORE, C. J. The plaintiff as assignee of certain property owners, along whose property the city had ordered cement sidewalks built, recovered a judgment for \$189.50, being 4½ cents per square foot of the total cost of the walks. The case is brought here by writ of error.

It is insisted the city is not liable (1) because the plaintiff was not a licensed sidewalk builder for the year commencing May 1, 1911, and had not filed and had approved his bond as a sidewalk builder for that year; (2) because, under the ordinance under which the plaintiff claims to recover, the city did not undertake or agree to pay the plaintiff either personally or as assignee, but only property owners along the street upon which the sidewalk was laid. It is also said the court erred in his refusal to set aside the verdict and grant a new trial for the reason that the verdict of the jury on the question as to whether the sidewalks charged for by the plaintiff were defective walks, and were not built in compliance with the ordinance of the city of Pontiac, and the specifications in reference to building of cement sidewalks was against the clear weight of the evidence in the case upon such question. In May, 1900, the following resolution was passed by the com-

mon council: "That hereafter all contractors building cement walks for or in behalf of the city or any walk for which the city pays expenses for any portion of the cost thereof shall file a good and sufficient bond to the city of Pontiac in the sum of five hundred dollars, guaranteeing the walks for a period of five years."

The ordinances germane to the issue presented which were in force at the time the walk was built are as follows:

"Section 1. Hereafter when a sidewalk has been ordered built by the common council of the city of Pontiac in said city and has been built by the same person or persons who have been contracted with to build walks for said city, if the same has been built and laid of flag stone or cement and as good as the best that is now laid on Saginaw street in said city, the said city will pay to the owners of the property along which said sidewalk has been so laid one-half of the actual value thereof not exceeding four and one eighth cents per square foot.

"Section 2. On the completion of the said sidewalk the person entitled to said sum shall present his or her claim to the council in the same manner as is provided for the presentation of other claims and the council shall audit and allow the same, but it shall be a complete defense to said claim if it shall appear to the council that the said walk or the material used therein is defective or is not built in a substantial and workmanlike manner."

Pontiac now has the commission form of government. The records of the city show the following: "Pontiac, Mich., August 1, 1911. To the Honorable Commissioners of the City of Pontiac, Mich.—Gentlemen: We the undersigned, property owners and taxpayers liable to assessment, do hereby most earnestly petition your honorable body for the construction of a sidewalk on Paddock from Raeburn to Prospect and on Prospect from Paddock to Saginaw North Side, and your petitioners will ever pray. C. McClelland, F. Burke, Earnest Radson, Ross & Slater Construction Co.; Prospect, Ray W. Long; Prospect, V. Wells; Church, Gates Bros. By Commissioner Osmun: Resolved that the petition be received and the prayer granted." The city engineer established the grade of the walk. Before its construction was commenced and some time in August, the plaintiff filed his bond in due form with sureties, with the city clerk. He testified that, before he built the walk, he was informed by Commissioner Osmun that the bond was all right. This is denied by Mr. Osmun, but on the cross-examination he said in part: "I said (to Mr. Rice) that his bond might be good, but it hadn't been passed by the commission yet. His bondsmen might be good. He asked me something about the bondsmen, and I said that I considered them good. That is true, they are

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

good. I don't know as I knew that at the time his bond was in the hands of the city clerk. I think I heard it some way. I couldn't say whether that was before he started to build the walks or not." Mr. Rice says he had no knowledge his bond was not satisfactory to the commissioners until the walks were all completed, and we do not discover anything in the record in conflict with this testimony. Mr. Osmun frequently saw the walk while it was under construction. The testimony in relation to the character of the walk was very conflicting. That offered on the part of the plaintiff tended to show that it was well built. The testimony on the part of the city was to the contrary. Testimony on the part of the plaintiff and Mr. Osmun's testimony shows that before this walk was built Mr. Rice had built cross-walks and sidewalks which had been directed to be built by the city. The testimony also discloses that the blanks upon which were written the assignments from the property holders to the plaintiff were furnished by the city, and that it had furnished such blanks for several years, and had paid the rebates to the contractors where so assigned.

Those parts of the charge necessary to be quoted to show what was submitted to the jury, are as follows:

"The city has prescribed as near as practicable the amount of cement that shall be used in a load of gravel or the proportion and the cement that shall be mixed with the sand—that is, the proportion—because experience has shown to the officials that taking it one time with another that makes the most durable and best walk, and the prices the property owners promise to pay, and the city promises to rebate for is for work substantially built in compliance with these specifications."

"It may seem a little harsh, but it is here, and the court can do no better than to call your attention to it. As a sort of penalty to compel sidewalk builders to comply with this ordinance and these specifications, it is enacted that failure to comply with these specifications shall be held to be a complete defense. The meaning of that is that the property owners may settle with the sidewalk builder if they wish to, but the city shall not pay any rebate where a sidewalk was not substantially built and complied with the specifications, and it shall be a complete defense; that is, the city shall not be liable at all for any rebate, unless there is a compliance."

"With regard to the assignments from the owners, I say to you technically there is no doubt but the city attorney is correct—that is, the commission has seen fit to insist that the rebate should go directly to the property owner, that they should enforce such a provision—but it appears in evidence that for years, as a matter of convenience, property owners, when a strip of walk has

been constructed, have assigned their claims to the contractor, and he has collected the rebate all in one bunch, so I allow the case to go to the jury as far as these assignments are concerned, you will need pay no attention to them. Mr. Rice is the legal holder of them under the practice that has obtained in the city."

"It is the claim of the plaintiff that he presented his bond in good faith, that the commissioner of streets told him his bond was all right, and that he proceeded with the work without any knowledge that his bond had not been officially accepted. It is his further contention that the commissioner of public streets saw the plaintiff building the walks in question, and was there almost daily. Plaintiff further contends that the walk was built as a matter of fact in a substantial and workmanlike manner. Now, if you find from the evidence that the plaintiff in good faith performed this contract on which recovery in this suit is sought substantially, and I emphasize the word, 'substantially,' in all material particulars according to its terms, without willful departure therefrom, or omission in the essential points, and that such performance is sufficient to entitle the plaintiff to recover in this suit—that is, provided he was told by the commission that his bond was all right."

"I charge you, further, that if you find that the city permitted the walks in question to be built, under an ordinance allowing the property owners a rebate or a certain percent, and if you find that the property owners assigned their claims to the rebate to the plaintiff, then the plaintiff would be entitled to whatever rebate the property owners would get under the ordinance. If you find that the plaintiff presented a bond, and left it with the city clerk, and if you further find that the plaintiff was told by the commissioner of public streets that his bond was all right, and, if you further find that, after leaving the bond with the city clerk, the plaintiff went ahead and built the walks in question with the knowledge and consent of the commissioner of public streets, then I charge you in that case that the city cannot now defeat this action on the ground that the bond was not officially accepted."

"The question, therefore, for you to determine in addition to the question of the bond, is this: Has there been a substantial compliance with the provisions of the ordinance in the construction of the walk? In other words, is it a good and substantial walk built in a good workmanlike manner of ordinarily good material, and as good as the best that is laid on Saginaw street in the city of Pontiac? And, if you find from the evidence that this walk is a good substantial walk, and that it does conform with the requirements of the ordinance, your verdict should be for the plaintiff for the

amount claimed, if you also find as a fact that Commissioner Osmun told the plaintiff his bond was all right."

"Upon the part of the defense I charge you as follows: That there can be no recovery in this case simply because Mr. Rice left a bond with the city clerk. It appears the bond was later rejected by the commissioners and returned to him. I charge you, further, that if the jury find from the evidence in the case that the sidewalks charged for by the plaintiff in this case were not built and laid so as to be as good as the best cement sidewalks that are laid on Saginaw street in the city of Pontiac, and said walks and the material therein are defective and are not built in a substantial manner, then your verdict must be in favor of the defendant of no cause of action."

"In this case the burden of proof is upon the plaintiff, John W. Rice, to show by a fair preponderance of the evidence in the case that the sidewalks charged for were built and laid so as to be as good as the best cement sidewalks on Saginaw street, and that said sidewalk and the materials therein were not defective and were built in a substantial and workmanlike manner, and if the plaintiff Rice has failed so to do, or if the evidence upon these questions is evenly balanced, then your verdict should be in favor of the city of no cause of action."

[1] Upon the record as made, we do not think the city has any just complaint to the way in which the case was submitted to the jury.

[2] Did the court err in refusing a new trial because the verdict was against the weight of the evidence? As before stated, the testimony was in sharp conflict. Its weight would depend much upon the appearance of the witnesses, their opportunities for knowledge, and their interest. The jury and the trial judge had the great advantage of seeing and hearing the witnesses.

We are not disposed to say it was reversible error, in view of the record, to refuse a new trial.

Judgment is affirmed.

JACKSON CITY BANK v. CAMPBELL et al.

(Supreme Court of Michigan. Nov. 8, 1912.)

MORTGAGES (§ 171*)—RECORDS—PRIORITIES.

Comp. Laws, § 8988, providing that every conveyance of real estate not recorded as provided herein shall be void as against any subsequent purchaser in good faith, whose conveyance is first duly recorded, applies to mortgages as well as to deeds, so that a mortgagee who recorded his mortgage could claim a lien on the property as against an unrecorded mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 892, 394-409; Dec. Dig. § 171.*]

Appeal from Circuit Court, Jackson County, in Chancery; Clement Smith, Judge.

Action by the Jackson City Bank against Robert Campbell and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ.

Lyman B. Trumbull, of Jackson, for appellants. Potter & De Land, of Jackson, for appellee.

MOORE, C. J. The following is taken from the brief of appellant: "This suit was brought by the Jackson City Bank to foreclose a mortgage given it by the defendant Robert Campbell upon two pieces of property situated in the city of Jackson. The defendant Helen Turner filed her cross-bill asking for foreclosure of a prior deed, in the nature of a mortgage, given her by Mr. Campbell on the same property, also asking that her lien be given priority over that of the Jackson City Bank. The circuit judge decreed a foreclosure of both mortgages, but gave priority to the bank. * * * The appellant is seeking to have the decree modified so as to give priority to her lien. No other question is involved on this appeal. The claim of the bank amounts at this time to upwards of \$3,600, and Mrs. Turner's claim to upwards of \$1,700. Unless Mrs. Turner be given priority, nothing will be realized upon her mortgage, because the value of these properties is not in excess of the bank's lien. * * * After this suit was commenced, by stipulation of all the interested parties, one of these pieces of property known as the Wildwood avenue property was sold for the sum of \$3,000 and the money deposited with the register of the court, under agreement that the liens of the respective parties on that piece of property should be transferred to that fund and the decree run against the fund instead of the property. The other piece of property known as the Webster street property is worth about \$600." April 25, 1891, complainant made a deed of the Wildwood property to Marian Campbell. January 5, 1900, Marian Campbell deeded the same property to Robert Campbell. December 2, 1905, Mr. and Mrs. Campbell, for the purpose of securing an indebtedness of Mr. Campbell, deeded this property to Mrs. Turner. This deed had the following provision in it: "This deed is given to secure the investment of \$3,200, and if said moneys are not paid back to Helen Turner to be in full force and effect. But, if said moneys are paid back, then this deed to be null and void." It is conceded that this deed in fact was a mortgage. The last three mentioned deeds were not placed on record, but were all left with Mrs. Turner. In June, 1906, Mr. Campbell was indebted to the complainant bank. He stated to its vice president and cashier that he was the owner of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

Wildwood property. The bank, without causing an examination of the record, granted an extension of time to Mr. Campbell, and Mr. Campbell and his wife executed and delivered to the bank a mortgage, containing no covenants of title or warranty covering the property in question, purporting to secure said bank for indebtedness which Mr. Campbell might from time to time be owing it. Said mortgage was dated June 15, 1906, acknowledged June 27, 1906, and was recorded, on the 12th day of January, 1907.

The above being the undisputed facts the question is, Did the trial court err in its decree. The position of the appellant is stated by her counsel as follows (we quote from the brief): "If the complainant had gone to the records, it would have found title in Waldron and nothing to indicate that Campbell ever had any claim upon the property. Would this not naturally have raised the inquiry as to where was Mr. Campbell's deed? For what purpose was his deed or deeds being withheld from record? The registration books were open to Mr. Potter, and, if he did not actually make use of them, the bank cannot now complain that it did not have the benefit of the inquiry which he would have made if the facts as they appeared in the books had been disclosed to him. A question or two put to Mr. Campbell would have disclosed the whereabouts of the deeds and the purpose for which they were left with Mrs. Turner, or, if Campbell had not disclosed these facts, his inability to produce or account for the deeds would have put Mr. Potter upon further inquiry, and, until they were located, no man acting in a reasonable way would have parted with a consideration for that kind of security. Was Mr. Potter not put upon inquiry by the absence of these deeds to determine what had been done with them, and can it be said that he acted in good faith within the meaning of the law? * * * The argument under this head resolves itself into this: When a mortgagor deposits with the mortgagee his unrecorded title deeds, has the mortgagee not a right to presume that, as far as the mortgagor is concerned, no person acting in good faith and for valuable consideration will take another conveyance until these deeds are produced? We regret that diligent research has not disclosed other cases where this exact point has been presented."

[1] The Legislature has made an effort to guard the rights of parties who acquire titles to, or liens against real estate. Section 8988, C. L., reads as follows: "Every conveyance of real estate within this state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith, and for valuable consideration of the same real estate or any portion thereof whose conveyance shall be first duly recorded." We have held that this section applies to mortgages

as well as deeds. *Burns v. Berry*, 42 Mich. 176, 8 N. W. 924; *General Electric Co. v. Norris et al.*, 100 Mich. 505, 59 N. W. 151. The object of the registry laws is stated in the note to section 8978, C. L. The parties to this litigation had the misfortune to believe a man to be honest who was in fact dishonest. One of them withheld her evidence of a lien from record. The other one recorded its lien, and thereby became entitled to the benefit of the statute.

The decree is affirmed, with costs.

VANDERVEEN v. ELLIS.

(Supreme Court of Michigan. Nov. 8, 1912.)

COMPROMISE AND SETTLEMENT (§ 23*)—SETTLEMENT WITH CUSTOMERS—TRANSFER OF ACCOUNT—EVIDENCE.

Evidence in an action against a stock broker by a customer held to show a complete settlement, conclusive in the absence of fraud, by transfer of the account to the broker's successor.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 91-94; Dec. Dig. § 28.*]

Error to Circuit Court, Ottawa County; Philip Padgham, Judge.

Action by Arend Vanderveen against George E. Ellis. Judgment for defendant, and plaintiff brings error. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

Walter I. Lillie, of Grand Haven, for appellant. Farr & Kolyn, of Grand Haven (John A. Brown, of counsel), for appellee.

KUHN, J. The plaintiff was a physician in the city of Grand Haven, and the defendant conducted a stockbroker's office in the city of Grand Rapids. For many years the plaintiff had been in the practice of purchasing stocks upon margins, and had dealt with various Chicago and Detroit brokers. In 1901 the plaintiff began to deal with the defendant in buying stocks upon margins, continued this for a time, and closed the account with a profit of about \$1,600. He began dealing again with the defendant in May, 1906, by purchasing stocks upon margins, and in 1907, the defendant desiring to close out his brokerage business, Connor H. Smith took his place as a broker. The plaintiff was informed of this, and desired the defendant to continue the business for him, but consented to turn over to Mr. Smith the stock held on margins by the defendant, and also a balance of \$1,837 then in the hands of O'Dell & Co., through whom the defendant dealt. There were also 500 shares of stock purchased for the plaintiff upon margins. These were turned in at the then market price and immediately repurchased by Smith, at the same price, for plaintiff. Thereafter the plaintiff continued to do busi-

ness with Smith. Some time in 1908 Smith closed out the business, in which the plaintiff at that time claims to have had due from Smith, \$2,500. Plaintiff assigned his claim to one Lamereaux, and suit was commenced against Smith, but subsequently submitted to a nonsuit. Plaintiff took a reassignment of his claim from Lamereaux, and brought suit against the defendant in assumpsit by declaration with bill of particulars attached. The trial judge directed a verdict in favor of the defendant.

It is contended by the defendant that, having been elected mayor of the city of Grand Rapids in the winter and spring of 1907, he desired to close out his stockbroker's business, and that, after some negotiations, on May 4, 1907, he effected a complete settlement with the plaintiff of all business in his hands at that time and had no further business relations with him at all.

The following correspondence between the parties was introduced in evidence:

"City of Grand Rapids, Michigan. Mayor's Office. George E. Ellis. Stanley Jacowski, Secretary. April 17, 1907. Friend Vanderveen: As you know I retired from business December 31, 1906, and the accounts are all transferred to Connor Smith, excepting a few and I desire to transfer them. You can draw down all excepting two dollars per share which he requires for his protection. Kindly inform me by return mail so that I can transfer your account and balance to Connor Smith. Thanking you for past favors, Yours respectfully, George E. Ellis."

"Grand Haven, Michigan, April 18th, 1907. Hon. George E. Ellis—Dear Sir: Your letter received. I have felt perfectly safe with my stocks in your hands. That is the reason why I prefer to leave them with you, in hopes that in the near future I could get out and make up a part, at least, of my severe losses. But I presume you prefer to free yourself of this responsibility and would like to make this transfer to Mr. Connor Smith. He, of course, is a perfect stranger to me and I would like your candid opinion as to his credit and financial reputation. This I would treat as strictly confidential, but I would like to know in making the transfer does your commissions go with the stocks to Smith and will I settle with him for both the buying and selling when I close them out? According to my receipts you are now holding money amounting to \$6462. Isn't that right? I have been obliged to make loans from bank here and would like to draw to make good some of that loan. When I receive your answer I shall run up first part of next week to see you. Yours truly, A. Vanderveen."

"City of Grand Rapids, Michigan. Mayor's Office. George E. Ellis. Stanley Jacowski, Secretary. April 20, 1907. Friend Vanderveen: Your credit balance inclusive of div-

idends, etc., is correct, \$6462.00. Connor Smith is all right and I believe him to be entirely honest and I think he is worth twenty thousand dollars. There will not be any charge for extra commission and when you transfer you can draw all in excess of two dollars per share. Yours truly, George E. Ellis."

On May 4, 1907, the defendant sent the plaintiff a statement of account as follows:

Grand Rapids, May 4, 1907.

Account Purchase and Sale of

For account of Dr. A. Vanderveen.

By [and then the name "Connor H. Smith" has been scratched out, and "successor to" has been scratched out, and leaves] George E. Ellis, Morton House.

1906.				
May	15	Bot. 100 O & W, 49%, Sold 38%...	\$1,150 00	
May	16	Credit of certifi- cates of deposit		\$ 200 00
June	15	Bot. 100 O & W, 48%, Sold 38%...	1,025 00	
June	15	Bot. 100 G. W., 18, Sold 11%		675 00
June	16	Credit by certifi- cate of deposit..		400 00
June	16	Credit interest		7 00
June	28	Credit by certifi- cate of deposit..		500 00
July	20	Credit dividend 2 per cent. 200 O & W		400 00
December	3	Bot. 100 S. R., 34%, Sold 21%	1,375 00	
December	17	Bot. 100 Gas 96%, Sold 92%		400 00
1907.				
January	17	Credit by certifi- cate of deposit...		1,200 00
January	21	Credit by certifi- cate of deposit..		1,000 00
February	15	Credit by dividend 100 gas		150 00
February	20	Credit by interest on certificate of deposit		5 00
May	7	Credit by check..		800 00
May	15	Credit by check..		800 00
May	25	Credit by check..		1,000 00
May	4	Paid O. H. Smith, per instructions	1,387 00	
			\$6,462 00	\$6,462 00

No question is made by the plaintiff as to the correctness of this statement, and it appears that all his transactions with the defendant up to this time were perfectly satisfactory to him, and he never made any complaint. It appears that the terms of the settlement were well understood by Vanderveen, and were assented to by him, and it was understood that their business relations were at an end. The testimony further shows that after May 4, 1907, the plaintiff did business entirely with Connor H. Smith. Memoranda of transactions between Vanderveen and Smith were introduced in evidence, all of them headed as follows:

"Account purchase and sale of

"For account of Dr. A. Vanderveen.

"By Connor H. Smith, successor to George E. Ellis, Morton House."

During all of this period the checks made out by Vanderveen in payment of these transactions were made payable to Connor H. Smith, and not to Ellis, and Vanderveen drew out from Smith \$1,700. It seems to us that the transaction of May 4, 1907, terminated the liabilities of Ellis to Vanderveen on that day, unless it was tainted with fraud. Plaintiff alleges fraud in a special count in his declaration, and the basis of his claim is the statement made by Ellis regarding the financial condition of Smith when Vanderveen inquired of him regarding Smith. The statement made by Ellis in the letter regarding Smith's financial condition was merely one of opinion, and the record does not disclose that at the time he wrote the letter he was not entirely warranted in his conclusions. Smith testified that at that time he was worth quite a considerable over \$20,000. Ellis also showed Vanderveen a statement of Smith's financial relations with his brokers which showed that Smith had a balance of \$22,667.86 with O'Dell & Co. We cannot find any evidence that Ellis made any fraudulent misrepresentations in order to effect the settlement of May 4, 1907. The settlement was complete, and terminated the relations between the parties, and should be conclusive.

For the reasons stated, the action of the court below in directing a verdict for the defendant is sustained.

TOTTEN v. TOTTEN.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. RAPE (§ 66*)—CIVIL LIABILITY—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an action for assault and battery, including ravishment, plaintiff may testify that on the day following the assault she told her husband, to show the genuineness of the charge.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. § 66.*]

2. EVIDENCE (§ 219*)—ADMISSIONS—ADMISSIBILITY.

Where, in an action for assault and battery including ravishment, the evidence showed that on the day following the assault plaintiff informed her husband, who then sought and found defendant, and requested him to be at the husband's house that night, evidence that thereafter during the same afternoon defendant approached a third person and asked him if he would go on defendant's bond, if desired, was admissible to indicate guilty knowledge.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 762-770; Dec. Dig. § 219.*]

3. WITNESSES (§ 345*)—CROSS-EXAMINATION—DISCRETION OF TRIAL COURT.

A witness may be asked on cross-examination, within the discretion of the trial court, as to whether within a year the witness had been on trial for raping a girl under 15 years of age, in which the jury disagreed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1126-1128; Dec. Dig. § 345.*]

4. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where the declaration in one count charged an assault and battery without ravishment,

and in another assault and battery with ravishment, and plaintiff's evidence was directed to the latter count, and plaintiff testified positively to the assault, violence, overpowering, etc., and that she did not encourage or consent and that the intercourse was against her will, and defendant relied on an alibi, and the jury found him guilty under the latter count, a charge that if defendant did not have intercourse with plaintiff against her will, but committed an assault and battery on her, she would be entitled to recover the damages suffered from the assault and battery alone, was not prejudicial as permitting the jury to credit her story in part and disbelieve it in part.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

5. RAPE (§ 65*)—CIVIL LIABILITY—RESISTANCE OF PLAINTIFF.

The mere fact that plaintiff suing for assault and battery with ravishment did not resist to the utmost did not excuse the defendant from his unlawful act if he had intercourse with her without her consent, but she could not recover damages for any act to which she consented.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 106; Dec. Dig. § 65.*]

6. RAPE (§ 65*)—CIVIL LIABILITY—RESISTANCE OF PLAINTIFF.

In a civil action for assault and battery, a charge of ravishment does not change the nature of the action, but is only matter of aggravation bearing on the measure of damages.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 106; Dec. Dig. § 65.*]

7. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS—NECESSITY.

Where a party requested instructions, the opposite party desiring more elaborate instructions on the subjects submitted must request such instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

8. RAPE (§ 66*)—CIVIL LIABILITY—EVIDENCE—INSTRUCTIONS.

Where, in an action for assault and battery with ravishment, plaintiff testified that she did not bring the suit to get money out of defendant, but to punish him, the refusal to charge that, if the jury found defendant guilty, they could give plaintiff such an amount of damages as would compensate her for the injury done as shown by the evidence, and that compensation to plaintiff was the purpose in view, and that, when that was accomplished, anything beyond by whatever name called was unauthorized, was erroneous, and the error was not cured by a charge that the purpose of awarding damages was to fairly compensate plaintiff for the injuries she had received, and not to punish defendant.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. § 66.*]

9. TRIAL (§ 250*)—INSTRUCTIONS.

Where, in an action for assault and battery with ravishment, injury to plaintiff's reputation was not alleged or proved, and there was no proof of loss of social standing, and plaintiff was not compelled to disclose the assault by reason of her physical condition, a charge on the measure of damages that the damages must include not merely physical injuries and suffering but damages to plaintiff's good name, mental suffering, humiliation, and mortification was erroneous for allowing damages to reputation, and, where the court in view of the verdict could not say that the jury did not consider such element in estimating the damages, the error was reversible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. § 250.*]

10. APPEAL AND ERROR (§ 215*)—QUESTIONS REVIEWABLE — INSTRUCTIONS — OBJECTIONS—EXCEPTIONS.

Under Comp. Laws, § 10,247, providing that it shall not be necessary to except to the charge but the party aggrieved may assign errors, a defendant in an action for assault and battery with ravishment need not object in the trial court to an instruction on the measure of damages because submitting an element of damages not alleged and proved, but he may in the Supreme Court assign error on the charge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215.*]

Error to Circuit Court, Kent County; John S. McDonald, Judge.

Action by Myrtle Totten by Ryol J. Totten, her next friend, against Bion H. Totten. There was a judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ.

Rodgers & Rodgers and M. L. Dunham, all of Grand Rapids, for appellant. Albert B. Cogger, of Big Rapids, and Ellis & Ellis, of Grand Rapids, for appellee.

STEERE, J. Plaintiff instituted these proceedings against defendant in an action of trespass to recover damages for an assault and battery committed upon her person, including a ravishment. The assault is alleged to have taken place at plaintiff's home in the township of Solon, Kent county, Mich., on Friday, the 26th of August, 1910. The case was tried in Kent county circuit court before a jury, and plaintiff recovered a verdict and judgment in the sum of \$3,000.

Defendant has removed the case to this court on writ of error, alleging 16 assignments—12 to the charge of the court, 3 with reference to the admissibility of testimony, and 1 to the court's refusal to grant defendant's motion for a new trial. At the time of the alleged assault plaintiff was a married woman 20 years of age. She had been married 4 years, and was the mother of one child, 2½ years old. Her husband, Ryol J. Totten, is a nephew of the defendant, and at the time in question was his tenant. Plaintiff and her husband were occupying and cultivating a farm of defendant, consisting of about 90 acres, located a little over a mile eastward from the village of Cedar Springs, in which village defendant resided with his family. By the arrangement under which plaintiff and her husband occupied the farm, defendant had reserved to himself a small room on the first floor of the farmhouse called the "clothes press," to which there was access by a door from without, an inner door connecting with an adjoining bedroom usually occupied by plaintiff and her husband. Defendant was a man 54 years of age, having a wife and two grown daughters. Both he and his wife, singly and together, were ac-

customed to visit the farm from time to time as any matter of business or inclination suggested. They apparently were on familiar and friendly terms with plaintiff and her husband up to the time of the alleged assault.

On August 26, 1910, plaintiff's husband was absent from home, having gone to Lansing on an early morning excursion train, returning after midnight of the same day. Plaintiff remained at home alone with her little boy. It is her claim that about 3 o'clock in the afternoon, while she was in her bedroom combing her hair and her child was playing out in the yard, defendant came into the room through the door from the "clothes press," to which he had access from the outside, and addressed her, first asking where her husband and the hired man were; that his presence did not alarm nor particularly surprise her at first, as he was frequently around the farm, and had control of the adjoining room; that after some commonplace conversation about farm matters, during which he handed her an apple, he proceeded to approach her in an insulting manner, followed by an unexpected assault in which he overpowered her, threw her on the bed, and with force and violence and against her will perpetrated the outrage complained of. The defense was a total denial, not only of the assault, but of defendant's having met plaintiff or been at the farmhouse that day. Much testimony was introduced on each side touching his claim of alibi.

[1] Error is assigned on the ruling of the court in allowing plaintiff to testify against objection that she told her husband of the assault the following day. On direct examination she was asked by her counsel: "Q. Did you ever tell your husband this? A. I did. Q. When? Mr. R. I object to that as immaterial and incompetent." The objection was overruled and the witness answered: "Saturday. That noon to the dinner table." A motion was made to strike this testimony out, which was denied. The Saturday referred to was the day following the alleged assault, witness having previously testified to going to her parents' home on the evening of that day, taking her baby with her.

It is claimed that the rule allowing proof of complaints made to others by the female assaulted, which is an exception to the general hearsay rule, is applicable only to criminal prosecutions, and should not prevail in civil actions, nor be extended to permit a plaintiff in a civil action to bolster up her claim for damages by proof of self-serving statements made by herself after the alleged assault. While the question does not appear to have been squarely before this court in a civil action, it has more than once been held in carefully considered criminal cases that such testimony is competent. *Brown v. People*, 36 Mich. 203; *People v. Brown*, 63

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Mich. 531, 19 N. W. 172; *People v. Gage*, 62 Mich. 271, 28 N. W. 835, 4 Am. St. Rep. 854; *People v. Marrs*, 125 Mich. 376, 84 N. W. 284; *People v. Bernor*, 115 Mich. 692, 74 N. W. 184. In civil actions failure of the female to complain or the continued existence of friendly relations between the parties is admissible as tending to show the falsity of the charge, and, on the other hand, we think it likewise fairly admissible, as tending to show the genuineness of the charge, to allow proof not only of recent subsequent conduct and appearance, but complaints. The plaintiff in this case gave no details of the conversation or what was said beyond the fact that she told him. This rule is well reasoned in *Gardner v. Kellogg*, 23 Minn. 463, wherein the court said: "Whatever may be the reason for the rule as applied to criminal cases, whether it is that statements of this character as to the cause and immediate consequences of the injury, made by the injured party so soon after the injury, and while still under the influence of the smart and suffering occasioned by it, constitute a part of the *res gestæ*, as was held in *Thompson v. Trevanion*, *Skinner*, 402, approved in *Aveson v. Lord Kinnaid*, 6 East, 188, and in *Insurance Co. v. Mosley*, 8 Wall. 397 [19 L. Ed. 437], or whether it is that silence under such circumstances is so contrary to human experience, and to the natural and ordinary conduct of a woman suffering under such a wrong, as to raise, if not explain, an unfavorable presumption affecting the credibility of her testimony as a witness, and hence, as is suggested by *Woodruff, J.*, in *Baccio v. People*, 41 N. Y. 265, 268, affirmative proof is admissible to repel the inference—it would seem quite clear that the rule has for its support a foundation equally as firm and reasonable in civil as in criminal actions. If it is a safe and sound rule to observe in the determination of a controverted fact which is to affect the liberty and dearest personal rights of the citizen, it is difficult to perceive why it ought not to be followed in the ascertainment of the same fact when his pecuniary interests alone are involved."

[2] Error is assigned on refusal of the court to strike out the testimony of a witness named Durfey as to defendant's asking him if he would go on his bond. Plaintiff's husband had testified that after dinner on the day following the alleged assault, shortly after learning it, he had sought out defendant in a poolroom in Cedar Springs, and told him to be at the farmhouse that night at a certain time, and, when asked by defendant why, said, "It makes no difference. You be there, or I'll send for you." Durfey testified that the same afternoon defendant approached him, and wanted to know if he would go on defendant's bond if he wanted him to; that in reply to the inquiry of what he wanted it for defendant said he would see him later. It was claimed by the plaintiff that it was fairly inferable from the sequence of

facts that inquiry as to bonds was the result of his talk with plaintiff's husband, and tended to indicate guilty knowledge. We are not prepared to say that such evidence had no probative force, and do not find its admission reversible error.

[3] A witness named Peter Keech, called by defendant in support of his claim of alibi, was asked in the course of a sharp cross-examination: "Q. Mr. Keech, are you the same Peter Keech that within about a year was on trial in the circuit court here for raping a girl under 15 years of age, in which the jury disagreed?" This was objected to as incompetent and immaterial, and the objection overruled. Witness answered that he was, but was not convicted. This ruling is assigned as error. The question was within the discretion of the trial court permissible on cross-examination. In the case of *Driscoll v. People*, 47 Mich. 413, 11 N. W. 221, it was said: "A witness may be asked on cross-examination within the proper discretion of the court, not only concerning his conviction, but also concerning any serious charge brought against him. *Wilbur v. Flood*, 16 Mich. 40 [93 Am. Dec. 203]; *Clemens v. Conrad*, 19 Mich. 170; *Hamilton v. People*, 29 Mich. 173." Three of defendant's assignments of error, involving refusal of the court to give seven of his requests to charge, raise questions relating to the elements of assault and battery with carnal knowledge, to what extent the assault must have been resisted, and whether it must have been entirely against plaintiff's will and accomplished by force, in order to permit the recovery of substantial damages. It is alleged on these propositions the court charged inconsistently and "both ways."

[4, 5] Plaintiff's declaration contains two counts—one for assault and battery only, without ravishment, and the other for assault and battery accompanied by and including violent debauchery and carnal knowledge by force and against the will of plaintiff. Her testimony was directed to, and recovery sought under, the latter count. The issue was well defined along these lines. She testified positively to the assault, violence, overpowering, carnal knowledge, that she did not encourage or consent, and that it was against her will. Defendant himself testified that she did not consent, that he had no intercourse with her of any kind on that day, did not see her and was not at the farmhouse, where she claimed the assault took place, at all during the day in question, and all testimony introduced in his behalf was to that effect. It apparently was the claim of defendant that, even should the jury find that he had improper relations with plaintiff on that occasion, it might be inferred that it was with her consent, or that her testimony failed to establish by a preponderance of evidence it was against her

consent, and that she resisted to the utmost and continued her resistance until the act was consummated. This is based on plaintiff's failure to make outcry and active physical resistance. Her testimony relative to that feature of the case is, in part, as follows: "When he took hold of me, I was frightened. I was shocked. I never thought of such a thing. I was shocked by his stepping up to me and doing what he did. He made that remark, 'I love you,' and I could not help myself. He had hold of me when he made the remark. My hair was down over my face. I have quite a little hair. His making this remark and grabbing me frightened me. I was just shocked and I could not help myself hardly at all. I was so surprised and everything else. It made me helpless almost, for I never expected such a thing. I did not strike him, for he had hold of my hands. When I said on cross-examination that I was conscious all the time, I meant that I was conscious to an extent that I hadn't fainted. I knew what was going on and knew what he did, but was so surprised and frightened and everything else that I couldn't help myself. If I could, I defended myself as far as I could. I could not do very much simply because he put his face over my mouth and had hold of my hands. I was so frightened that I could not. I was weak and faint. When I get frightened, it makes me faint. I hardly ever scream when I am frightened because it makes me faint. I almost faint away. I was in that condition when this was going on."

Defendant proffered numerous requests, in varying language, involving the principles above mentioned, typical of which are:

"(3) There is no claim in this case that the plaintiff used any physical force or attempted to use any physical force in resisting the assault of the defendant, or that the plaintiff made any outcry or attempted in any manner to prevent the assault, debauch, and carnal knowledge of her person. The plaintiff claims that the reason she did not physically resist the said defendant or make an outcry or attempt in some way to defend her person was because she was so scared that she lost control of herself. Now, unless the plaintiff has satisfied you by a preponderance of the evidence that she was physically unable to resist the defendant, and that she was physically unable to make any outcry or in any manner endeavor to protect herself and that while she was in this condition the sexual intercourse occurred, then she cannot recover in this action for an assault and carnal knowledge of her person by force and against her will.

"(4) It is the law that the gist of this action is force and violence, and that to sustain plaintiff's claim she must show, in addition to carnal intercourse, that defendant accomplished the act by force and violence

and against her will. It must also appear that she resisted defendant to the extent of her capability, and that said resistance extended to the time said act was accomplished."

The court in his charge clearly and correctly defined assault and battery and rape, then stated that in this civil case "the mere fact that she did not resist to the utmost would not excuse the defendant from his unlawful acts, if you find he had intercourse with her without her consent. * * * She could not recover damages for any act to which she consented." So far as we can gather from the record, it was plaintiff's position that defendant was guilty under the second count, which included ravishment, or not guilty at all, and the evidence on both sides so indicates, but the court charged: "If you find that the defendant did not have intercourse with her against her will, but did commit an assault and battery upon the plaintiff, she would be entitled to recover such damages as she has shown she has suffered from such assault and battery alone"—thus allowing the jury to credit her story in part and disbelieve it in part. Whatever else may be said of this portion of the charge, it becomes unimportant, inasmuch as the jury found defendant guilty under the second count of assault and battery accompanied by debauchery. His instruction upon that branch of the case, that, in order to recover, it is not necessary to prove the limit of resistance provided the act was perpetrated against her will, is in harmony with *Shenk v. Dunkelow*, 70 Mich. 89, 37 N. W. 886, in which the requests of defendant embody the same propositions as many of those presented here. The court there said, speaking of the action as an entirety: "The plaintiff claimed it was not necessary for the plaintiff to show that the assault was committed with such force and violence as to constitute the crime of rape, nor was it necessary to establish any fact in the plaintiff's case by more than a preponderance of the evidence to entitle her to recover. * * * Her statements, if believed by the jury, taken with the other evidence in the case, although they were denied by the defendant, contain all the elements necessary upon which to base the verdict the jury rendered." See, also, *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668.

[8] In a civil action for assault and battery, a charge of ravishment does not change the nature of the action, but is only matter of aggravation, bearing on the measure of damages. The language used in *List v. Miner*, 74 Conn. 50, 49 Atl. 856, is applicable. In that case an aggravated assault and battery was charged, as in this case. The trial court said: "As has been said to you, any unlawful touching of another constitutes in fact assault." This was claimed to be misleading, and it was urged that the jury must have

been misled by a total lack of a charge upon the element of consent; that the charge as to assault and battery "must have been understood by the jury to mean that if the defendant had carnal knowledge of the plaintiff with her full consent, or even by her solicitation, that he had committed upon her an assault for which she could recover." The appellate court disposed of the technical niceties raised upon the charge and refusal to charge on those distinctions as follows: "If any claim had been made during the trial by either party that whatever the defendant did to the plaintiff he did by her consent and allowance, or if there had been any evidence upon which such a claim might have been based, there would be some force in the objection that the defendant here makes to the charge; but there was no such evidence in the case, and no such claim was or could be fairly made. The complaint charged a violent assault upon the plaintiff, made against her will and consent. The evidence for the plaintiff tended to prove just such an assault as was alleged, and not one of a different kind. The answer unqualifiedly denied any assault at all, and the defendant, by his evidence, denied absolutely that he had ever assaulted the plaintiff or had anything whatever to do with her. Before the jury, then, the claims of the parties were these: The plaintiff claimed that all the defendant did to her was done against and not with her consent and allowance. The defendant claimed her story was untrue from beginning to end, and that he had never assaulted her or had carnal knowledge of her at all, with or without her consent. * * * In view of the case as it was before the jury, upon the claims made and evidence adduced by the respective parties, we think the charge, upon the point in question, was sufficient."

[7] Error is assigned upon portions of the charge relating to witnesses in which the court stated that in a case of this kind it was not essential in order to convict that plaintiff should be corroborated by the testimony of other witnesses; that evidence which tended to prove defendant committed the assault also tended in the same degree to prove that he was there at plaintiff's home at the time of the assault. If the jury found from the evidence that any of defendant's witnesses testified falsely as to his acts or movements on that day, it might be considered as bearing upon credibility and guilt. The last instruction was given at the conclusion of an instruction in regard to the defense of alibi. These instructions were given upon requests presented by plaintiff, are supported by authority, and should be considered in connection with the charge as an entirety. The objection made to them is chiefly that they were partial, in favor of plaintiff, and should have been elaborated and applied by the court equally to both sides. The court might,

with propriety, have done so had defendant requested it, but we do not find the charge upon this point as given error, and it is not error for the court to fail to charge more elaborately, not being requested to do so, especially where the subject has been brought to the attention of the defendant by requests preferred by the opposite side before the charge is given. *Barnett v. Farmer, etc., Co.*, 115 Mich. 247, 73 N. W. 372.

[8] Plaintiff, while giving her evidence, declared that she did not bring this suit to get money out of defendant, but said "we brought it to punish him for what he did." Upon that subject defendant's counsel requested the court to charge as follows: "If you find the defendant guilty in this case, you have the right to give the plaintiff such an amount of damages as will compensate her for the injury done as shown by the evidence in this case. Compensation to the plaintiff is the purpose in view, and, when that is accomplished, anything beyond, by whatever name called, is unauthorized. It is not the province of the jury after damages have been found for the plaintiff so that she is fully compensated for the injury to mulch the defendant in an additional sum to be handed over to the plaintiff as punishment for the alleged wrong." This was refused. The court, however, in lieu thereof said: "The purpose of awarding damages, if you find that plaintiff has sustained any, is to fully and fairly compensate her for injuries she has received, and not to punish the defendant." This language is advisory rather than mandatory. It is not the equivalent of the request which was refused, and which is a correct statement of the law especially applicable to this case, in view of the emphasis put upon the subject by plaintiff's testimony that punishment was her purpose. It should have been given as requested.

[9] In instructing the jury as to the measure of damages the court said: "These damages include not merely physical injuries and suffering, but damages to her good name, mental suffering, humiliation, and mortification." There was no evidence in the case of damage to her good name, but the court stated to them that it was an element of damages. Injury to reputation or good name were neither alleged nor proven. There was not a scintilla of proof as to loss of social standing, that she had been shunned, slighted, or slurred by her friends and neighbors, or that any one regarded her with less respect. This transaction, as she related it, was absolutely unknown to her friends and neighbors, or the public, until she and her husband advertised it, that the circumstances of the assault did not make it public, and that she was not compelled to disclose it by reason of her physical condition is shown by her own testimony. Neighbors lived across the road, not far away, and a hired man named Baldwin was on the premises. She

remained around her home until towards 6 o'clock that evening, and then went after the cows as usual. The hired man testified that she helped him do the chores, milking four cows. In the evening she went to the neighbor's across the way, who noticed nothing unusual, and remained there visiting until her husband returned, when she went home with him. The only evidence of anything which was noticable at that time given by any witness is the testimony of her husband that she appeared down-hearted, and he heard her sobbing two or three times during the night. There is no proof of loss of good name or circumstances beyond her control making the matter public or a known disgrace. This court has more than once held that damages in case of tort must be proven before they can be recovered. *Cousins v. Railway Co.*, 96 Mich. 388, 56 N. W. 14; *Spray v. Ayotte*, 161 Mich. 593, 126 N. W. 630; *Pratt v. Hamilton*, 161 Mich. 258, 126 N. W. 196.

In the case of *Kepler v. Hyer*, 48 Ind. 499, involving a criminal assault upon a female, the court held, apparently irrespective of allegations and proofs, that injury to reputation or character in such a case cannot be made the basis on which to estimate damages. In the case of *Fay v. Swan*, 44 Mich. 546, 7 N. W. 215, which involved an assault with intent to ravish, this court held that the jury in estimating damages could take into account the disgrace as well as physical suffering caused by the assault. An examination of the record in that case discloses that the word "disgrace" was apparently not used as synonymous with good name or reputation, but rather as meaning a sense of shame, humiliation, or feeling of disgrace affecting plaintiff's mental suffering. While the question of necessary publicity was not discussed in that case, it appeared that plaintiff was forced to obtain the services of a physician and unavoidably make known to him the transaction. That case is not in conflict with the well-reasoned rule stated in *Sletten v. Madison*, 122 Wis. 251, 99 N. W. 1020. The court there said: "The most obvious of the errors assigned is presented by an instruction to the jury to include as an element of damage to be compensated, loss of reputation. Respondent's counsel offers neither argument nor citation in support of the proposition that loss of reputation is an element of the general damages resulting from an assault, even when accompanied by sexual solicitation. Indeed, seems to concede the contrary, but urges that the instruction could not injure the defendant because there was no evidence of any loss of reputation. The conclusion is non sequitur. Instruction to the jury to make allowance for such an element was a direct invitation to them to draw on conjecture or imagination as to its existence in absence of any evidence, and for that reason alone would be erroneous, even if the element mentioned

would be proper as special damages when supported by the proofs. [Citing cases, etc.] Hence the conclusion is irresistible that without direct allegation of such injury as special damage supported by proof there can ordinarily be no recovery for this element of damage in an action for assault. We are not prepared to say that there may not be cases where the assault, especially when associated with attempts upon the chastity of a woman of pure character and good reputation under circumstances of publicity, may not affect her fair name and her standing in the community to her actual, nay, pecuniary damage. The proneness of the human mind to suspicion is such that the mere fact of sexual attempt upon a woman may arouse suspicion of conduct or character on her part to have invited it with hope of success, and the fact that she is known to have been so solicited may derogate from the pre-existing belief in her virtue and decorum. We shall not decide in the present case whether that may, under special circumstances of both allegation and proof, ever be an element of special damage in an action for assault. That is not the situation here, for there is neither allegation nor proof of any such facts. The recovery permissible in this case was only for those general damages which so customarily accompany an assault that the law presumes them at least in some degree. As we have said, these do not include injury to reputation. Hence we conclude the instruction complained of was error." The court, in his reasons for refusing a new trial, and counsel for plaintiff in their brief, admit, in effect, that there is no positive evidence of injury to good name and that the instruction upon that subject was erroneous, but state that it was an inadvertent and harmless error in view of the rest of the charge and the fact that able counsel at defendant's table, listening to the charge, apparently did not notice it, and did not call the court's attention to the matter. It was clearly stated as an element of damages, and the first element mentioned in addition to physical suffering. The statement is nowhere contradicted or corrected in the charge and stands as a part of it. In view of the verdict, we cannot say that the jury did not take their cue from this instruction, and that it did not enter into and constitute a portion of their award. It is rather to be presumed that it did.

[10] If manifestly an inadvertence as indicated to those listening to the charge, it would seem to be the duty of plaintiff's counsel, rather than defendant's, to call the attention of the court to it. Under the practice which formerly prevailed, it would have been the duty of counsel for defendant to then take exceptions, thereby calling the attention of the court to the matter and thus give opportunity to make correction; but latterly, for reasons which we do not seek to fathom, the Legislature provided that it is not neces-

sary in such cases to except to the charge given to the jury, but the party deeming himself aggrieved by any portion of the charge may remain silent, and subsequently, when removing the case to this court, for review, assign his errors upon the charge. Comp. Laws, § 10,247.

The question of damages in this case was a most important one, upon which the jury should have been plainly, fully, and correctly instructed.

For the reasons stated, the judgment is reversed, and a new trial granted.

BRANCH v. KLATT.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. NEGLIGENCE (§ 125*)—SIMILAR ACCIDENTS—ADMISSIBILITY.

In an action for personal injuries, evidence of prior, similar accidents in the same place, the conditions being shown to remain unchanged, is admissible to prove both notice of the defect and negligence, but evidence of such accidents subsequent to the one in issue is not admissible.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 239-244; Dec. Dig. § 125.*]

2. WITNESSES (§§ 236, 237*)—QUESTIONS—ASSUMING FACTS—ACTIONS FOR INJURIES—EVIDENCE—ADMISSIBILITY.

In an action against the proprietor of a theater for injuries claimed to have been sustained through his failure to light a stairway and provide railings, where no evidence of prior accidents had been offered, the exclusion of a question as to how many times a day a witness saw people stumbling at that place was not error, since the question assumed facts not proved and included accidents occurring both before and after the one in issue, especially where it did not appear what the answer to such question would have been.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 817-826, 829-832; Dec. Dig. §§ 236, 237.*]

3. THEATERS AND SHOWS (§ 6*)—ACTIONS FOR INJURIES—EVIDENCE—WEIGHT AND SUFFICIENCY.

In an action against the proprietor of a theater for injuries claimed to have been sustained through his failure to light a stairway and provide railings, evidence held to support a verdict for defendant and a special finding that the stairway was provided with railings at the time of the accident.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 6; Dec. Dig. § 6.*]

4. NEW TRIAL (§ 150*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.

Depositions taken subsequent to a trial, and offered in support of a motion for a new trial to show the falsity of testimony given on the trial, were to be considered in like manner as newly discovered evidence presented by affidavit in support of such motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 306-310; Dec. Dig. § 150.*]

5. NEW TRIAL (§§ 100, 102, 104, 108*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.

Motions for a new trial on the ground of newly discovered evidence are not regarded with favor, and, to prevail, it must appear to the court's satisfaction that the evidence and not merely its materiality is newly discovered, that it could not have been discovered with

reasonable diligence and produced at the trial, is not cumulative, and is so strong and convincing as to render a different result probable on a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 183, 201-204, 207-214, 218-220, 226-228; Dec. Dig. §§ 100, 102, 104, 108.*]

6. APPEAL AND ERROR (§ 981*)—NEW TRIAL (§ 108*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.

Whether newly discovered evidence offered on a motion for a new trial is of such a character as to require a new trial and render a different conclusion probable on such new trial is to be determined by the trial judge in his good judgment and discretion, which discretion will not, as a rule, be disturbed on appeal unless abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. § 981.* New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

7. NEW TRIAL (§ 108*)—NEWLY DISCOVERED EVIDENCE—MATERIALITY.

In an action against the proprietor of a theater for injuries claimed to have been sustained through his failure to light a stairway, and provide railings, where evidence was offered by defendant that the stairway was lighted and provided with railings, the court did not err in denying a motion for a new trial supported by depositions claimed to show that the testimony given on the trial as to the presence of such railings was false, since, if the stairway was broad with easy steps and well lighted, the absence of such railings would not necessarily be controlling on the question of negligence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

Error to Circuit Court, Wayne County; George P. Codd, Judge.

Action by Teresa Branch against William F. Klatt. Judgment for defendant, and plaintiff brings error. Affirmed.

See, also, 165 Mich. 666, 131 N. W. 107.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

Patrick J. Kelaher, of Detroit (McHugh, Gallagher & McGann, of Detroit, of counsel), for appellant. Luman W. Goodenough and Irvin Long, both of Detroit, for appellee.

STEERE, J. Plaintiff instituted this action to recover damages for personal injuries imputed to defendant's negligence in failing to provide and maintain a safe and suitable stairway leading to his theater.

Defendant was proprietor of a place of public entertainment known as the Bijou Theater, located on the second floor of a building numbered 24, on Monroe avenue, in the city of Detroit. The ticket office of said theater was situated on the first floor of the building at the street entrance, where patrons attending the performances purchased tickets of admission. Having procured these, they were allowed to ascend the stairway leading to the second floor and enter the theater. On the afternoon of October 21, 1909, plaintiff patronized said place of amusement where a continuous moving picture perform-

ance was in progress. She took a seat, witnessed the regular bill of said show, and then withdrew. On making her exit by said stairway, she fell down a flight of eight steps, sustaining, as is alleged, serious injuries. This case has been twice tried in the circuit court, and is now here a second time for review. On the first trial the case was taken from the jury; a verdict and judgment being directed and entered by the court in favor of the defendant, on the ground of contributory negligence. Plaintiff thereupon brought the proceedings to this court for review on a writ of error. It was here held on the record as then made that issues of fact were involved which should have been left to the jury to decide under proper instructions. The judgment was reversed and a new trial granted. The opinion then rendered, reported in 185 Mich. 686, 131 N. W. 107, furnishes a complete and clear statement of the case, and contains a diagram of the entrance to the theater, showing the landings and steps occupying the stairway down which plaintiff fell. On a retrial in the circuit court the case was submitted to a jury, again resulting in a verdict and judgment in favor of defendant. A motion for a new trial was made and denied. Plaintiff again seeks a reversal, presenting two assignments of error, as follows: "(1) The court erred in excluding the following question: 'How many times per day while you were standing in the rear of that theater did you find people stumbling across that place?' (2) The court erred in denying plaintiff's motion for a new trial."

The first assignment of error approaches a question which has been the subject of serious consideration and somewhat conflicting opinions in this court as well as in other jurisdictions. The two cases of *Early v. L. S. & M. S. Ry.*, 66 Mich. 349, 33 N. W. 813, and *Langworthy v. Green Tp.*, 88 Mich. 207, 50 N. W. 130, are cited by counsel for defendant as holding that proof of previous accidents occurring at the same place as the one giving rise to the litigation is not permissible. In the *Early* case it was said: "The court committed no error in excluding other and previous accidents occurring at the same place." And in the *Langworthy* case: "A witness was asked by defendant's counsel if he had ever heard or known of any one being injured on that obstruction before this, but the court properly excluded the testimony. *Hodges v. Bearse*, 129 Ill. 87 [21 N. E. 613]." It would seem in this case that the interrogator was seeking to prove a negative. To the extent these authorities tend to substantiate the rule defendant contends for, they must be regarded as somewhat out of tune with others which came before and after them. See *Gr. Rapids, etc., Ry. Co. v. Huntley*, 38 Mich. 527, 31 Am. Rep. 321; *James v. Emmet Min. Co.*, 55 Mich. 335, 21 N. W. 361; *Smith v. Sherwood Tp.*, 62 Mich. 165, 28 N. W. 800; *Thorsen v. Babcock*, 68

Mich. 523, 36 N. W. 723; *Lombar v. East Tawas*, 86 Mich. 14, 48 N. W. 947; *Retan v. Railway Co.*, 94 Mich. 146, 53 N. W. 1004; *Corcoran v. City of Detroit*, 95 Mich. 84, 54 N. W. 692; *Alberts v. Village of Vernon*, 98 Mich. 549, 55 N. W. 1022.

[1] In *Gregory v. Detroit United Ry.*, 138 Mich. 368, 101 N. W. 546, it was held that "such testimony is only admissible to show notice and knowledge of the defects," but this was overruled in *Woodworth v. Detroit United Ry.*, 158 Mich. 108, 116 N. W. 549, and it now stands as the law in this state that evidence of prior similar accidents in the same place, the conditions being shown to remain unchanged, is admissible to prove both notice of the defect and negligence. It is not permissible, however, to prove that others stumbled in the same place after the accident. *McGrail v. Kalamazoo*, 94 Mich. 52, 53 N. W. 955.

[2] The question asked in the case at bar, exclusion of an answer to which is alleged as error, assumed facts not proven, and was so framed as to include accidents occurring both before and after the one in issue. It called for incompetent as well as competent testimony, and the record contains no intimation of what the answer would have been. No proposal or offer was made to show that other persons did in fact stumble across that place prior to the time plaintiff fell. The question asked did not properly present that issue. It was objectionable in substance in part and in form as a whole. The objection was properly sustained.

The reasons upon which plaintiff's motion for a new trial was made are stated as follows:

"(1) Because the said verdict was contrary to the weight of evidence adduced at the trial of said cause.

"(2) Because the jury erred in its finding as to the special question submitted to it, at the request of the defendant.

"(3) Because the testimony of the said defendant, and the witnesses produced by him, so far as the same pertained to the time when the railing down the steps leading from the aisle of said theater had been placed in position, was erroneous and false.

"(4) Because the testimony of said defendant and the witnesses sworn in his behalf as to the manner of keeping a record of the business of said defendant prior to and at the time of and subsequent to the accident, which was the basis of the plaintiff's cause of action, was erroneous and false.

"(5) That the testimony of said defendant was false and erroneous in the following answers given to the following questions."

This is followed by several pages of questions and answers extracted from the testimony of defendant and one of his witnesses, all of which is alleged to be "false and erroneous."

The grounds of negligence alleged in plaintiff's declaration are, briefly stated, failure to

equip the stairway with suitable railings on each side, failure to provide them with sufficient lights to enable plaintiff to see where the stairs and landings began and ended, and failure, either by signs and proper notices or by attendants, to inform and advise her of the conditions and dangers.

[3] On the trial of the case plaintiff was sworn and testified to the time and circumstances of her attending the theater and falling when making her exit. After describing the stairway and manner in which it was arranged and equipped, her testimony, appearing in the printed record in narrative form, is as follows: "At the time I met with the accident, there was no railing down this curved step. I had entered the theater safely and witnessed the performance, and was leaving while an act was in progress. The Bijou is one of the so-called continuous moving picture theaters. It was dark in the theater when I started to leave, and I felt my way down the first flight of three steps. I saw where the other flight started to lead downstairs and walked toward it. I had been in this theater but once before, some months previous, and did not know about the curved step, and, being unable to see it, I walked right off, and was thrown down the flight of eight steps to the first landing. I sustained serious injuries. There was no one leaving the theater at the same time with me, nor immediately in front of me. There was no railing or support down the first three steps, over the single step, or along the wall leading down the first flight of eight steps." At the conclusion of her examination plaintiff rested her case. Thereupon the defendant, to maintain the issue on his part, produced seven witnesses, including himself, who gave abundance of positive testimony that suitable handrails were present in the stairway at the time of, and long before, the accident, and that the exit was amply equipped with electric lights, both arc and incandescent, to enable persons to plainly see the steps and landings when ascending or descending. Five of these witnesses were present on the occasion in question, and testified that these lights were turned on and clearly lit the stairs, throwing plenty of light on the landing so that everything was distinct and plain. In so-called rebuttal, though more properly a part of her main case, plaintiff produced four witnesses who testified to having patronized the theater before the accident, and that there were no railings down the curved steps, but that they were put there after plaintiff fell. During the progress of the trial a recess was taken by consent of counsel, and judge and jury visited the premises and inspected the place where the accident occurred.

In connection with his charge the court submitted to the jury the following question, proposed in writing by defendant's counsel: "Were there any railings leading down to the curved step in defendant's theater at the

time of the accident?" In harmony with their general verdict in favor of defendant the jury answered "Yes" to the special question. There was an abundance of positive and negative testimony in sharp conflict as to the existence or nonexistence of facts alleged as grounds of negligence, given by both interested and apparently disinterested witnesses on each side. As heretofore held by this court, the case clearly involved issues of fact for the jury. The charge of the court, against which no error is assigned, plainly instructed the jury as to the nature of the case and the questions of fact within their province to decide. In view of the abundance of conflicting testimony on those issues, we cannot conclude that the "verdict was contrary to the weight of evidence adduced at the trial," or that "the jury erred in its finding as to the special question submitted to it at the request of the defendant."

The remaining reasons urged by plaintiff in support of her motion for a new trial relate to the time when the railings down the stairway leading from the aisle of the theater were put in position; it being charged that defendant's testimony at the trial on that issue was manifestly false, misleading, and evasive. This claim is based largely on certain depositions taken by plaintiff subsequent to the trial before a commissioner.

At the trial defendant William Klatt testified that the rails leading from the center aisle to the curved steps were put up about four years previous about the time the theater was remodeled, and had remained there since. On his subsequent examination before the commissioner he again so testified, and further stated that said rails were included among the repairs made by certain contractors, that he did not know whether they had any plans and specifications for the work, and had no accounts or other written evidence showing when or by whom the rails were put in. Richard Mildner, a member of the firm of Mildner & Elson, architects, testified before the commissioner that his firm prepared the plans and specifications for remodeling the theater, and that these plans, which he produced, showed no railings down the steps; that, if any were placed there, it must have been done afterwards. Otto Damm, a member of the firm of contractors who had the contract of remodeling, identified the plans as those under which the work was done. He did not remember anything about the rails, but stated his books would show if they put them in. He later produced the books of his firm which showed no entries relating to installing any handrails down the first three flights of steps leading from the aisle of the theater. A witness named Christine Brewce testified before the commissioner to working at the theater when it was remodeled; that it was more than three months later when the stair railings were installed; guessed it was more

than six months later; that they were put in later, of course, but witness did not know exactly when.

It is the contention of plaintiff that the testimony as a whole, particularly emphasized by that taken before the commissioner after the trial, shows that defendant and his witnesses, not only testified falsely as to when and by whom the rails were installed, but made a studied attempt to mislead and conceal facts which might help towards ascertaining the truth. In his reasons for denying the motion for a new trial the learned circuit judge, referring to the answer made by the jury to the special question, said: "The claim that this testimony is false is based mainly upon further testimony relative thereto taken before a circuit court commissioner. I do not find, however, from this testimony that there is any material change in that which was given upon the trial; and the arguments which were submitted to the court, with inferences of counsel therefrom, were the same as those submitted to the jury at the time of the trial. The jury manifestly believed the testimony that was presented. They had full opportunity with the court to note the appearance of the witnesses on the stand, and were given an opportunity to personally examine the railing in question by a visit to the premises had during the trial by consent of both parties. I see no reason why the finding of fact made by the jury in this regard should be set aside."

[4] It can safely be said that, in the absence of the depositions subsequently taken before a commissioner, the motion for a new trial would not call for serious consideration. These depositions which are chiefly relied upon by counsel in urging the second assignment of error are to be considered in like manner as is newly discovered evidence presented by affidavits in support of a motion for a new trial.

[5] It is recognized as a general rule that a motion for a new trial upon that ground is not regarded with favor, and, to prevail, it must appear to the satisfaction of the court that the evidence itself, and not its materiality, is newly discovered; that the party could not with reasonable diligence have discovered and produced it at the trial; that it is not cumulative merely, unless it be so strong and convincing as to render a different result probable; and that such result is in fact probable and the legitimate, logical effect of such evidence would be on a retrial to reverse the former verdict.

[6] Whether the newly discovered evidence is of such a character and a different conclusion ought to follow or is probable on a retrial is a question primarily and peculiarly addressed to the good judgment and discretion of the trial judge who heard and saw the witnesses, and is familiar with the visual

conditions of the case. That discretion will not, as a rule, be disturbed except in case of manifest abuse.

[7] It is further to be observed that the depositions, as well as the special question complained of, relate only to the time when the handrails were put in the stairway, and do not touch the issue of whether the stairway was properly lighted, or in any way attack the testimony of defendant's witnesses on that question. The issue as to the presence of rails was not necessarily a controlling one. The question of plaintiff's contributory negligence was involved, and it was also a question for the jury whether or not failure to supply handrails was negligence under the circumstances shown in this particular case. If the stairway was broad, with easy steps and well lighted, it could with reason be contended that the absence of handrails was not. Plaintiff, according to her own testimony, was alone, departing at her leisure, with abundance of time, undisturbed by any rush or crowd and fell, not because there was no railing, but because it was dark. She says: "It was dark in the theater when I started to leave and I felt my way down the first flight of three steps, * * * did not know about the curved step, and, being unable to see it, I walked right off and was thrown down the flight of eight steps to the first landing." The inference from her testimony is that if the place had been plainly lighted, so that she was able to see clearly, she would not have fallen. Against her testimony that the stairway was dark the defense opposed the testimony of numerous witnesses that it was well lighted. If the jury believed defendant's testimony as to the lights, they could legally find that defendant had discharged his duty to plaintiff regardless of the presence of handrails.

We find no error in the decision of the trial court denying plaintiff's motion for a new trial.

The judgment is affirmed.

POWERS v. CALHOUN COUNTY.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. APPEAL AND ERROR (§ 1010*)—FINDINGS—CONCLUSIVENESS.

Findings of fact by the trial court are conclusive on appeal, if there was evidence tending to sustain them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

2. COUNTIES (§ 139*)—LIABILITY ON CONTRACTS.

To entitle an attorney who assisted the prosecuting attorney in a proceeding to recover for his services against the county, he must either show the express or legally implied obligation of the county to pay him.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 203-207; Dec. Dig. § 139.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. DISTRICT AND PROSECUTING ATTORNEYS (§ 7*)—COMPENSATION—ASSISTING PROSECUTING ATTORNEY—IMPLIED LIABILITY OF COUNTY.

Plaintiff at the request of the prosecuting attorney, who stated merely that he would O. K. a reasonable bill for plaintiff's services, under the expectation, as he subsequently stated, that the supervisors would pay it, assisted the prosecuting attorney in a proceeding to which the board of supervisors was a party. The only understanding on the part of the managing officers of the county who knew plaintiff's participation was that the supervisors would pay for his services, if they saw fit, though plaintiff did not know of such understanding by the county officers, and relied on the prosecuting attorney's promise that he would O. K. a reasonable bill. *Held*, that there was no implied obligation on the part of the county to pay for plaintiff's services.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. § 34; Dec. Dig. § 7.*]

Case Made from Circuit Court, Calhoun County; Walter H. North, Judge.

Action by Walter S. Powers against Calhoun County. Judgment for defendant, and plaintiff appeals on a case made. Affirmed.

Argued before MOORE, C. J., and STEERE, MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

J. M. Powers, of Battle Creek, for appellant. R. H. Kirschman, Pros. Atty., of Battle Creek, and Edward R. Loud, Asst. Pros. Atty., of Albion, for appellee.

OSTRANDER, J. In April, 1911, the supervisors of Calhoun county met to canvass the vote cast for and against local option in the county. It adjourned without repealing the prohibition resolution which for two years had been in force in the county. Legal proceedings were instituted to compel them to reconvene and repeal the said resolution. The circuit court for the county of Calhoun, upon the petition of interested parties, in mandamus proceedings, issued its order directing them to show cause why they should not meet, and declare that local option, so called, had been defeated at the said 1911 election. The supervisors, as a board, answered, and, after a hearing, the court made its order that the writ prayed for should issue. The supervisors then sued out of the Supreme Court a writ of certiorari to review the action of the circuit court; the affidavit therefor being made by the chairman of the board. The writ of certiorari issued and the determination of the circuit court was affirmed. Plaintiff assisted the prosecuting attorney of Calhoun county in such proceedings in the circuit court and in this court. He gave his assistance upon the request of the prosecuting attorney, who advised him that he would O. K. a reasonable bill for his services, and who expected, as he later testified, that the supervisors would take his (the prosecuting attorney's) advice and pay the bill. Upon presenting his bill, the amount of which is not questioned, the

board of supervisors refused to allow it. Plaintiff thereupon appealed to the circuit court for Calhoun county, and that court, after a hearing, at which testimony was introduced, declined to allow the claim. The court made a finding in the form of an opinion, and plaintiff proposed a finding amendatory thereof.

The finding proposed by plaintiff we set out, with the rulings of the circuit judge thereon:

Proposed Findings.

"(1) I find as a fact that, before the services were rendered by the plaintiff, the prosecuting attorney for said county of Calhoun said to the plaintiff that, if he would assist him in the case of the Battle Creek Brewing Company v. the Board of Supervisors of Calhoun County, he, the said prosecuting attorney, would O. K. the plaintiff's bill for such services to said board of supervisors, and that said prosecuting attorney did O. K. said bill after the services were rendered and before the bill was presented to the board of supervisors, viz., on the 16th day of June, 1911.

"(2) I find as a fact that the plaintiff assented to that arrangement and said to the prosecuting attorney, in substance, that such arrangement would be satisfactory.

"(3) I find as a fact that the services charged for in this cause were rendered by the plaintiff in pursuance of such arrangement with the prosecuting attorney.

"(4) I find as a fact that the circuit court for the county of Calhoun made an order directing the board of supervisors of said county to show cause before said court why a mandamus should not issue directing said board to reconvene and repeal the local option resolution then on the records of said county of Calhoun, and that the claim of the plaintiff in this cause grew out of said litigation for legal services rendered in said litigation.

"(5) I further find that said board of supervisors did show cause by an answer signed, 'Calhoun County Board of Supervisors, by Robt. H. Kirschman, Prosecuting Attorney, W. S. Powers, of Counsel.'

"(6) I further find as a fact that, when the hearing was called in the circuit court on said order to show cause, the prosecuting attorney for said county said to the court, in substance, that he desired the court to recognize the plaintiff as his assistant on said hearing; that plaintiff took charge of the case, interrogated all of the witnesses that were sworn on said hearing; that plaintiff made an argument to the court at the close of the testimony taken; that said plaintiff was recognized by the court as requested by the prosecuting attorney.

"(7) I further find as a fact that the petition to the Supreme Court for a writ of certiorari to review the decision of the lower

court was made by Ralph Doolittle as chairman of the board of supervisors of said county, signed and sworn to by him, and that such petition at the time it was signed and sworn to contained the name of Robt. H. Kirschman, prosecuting attorney, and W. S. Powers, of counsel.

"(8) I find as a fact that all the papers in the circuit court and Supreme Court on behalf of the respondent, board of supervisors, in said litigation, contained the name of Robt. H. Kirschman, prosecuting attorney, and the plaintiff as counsel, and that said papers contained the name of no other attorneys.

"(9) I find as a fact that when the petition to the Supreme Court for said writ of certiorari was signed and sworn to by the chairman of said board, Ralph Doolittle, the plaintiff's name was signed to said petition as counsel, and that said Doolittle was told, in substance, that a bill would probably be presented to the county for the services of the plaintiff as attorney in said cause.

"(10) I find as a fact that the following bill was presented to said board of supervisors at its October, 1911, session, certified to by Robt. H. Kirschman, prosecuting attorney for said county, disallowed by said board, after plaintiff presented evidence of the claim; that the plaintiff appealed from said decision, and that said claim is the basis of plaintiff's claim in this suit; that it was admitted on the trial of this cause that said prosecuting attorney signed and certified said bill after the services were all rendered. 'County of Calhoun. In account with W. S. Powers, Dr. 1911. To services rendered as attorney in the Local Option cases before the Board of Supervisors, in the Circuit Court and in the Supreme Court from the 10th day of April to the 27th, 1911, \$200.00. To expenses to Lansing on said case. \$2.28. I hereby certify that the above services were rendered by W. S. Powers, and the charges therefor are reasonable in amount and proper to be paid by said county of Calhoun. Robt. H. Kirschman, Prosecuting Attorney.' And I also find as a fact that the amount claimed by plaintiff, viz., \$202.28, is a reasonable charge, and that plaintiff's services rendered in the circuit and Supreme Courts in said litigation was worth the amount claimed.

"(11) I further find as a fact that several attorneys were sworn on this trial and testified that plaintiff's services were worth from \$500 to \$800, and that no testimony was offered to contradict such evidence."

Proposed Findings of Law.

"(1) I find as a matter of law that the prosecuting attorney had a legal right to employ the plaintiff to assist him in the trial of the case of the Battle Creek Brewing Company v. the Board of Supervisors of Calhoun County, and that such charges would constitute a proper charge against the county,

"(2) I find as a matter of law that when the prosecuting attorney said to the plaintiff, if he would assist in the trial of the case, he, the prosecuting attorney, would O. K. the bill before the board of supervisors and the plaintiff assented and performed the services, that would constitute a binding agreement on the county, and the plaintiff would be entitled to recover what his services were reasonably worth.

"(3) If the services were rendered by the plaintiff with the knowledge and consent of the prosecuting attorney upon the statement that the bill would be O. K'd by the prosecuting attorney to the board of supervisors, that would constitute a binding agreement, and the county would be liable for plaintiff's services.

"(4) It being admitted that the plaintiff performed the services and paid out the money for and claimed in this case in the above-mentioned litigation, and that such services were necessary and the charges therefor reasonable, that such services were performed in connection with the prosecuting attorney, both in the circuit and Supreme Courts, that the prosecuting attorney advised with and accompanied the plaintiff to Lansing to procure the writ of certiorari, that the name of the plaintiff was on all the papers in the case, wherever the prosecuting attorney's name appeared as counsel, and it was known to the chairman of the board of supervisors that the plaintiff's name so appeared, and said chairman was informed that there would probably be a bill presented to said board of supervisors for the service of plaintiff, I find as a matter of law that such facts would be sufficient to authorize the plaintiff to recover \$202.28.

"(5) The services charged for and money paid out by the plaintiff having been done with the knowledge of the prosecuting attorney and in connection with him as his assistant in the case, and the said defendant having received the benefit of such services and money paid out, the law will imply a contract to pay, and I find as a matter of law that the plaintiff can recover what such services were reasonably worth.

"(6) I find that, under the law as it now stands, the defendant is placed on the same basis as an individual respecting claims against a county, and if services were performed and money paid out by plaintiff, and accepted by the defendant, the law will imply a contract to pay, and plaintiff can recover what his services were reasonably worth in this case, which would be \$202.28."

By the Court.

"Since the finding of the court was filed in the above-entitled cause, the plaintiff has submitted for hearing a motion for amended findings of fact and law. Counsel for the respective parties have been heard relative to these amended findings, and, after due

consideration of the same, I make the following disposition thereof:

"First. I find as I am requested in the proposed finding of fact No. 1, with this modification, that the expression 'assist him' should be understood in the light of testimony given by Mr. Kirschman as follows: 'I said [speaking to the plaintiff] that I thought I had no authority to engage any one to assist me in the preparation of that case or whatever it was we were working on at that time.' Also: 'There was something said about the board of supervisors paying the bill, and I tried to make it clear to Mr. Powers that the extent of my power was to O. K. the bill, and would do what I could to see that the bill was properly paid, and I certified to that effect on his behalf. Q. Did you ever tell Mr. Powers or the board of supervisors that it [Mr. Powers' bill] was a legal claim against the county, or that you had the legal authority to employ Mr. Powers to perform the services that he did? A. No. Q. Didn't you say to him [Mr. Powers] that if he would assist you that you would O. K. his bill to the board of supervisors? A. I said I would O. K. the bill for him. Q. You understood at the time that you agreed to O. K. that bill you were engaging Mr. Powers to assist you on behalf of the county or board of supervisors, did you not? A. No, sir; I did not. Q. Did you expect that he [Mr. Powers] would receive his compensation from the county, if he received any? A. I expected that they would take my advice and pay him, and I think now they are morally bound to pay the bill. Q. Is there anything further? A. I would like to say, if I may, that, when the question of the O. K. was mentioned in Mr. Powers' office, I said in substance that I would O. K. Mr. Powers' bill. He was doing work on the case at that time.'

"I find as I am requested in the plaintiff's proposed amendment to the findings of fact Nos. 2, 3, 4, and 5, and I find as requested in proposed finding No. 6, except that the evidence does not show with any degree of certainty what the exact words were which were used by the prosecuting attorney, that is, whether he referred to Mr. Powers, as 'his assistant,' or as Mr. Kirschman testifies which was as follows: 'I arose and addressed the court in substance that Mr. Powers appeared with my consent,' and 'I think he [the plaintiff] said he represented the prosecuting attorney, or words to that effect. I cannot give the precise language that he used.'

"I find the facts established as set forth in the plaintiff's proposed amendment findings of fact Nos. 7, 8, and 9, with this modification to No. 9, which appeared in the testimony of Mr. L. E. Stewart: 'I told Mr. Doolittle that Mr. Powers undoubtedly would render a bill to Calhoun county for his services in the case, that he was acting as attorney for the board; that my understand-

ing was that the board of supervisors are authorized to allow or disallow the bill which was true at the time I was prosecuting attorney, and that was my opinion at the time, and Mr. Miller assured them of the same thing.' I also find facts established as set forth in the proposed amendment findings of facts Nos. 10 and 11.

"Proposed Amendment of Findings of Law.

"I do not find any of the proposed amendments of law to be true propositions of law, these proposed findings being Nos. 1, 2, 3, 4, 5, and 6. But, on the contrary, I find that none of the legal propositions contained in these proposed findings of law are true as matters of law."

Exceptions were filed by plaintiff to all adverse findings, of both fact and law.

[1] The findings of fact must be accepted in this court as conclusive if there was evidence tending to sustain them. The ultimate fact that plaintiff was employed by the prosecuting attorney is not found. What is found is that there was a qualified employment of plaintiff so far as any intention to bind the county or the board of supervisors is concerned. There is testimony tending to sustain this finding. It is not found that the board of supervisors employed plaintiff, or knew that he was acting for them. The chairman of the board, and perhaps one other member, did know that he was acting and would probably present a bill for services, but the chairman was also informed (but not in the presence or to the knowledge of plaintiff) that it was for the board to decide whether, if the demand was presented, it should be paid. It is not found that the court, upon the application of the prosecuting attorney, or otherwise, authorized or approved the appointment or hiring of plaintiff.

Questions are raised and discussed in the brief for appellant which we think are not presented by the record. One of these questions is whether under the Constitution of 1909, art. 8, § 9, and Act No. 58, Public Acts of 1909, as amended, counties may be held liable as an individual would be to pay for goods furnished to it and services performed for it. Another is whether the prosecuting attorney had authority to employ counsel, and bind the county to pay for his services. Whether he had or did not have such authority, it is found that he did not assume to exercise it. He expressly disclaimed it. Nor does the record present the case of one performing services for the county to the knowledge of its managing officers without any arrangement or understanding concerning compensation. There was an arrangement made with the prosecuting attorney. There was an understanding on the part of such of the managing officers of the county as are shown to have known that plaintiff was rendering services that the board of supervisors were at liberty to pay or not to

pay, as they might thereafter conclude to do.

[2] That plaintiff was not informed of such an understanding is of no importance. He must establish either the express or legally implied obligation of the county to pay him.

[3] He has not established an express agreement and the facts conclusively negative the necessary implication. *Clark v. Township of West Bloomfield*, 154 Mich. 249, 117 N. W. 638.

The judgment is affirmed.

WALLIN v. ARCADIA & B. R. RY. CO.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. MASTER AND SERVANT (§ 174*)—INJURY TO SERVANT—LIABILITY—INTOXICATION OF FELLOW SERVANT.

Comp. Laws, §§ 6284, 6285, prohibiting the employment as trainmen of persons using intoxicating drinks as a beverage, and declaring that the liability of a person having charge of an engine while intoxicated shall not release the railroad company from liability, do not impose on a railroad company a greater civil liability than rested on it at common law, and at common law the mere fact that a company knew, or was chargeable with knowledge, of the fact that a conductor used intoxicating liquor as a beverage, unaccompanied by knowledge of incompetency, was insufficient on which to base a common-law liability for injuries to a fellow servant, but at common law the basis of liability lay in the fact that its servant had become incompetent through the use of intoxicants, of which fact the company had knowledge.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 347, 348; Dec. Dig. § 174.*]

2. MASTER AND SERVANT (§ 294*)—INJURY TO SERVANT—ISSUES—INSTRUCTIONS.

Where the declaration in an action for injuries to a brakeman charged habitual intoxication on the part of the conductor and knowledge thereof on the part of the railway company, and the court in its charge predicated the company's liability on the fact that it had knowledge of, or was chargeable with notice, of the fact that the conductor used intoxicating liquor as a beverage, the refusal to charge that plaintiff could only recover because of the company's negligence in employing and continuing to employ the conductor, and that the company was not negligent in keeping the conductor in its employ unless he was incompetent because of his use of intoxicating liquors, was reversible error.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1162-1167; Dec. Dig. § 294.*]

3. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a brakeman attempted to open a coupler at a time when the car and engine were at rest, and he believed that the engine would not move until the engineer received a signal from himself, he was not bound as a matter of law to apprehend that the conductor would appear and give the signal for the operation of the engine, and he was not guilty of contributory negligence as a matter of law for

selecting a dangerous rather than a safe way of preparing for the coupling.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

4. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

A brakeman who continued in the service after knowledge of the railway company's breach of the statutory duty in employing a conductor addicted to the use of intoxicating liquors was not guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

5. MASTER AND SERVANT (§ 204*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

A brakeman who continued in the service after knowledge of the railway company's breach of statutory duty in employing a conductor addicted to the use of intoxicating liquors did not thereby assume the risk of injury arising from the act of the conductor.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 544-546; Dec. Dig. § 204.*]

6. MASTER AND SERVANT (§ 260*)—INJURY TO SERVANT—LIABILITY—PLEADINGS.

A brakeman suing for injuries received in consequence of the act of the conductor in charge of the train need not plead Comp. Laws, §§ 6284, 6285, prohibiting the employment as trainmen of persons using intoxicating liquors as a beverage, to avail himself of the statute as a relief from the charge of assumption of risk in continuing in the service after knowledge of the intemperate habits of the conductor.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 844-848; Dec. Dig. § 260.*]

Error to Circuit Court, Manistee County; Charles A. Withey, Judge.

Action by Charles A. Wallin against the Arcadia & Betsey River Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, BLAIR, STONE, and OSTRANDER, JJ.

Kleinhans & Knappen, of Grand Rapids (Dovel & Dovel, of Manistee, of counsel), for appellant. D. G. F. Warner, of Frankfort (Smurthwaite & Belcher, of Traverse City, of counsel), for appellee.

BROOKE, J. Plaintiff recovered a judgment for damages for injuries received on February 19, 1909, while in the employ of defendant. Defendant operates a railroad 21 miles long between Copenish and Arcadia. Upon this road it runs a single mixed train, one round trip each day. The train crew at the time of the accident consisted of Conklin, the conductor, Lang, the engineer, and plaintiff, who acted as fireman on the road and brakeman at switching points. This position plaintiff had held for a total period of three years, one-half of which immediately preceded his injury. At Copenish there is a union depot used by the Ann Arbor Rail-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

way, the Manistee & Northeastern Railway and defendant. Upon arrival at the depot at about 10:20 in the morning, it is customary for Conductor Conklin to take the mail from that point to the post office. After discharging the passengers, the train is run a few hundred feet to a switch, then upon a side track in a northwesterly direction to defendant's freight depot. Necessary switching operations are then carried on; plaintiff doing the switching when the conductor is absent. On the morning in question the conductor absented himself from the train as usual. The "peddler" or local freight car had been left in front of the freighthouse, and plaintiff and Lang, the engineer, had done the necessary switching; the conductor being absent. The engine was then run back to the freighthouse to be coupled to the "peddler" for the return trip. When the tender of the engine was first pushed against the "peddler," the coupling failed to "make." The impact pushed the "peddler" some four feet away from the tender. Plaintiff, who had been standing upon the tool box at the back of the tender, jumped off and crossed to the "peddler," and with his hand attempted to open the coupler on that car. While in the act of opening the coupler, the engineer, in obedience to a signal from Conklin, who, it was claimed, had returned without plaintiff's knowledge and was standing on the freighthouse platform, backed the tender against the "peddler," crushing his hand between the couplers.

Four negligent acts of defendant are counted upon by plaintiff. The first three were eliminated by the circuit judge. As the plaintiff does not appeal, it is necessary to consider only the fourth, which is as follows: "That the conductor of the train was incompetent, in that he was in the habit of getting intoxicated and was unfit to discharge the duties of a conductor, which was known to the defendant, and that at the time of the injury he was under the influence of intoxicating liquors to such an extent as to make his condition the real or proximate cause of the injury." Upon this question, the court charged the jury as follows: "It was the duty of the defendant in this case to use reasonable diligence to know that its conductor on that train was a sober man, not in the habit of drinking intoxicating liquor as a beverage. That was a continuing duty. A duty that was upon the defendant all the time. From the time that it employed Conklin until the accident in question. If the defendant neglected that duty, and did not observe its duty in regard to it and exercise such diligence by observation and inquiry, as a reasonably prudent employer should and would have done, and the plaintiff's injury is attributable to that neglect, then the plaintiff is entitled to recover. It is an undisputed fact in this case that some of the officers of the defendant knew that

the conductor, Conklin, drank intoxicating liquors more or less, because they came upon the stand and told you that they knew it, and drank with him in saloons. So that it appears without contradiction in this case that the conductor drank intoxicants as a beverage. So they were chargeable with the knowledge of the fact that he did drink intoxicating liquors as a beverage. But this alone would not entitle the plaintiff to recover, and it would not in itself afford a basis for recovery for the plaintiff, but it is a fact which is proper for you to consider to determine in connection with all the evidence in the case, whether or not the habits and condition of the conductor was the moving cause of the plaintiff's injury. The term, 'drunk,' or 'being drunk,' and 'intoxicated,' 'being intoxicated,' those terms have been used very frequently in your presence in this case. I say to you in that connection that if on the occasion in question the conductor, Conklin, was not in the normal, natural, legitimate exercise of his natural functions, and that he was appreciably out of the normal condition, so that he could not exercise the same ready care and judgment that he would do if he did not indulge in the drinking of intoxicating liquor, and that it contributed in an appreciable degree to his conduct on this occasion when he signaled back this engine, as he said he did, and wrought the injury to the plaintiff, without negligence on the part of the plaintiff which contributed thereto, the plaintiff is entitled to recovery in this case. On the other hand, if the drinking of Conklin on that day, if he did drink any, or on any other day, if he did drink any, did not disturb his mental balance, and left his judgment as alert, as keen, and accurate as it would be normally, and in no manner contributed to his conduct, and to the fact of his signaling back the engine as he did, then the plaintiff is not entitled to recover, because it would not be the approximate cause of the injury. The inquiry, you see, narrows itself within close limits. It is in saying what the conductor's condition of mind was, and what his judgment and his alertness of mind might have been at that time; his correctness of judgment in what he should do and what he should not do. In determining that, you should take into consideration the testimony in the case bearing upon that subject. The testimony before you in regard to his drinking in the saloon, in regard to his drinking in the freighthouse when they were in the habit of eating lunches there. And his drinking at any time or place which the evidence points out. And you should take into consideration the testimony of the plaintiff for what you say it is worth as to his manner and the way in which he behaved himself and walked with him after the accident occurred, immediately after the accident occurred, and from there to

the doctor's office, and while he was in the doctor's office, you should take into consideration the identical circumstances of the accident itself. Say whether a man of his experience, whose mind was clear and in its normal condition, whose judgment was without interference, would do as he did there, or would not do so unless it was interfered with. Take all these things into consideration and determine the truth of the matter, whether the conductor, Conklin, was at that time incompetent in the sense that he was not his natural self because of the use of intoxicating liquors. If he was not, the plaintiff may recover, if he was not himself negligent. If the conductor was his normal self, and acted as such on that occasion, then the plaintiff cannot recover in this case. * * * If you find the fault lay with Conklin, as I have described it to you, and that this was proven by the preponderance of evidence, as I have instructed you, then it is your business to find a verdict for the plaintiff. If you find that is not the case, that the responsibility was not with Conklin, because of his conduct, then the plaintiff is not entitled to recover, and he is not entitled to recover if his negligence contributed to the injury."

[1] It is apparent from a perusal of the record that the learned circuit judge was of opinion that the statute (C. L. §§ 6284, 6285) imposed upon the defendant a different and greater civil liability than it rested under at common law. The proviso to section 6285 we think clearly negatives this view. These sections occur under the caption "Police Regulations," and are penal in character. They add nothing to the common-law civil liability of the defendant.

The eleventh request preferred by defendant is as follows: "If the plaintiff is entitled to recover at all, it is only because of defendant's alleged negligence in employing and continuing to employ, its conductor, Conklin. Defendant was not negligent in keeping in its employ its conductor, Conklin, unless Conklin was incompetent because of his alleged use of intoxicating liquors while in charge of the train, and unless defendant had knowledge, or notice, of such alleged incompetence and thereafter retained him in its employ. Unless, therefore, you shall find, under the evidence, that Conklin was incompetent to perform his duties because of the use of intoxicating liquors, and that defendant had knowledge thereof, or that he was an habitual drunkard so that defendant would be charged with notice thereof, plaintiff cannot recover."

[2] Under the theory upon which the case went to the jury, we are of opinion that this request should have been given. The declaration charges habitual intoxication on the part of Conklin and a knowledge thereof on the part of defendant. The charge as given predicates defendant's liability upon the fact

that it had knowledge of or was chargeable with notice of the fact that Conklin used intoxicating liquor as a beverage. Such knowledge or notice, unaccompanied by knowledge or notice of incompetency, would be insufficient ground upon which to base a common-law liability, and the statute is not by the declaration, and in our opinion cannot properly be invoked as a basis of liability. While the use of intoxicants in any manner or degree by those charged with the responsibility of caring for the movement of trains is to be reprehended, it is nevertheless a matter of common knowledge that many men are able to indulge in such use in moderation through a long lifetime without any appreciable diminution of their faculties. The basis of defendant's liability at common law lies in the fact (if it be a fact) that its servant had become incompetent through the use of intoxicants of which fact defendant had knowledge or notice. *Hilts v. Railway Co.*, 55 Mich. 437, 21 N. W. 878; *Johnson v. Lake Shore Ry. Co.*, 162 Mich. 301, 127 N. W. 271.

[3] The claim of defendant that plaintiff should not be permitted to recover because he selected the dangerous rather than the safe way of preparing for the coupling is without merit. When he attempted to open the coupler, both cars and engine were at rest, and he believed the engine would not move until its engineer received a signal from himself. Had they remained stationary, there would have been no danger. We think he was not bound as a matter of law to apprehend that the conductor would appear and give the signal for the operation. His conduct, under the circumstances, in all its detail was a proper subject for the consideration of the jury upon the question of his negligence.

[4] It is urged that, because plaintiff was aware of the alleged intemperate habits of Conklin, he therefore should be held to have assumed the risk of injury arising from Conklin's incompetency, induced by such habits, and that by himself continuing in the service after he acquired such knowledge he was guilty of contributory negligence. We are of opinion that one cannot be charged with contributory negligence simply because he continues in his employment after knowledge of the breach of a statutory duty, and so long as his own acts in such employment are not negligently performed.

[5] Were the duty imposed upon the defendant simply a common-law duty, it is, we think, clear that with such knowledge of its breach as plaintiff possessed he should be held to have assumed the risk by his contract of employment. *Davis v. Railway Co.*, 20 Mich. 105, 4 Am. Rep. 364. But, where a duty is imposed by statute, we have held that the master may not legally contract for its violation, and therefore that the servant does not assume the risk of such violation. *Sipes v. Michigan Starch Co.*, 137 Mich. 258,

100 N. W. 447; *Sterling v. Union Carbide Co.*, 142 Mich. 284, 105 N. W. 755; *Murphy v. Grand Rapids Veneer Works*, 142 Mich. 677, 106 N. W. 211; *Swick v. Aetna Portland Cement Co.*, 147 Mich. 454, 111 N. W. 110; *Syneszewski v. Schmidt*, 153 Mich. 438, 116 N. W. 1107; *Kleinfelt v. J. H. Somers Coal Co.*, 156 Mich. 473, 121 N. W. 118, 132 Am. St. Rep. 532; *Van Doorn v. Heap*, 160 Mich. 199, 125 N. W. 11; *Rivers v. Traction & Electric Co.*, 164 Mich. 696, 128 N. W. 254, 131 N. W. 86.

[6] We are of opinion that it was not necessary for plaintiff to plead the statute in order to avail himself of it as a relief from the charge of assumption of risk.

It is unnecessary to discuss other assignments of error.

The judgment is reversed, and a new trial ordered.

MARTIN v. GAGE, Circuit Judge.

(Supreme Court of Michigan. Nov. 8, 1912.)

ARREST (§ 27*)—AFFIDAVIT—SUFFICIENCY—KNOWLEDGE OF AFFIANT.

An affidavit that defendant, at a time and place, on the 9th day of August, in a certain discourse which the said defendant then and there had with G. in the presence and hearing of divers good and worthy persons, did speak, publish, and declare certain false, scandalous, malicious, and defamatory words of and concerning this affiant (specifying them), and at other times and places within the past year, but on what particular time and at what particular place this affiant does not know, he in certain other discourses with other persons, not known to this affiant, falsely accused this affiant, is insufficient to be the basis of an order holding defendant to bail, as it does not show that affiant had personal knowledge of the truth of the facts therein stated.

[Ed. Note.—For other cases, see *Arrest*, Cent. Dig. §§ 54-55½; *Dec. Dig.* § 27.*]

Mandamus, on the relation of Fred J. Martin, to compel William G. Gage, Saginaw circuit judge, to quash proceedings whereby relator was arrested. Writ granted.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

McHugh, Gallagher & McGann, of Detroit, for relator. Thos. A. E. Weadock, of Detroit, for respondent.

MOORE, C. J. Relator was arrested upon a writ of capias ad respondendum. Later he gave a bond for his appearance, and was released from custody. The portions of the affidavit material to quote here are as follows: "State of Michigan, County of Wayne—ss.: Madeline Clements Wanner of Detroit, in said county and state, being duly sworn, deposes and says that she is a married woman of the age of twenty-one years, having been married to Charles A. Wanner in New York City on the twenty-seventh day of June, A. D. 1911, by Rev. Mr. Goodchild, a

minister of the Central Baptist Church of New York City; that since the year 1906 she has resided at Detroit with her mother, Luella Clements, widow of Harry Clements, formerly of Bay City, Michigan, where the family formerly resided; that her father, Harry Clements, died at Bay City on the thirty-first day of October, A. D. 1901, and that since that time she has resided constantly with her mother; that she, the said Madeline Clements Wanner, has a claim for damages against Fred J. Martin, residing at Saginaw, in the county of Saginaw and state of Michigan, for the cause of action stated in the writ hereto annexed, upon which she believes she is entitled to recover the sum of twenty-five thousand dollars, and this deponent further says that the facts and circumstances upon which her said claim is based are as follows: Said Fred J. Martin on the 9th day of August, A. D. 1911, in the writing room of the Congress Hotel, in the city of Chicago, county of Cook and state of Illinois, in a certain discourse which the said defendant then and there had with William H. Gallagher, of Detroit, in the presence and hearing of divers good and worthy persons, did speak, publish, and declare these false, scandalous, malicious, and defamatory words of and concerning this affiant." Here follows language, which, if not true and not privileged, was slanderous. "And at other times and places within the past year, but on what particular time and at what particular places this affiant does not know, but especially at said city of Chicago, said Fred J. Martin, in certain other discourses with Morris Robinson of Chicago, Walter Bolger, and other persons not known to this affiant, falsely and maliciously said of and concerning said affiant, she being at the time a young girl of about fourteen, and both said Martin and this affiant being unmarried, falsely accused this affiant. * * * This affiant further says that she is not guilty of any of such charges nor any similar charges and has been grievously injured by said false accusations. [Signed] Madeline Clements Wanner. Subscribed and sworn to," etc.

A motion was made to quash the proceedings, in support of which motion relator filed his own and other affidavits. The reasons stated in the motion are:

"First. Because the affidavit of the above-named plaintiff for said writ of capias is not within the personal knowledge of said affiant, as appears from the face of said affidavit, and as appears likewise from the alleged facts stated therein.

"Second. Because the said affidavit of said above-named plaintiff does not establish such a case as warrants, under the law, an order holding defendant to bail.

"Third. Because this court possesses no jurisdiction to issue an order holding defendant to bail under the circumstances set forth

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 133 N.W.—18

in affidavit for said writ of *capias* made by the above-named plaintiff.

"Fourth. Because said order to hold to bail was based upon hearsay evidence—as appears by the affidavit of the above-named plaintiff.

"Fifth. Because plaintiff's alleged right of action is based upon a conversation alleged to have been held between defendant and William H. Gallagher, attorney of record for the plaintiff in case entitled *Blanche Peck Wanner, Plaintiff, v. Madeline Clements, Defendant, Circuit Court for Wayne County, File No. 53,646*, which said right of action was then pending in said court, and the alleged defamatory statements were afterwards, on or about the 18th day of September, A. D. 1911, sworn to by said defendant, when called as a witness in said cause, which said cause has not as yet been tried in court on its merits, and which is pending in said court for trial.

"Sixth. Because defendant cannot properly be deprived of his liberty upon an affidavit for writ of *capias*, made up of hearsay statements and allegations."

The trial judge was of the opinion that the affidavit was defective, but regarded the affidavit of relator as an admission of the truth of the averments in the affidavit, and declined to quash the proceedings. He cited in support of his opinion the case of *Robinson v. Circuit Judge*, 142 Mich. 70, 105 N. W. 25. A reference to that case will show it is clearly distinguishable from the case at bar. The opinion in that case closes by saying: "But, whether or not the affidavit is technically sufficient, the writ asked for is not one of right, and as relator made it appear to the circuit court that the facts set out in the affidavit are true, contesting and disputing only the conclusion of affiant." The affidavits of relator are too long to make it advisable to quote them, but a fair reading of them does not give rise to the inference that the facts set out in the affidavit for *capias* are true. The last-named affidavit was too faulty to be the basis of a proceeding of the character of the one before us. See *Proctor v. Prout*, 17 Mich. 473; *Hackett v. Circuit Judge*, 36 Mich. 334; *Shaw v. Ashford*, 110 Mich. 534, 68 N. W. 281; *Wright v. Circuit Judge*, 119 Mich. 499, 78 N. W. 545; *Church v. Circuit Judge*, 129 Mich. 126, 88 N. W. 403; *Robinson v. Circuit Judge*, 142 Mich. 70, 105 N. W. 25; *Conrad v. Circuit Judge*, 144 Mich. 497, 108 N. W. 347.

The writ is granted, with costs.

OLMSTEAD v. MEYERS et al.

(Supreme Court of Michigan. Nov. 8, 1912.)
MORTGAGES (§ 561*)—DEFICIENCY—EVIDENCE.

A mortgage foreclosure decree having been entered for \$5,119.24, the property was sold for \$5,000, as shown by the commissioner's deed; but, the original files having been lost,

complainant introduced a memorandum, found in the office of his solicitor, showing that the amount due and costs was \$5,300, and that there was a deficiency of \$300. The chancery calendar also showed three entries, under the date of April 7th, reciting in order the filing of the report of the circuit court commissioner, the entry of an order confirming the sale, and the enrolled file. *Held*, that it would be presumed, in a proceeding to recover a decree for a deficiency, that the sale was not made or the report of sale filed until after the decree and files had been enrolled as required by chancery rule 24, under the rule that, in the absence of evidence to the contrary, it would be presumed that the proceedings were regular.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1609-1621; Dec. Dig. § 561.*]

Appeal from Circuit Court, Berrin County, in Chancery; George W. Bridgman, Judge.

Action by Melbourne H. Olmstead against William C. Meyers and another. Application for a deficiency judgment and foreclosure. From a decree denying the application, complainant appeals. Reversed and rendered.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

James O'Hara, of St. Joseph (Chester P. O'Hara, of St. Joseph, of counsel), for appellant. Coolidge, Riford & White, of Benton Harbor, for appellees.

MOORE, C. J. February 10, 1902, the circuit court in chancery handed down a decree of foreclosure in a suit between the parties hereto, decreeing that there was due to the complainant from defendant William C. Meyers, upon certain notes and mortgages, the sum of \$5,119.24, and ordering the defendant to pay this sum on or before February 20, 1902, and in default the mortgaged premises be sold, and containing the usual orders in a foreclosure. The decree also provided that, if upon such sale there should be a deficiency, the said commissioner should specify the amount thereof in his report of sale, "and that on the coming in and confirmation of said report the defendant William C. Meyers, who was decreed to be personally liable for the debt secured by said mortgage, pay to the complainant the amount of such deficiency, with interest thereon from the date of such report." Mr. Lawrence C. Fyfe was the solicitor. He died in the fall of 1909. In January, 1912, complainant filed a petition, praying that defendant William C. Meyers be decreed to pay the deficiency. An answer was interposed to said petition, and a hearing had in open court.

The only question before the court was the right of the complainant to a decree for the deficiency and an execution thereon. All the files in the original foreclosure case were missing. The court records were introduced in evidence, and consisted of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

chancery calendar entries, the decree of foreclosure, and the order confirming report of sale by the commissioner. The complainant also introduced in evidence the record of a deed made by the circuit court commissioner on a sale of the mortgaged premises on April 7, 1902, wherein the complainant was the purchaser and grantee, and the consideration named was \$5,000; also a memorandum found in the office files of Mr. Fyfe, complainant's solicitor at the time, which was in his handwriting and was as follows:

Amt. due at sale, decree February 10, 1902.....	\$5,119 24
Interest from Feb. 10, 1902, to date of sale, April 7, 1902, 2 mo. less 3 days	58 71
Taxed costs	108 10
Costs of sale, including printer....	17 95

	\$5,300 00
April 7, 1902. Bid.....	5,000 00

Deficiency \$ 300 00

Complainant was produced and sworn as a witness, and testified that no part of the deficiency had ever been paid. No proofs were introduced by the defendant. On February 27, 1912, the circuit judge denied the prayer of the petitioner, and dismissed the same, with costs, from which decree the complainant appeals to this court.

Among the entries upon the chancery calendar are the following:

"April 7. Filed report of Charles W. Stratton, circuit court commissioner.

"April 7. Entered order confirming report of sale. 'F,' page 570.

"April 7. Enrolled files."

The contention of the solicitors for defendant is stated in the brief as follows: "In the absence of other testimony we must presume that the sale had been made and the report of the sale filed before the decree and files were enrolled. Under these circumstances all proceedings based upon the report of sale would be void, because in violation of chancery rule No. 24, providing 'no process shall be issued or other proceeding had on any final decree to enforce the same, until the same is duly enrolled pursuant to the statute.'"

It is evident the trial court accepted this view of counsel. In doing this we think he was wrong. It will be observed that the entries all bear the same date. In the absence of evidence to the contrary, it has been repeatedly held by this court that it is presumed an officer does his duty and that his proceedings are regular. *Clark v. Axford*, 5 Mich. 182; *Peck v. Cavell*, 16 Mich. 9; *Blair v. Compton*, 33 Mich. 414; *Lymburner v. Jenkinson*, 50 Mich. 488, 15 N. W. 562; *Love v. Wood*, 55 Mich. 451, 21 N. W. 887; *Kniekerbocker v. Wilcox*, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595; *Coveney v. Phisicator*, 132 Mich. 258, 93 N. W. 619.

What we have said upon this point covers

the question presented about the taxation of costs.

The decree is reversed, and one may be entered here for the \$300 and interest, and cost of both courts.

EVANS v. WOODLEY.

(Supreme Court of Michigan. Nov. 8, 1912.)
MECHANICS' LIENS (§ 93*)—CONTRACTS—PERFORMANCE—ACCEPTANCE OF WORK—REQUISITES.

Where a building contract stipulated that the owner, in consideration of performance thereof by the contractor, would pay to the contractor a specified sum when the work was completed and accepted, the contractor, failing to complete the work and to obtain the owner's acceptance, could not enforce a mechanic's lien for a balance claimed to be due.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 124; Dec. Dig. § 93.*]

Error to Circuit Court, Wayne County; Joseph W. Donovan, Judge.

Suit by John Evans against Jennie N. Woodley. From a decree for complainant, defendant brings error. Reversed, and bill of complaint dismissed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

Frank D. Andrus, of Detroit, for appellant. Ralph M. Tate, of Detroit, for appellee.

BROOKE, J. The bill of complaint in this case is filed to enforce a mechanic's lien. The contract between the parties contained the following clause: "The party of the first part, for and in consideration of the fulfillment by the said party of the second part of the covenants and agreements of the said party of the second part herein contained, does hereby covenant and agree to pay or cause to be paid to said party of the second part the sum of \$495, when the work is completed and accepted by the said party of the first part." Complainant introduced evidence tending to show that he had never fully completed his contract, and that defendant had not accepted the work. He further offered the evidence of two contractors, who examined the job after he abandoned it. They testified that to complete the job according to the contract would cost \$110. Under these proofs defendant moved the court for a decree dismissing the bill. This having been denied, defendant offered evidence tending to show that to complete the contract she had been obliged to pay the sum of \$250.

We are of opinion that the bill should have been dismissed. Here is an indivisible contract, by the terms of which nothing is due the contractor until the work is completed and accepted by the owner. By his own testimony complainant shows failure to com-

plete on his part and failure to accept on the part of defendant. Under such a state of facts, the refusal to accept being reasonable, a bill will not lie to enforce a mechanic's lien for a balance claimed to be due. *Boots v. Steinberg*, 100 Mich. 134, 58 N. W. 657.

The bill of complaint is dismissed, with costs of both courts.

Ex parte EVANS.

(Supreme Court of Michigan. Nov. 8, 1912.)

CRIMINAL LAW (§ 991*) — SENTENCE — INDETERMINATE SENTENCE—SURPLUSAGE.

The indeterminate sentence law (Pub. Acts 1905, No. 184), providing that the maximum penalty provided by law shall be the maximum sentence, and shall be stated by the judge in passing sentence, fixes the maximum sentence, and imposes on the judge the ministerial duty of stating the maximum in passing sentence, and a provision in a sentence, on conviction of burglary, punishable under Comp. Laws 1897, § 11,546 with a maximum term of 15 years, that the maximum shall be 5 years, is a nullity, and must be rejected as surplusage, and the remainder of the sentence, read in connection with section 11,546, fixes the maximum period at 15 years, and the prisoner, treating the sentence as rendered as valid and serving out the period fixed therein, is not entitled to his discharge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2518, 2525, 2528; Dec. Dig. § 991.*]

Habeas corpus for Charles Evans for his discharge from Jackson Prison. Denied, and prisoner remanded.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OS-TRANDER, and BIRD, JJ.

Burney E. Brower and Rueben H. Rossman, both of Jackson, for petitioner. Thos. A. Lawler, Deputy Atty. Gen., for the People.

BIRD, J. The petitioner, Charles Evans, raises the question as to whether he is legally detained in Jackson Prison by a petition for a writ of habeas corpus.

The petitioner was convicted of the crime of burglary in the Berrien circuit court, and on the 1st day of May, 1907, received the following sentence: "The said Charles Evans to be confined in the state prison at Jackson, at hard labor, for the maximum period of five years and for the minimum period of two years, and the court recommends three years as a reasonable maximum sentence." The maximum period fixed by the trial court having expired, the petitioner contends that he is now entitled to be discharged. The warden refuses to release him, and bases his refusal upon the fact that the statute (section 11,546, C. L. 1897) under which petitioner was sentenced provides a maximum penalty of 15

years, and that the statute should control, rather than the 5-year period fixed by the trial court.

It is argued by the Attorney General, in defense of the warden's position, that the fixing of a 5-year maximum period by the trial court was without warrant of law, for the reason that the indeterminate sentence law confers no authority on the trial court to fix any other or different maximum period than the one fixed by the statute under which the sentence was pronounced. The indeterminate sentence law provides: "The maximum penalty provided by law shall be the maximum sentence in all cases except as herein provided and shall be stated by the judge in passing sentence." Act No. 184 of the Laws of 1905. It will be observed from a reading of this provision that the Legislature conferred no authority on the trial court to fix the maximum period. The Legislature itself pointed out what the maximum period should be, and directed the trial court to "state it in passing sentence." The duty imposed on the trial court was not one in which he had any discretion, but was simply a plain ministerial duty. This being so, it would follow that the maximum period of 5 years fixed by the trial court is a nullity, and should be rejected as surplusage, and the remainder of the sentence read in connection with the statute, which fixes the maximum period at 15 years. In *re Duff*, 141 Mich. 623, 105 N. W. 138.

But it is argued that the trial court did fix the maximum penalty at 5 years, that the sentence has never been corrected, and the petitioner has treated it as valid and served out the period, and now ought to be discharged. We do not so view it. As soon as sentence was pronounced upon the petitioner, the statutory maximum penalty became a part of it. It was a legislative fixing, with no power in the trial court to make it more or less, and the fact that he did make it less, either through inadvertence or misapprehension, could no more alter the statutory period than as though he had named a longer period than 15 years. This precise question was discussed and decided in *Re Duff*, supra; but it is contended by the petitioner that that case is no longer controlling, because the indeterminate sentence law has since been amended. This provision of the 1905 law is the same as the law of 1903 (Pub. Acts 1903, No. 136), except that in the 1905 law the trial court was directed to state the statutory maximum penalty in passing sentence. Neither law gives the trial court any discretion in fixing the maximum period, where it is fixed by the statute. This amendment to the law would not destroy the applicability of the case to the present one.

The petition is denied, and the prisoner remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

CHILDS v. DAHLKE et al.

(Supreme Court of Wisconsin. Oct. 29, 1912.)

1. DEDICATION (§ 44*)—EVIDENCE.

In an action to quiet title and to abate as a nuisance a certain power house and building, alleged to have been erected by the defendants in a street, evidence held to show that the street in question did not extend to a hydraulic canal, which was constructed wholly on the land of the proprietor of the land from whom the plaintiff claimed.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85–87; Dec. Dig. § 44.*]

2. WATERS AND WATER COURSES (§ 154*) — RIPARIAN OWNERS—WHO ARE.

Where a street does not occupy all intervening space between lots platted by the builder of a hydraulic canal and the canal, the title in fee to such lots would not extend to the canal, and the owner could have no riparian privileges thereon.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 167–173; Dec. Dig. § 154.*]

3. WATERS AND WATER COURSES (§ 156*) — RIGHT TO WATER POWER—USE OF SERVIENT TENEMENT BY OWNER.

Though by the deed to an owner of lots he became entitled to have certain water power, the owner of the water power and the land on which it is maintained and which is charged with such right has a right to use the property for his own benefit in any manner which does not impair the right granted; and where, after a flood, the canal on the servient tenement was rebuilt, water gates therein relocated, and an electric power plant built between the land in question and the canal, the owner was entitled only to have made the proper connections for supplying his water under the changed circumstances, and he could not have damages for the shortening of the canal, the relocation of waste gates, etc., even though the power plant encroached on an abutting street.

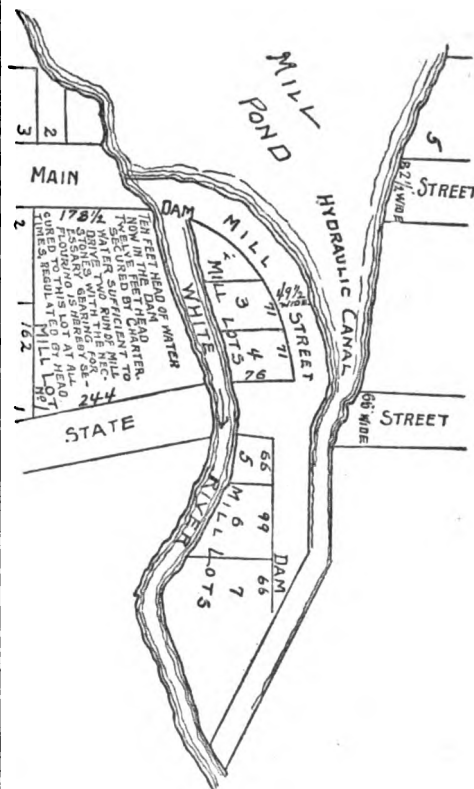
[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 158, 174–183; Dec. Dig. § 156.*]

Appeal from Circuit Court, Marquette County.

Action by W. O. Childs against Charles T. Dahlke and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

This action was brought to quiet plaintiff's title to lots 6 and 7 of the recorded plat of Neshkoro in Marquette county, together with 150 inches of water to be drawn from the millpond and hydraulic canal at any point on said lots under 10-foot head, to be measured in the conductor where it issues on the wheel or wheels, and to abate as a nuisance a certain power house and building erected by defendants in "Mill street," which it is alleged shut off access to and use of water and power on the premises, and to compel the defendants to restore the dam and hydraulic canal and fill up Mill street between plaintiff's lots and the canal and river, and to restore the same to their former condition as they existed prior to the flood of June 6, 1906; and immediately to build and perpetually maintain a suitable bulkhead and gate in the canal for the plain-

tiff's use in taking said 150 inches of water therefrom, and to permit proper connection to be made therewith by plaintiff between said lots and said dam and canal substantially as existed prior to June 6, 1906; and for damages and injuries to plaintiff's property and for other relief. The village of Neshkoro, including the land in controversy, was platted by Helen M. White, proprietor, September 21, 1852, and recorded September 25, 1852. The following is the part of the plat embracing the premises in question:



The defendants answered by way of admissions and denials. The court made very full findings upon all the questions of fact litigated upon the trial, and rendered in accordance with said findings the following judgment (omitting formal parts):

"It is considered and adjudged:

"(1) That the plaintiff was at the time of the commencement of this action, and now is, the owner in fee simple absolute of mill lots 6 and 7, fronting on Mill street, in the plat of the village of Neshkoro, in Marquette county, in the state of Wisconsin, together with the right to draw and use 150 inches of water from the millpond and canal described in the complaint, and in said findings, for power at any point on said lots 6 and 7, under a head of 10 feet, and rights appurtenant thereto, the water to be measured at the conductor where it issues onto the wheel or wheels on said mill lots 6 and 7, and his

rights and interest in said premises as such owner in fee simple, and his rights and interest in said water power, and appurtenant rights, which are the same granted and defined in the deed from George Osman and wife, and Salem W. Richardson and wife, to Thomas Wells, dated September 17, 1866, and recorded in the office of register of deeds of said Marquette county, October 1, 1866, in volume 9 of Deeds, on page 68, through which deed plaintiff derived his title, is hereby declared and established.

"(2) That the defendants, Charles T. Dahlke, Edward J. Dahlke, Gustav E. Dahlke, the Neshkoro Milling Company, a corporation, and Neshkoro Light & Power Company, a corporation, and all persons claiming under them, or any or either of them, subsequent to the filing of the notice of the pendency of this action, to wit, February 7, 1911, be and they are and each of them is hereby forever barred from any and all claims of right or title to the said premises or to said easement or right to draw or use said water or lien thereon, or any part thereof.

"(3) That the width of Mill street in front of said mill lots 6 and 7 be and is hereby established at 49½ feet, excepting east of the point where the north line of said street deflects southward to connect with the south line.

"(4) That plaintiff is owner of an easement consisting of a right to tap the hydraulic canal and pond described in said complaint and findings for the purpose of drawing the water to which he is entitled as herein adjudged, and to draw said water to any part of said mill lots 6 and 7 and there use the same, and to construct and maintain all necessary aqueducts or other devices for such purpose in and across Mill street and the land between said Mill street and said canal and pond.

"(5) (a) That the nuisance described in said complaint and findings, to wit, the new electric power house and its additions and foundations, together with the water wheels, dynamos, shafting, machinery, appliances, and structures connected with, or appurtenant thereto, so far as the same are within the limits of said Mill street, be abated and removed by the said defendants from the limits of Mill street as herein established on or before May 18, 1912; (b) that in the event said defendants neglect or refuse to abate said nuisance before May 18, 1912, that a warrant do issue to the sheriff of Marquette county, Wis., out of this court, under the seal thereof, commanding said sheriff to abate and remove said nuisance at the expense of said defendants, in the following manner, to wit: By wholly razing and removing said building, together with the waterwheels, dynamos, shafting machinery, and appliances and other structures connected with or appurtenant thereto from within the limits of said Mill street, and that, in case such warrant be issued and executed, the said sheriff

collect his own fees and charges and all of the expenses of such abatement and removal of and from the said defendants in the manner provided by law; or (c) that upon the neglect or refusal of the defendants to abate and remove said nuisance as aforesaid or to otherwise comply with this judgment, upon filing an affidavit showing such neglect or refusal, the plaintiff may apply to the court for an order for the enforcement of the same in such manner as to the court may seem proper.

"(6) That plaintiff have leave to bring and maintain another action to recover the damages which he has suffered by reason of the shortening of the hydraulic canal and relocation of the gates and other changes in the premises subsequent to the flood of 1905.

"(7) That the plaintiff W. O. Childs do have and recover of and from defendants Charles T. Dahlke, Edward J. Dahlke, Gustav E. Dahlke, the Neshkoro Milling Company, and Neshkoro Light & Power Company the costs and disbursements of this action, taxed and allowed at the sum of \$320.18 (three hundred twenty and 18/100 dollars).

"Dated December 8th, A. D. 1911.

"By the Court, A. H. Reid, Judge."

From this judgment plaintiff appealed to this court.

John J. Wood, Jr., of Berlin (B. R. Goggin, of Grand Rapids, of counsel), for appellant. E. F. Kileen, of Wautoma, and D. W. McNamara, of Montello, for respondents.

KERWIN, J. (after stating the facts as above). The first, second, third, and fourth assignments of error may be treated together, since they involve the controversy over the width of Mill street, and whether the fee in the plaintiff's lots 6 and 7 extends to the hydraulic canal, so called on the plat.

It is established by the findings and the evidence that the plaintiff is and was before the commencement of this action the owner of lots 6 and 7 fronting on Mill street, together with 150 inches of water to be drawn from the millpond at any point on the lots aforesaid under a head of 10 feet, the water to be measured at the conductor where it issues onto the wheel or wheels; that the deed through which plaintiff claims title provides that the parties of the first part are to keep up and maintain and keep in repair the dam at said millpond, except when the necessity for such repairs are occasioned by the carelessness of the said party of the second part, in which latter case the said party of the second part is to make the necessary repairs, and in all cases the said repairs are to be made without delay; that a dam was constructed by legislative authority on White river in 1851, and a plat made and recorded in 1852 covering the property in question, which shows Mill street north of plaintiff's lots and south of the hydraulic canal; that there was a head of

10 feet of water on the dam before the hydraulic canal was constructed; that defendants, by reason of their ownership of the dam and several conveyances through which they took title and mesne conveyances upon which plaintiff took title, are under obligation to maintain a dam and power substantially as it was when their grantor, Thomas Wells, took title in 1866; that the surface of mill lots 1, 2, 3, 4, 5, and 6 and part of 7 adjacent to the dam and Mill street was about the elevation of the surface of the dam and Mill street; that the old bed of White river extending easterly from the dam was some 10 feet lower than the crest of the dam and the water for hydraulic purposes for use on said lots could only be drawn from the pond; that the dam and Mill street on top of said dam extended from near the northwest corner of mill lot 1 across the valley of White river in a semicircular course northeasterly and easterly to about State street, thence Mill street continued easterly to its end throughout its whole width on the natural surface of the ground which sustained an elevation of some ten or twelve feet above the ordinary surface of the water in the river in a state of nature; that on the plat at a point opposite mill lots 3 and 4 on Mill street west of State street appear the words and figures, "49½ wide"; that Mill street is a public highway throughout its entire length; that plaintiff owns an easement or right of way in lands to the north of mill lots 6 and 7 to the canal to conduct from said canal to any place on said lots the water power owned by him.

The court also found that in 1855 H. E. Otis Childs and Sylvester Craig by conveyances from the owner became the owners in fee of mill lot 5, together with 100 inches of water to be drawn from the pond which afterwards became the property of Felix Dombrowski, and that said 100 inches of water power is a first call on said water power, and that the plaintiff's 150 inches is the second call on said water power; that through due mesne conveyances from the original owner Helen M. White, who made and recorded the plat, the defendant Neshkoro Milling Company became the owner of mill lot 1 in block E and mill lots 2, 3, and 4, together with the remainder of the water power; that the dam was constructed prior to the making of the plat; that the hydraulic canal delineated on the plat had not been constructed at the time the plat was made, but the water of the pond extended in a depression on the north side of Mill street to a point about a rod east of the east line of State street; that at the time of platting Mill street had a water boundary on the westerly and northerly side from near the northwest corner of mill lot 1 to a point a trifle east of the east line of State street; but no water boundary east of that point, although such boundary was delineated on

the plat; that Mill street as dedicated was 49½ feet wide at all points except the east end, and the facts proved failed to show any dedication of any additional strip widening Mill street east of State street beyond the width of 49½ feet, and that the hydraulic canal was constructed with its south line east of State street to the angle opposite lot 6 some 66 feet north of the south line of Mill street; that Helen M. White in making the plat intended that Mill street should be 49½ feet wide throughout its course, excepting the wedge part at the easterly end, and intended to construct the canal upon her own land along the north side of that street; that the title of the owners of lots 6 and 7 extends to the center of Mill street of the width before stated, and no farther, except the easement to tap the canal and conduct therefrom the 150 inches of water appurtenant to said lots; that mill lots 2 to 7, inclusive, have no natural northern riparian boundary, and no riparian rights were naturally appurtenant thereto on the north side thereof.

[1] The foregoing findings, or some of them, are attacked by appellant as not supported by the evidence, and especially it is insisted that Mill street is more than 49½ feet wide and extends to the hydraulic canal, and the title in fee to plaintiff's lots extends to the canal. We think the finding that Mill street was not intended by the proprietor of the plat to extend to the south line of the hydraulic canal is well supported by the evidence. The figures on Mill street "49½ wide" are significant on this point. The fact that the evidence and findings show that, while the whole space between lots 5, 6, and 7 and the south line of the canal was used by proprietors of the lots to some extent, it appears that travel by the public generally was upon the 49½-foot strip along lots 5, 6, and 7. Moreover, it is quite apparent from the established facts that the canal was intended to be and was constructed wholly upon the land of the proprietor of the plat through whom plaintiff claims. Other findings heretofore recited and supported by the evidence show that it was not the intention of the plat that Mill street should extend to the hydraulic canal.

[2] Nor is it necessary to consider whether White river or the hydraulic canal is navigable, because in our view of the case the question is wholly immaterial. Mill street opposite lots 6 and 7 not extending to the canal, the fee in such lots stops at the center of Mill street. Of course, since the plaintiff's lots did not extend to the hydraulic canal, they could not under any circumstances have riparian privileges upon the canal even if navigable; therefore there is no question of riparian rights in the case. Counsel for appellant relies upon *Smith v. Chicago, M. & St. P. Ry. Co.*, 83 Wis. 271, 50 N. W. 497, 53 N. W. 550; *Mariner v. Schulte*, 13 Wis. 692; *Smith v. Ford*, 48 Wis. 115, 2

N. W. 134, 4 N. W. 462; *Brown v. Baraboo*, 98 Wis. 273, 74 N. W. 96; *Waite v. May*, 48 Minn. 453, 51 N. W. 471. An examination of these cases convinces us that they do not rule the situation here.

[3] But it is further insisted, under the fifth and sixth assignments of error, that if it be held that the plaintiff's title extends only to the center of Mill street with an easement in the north half of Mill street, and the land between the hydraulic canal and Mill street to reach the water power, the judgment is nevertheless wrong in limiting the plaintiff's right to reach the canal and obtain water effectively. True, the defendants are bound to maintain the dam and water power and furnish the plaintiff on his lots with the 150 inches of water called for in the deed, but they have a right as owners of the water power and the land upon which it is maintained to use such property for their own benefit, though not in such manner as to impair the plaintiff's use of his 150 inches of water which he has a right to use upon his lots 6 and 7 under a 10-foot head. The court below found upon sufficient evidence that in the fall of 1866 plaintiff's grantor, Thomas Wells, who then owned mill lots 6 and 7 and appurtenant 150 inches of water, built upon said lots a woolen mill, and connected the same with the canal at a point about 3 feet east of the west line of lots 6 extended north by means of a conductor or aqueduct in and across the street through which he conducted water for water power to operate his mill continuously for more than 20 years; that about 1884 said Thomas Wells built a sawmill addition to said woolen mill on the north side thereof, and wholly within the limits of Mill street; that the west line of said woolen mill and sawmill was located about two feet east of the waste gates in the canal as the same were prior to the flood of 1905; that the evidence lays no foundation for any claim of title by adverse possession either as against the public or defendants to any lands lying north of the center of Mill street; that in June, 1905, there was a flood in White river such as to wash out the gates and the south bank of said canal and the ground of Mill street east of State street between mill lots 6 and 7 and the canal to some extent; that in 1905, after the flood, the defendants Dahlke, the town of Neshkoro aiding, reconstructed said canal, partially filling in State street, and locating the south line of the canal a few feet north of its former south line, and locating the waste gates therein about 30 feet westerly of their former location; that no change in the south line of the canal or the north line of Mill street was made until after the flood and washout in 1905; that in the beginning of the year 1908 the defendants Dahlkes and the Neshkoro Milling Company constructed a new electric power house on the south side of the canal and between

it and plaintiff's premises, and later constructed an addition thereto to the westerly; that from State street to the waste gates the south line of the canal is supported by a stone and cement retaining wall, and there is no way to connect plaintiff's mill lots with the canal, except by putting a water conductor upon some part of lot 5 or penetrating the foundations of the new power house, and there is no way to obtain water for power on mill lots 6 and 7 otherwise than the tapping of the wooden bulkhead at the end of said power house in which are located the waterwheels of the defendants; that said water power appurtenant to mill lots 6 and 7 may not be quite so readily obtainable under present circumstances as formerly, but it would require only a greater length of conduit and an unimportant additional expense to tap the canal; that to compel defendants to reconstruct the new waste gates and canal would be a great expense entirely out of proportion to any advantage thereby brought to plaintiff; that all surveys show that the south line of the canal from the bridge on State street to the new power plant is now more than 49½ feet north of the north line of mill lots 5 and 6, and the same evidence shows that the major portion of the new power plant is located within the street, and that the northeast corner of said new power plant is approximately 3 feet north of the north boundary line of Mill street; that said new power house is an obstruction to Mill street and a nuisance thereon, and excludes plaintiff from access to the canal and obstructs his right of way for a conductor, and obstructs his approach to that part of lots 6 and 7 owned by him, and that said new power plant is a public nuisance which does the plaintiff special damage; that said new power plant also obstructs the drawing from the canal of 150 inches of water to lots 6 and 7; that, if said power plant should be continuously maintained as located, it would materially reduce the value of plaintiff's property, and plaintiff has sustained and would sustain in the future damages differing, not merely in degree, but in kind, from the damages sustained by the general public.

The contention of the appellant under this head is that defendants are bound to maintain the dam and power substantially as it was when Thomas Wells, grantor of plaintiff, took title in September, 1866; and that upon the established facts the plaintiff's right to his water power has been obstructed and substantially interfered with, and that the abatement of the new power plant should not have been limited to such part as encroaches upon Mill street, that plaintiff should not be required to leave his own land to tap the millpond or the bulkhead, and that full restoration of the canal and water power to its former condition should have been adjudged. The court below sub-

stantially and correctly settled the rights of the parties by the judgment, except that it failed to award damages for the expense of making proper connection with the hydraulic canal in order to reimburse the plaintiff for the extra expense occasioned by the change in the hydraulic canal and the obstructions placed between plaintiff's lots and the canal, or to provide in the judgment that defendants make the proper changes, connections, and constructions at their own expense and maintain the same according to the terms of the deed through which plaintiff claims title. The plaintiff is entitled to no other restoration and no further damages. It is thought best, however, to provide in the judgment that the defendants make the proper changes so as to furnish and deliver the 150 inches of water owned by plaintiff.

The case is therefore remanded, with directions to modify the judgment by requiring the defendants to make the proper changes, constructions, and connections in the canal, water power, and land between lots 6 and 7 and the canal so as to effectively deliver 150 inches of water, drawn from the canal or pond under a 10-foot head, on the north line of said lots 6 and 7 at such point as may be ordered by the court according to the terms of the deed through which plaintiff derives title, within such reasonable time as may be fixed by the court, and, if necessary, further evidence may be taken in order to enable the court to make the proper modification as indicated herein; that the sixth paragraph of the judgment providing that plaintiff have leave to bring and maintain another action to recover the damages he has suffered by the shortening of the canal and relocation of the gates and other changes in the premises subsequent to the flood of 1905, be omitted from the judgment.

The judgment of the court below is ordered modified as indicated in this opinion, and the cause remanded for further proceedings accordingly, the appellant to recover costs in this court, except that the cost for printing be limited to \$50.

MELIN v. STUART (CITY OF MINNEAPOLIS, Garnishee) (three cases).

(Supreme Court of Minnesota. Nov. 8, 1912.)

1. APPEAL AND ERROR (§ 773*)—RECORD—FILING PAPER BOOK—EFFECT OF DELAY.

Where notice of appeal was served August 10, 1912, and notice of trial was served in due time for the October, 1912, general term of the Supreme Court, but no paper book or points and authorities were served until October 15th, a motion to dismiss the appeal must be granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

2. GARNISHMENT (§ 46*)—LIABILITIES SUBJECT—PREMATURE PAYMENT BY GARNISHEE.

Where a defendant had drawn his pay in advance from a garnishee city before the gar-

nishee summons was served, the garnishee was entitled to discharge, though the city had no right to pay before the end of the month, nor the defendant to receive it.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 46.*]

Appeal from Municipal Court of Minneapolis; E. A. Montgomery, Judge.

Proceedings by Sarah C. Melin against H. A. Stuart, in which the City of Minneapolis was garnishee. From orders entered, the plaintiff appeals. Dismissed.

E. Luther Melin, of Minneapolis, for appellant. A. M. Higgins, of Minneapolis, for appellee Stuart. W. G. Compton, of Minneapolis, for appellee garnishee.

PER CURIAM. Motion to dismiss the appeal for failure to serve paper book and points and authorities in each of the three above entitled proceedings.

[1] It appears that notice of appeal was served August 10, 1912, and notice of trial in due time for the October, 1912, general term of this court, but no paper book or points and authorities were served till October 15th. Under the rules the motion must be granted. We do it with no great reluctance, for we are convinced that thereby plaintiff escapes additional costs. In one case the order is not appealable.

[2] In discharging the garnishee in the other two cases, the court could not have erred; for defendant had drawn his pay in advance from the garnishee city for his service before the garnishee summons was served. It is immaterial that the city had no right to pay before the end of the month, or he to receive it. Clearly he could in no event again recover it from the city. Therefore the city did not owe him anything that plaintiff could reach.

The appeals are dismissed, with \$10 costs to be taxed in one case only against plaintiff.

PATTERSON v. ADAN (PHILADELPHIA CASUALTY CO. et al., Garnishees).

(Supreme Court of Minnesota. Nov. 8, 1912.)

(Syllabus by the Court.)

1. GARNISHMENT (§ 42*)—LIABILITIES SUBJECT—LIABILITY INSURANCE.

Where, under a policy insuring against loss by reason of the operation of the assured's automobile, an action is brought by a person injured by such automobile against the assured, and the insurance company thereupon takes sole charge of the defense, to the exclusion of the assured, as it had the right to do under the policy, a judgment in the action against the assured becomes, as between plaintiff, defendant, and the company, a liability or debt owing unconditionally by the company to the assured, which such plaintiff may reach by garnishment.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 83-88; Dec. Dig. § 42.*]

2. INSURANCE (§ 514*)—LIABILITY INSURANCE
—ACCURAL OF INSURER'S LIABILITY.

A provision in the policy that no action shall lie against the company, "unless brought by the assured for loss or expense actually sustained and paid in money by him after trial of the issue," applies only in case the company denies liability and refuses to defend.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1298; Dec. Dig. § 514.*]

Appeal from District Court, Ramsey County; William Louis Kelly, Judge.

Action by Arthur H. Patterson against Edmon Adan, in which the Philadelphia Casualty Company and another were garnishees. From an order denying plaintiff's motion for a judgment on the disclosure by the garnishees, plaintiff appeals. Reversed and remanded.

C. D. & R. D. O'Brien, of St. Paul, for appellant. Harris Richardson and Walter Richardson, both of St. Paul, for respondent.

HOLT, J. Plaintiff recovered a verdict against the defendant in the sum of \$4,500 for an injury received through the negligence of defendant, causing his automobile, in which plaintiff was riding, to overturn. Judgment was entered on the verdict, and defendant appealed to this court, but gave no supersedeas bond. Pending the appeal, the respondent was duly garnisheed, and upon the disclosure had plaintiff moved for judgment. The motion was denied, and the garnishee discharged.

From the disclosure it also appears that, when the accident occurred which caused the injury for which plaintiff recovered the judgment, the defendant held a so-called insurance policy issued by the garnishee, hereinafter and in the policy called the company, covering risks resulting from accidents in the use of the automobile in question. In consideration of the premium the company "agrees to indemnify the assured against loss" as therein defined, subject to the special and general agreements therein contained, which are to be construed as co-ordinate conditions. The other terms of the policy deemed material to the question now presented for decision are these:

"The company agrees to indemnify the assured: (I) Against loss by reason of the liability imposed by law upon the assured for damages on account of bodily injuries, or death accidentally, suffered by any person or persons, by reason of the maintenance, or use, within the limits of the United States of America or Canada, of" the assured's automobile. "(II) Agrees to serve the assured, upon notice of such injuries or death, by such investigation thereof, or by such negotiations or settlement of any resulting claims as may be deemed expedient by the company. * * * (III) Agrees to defend, in the name and on behalf of the assured, any suits which may at any time be brought against him on account of such injuries or

death, including suits alleging such injuries and demanding damages therefor, although such suits, allegations, or demands, are wholly groundless, false, or fraudulent, and covered by this policy. * * * (IV) Agrees to provide" the necessary appeal bonds. "(V) Agrees to pay all costs taxed against the assured in any legal proceeding defended by the company, all interest accruing after entry of judgment upon such part thereof as shall not be in excess of the limits of the company's liability as hereinafter expressed, and all expenses incurred by the company for investigation, negotiation or defense."

This insurance is subject to the following "special agreements": "(1) The company's liability for loss on account of an accident resulting in injuries to or in the death of one person is limited to five thousand (\$5,000) dollars, and subject to the same limit for each person." Then follow general and special provisions covering loss from destruction of the property of others through the use of the automobile, substantially of the tenor above quoted, and also general and special provisions covering loss or damage to the automobile. Then follow these general agreements relating to all the risks:

"General Agreements: (1) The assured, upon the occurrence of an accident, shall give immediate written notice thereof. * * * The assured shall, at all times, render to the company all co-operation and assistance in his power. (2) If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the company every summons or other process served on him, and the company will at its own cost defend against such suit, even if groundless, in the name and on behalf of the assured. (3) The assured shall not voluntarily assume any liability or settle any claim, except at his own cost, nor incur any expense, nor interfere in any negotiations for settlement or in any legal proceedings without the consent of the company previously given in writing. * * *

(4) No action shall lie against the company to recover for any loss or expense under this policy, unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after trial of the issue."

The disclosure shows that as soon as the action was begun the company took sole charge of the defense. At the trial plaintiff recovered a verdict of \$5,000, the company in behalf of defendant duly appealed to this court from an order denying a new trial, the order was reversed, and upon a new trial the verdict first above mentioned was obtained. The company carried on all the steps in the litigation, including the present appeal in the main action; but upon advice of counsel no supersedeas bond was given, because the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

assured defendant was then thought to be insolvent, although the company since learned that he thereafter left the state with several thousand dollars in his possession. It was also disclosed that the practice of the company, when it undertook to defend in behalf of the assured, was to pay the final judgment without waiting for the assured to pay it, first, however, ascertaining that the assured was absolutely able to respond to the full amount thereof.

[1] Upon the record did it appear that the company, the garnishee, was indebted to the defendant when the disclosure was had? It may be conceded that the company intended so to frame the policy that not every avenue of escape from payment in case of a loss should be closed. The main purpose of its business is to obtain and retain the premiums. The object of the assured is to get protection. The object and purpose of the contracting parties is not to be lost sight of in construing a contract, nor is the rule that in case of ambiguity it must be resolved against the one who prepared the instrument. The language in the lengthy document before us was not the choice of the assured. Recognition needs be taken of the enormous growth of liability insurance of late years. The hazards of modern industries and the risks connected with some of the advantages of present-day life call for this kind of insurance. Policies attempting to fill this demand should, if possible, be construed so as not to be a delusion to those who have bought them. In soliciting business, is it supposable that the company would inform the assured that it assumed no risk if the assured, after accepting the policy, becomes so financially embarrassed that no judgment could be enforced against him? Insurance companies of this kind do not, at least openly, ask for the patronage of the insolvent. They profess to give the needed protection to all. Those who procure this kind of insurance have not only their own protection in mind, but also the idea that, if through their involuntary negligence a servant or other person sustains injury, such an one may be recompensed. But, even granting that this policy is so worded that on its face it must be considered one of indemnity alone, we think that under it the company may, and in this case did, place itself in a position which has resulted in liability to the assured. If suit is brought on a claim intended to be covered by this policy, the company, after notice, agreed to defend; but, not only that, it reserved to itself the exclusive right to settle or carry on the litigation, excluding the assured from any interference therewith. On these provisions the company acted, assumed the defense, and has carried on the litigation to the bitter end, even after defendant left this jurisdiction. The assured retained no voice or interest in the litigation. The company substituted its interests and

its judgment for that of the assured in the action. By so doing it assumed a relation to this plaintiff, and to every plaintiff where under its policy it steps into a suit, which must be considered in construing the contract. Neither public policy nor legal principles can be invoked against the validity of these provisions, if they mean no more than an undertaking to contest an asserted claim against the assured, for which it is liable when established; but if, under the pretense of an insurance obligation, the company carried on litigation in the name of one who has neither voice nor interest therein, and which does not affect the company itself, because the assured is unable or unwilling to pay if plaintiff is awarded judgment, it would seem the company becomes an officious intermeddler. Public policy does not permit a litigant to so surrender control of his lawsuit to one who has no interest in the cause of action. A contract between client and attorney, although the attorney has a lien for his fees on the cause of action, is void, if the client is excluded from control of the cause of action. The policy here should be so interpreted, if possible, that its provisions do not run contrary to law, and that result is reached by holding that the undertaking to defend means something more than carrying on litigation in court. By undertaking the defense the company elected to treat plaintiff's cause of action, if he had any, as covered by its contract; and when it substituted itself and its judgment for that of the defendant, both plaintiff and defendant have a right to insist that the final judgment establishes the liability and debt of the company to the assured. The undertaking to defend is of no value, and may be of great danger, to the assured, where he thus abandons all control of the suit to the company, if it does not mean that whatever liability is established shall be discharged. The company admits that where the assured is perfectly solvent the practice of the company is to carry the defense to a successful issue by paying the judgment without stopping for the assured to pay it. It is even more important to an assured who is in financial stress that no judgment be allowed to stand unsatisfied against him than it is to one who has abundant means to satisfy it with. Contractors and manufacturers of limited means, as well as persons of small means, or no means at all, who operate an automobile, carry the class of insurance here in question because accidents resulting in large judgments would mean financial ruin to them. Suppose after the company so insuring should insist on its right to take the exclusive charge of the defense of an action arising out of a risk covered by the policy, nevertheless a large judgment results against the assured, which, because of temporary embarrassment, he cannot pay; was it intended by the terms of the contract that such occurrence should relieve the com-

pany, force the assured to the wall, and leave the plaintiff in the action, whom the insurance was no doubt indirectly intended to benefit, wholly in the cold? We do not think this is a fair intention of this policy in a case where the company, under the terms thereof, substitutes itself for the assured in contesting a cause of action, and we do not so construe it.

[2] The provision most strongly relied on by the company to show that this is indemnity and not liability insurance is this, found in the general provisions covering all the risks: "No action shall lie against the company to recover for any loss or expense under this policy, unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after trial of the issue." This manifestly is not a condition precedent to liability in every instance; for then, in case of loss or damage to the automobile, also covered by this policy, if the company does not voluntarily pay the loss, no action could lie. The company also expressly agrees to pay the costs taxed in the action and the interest on the judgment. Nevertheless a strict reading of the provision would make it incumbent on the assured to first pay these items expressly agreed to be paid by the company before there was a legal liability against it. We think a proper construction of the provision is that no suit will lie against the company, in cases where the company declined to take the defense, unless the assured actually litigated and paid the claim. In such a case there is no interference on the part of the company with the rights of either a plaintiff or the assured in the litigation, and, not having elected to treat the cause of action as a risk covered by the policy, it may properly stipulate that, before the assured shall maintain a suit against it, the claim must have been tried, established, and paid. We therefore hold that in a policy such as this, where the company has come into the litigation and assumed exclusive control thereof under its contract, it recognizes a liability, if it fails to defend successfully, to pay the assured the amount of the judgment it so permits to be established, not exceeding the sum stipulated in the policy, and also that, as to the plaintiff, it should be considered that such judgment is a debt due the assured from the company, and not dependent on any contingency. Payment of the judgment, so far as the rights of the company are concerned, in such case, is a mere pro forma matter, and not a condition precedent to its liability to defendant under plaintiff's garnishee proceeding.

We know this conclusion is not in accord with perhaps the weight of authority; but, in the cases cited to sustain the opposite of the rule we adopt, it is not clear that the company took exclusive, or any, charge of

the litigation, and therefore, in our opinion, sufficient consideration is not given to this feature of the contract. *Connolly v. Bolster*, 187 Mass. 266, 72 N. E. 981; *Finley v. Casualty Co.*, 113 Tenn. 592, 83 S. W. 2, 3 Ann. Cas. 962; *Stenbom v. Brown-Corliss Engine Co.*, 137 Wis. 564, 119 N. W. 308, 20 L. R. A. (N. S.) 956; *Cushman v. Carbondale Fuel Co.*, 122 Iowa, 656, 98 N. W. 509; *Allen v. Aetna Life Ins. Co.*, 145 Fed. 881, 76 C. C. A. 265, 7 L. R. A. (N. S.) 958; *Maryland Casualty Co. v. Omaha Electric Light & Power Co.*, 157 Fed. 514, 85 C. C. A. 106; *Travelers' Insurance Co. v. Moses*, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663; *Frye v. Bath Gas & Electric Co.*, 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500. But we are inclined to follow the rule adopted in New Hampshire, and expressed in a very able opinion by Chief Justice Parsons in *Sanders v. Insurance Co.*, 72 N. H. 485, 57 Atl. 655, 101 Am. St. Rep. 688, wherein he says: "The view that the contract means that the insurance company, after taking control of the proceedings in a suit against the assured, cannot thereafter be discharged, except by payment of the indemnity to the assured or securing his discharge from the claim, is thought to best conform to the intent of the parties, and is adopted." This seems a just and fair view, considering the terms of the contract, its purpose, and the position assumed by the parties thereunder; and we think it in line with the principles applied in *Anoka Lumber Co. v. Fidelity & Casualty Co.*, 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689. The assumption that a similar policy was an indemnity and not a liability contract in *Kennedy v. Fidelity & Casualty Co.*, 100 Minn. 1, 110 N. W. 97, 9 L. R. A. (N. S.) 478, 117 Am. St. Rep. 658, 10 Ann. Cas. 673, was not necessary for the determination of that case, and therefore not a precedent here.

The order is reversed, and cause remanded for further proceedings in harmony herewith.

W. H. FERRELL & CO. v. GREAT NORTH-EERN RY. CO.

(Supreme Court of Minnesota. Nov. 8, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 35*)—REGULATION—INTER-STATE SHIPMENTS—FACILITIES.

A contract by a common carrier to supply to a particular interstate shipper a specified number of cars on certain dates, to be used in such shipment, is not a violation of the act of Congress regulating interstate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 8155]), unless it appear that the contract, if performed, will in fact extend to that shipper an undue or unreasonable preference over other shippers.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 94; Dec. Dig. § 35.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. CARRIERS (§ 69*) — CARRIAGE OF GOODS — BREACH OF CONTRACT—EVIDENCE.

Evidence held sufficient to support the verdict; and, though perhaps indefinite in some respects, defendant is not, under the rule of *Cruikshank v. Insurance Co.*, 75 Minn. 266, 77 N. W. 958, entitled to judgment notwithstanding the verdict.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 217–219, 222, 228, 230, 232–239; Dec. Dig. § 69.*]

Appeal from District Court, Mille Lacs County; C. A. Nye, Judge.

Action by W. H. Ferrell & Co. against the Great Northern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 114 Minn. 534, 131 N. W. 1135.

James E. Markham, of St. Paul (M. L. Countryman, of St. Paul, of counsel), for appellant. Stiles & Devaney, of Minneapolis, and E. L. McMillan, of Princeton, for respondent.

BROWN, J. Action to recover damages for the breach of an alleged contract to furnish refrigerator cars for the shipment of certain property, in which plaintiff had a verdict, and defendant appealed from the judgment rendered thereon after a denial of its motion for judgment notwithstanding the verdict. The case was before us on a former appeal, where it was held that the complaint stated a cause of action for breach of contract. 114 Minn. 534, 131 N. W. 1135. We follow that decision.

It is unnecessary to set out the allegations of the complaint at length, or the proceedings preliminary to the commencement of the trial. While the complaint contains several causes of action, predicated upon distinct grounds, the trial court required plaintiff to elect upon which ground it would rely for recovery, and plaintiff elected to rely upon the breach of an express contract to furnish the cars. The trial so proceeded, and was confined to a definite number of the several causes of action stated in the complaint; all others being dismissed or abandoned. The facts, so far as necessary to an understanding of the questions presented, are as follows:

Plaintiff is a Minnesota corporation, an extensive dealer in and shipper of Minnesota potatoes, and owns warehouses for storage purposes at several stations along defendant's road between St. Paul and Duluth. In January, 1910, plaintiff had in storage in its said warehouses a large quantity of potatoes for shipment to the Southern and Southwestern markets, requiring for their transportation in the neighborhood of 200 refrigerator cars. Plaintiff filed with local agents of defendant orders for a specified number of cars, designating the number and the station at which they were required. One of these orders was so presented on January

13th, and called for 100 cars, on the dates and at the stations therein named. Some of the cars so ordered were furnished by defendant, namely, 61. On January 28th plaintiff presented another order for additional cars, under which no cars were furnished. There seems to have been some delay in the matter, and, being anxious to get their potatoes to the Southern market, plaintiff's general manager personally visited the traffic manager of the road on the 31st of January, and it is claimed by plaintiff that a contract was then entered into by which defendant undertook and agreed to furnish at the times and stations designated by plaintiff the necessary number of cars required for the shipment of the potatoes plaintiff then had on hand. The cars were not furnished, and the potatoes could not be shipped out, and plaintiff claims that, in consequence of defendant's failure, plaintiff suffered a loss by reason of a drop in the market price of potatoes, for which it seeks to recover in this action. Defendant denied making the contract, and whether it was made presented one of the principal issues on the trial below. Plaintiff's right to recover was thus placed entirely upon the alleged contract, and not in any view upon a claim of the violation of defendant's common-law or statutory duty to furnish the cars.

[2] 1. It is contended by defendant that the evidence wholly fails to sustain the claim of an express contract, and that the court below erred in denying its motion for a directed verdict, and also in denying its motion for judgment notwithstanding the verdict. Our examination of the record results in the conclusion that the evidence sufficiently supports the verdict, within the rule guiding us in such cases. It is not disputed that plaintiff's manager, Ferrell, called upon defendant's general traffic manager, Broughton, on or about January 31st, in reference to providing cars under the orders previously made by plaintiff, and no dispute but that the traffic manager referred plaintiff's representative to Mr. Beidleman, an agent of defendant having in charge its refrigerator car service. Nor is it disputed that those persons then had some negotiations and discussion in reference to the subject. Plaintiff claims, and Ferrell so testified, that the former orders for cars were then before the parties, and that Beidleman expressly agreed to provide the cars so ordered. Beidleman denied the express agreement, and testified that he agreed to furnish the cars just as soon as they could be had, that there was a car shortage at the time, and that the company was providing and sending to the use of plaintiff as rapidly as possible all available cars. The testimony offered by plaintiff was sufficient, if believed by the jury, to establish the alleged con-

tract. If it may be said that the question is doubtful on the evidence taken as a whole, the doubt, so far as this court is concerned, was solved by the action of the trial court in upholding the verdict of the jury. The evidence is not so clearly against the conclusion of the jury to justify this court in ordering final judgment against plaintiff. *Cruikshank v. Insurance Co.*, 75 Minn. 266, 77 N. W. 958.

It was not, of course, the understanding, on January 31st, that the cars were to be furnished on the dates specified in the prior orders, for the dates therein named had passed. But it was a fair question whether it was not understood between the parties that the number of cars to be thereafter furnished was to correspond with the number called for by those orders, namely, a certain number per day at the stations named. The company was then informed of the number of car loads of potatoes plaintiff had in readiness for shipment, and the jury was fully justified in concluding that the parties agreed and understood that cars should be furnished in harmony with the previous order except as to dates. The evidence was also sufficient to justify the jury in finding a breach of the contract, and a failure to supply the cars contracted for. We find no substantial variance, between the allegations of the complaint and the evidence, respecting the number of cars required or ordered by plaintiff at the different stations, and the amount awarded by the verdict was clearly within the evidence. Since, therefore, plaintiff's evidence established the alleged contract, the breach thereof, and resulting damage, plaintiff was entitled to recover, and the verdict must be sustained, unless the further contention of defendant, namely, that the contract was void and unenforceable, because an unlawful discrimination in plaintiff's favor, be sustained.

[1] 2. The cars required by plaintiff were for interstate trade; the potatoes being shipped to points beyond the state. It is contended by defendant in this connection that the alleged contract, conceding it to have been entered into as claimed by plaintiff, was upon its face a violation of the federal statutes regulating interstate commerce and therefore void, and for that reason judgment should have been ordered for defendant. The part of the act of Congress bearing upon this question is found in section 3 of the Interstate Commerce Act, approved February 4, 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), where it is provided "that it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, corporation, or locality, or any particular description of traffic, in any respect whatsoever or to subject any particular per-

son, company, corporation, or locality or any particular description of traffic, to any undue or unreasonable prejudice, or disadvantage in any respect whatsoever." Substantially the same provisions are found in the statutes of the state. Section 2009, R. L. 1905.

There can be no serious question that the intention of the act of Congress, as well as the state statute, was to afford all shippers a fair opportunity and equal privilege in the use of cars for the shipment of their commodities, and to that end all undue and unreasonable discrimination is thereby expressly prohibited. But it does not follow, necessarily and as a matter of law, that a contract by a carrier to furnish a particular shipper a definite number of cars on specified days in the future is a violation of either the letter or spirit of the law, in the absence of a showing of a discrimination or an undue or unreasonable advantage in fact. Notwithstanding the performance of such a contract may necessitate setting apart to the particular shipper a large number of cars, yet ample facilities for all other shippers may be at hand, and the requirements of all readily supplied. In such situation there could be neither discrimination nor undue advantage. The purpose of the law was not to embarrass or abolish the right of contract in respect to such matters, but to prevent an unreasonable advantage being conferred upon a particular person. If all may be supplied with cars, notwithstanding an existing contract calls for a large number to a particular shipper, no advantage accrues to that shipper, or disadvantage to others.

The authorities cited by counsel for defendant do not, as we read them, go to the extent of holding that a contract of the tenor and effect of that here involved is void upon its face. On the contrary, the whole basis of those decisions is discrimination and undue advantage in fact. The case of *Railway Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, mostly relied upon, is not in point. That case involved a discrimination in rates. The railroad company there contracted to expedite and hasten a particular shipment at regular rates, and the court held that, though such a contract would be lawful, if a rate therefor had been published as required by law, yet the contract so favoring a particular shipper at the regular tariff rate was a violation of the statute, a breach of which would not subject the company to liability. The invalidity of the contract—that is, the special advantage given the shipper—appeared upon the face of the contract. It provided for special efforts on the part of the company to transport a car of horses to a particular point in time to connect with an outgoing train on another road, at the regular rate of transportation—a benefit not conferred upon shippers in general. The case is not here in

point. A special reference to the other citations is not necessary. They do not meet the question here involved.

We hold, therefore, that the contract in the case at bar is not void upon its face, and the remaining question is whether it was void in fact. This must be determined by the further question whether any undue or unreasonable advantage was thereby conferred upon plaintiff. The court below, at the request of defendant, submitted the question to the jury; counsel having first sought an instruction that the contract was void as a matter of law. In so submitting the question we discover no error. The evidence upon the question whether defendant by this contract placed itself in such position that the same privilege could not, by reason of shortage of cars or other cause, be conferred upon others similarly situated, was conflicting, presenting an issue of fact. If the company had a sufficient number of cars of this character to supply requirements of all shippers, then it is clear that no undue or unreasonable, or in fact any advantage at all, over other shippers, was conferred upon plaintiff. The verdict determined the issue adversely to defendant, the trial court approved the verdict, and we discover from the record no reason for interference. Though the evidence may perhaps be defective in some respects, the case is not one in which defendant is entitled to final judgment, and, as no new trial was asked for, the judgment must be affirmed. *Cruikshank v. Insurance Co.*, 75 Minn. 266, 77 N. W. 958.

Judgment affirmed.

MINNEHAHA COUNTY v. BOYCE

(Supreme Court of South Dakota. Oct. 25, 1912.)

1. LIMITATION OF ACTIONS (§ 58*)—SUPPORT OF INSANE PERSON—LIABILITY OF ESTATE.

Laws 1895, c. 98 (Pol. Code, § 544), provides that the amount incurred by any county for treatment and maintenance of any insane person in the hospital for the insane shall be a charge "against the estate of such insane person, provided that the insane person has no heirs within the United States dependent on said estate for support, and that no real property shall be sold during the life of the insane person, and further provided" that no personalty be sold under five years from the date of commitment, unless by order of the court on the death of the insane person, or when the property is liable to deteriorate during the time above specified; and when sold the county judge shall safely invest the proceeds for the insane person's benefit. *Held*, that no cause of action accrued to the county for the maintenance of an insane person until her death, when the amount of the liability became fixed and her property had become an "estate," so that an action for the recovery of payments by the county for the insane person's maintenance, made more than six years before her death, was not barred.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 324-328, 346, 347; Dec. Dig. § 58.*]

2. LIMITATION OF ACTIONS (§ 43*)—TIME OF RUNNING.

A statute of limitations does not begin to run until an action will lie to enforce the claim.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 217-219; Dec. Dig. § 43.*]

3. STATUTES (§ 184*)—CONSTRUCTION.

The legislative intent in enacting a statute which created a new and original liability must be ascertained by considering the language of the statute and its general purpose, as expressed therein.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 262; Dec. Dig. § 184.*]

4. INSANE PERSONS (§ 52*)—MAINTENANCE—LIABILITY OF ESTATE—"ESTATE"—"HEIRS."

Laws 1895, c. 98 (Pol. Code, § 544), makes the amount incurred by a county for maintenance of an insane person in a hospital for the insane a charge against the estate of the insane person, provided that he "has no heirs within the United States dependent on said estate for support, and that no real property shall be sold during the life of the insane person." *Held*, that the statute did not exempt the whole estate where only part of the heirs were dependent on the insane person; the term "estate," as used therein, not being equivalent to "property" in the popular meaning, and the words "heirs dependent on said estate" not being equivalent to the words "person dependent on said estate"; -so that, where only one heir was dependent on an insane person, the remainder of the estate left after the insane person's death was liable to the county's claim for maintenance.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 82; Dec. Dig. § 52.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2475-2483; vol. 8, pp. 7653, 7654; vol. 4, pp. 3241-3265; vol. 8, pp. 7677, 7678.]

Haney, J., dissenting.

Appeal from Circuit Court, Minnehaha County; Joseph W. Jones, Judge.

Action by Minnehaha County against J. W. Boyce, administrator of the estate of Anna C. Phillips, deceased. From a judgment in part for plaintiff and an order denying a motion for new trial, it appeals. Reversed, and remanded for further proceedings.

Martin Bergh, State's Atty., of Sioux Falls, for appellant. Boyce, Warren & Fairbank, of Sioux Falls, for respondent.

SMITH, J. Action by Minnehaha county against J. W. Boyce, as administrator of the estate of Anna C. Phillips, deceased, to recover the sum of \$1,331.20, the amount paid out by the county for the treatment and maintenance of the deceased as a patient in the State Hospital for the Insane, at Yankton, from June 17, 1898, to June 30, 1905. The case was submitted to the trial court upon an agreed statement of facts, upon which the court made findings of fact and conclusions of law February 18, 1912. Only such portions of the findings as are material to the questions presented upon this appeal need be referred to. They are, in substance, as follows: That some time prior to 1897

Anna C. Phillips became insane, and on May 18, 1897, Hattie C. Phillips was appointed guardian of her person and estate by the county court of Minnehaha county; that Anna C. Phillips, upon the petition of her said guardian, was committed to the State Hospital for the Insane, at Yankton, by order of the county court of said county, on the 17th day of June, 1898, and remained in said hospital and received treatment, care, and maintenance therein till the 30th day of June, 1905, when she was removed to a private hospital, where she died as an insane person June 11, 1910; that Anna C. Phillips was, at all times, an unmarried person, without children, and at her death left real property in the said county of a value of at least \$6,000, and personal estate of the value of at least \$2,500; that Minnehaha county has paid out for care, treatment, and maintenance of Anna C. Phillips at the State Hospital for the Insane, from June 17, 1898, to June 30, 1905, the sum of \$1,331.20, which payments were made quarterly each year, in sums of \$48, beginning September 30, 1898, and ending June 30, 1905; that an itemized and verified account of such payments was duly presented to and filed with said administrator on August 17, 1910; that Anna C. Phillips left surviving as her heirs at law five sisters and one brother and her mother, Hattie C. Phillips; that the five sisters and brother of said Anna C. Phillips are not dependent upon the estate of said Anna C. Phillips for their support; that Hattie C. Phillips, the mother, is dependent upon the estate of Anna C. Phillips for her support, and has been at all times, and is now, within the United States.

The court found, as conclusions of law, that the plaintiff is barred by the statute of limitations from recovering any sums or amounts for such support and maintenance paid more than six years immediately preceding the date of the death of Anna C. Phillips, to wit, June 11, 1910; that one-seventh of the estate of Anna C. Phillips, to which Hattie C. Phillips succeeded as heir of deceased, is not liable for any part of the amount expended by plaintiff, as aforesaid; that the plaintiff is entitled to recover of the defendant, as administrator of the estate, six-sevenths of the amount paid by plaintiff for the care, treatment, maintenance, and support of said deceased in said hospital, for the quarters ending June 30, September 30, and December 30, 1904, and March 31 and June 30, 1905, amounting in all to the sum of \$188.34, with interest from June 30, 1905.

[1] Plaintiff appeals, alleging the court erred in holding that plaintiff is barred by the statute of limitations from recovering payments made more than six years immediately preceding the death of said insane person, and in deciding that plaintiff was entitled to recover only six-sevenths of the sum

paid by it during said six years. Recovery is sought in this action under the provisions of section 544 of the Political Code, which reads as follows: "The amount incurred by any county of this state for treatment and maintenance of any insane person in the hospital for the insane shall be a charge against the estate of such insane person: Provided, that the insane person has no heirs within the United States dependent on said estate for support, and that no real property shall be sold during the life of the insane person; and further provided, that no personal property shall be sold under five years from the date of the sending of such insane person to the asylum, unless by order of the court on the death of the insane person or when such property is liable to deteriorate in value during the time above specified, and when sold as above, the county judge shall safely invest the proceeds thereof for the benefit of the insane person." Other provisions of the law make it the duty of the superintendent to furnish the county auditor of each county a quarterly statement, giving the number of patients from such county, together with the names and cost of maintenance, and require the superintendent to certify to the State Auditor on the 1st day of January, April, July, and October of each year the amount due the hospital from the different counties, and that the said Auditor shall place the same to the credit of the hospital and notify the county auditor of each county of such charge, and require the board of county commissioners to levy a tax in each county for the amount, and to pay the amount thus due into the state treasury.

The question presented upon the first assignment of error is: When did the statute of limitations begin to run against the plaintiff's claim? Respondent contends that the statute begins to run as to each item at the time it is paid by the county. Appellant, on the other hand, contends that the statute does not begin to run, under the provisions of section 544 of the Political Code, until the entire amount of the liability has accrued at the death of the insane person, and that the statute is not applicable to a part of the claim sued upon.

[2] The rule that no statute of limitations begins to run until such time as an action will lie to enforce the claim is so elementary as to require no citation of authorities. The original enactment for the establishment and government of the hospital for the insane was passed in 1874, since which time it has been many times amended. Chapter 98, Laws 1895, which has since been incorporated as section 544 of our present Political Code, was, however, an original enactment and not an amendment, and did not affect or in any manner change the then existing law, which is now embodied in the Political Code, relating to the payment by counties of the cost of treatment and maintenance of insane

patients in the hospital for the insane. It was plainly intended to and did create an entirely new and original liability against estates of insane persons not having dependent heirs in the United States. Hence no other provisions of the law of which it now forms a part afford any aid to the proper interpretation of the language used in the section itself.

[3] The legislative intent, therefore, must be ascertained by a consideration of the language and the general purpose expressed in the section itself. It was plainly the intent not to demand payment out of an "estate" upon which certain persons might be dependant for their support. Such persons are designated as "heirs." This is followed by the express declaration that no real property of the insane person shall be sold during the life of such insane person, and that no personal property of the insane person may be sold under five years from the date when such person became such patient, except upon his death, or when such property may deteriorate in value; and "when sold as above" the county judge is required to safely *invest the proceeds for the benefit of the insane person*. The language used points unmistakably to the conclusion that the Legislature did not intend that any property of an insane person, real or personal, should be appropriated in satisfaction of the statutory liability *during the life* of the insane person. The provisions for the protection of *dependent heirs*, and the placing of the liability upon the "estate," seem conclusive of such intent. It seems clear, therefore, that no cause of action arises until the liability created by the statute becomes effective by the death of the insane person, at which time the "amount" of the liability has become fixed, and the real and personal property of such insane person has become what is known in the law governing the disposition of the property of deceased persons as an "estate." When this "estate" comes into existence, the statutory liability matures and becomes actionable, and from that time the statute of limitations begins to run.

[4] We are of opinion, therefore, that the trial court erred in the conclusion of law that payments made by the plaintiff county more than six years before the death of the insane person are barred by the statute. The limitation of the liability of such estates to the estates of deceased insane patients, having no dependent heirs in the United States, presents a question of much greater difficulty.

The question here presented must depend on the sense in which the Legislature

used the term "estate." In many cases the precise meaning of the term "estate" can only be ascertained from the context or the circumstances under which it is used. In statutes the import of the term depends in a great degree upon its association with other expressions; and the fixed, absolute sense of the word in the abstract must give way to the connection in which it is used. In *re Hinckley*, 58 Cal. 457; *Campbell v. Campbell*, 37 Wis. 206. From the context it seems clear that the term "estate," in section 544 of the Political Code, is not used as an equivalent for the word "property" in the popular meaning. Nor are the words "heirs * * * dependent on said estate" used as equivalent to the words "persons * * * dependent on said estate." The provisos in the section are clearly intended to conserve the property of the insane person during his lifetime, and are designed to leave the liability of the estate to be determined by the non-existence or existence of dependent heirs at the time of his death, because persons having no legal claim to support, though they might become heirs upon his decease, cannot be said to be dependent upon his estate during his lifetime. The evident purpose of the statute was to create a liability to reimburse the county out of the estate of the decedent which does not pass to dependent heirs, and not to exempt the whole estate where but a part of the heirs are dependent. Such an interpretation of the statute as is contended for by respondent would, in very many cases, wholly defeat the evident purpose of the Legislature, which was to protect dependent *heirs*, and at the same time to justly appropriate the *estate* of the decedent, upon which no heir was dependent, in satisfaction of the claim of the county for reimbursement.

We are clearly of opinion the term "estate" in the statute was used by the Legislature, and should be interpreted, in this limited sense. The entire claim of the county should be paid out of the "estate" which does not pass to the dependent heir, Hattie C. Phillips. The estate remaining after the payment of such liability would be distributed among nondependent heirs.

The order and judgment of the trial court are reversed, and the cause remanded for further proceedings in accordance with this decision.

HANEY, J. (dissenting). In my opinion, the language of the statute is plain and unambiguous. By its express terms, when there is a dependent heir, there can be no charge against any portion of the estate. The trial court should be directed to dismiss the action upon the merits.

HUGHES v. HILL, Mayor, et al.
(Supreme Court of South Dakota. Oct. 25, 1912.)

1. INTOXICATING LIQUORS (§ 34*)—LOCAL OPTION—SUBMISSION TO POPULAR VOTE—FORM OF SUBMISSION AND BALLOTS.

The provision of Pol. Code, § 2856, as amended by Laws 1903, c. 166, that the question of the sale of intoxicating liquors at retail shall be submitted on a separate ballot, is mandatory; its purpose being to call the voter's attention specifically to that particular question, and, where such question was submitted on the official ballot used for the election of municipal officers, the submission and the election as to that question were void.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 42; Dec. Dig. § 34.*]

2. INTOXICATING LIQUORS (§ 34*)—LOCAL OPTION—STATUTORY PROVISIONS.

The submission of the question of selling intoxicating liquors at retail to a vote is governed by the provisions of the special law on that subject, and the general law of elections is applicable only where the special law fails to speak.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 42; Dec. Dig. § 34.*]

3. INTOXICATING LIQUORS (§ 34*)—LOCAL OPTION—SUBMISSION TO POPULAR VOTE—IRREGULARITIES.

The prime object of all local option elections is to discover the wishes of the voters, and, if such wishes can be discovered, the election is effective, unless some positive provision of law has been broken or disregarded in expressing it.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 42; Dec. Dig. § 34.*]

Haney, J., dissenting.

Appeal from Circuit Court, Bon Homme County; R. B. Tripp, Judge.

Action by Roscoe B. Hughes against Charles W. Hill, mayor of the city of Springfield, and others. From the judgment, plaintiff appeals. Reversed and remanded.

Lauritz Miller, of Mitchell, and W. M. Kirby, of Springfield, for appellant. T. N. Treat, of Springfield, and French & Orvis, of Yankton, for respondents.

McCOY, P. J. [1] This case involves the legality of the submission of the question of the sale of intoxicating liquors at retail at the municipal election held at Springfield in April, 1912. The vote was in favor of such sale. Section 2856, Pol. Code, and as amended by chapter 166, Laws of 1903, provides that said question shall be submitted upon a separate ballot. At the said election the question of such sale of intoxicating liquors was not submitted by a separate ballot; but the question "Shall intoxicating liquors be sold at retail?" was printed at the bottom of the official ticket or ballot used for the election of municipal officers at said election. It is the contention of appellant that said election, in so far as it relates to the submission of the question of the sale of intoxicating liquors, was void and unauthorized by law. On the other hand, it is con-

tended by respondents that, notwithstanding the failure to submit the question by a separate ballot, the result of said election fairly expressed the will of a majority of the voters, that the result was in no way affected by the manner of the submission, and that the election should stand as a legal and valid election, and that to hold such election invalid would, in effect, disfranchise the voters on that question by unauthorized action of the election officers. We are of the opinion that the contention of appellant is right. No one has a constitutional right to have such question submitted other than as provided by law. The only method provided for the submission of such question to a vote is by a separate ballot. It is a positive and essential provision of the law, and to hold that any election was valid, submitting the question in any way other than by a separate ballot, would, in effect, nullify this plain provision of the law. The principal reason for requiring the separate ballot is that each individual voter's attention will be called specifically to this particular question, whereas, if permitted to be submitted upon a general election ballot, as a part thereof, such question might be overlooked.

[2] The submission of this question to a vote is governed by the provisions of a special law upon that subject, and the general law of elections is applicable only where the special law fails to speak. *State v. Harris*, 22 S. D. 111, 115 N. W. 533. "The formality and regularity of local option elections are to be tested by the terms of the statute under which it is held, and by the general principles of the law relating to elections, where applicable. There must be a strict compliance with any special provisions of the local option statute in regard to the officers who are to hold the elections and their duties, the hours for keeping the polls open, the nature and scope of the question submitted to the voters, the form of the ballot to be used, the majority required to determine the result, and the qualifications of the voters. But minor irregularities, not violating mandatory provisions of the statute, will not vitiate the election, unless it is shown that they changed the result." 23 Cyc. 100. *Black, Intox. Liquors*, § 97; *Woollen and Thornton, Intox. Liquors*, § 534. The form of the ballot to be used in submitting such questions is not considered or classified as one of the minor irregularities which will not vitiate an election, but as one of the essential positive and mandatory provisions of the law, which must be strictly followed.

[3] Of course, the prime object of all such elections is to discover the wishes of the voters, and, if such wishes can be discovered, it will be made effective, unless some positive provision of law has been broken or disregarded in expressing it. *Woollen and Thornton, Intox. Liquors*, § 534. Section 2856, Pol.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Code, provides for a petition to be signed and filed, submitted on a separate ballot, and the form of the ballot. Most of these provisions have already been held to be mandatory by this court. We are of the opinion that the provision requiring a separate ballot is mandatory, and that the submission of said question and election were void.

The judgment appealed from is reversed, and the cause remanded for further procedure in accordance with this decision.

HANEY, J., dissenting.

TUNTLAND v. NOBLE, Mayor, et al.
(Supreme Court of South Dakota. Oct. 25, 1912.)

1. APPEAL AND ERROR (§ 725*)—ASSIGNMENT OF ERROR—SUFFICIENCY.

On an appeal from a judgment sustaining a demurrer to a complaint in a proceeding to contest a local option election, an assignment of error assigning as error the sustaining of the demurrer is sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3002-3005; Dec. Dig. § 725.*]

2. APPEAL AND ERROR (§ 724*)—ASSIGNMENTS OF ERRORS — SPECIFICATION OF ERRORS — SUFFICIENCY.

A more liberal rule should obtain with reference to the sufficiency of assignments of error than with reference to the sufficiency of specifications of error, the specifications being required to be so explicit as to reveal the precise question presented to the trial court for its determination, while assignments of error are sufficient if, taken in connection with the brief and argument accompanying it, they present clearly the question urged on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2997-3001, 3022; Dec. Dig. § 724.*]

3. INTOXICATING LIQUORS (§ 37*)—LOCAL OPTION—SUBMISSION TO POPULAR VOTE—CONTESTS.

A city auditor is required by statute to prepare the ballots to be used at municipal elections and have them in his office subject to inspection for three days prior to the election. *Held*, that a person failing to ascertain the proposed form of ballot for the submission of the question of the sale of intoxicating liquors at retail, and to have any alleged errors therein corrected, does not estop him from contesting the election on the ground that the ballots used were invalid, especially, as in this state the burden is on those desiring the sale of liquors to initiate the proceedings leading up to the election, it takes an affirmative vote of a majority of all those voting at the election, and not a mere majority of those voting on the question, to carry the election in favor of licensing such sale, and voters opposing the granting of licenses are therefore not required to take any affirmative action, but may make their opposition effective by simply neglecting to vote on that question.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 37.*]

4. INTOXICATING LIQUORS (§ 34*)—LOCAL OPTION — SUBMISSION TO POPULAR VOTE — FORM OF SUBMISSION AND BALLOTS.

At a city election the question of permitting the sale of intoxicating liquors at retail was submitted on a ballot 8 by 14 inches in

size, three columns of which were occupied by the printing of a proposed ordinance submitted on the same ballot; the questions whether such ordinance should be passed and whether intoxicating liquors should be sold at retail being printed at the bottom of the third column. *Held*, that this was not a compliance with the statutory requirement that such question should be submitted on a separate ballot, the object of that requirement not being merely to separate such question from political questions arising in connection with the election of municipal officers, but to call the voter's attention directly and specifically to that question.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 34.*]

5. INTOXICATING LIQUORS (§ 34*)—LOCAL OPTION — SUBMISSION TO POPULAR VOTE — FORM OF SUBMISSION AND BALLOTS.

The statutory requirement that the question of whether intoxicating liquors shall be sold at retail shall be submitted on a separate ballot is mandatory, and noncompliance therewith renders an election on that question void, since statutory requirements affecting the merits of the election or affecting an essential element thereof, as this does, are mandatory.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 34.*]

HANEY, J., dissenting.

Appeal from Circuit Court, Turner County; Robert B. Tripp, Judge.

Action by O. Tuntland against N. Noble, as mayor of the city of Centerville, and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Bogue & Bogue, of Centerville, for appellant. F. L. Soper, of Centerville, and Gardner & Churchill, of Huron, for respondents.

WHITING, J. At the annual election in and for the city of Centerville, the question of permitting the sale of intoxicating liquors at retail was voted upon. The canvassing board declared the majority of the ballots to have been cast in favor of permitting such sale. Appellant brought this action in the circuit court to contest the result of said election as so declared, and, for grounds of contest, while admitting that the majority of the ballots as cast were in favor of the sale of liquor, alleged that all the ballots cast at such election were invalid, and should not have been counted, for the reason that the said question was submitted upon the same ballot upon which was submitted the question of the adoption of a city ordinance. A copy of the ballot used was attached to the contest petition and shows that it was some eight by fourteen inches in size, printed upon one side, and with most of the ballot covered by the printing of the proposed ordinance which occupied three ordinary columns on said ballot. At the foot of the third column was placed the usual question as to whether the ordinance should be passed, together with the words "Yes" and "No," and squares opposite each in which the voter might place his cross to designate his vote. Below the other two columns appeared the question "Shall intoxicating liquors be sold

at retail" with the words "Yes" and "No" and like squares within which to designate one's vote upon the question of the sale of liquor. The complaint was demurred to upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and a judgment entered dismissing the contest. It is from the judgment and order sustaining the demurrer that this appeal is taken.

There is a special provision in the intoxicating liquor laws of this state directing that the question of the sale of liquor "shall be submitted upon a separate ballot." There is, however, no express provision of statute declaring that failure to follow such direction shall render the votes cast void or the election invalid. Appellant, however, contends that said provision is, from its very nature, mandatory, and that a failure to comply therewith renders void that part thereof relating to the sale of intoxicating liquors. Respondent in the case at bar contends: (1) That appellant has presented no sufficient assignment of error to raise the question urged. (2) That, inasmuch as the statute of this state provides that the city auditor shall prepare the ballots to be used at the election, and have the same at his office subject to inspection for the period of three days prior to the election, and an opportunity was thus given to those interested to ascertain the proposed form of ballot and to take steps, in accordance with other provisions of the statute, to have corrected any alleged errors in the form of ballots, appellant was estopped after election from questioning the ballot used. (3) That there was a substantial compliance with the statute inasmuch as all the statute contemplated was that the ballot upon which the question was submitted should be separate from that upon which appeared the names of the candidates for office. (4) That the ballots were valid because the statutory provision was merely directory, and a failure of the city auditor to follow such direction should not work the disfranchisement of the innocent voter, especially in view of the fact that it is not claimed that the result of the election was actually affected thereby.

[1] There is no merit in the claim that the assignment of error is insufficient. A demurrer was interposed. This demurrer was upon one ground only. The demurrer was sustained. Appellant assigns as error the sustaining of the demurrer. We cannot conceive where any uncertainty could arise as to the question sought to be raised.

[2] We might suggest that a much more liberal rule should obtain relating to the sufficiency of an assignment of error than to the sufficiency of a specification of error. While the latter should be so explicit as to reveal the precise question presented to the trial court for its determination, all that should be required in an assignment of error

is that such assignment, taken in connection with the brief and argument accompanying same, present clearly the question urged upon appeal.

[3] There is in this state no statute providing that a failure to object to the form of a ballot prior to election shall estop one from questioning such ballot after election. Without in any manner intimating our views upon what might be the effect of such neglect in the case of the ordinary ballot used upon the election of public officers, we are clear that any failure to object to the form of a ballot prepared for use in submitting the question of the sale of intoxicating liquors cannot estop an interested party from contesting the election upon the ground that the ballots used thereat were invalid. It must be borne in mind that in this state we have prohibition with local option license, thus throwing upon those desiring the sale of liquors the burden of initiating the proceedings leading up to election (*State ex rel. Crothers et al. v. Barber*, 19 S. D. 1, 101 N. W. 1078), also, that it takes an affirmative vote of a majority of all who vote at the election, and not a mere majority of those voting upon this question, to carry the election in favor of licensing the sale of intoxicating liquors (*State ex rel. Clark v. Stakke*, 22 S. D. 228, 117 N. W. 129; *Id.*, 22 S. D. 451, 118 N. W. 703). The voter who opposes the granting of license need not vote upon the license question at all in order to assist in the defeat of license. If he votes for some candidate for office, thus becoming enrolled as a voter at such election, he is counted as effectually against license, when he neglects to vote on that question, as when he casts a ballot against it. It follows that there is not, at any stage of the election proceedings, any affirmative duty, relating to the license question, devolving upon the elector who opposes the granting of license. He certainly can lose no right or advantage through any defect in the ballot used upon the submission of this question, and it is therefore not for him to investigate the form of ballot that has been prepared for use, and he can lose no right through his failure to investigate.

[4] Respondents urge that the only reason why the statute requires this question to be submitted upon a separate ballot is in order that it may be separated from the political questions arising in connection with the election of municipal officers; that the statute did not contemplate any more than a ballot separate from the ballot used for election of officers; that there was therefore a substantial compliance with the statute, and at least a compliance with the spirit of the law. There would be some merit in respondents' argument if they had not started from the wrong premise. The use of the separate ballot was clearly not for the purpose of separating this question

from politics. Common experience would teach any member of the Legislature that he could not, in any degree whatsoever, by mere use of separate ballots, accomplish the separation of this question from other matters to be voted upon at the same election. There is one thing, however, that can be accomplished by the use of a separate ballot, and that is the calling of the voter's attention directly and specifically to the question submitted thereon. This was clearly what was sought in the enactment of the statute requiring the separate ballot. It follows that the submission of this question in connection with a long ordinance, especially in the form in which the ballot was printed, was, if possible, even more in conflict with the spirit of the law than would have been its submission upon the ballot used for election of officers; and it certainly was in utter disregard of the letter of our law.

[5] The final contention of respondents raises a question of the highest importance, as the principles of law involved are far reaching in their application to elections. It is only their importance that warrants our doing more than referring to the opinion of this court in *Hughes v. Hill et al.*, 138 N. W. 290, decided at this term. The failure to provide the proper ballot was the fault of a public officer. There was no allegation that any voter was misled. No question of defective marking of ballots is before us. There is no dispute as to how the majority voted. The sole question, then, is whether or not the provision requiring a separate ballot is mandatory or merely directory. The following statement of the law as given in the case of *Horsefall et al. v. School District, etc.*, 143 Mo. App. 545, 128 S. W. 34, is that usually found in opinions and text-books: "We think it may now be said to be the established rule in this state, as it is generally in other jurisdictions, that, when a statute expressly declares any particular act to be essential to the validity of an election, then the act must be performed in the manner provided, or the election will be void; also, if the statute provides specifically that a ballot not in a prescribed form shall not be counted, then the provision is mandatory, and the courts will enforce it, but if the statute merely provides that certain things shall be done, and does not prescribe what results shall follow if these things are not done, then the provision is directory merely, and the final test as to the legality of either the election or the ballot is whether or not the voters have been given an opportunity to express, and have fairly expressed, their will." See, also, *McGrane v. County, etc.*, 18 Idaho, 714, 112 Pac. 316, 32 L. R. A. (N. S.) 730, Ann. Cas. 1912A, 165; *Short v. Gouger* (Tex. Civ. App.) 130 S. W. 267. What seems to us to be the true rule is laid down in the following from the opinion of the

court in the case of *Perry v. Hackney*, 11 N. D. 154, 90 N. W. 485: "The statute under consideration is, then, not in terms mandatory; but it is well settled that the employment of express words is not always necessary to give it that character. 'Where the aim and purpose of the lawmaking power would be plainly defeated if the command to do the thing in a particular manner did not imply an inhibition to do it in any other, no doubt can be entertained as to the mandatory character of the statute.' 23 Am. & Eng. Enc. Law, pp. 453, 454, and cases cited. The proper test for distinguishing mandatory from directory provisions in election laws is well stated by the Supreme Court of Indiana in *Parvin v. Wimberg*, 130 Ind. 568, 30 N. E. 790, 15 L. R. A. 775, 30 Am. St. Rep. 254, as follows: 'If a statute expressly declares any particular act to be essential to the validity of an election, or that its omission shall render the election void, the courts, whose duty it is to enforce the law as they find it, must so hold, whether the particular act in question goes to the merits or affects the result of the election or not; for such a statute is mandatory, and the court cannot enter into the question of its policy. On the other hand, if a statute simply provides that certain things shall be done within a particular time or in a particular manner, and does not declare that their performance shall be essential to the validity of an election, *they will be regarded as mandatory if they affect the merits of the election, and as directory only if they do not affect its merits.*' We also approve the following from the case of *Jones v. State ex rel. Wilson*, 153 Ind. 440, 55 N. E. 229: "All provisions of the election law are mandatory, if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote or to the ascertainment of the result, *or unless the provisions affect an essential element of the election*, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void."

Keeping in view the fact that the clear purpose of the statute was to call the attention of each and every voter to the specific question submitted to him, and to put it before him so that there could be no chance for him to confuse it with any other matter submitted at the election—in fact, that the purpose was to make the voting upon this question an election separate and distinct from any other election held at the same time and place—it becomes apparent that this provision of statute does "affect the merits of the election," that it does "affect an essential element of the election." This being true, a court will not investigate to ascertain

whether or not the disregard of this "essential element" going as it does to "the merits of the election" did, in fact, in a given case affect the apparent result of the election. A case very similar in principle to this was that of *Gomez v. Timon et al.* (Tex. Civ. App.) 128 S. W. 656. We quote from the syllabus: "Rev. St. art. 3388, as amended by Acts 31st Leg. c. 29, provides that votes at a local option election shall be by official ballot having printed or written at the top thereof the words 'official ballot,' which ballot shall have written or printed thereon the words 'for prohibition' and 'against prohibition.' It further provides that the voter shall be furnished by the presiding officer with one ballot, and shall not be permitted to depart with such ballot, and that those favoring prohibition shall erase the words 'against prohibition' and those opposing it shall erase 'for prohibition,' and none but official ballots shall be received and counted. Held, that the provisions of the statute as to the character of the ballots used were mandatory so that a local option election was void where the ballots did not have the words 'official ballot' thereon, and in which two ballots were given to each voter marked respectively 'for prohibition,' and 'against prohibition,' the voters voting one of such ballots and retaining the other in their possession." It is very clear that the provision of the law declaring that none but the official ballot should be counted was not the controlling feature in this case. The ballots came from the proper officers and in fact were the "official ballots," but such ballots failed to comply with the provisions of the law in two respects: one of which, the having of the words "official ballot" thereon, might perhaps have been held merely directory, the other of which, the using of two ballots instead of one, went to an "essential element" of the law, and could not be disregarded whether it actually affected the result of the election or not.

The judgment of the trial court and order sustaining the demurrer are reversed.

HANEY, J., dissenting.

STATE v. SHEPHARD.

(Supreme Court of South Dakota. Oct. 25, 1912.)

1. CRIMINAL LAW (§ 1178*)—ASSIGNMENTS OF ERROR—ABANDONMENT.

Assignments of error not mentioned or discussed by accused in his brief on appeal will be deemed abandoned.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. § 1173.*]

2. HOMICIDE (§ 171*)—ASSAULT WITH INTENT TO KILL—EVIDENCE—ADMISSIBILITY.

Where accused and prosecutor had a difficulty, and accused pulled a revolver and struck prosecutor, who ran into a store, and closed the

door to prevent accused from entering, but later opened the door part way, so that his head was visible, whereupon accused shot at him, the sustaining of an objection to a question on the cross-examination of the proprietor of the store as to whether prosecutor could have gone out the back door was proper, especially since there was nothing to show that prosecutor knew that he could escape through a back door.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 351-358; Dec. Dig. § 171.*]

3. CRIMINAL LAW (§ 1130*)—APPEAL—QUESTIONS REVIEWABLE—STATEMENT OF FACTS IN APPELLANT'S BRIEF.

Where the ruling on an objection to a specific question asked a witness is sought to be reviewed on appeal, the statement of facts in the brief must show the question objected to, the grounds of objection, and the ruling thereon, and that an exception was properly taken, the answer to the question, if any, and sufficient of the surrounding evidence, if any, to show the connection in which the question was propounded, and there must be an assignment of error in the record and brief properly raising the alleged error on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2965-2970, 3205; Dec. Dig. § 1130.*]

4. CRIMINAL LAW (§ 761*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

The court in its instructions may assume facts proved by undisputed evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1754-1764, 1771; Dec. Dig. § 761.*]

Appeal from Circuit Court, Meade County; Wm. G. Rice, Judge.

Roy Shephard was convicted of assault with intent to kill, and he appeals. Affirmed. See, also, 136 N. W. 1088.

Harry P. Atwater, of Sturgis, for appellant. Royal C. Johnson, Atty. Gen., M. Harry O'Brien, Asst. Atty. Gen., and Claude C. Gray, State's Atty., of Sturgis, for respondent.

McCOY, P. J. Appellant was convicted of the offense of assault with a firearm with intent to kill one Perkett, and has appealed, alleging error. From the record it appears that appellant and Perkett met in the street in front of a hardware store in the town of Faith, Meade county; that appellant said something to Perkett about having made misrepresentations, whereupon Perkett called appellant a liar, and that he was there to back up his statement, and commenced taking off his coat; that appellant also commenced taking off his coat, but quit removing his coat and pulled a revolver, and struck Perkett twice over the head with the same; that, after being so struck, Perkett turned and fled into the hardware store, pursued by appellant. Bystanders interfered, and prevented appellant from entering the store, and endeavored to take the revolver from him. Perkett closed the door after him, but soon afterwards opened the door part way, so that his head was visible, whereupon appellant fired a shot at him with the revolver, the bullet striking near the side of the door near Perkett's head.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

At the time the shot was fired Perkett had a post hole auger in his hands. Appellant himself testified: "Perkett was standing in the door when I fired the shot, and, after I fired it, he jumped back. I had no intention of hitting him. I am an expert shot. I had no intention of shooting him or killing him. I had no purpose other than defending myself. I fired the shot to prevent him from coming out. I did not shoot at him, but to scare him, and keep him away from me. I did not shoot very close, could have shot closer. I was careful where I shot. I was 14 feet from him when I shot. The gun was a 44 Colts."

[1] All assignments of error not mentioned or discussed by appellant in his brief will be deemed abandoned.

[2] On the trial Mr. Vanderley, proprietor of the store in which Perkett took refuge, on cross-examination, was asked by appellant's counsel the following question: "Mr. Perkett could have gone out the back door had he so desired?" To which question respondent's counsel objected as immaterial, and which objection was sustained, and appellant excepted to such ruling, and now urges the same as error. We are of the opinion the court ruled correctly, especially in view of the fact that there is nothing in the record tending to show that Perkett knew, or had any knowledge, that he could have escaped through some back door had he so desired.

[3] Appellant also contends that to questions 180, 182, and 197 defendant's objections should have been sustained as immaterial. Questions 180, 182, and 197 are not contained in the statement of facts in appellant's brief. Some reference is made to said questions in the assignments of error. Where a ruling of the trial court in sustaining or overruling an objection to a specific question is sought to be reviewed on appeal, the statement of facts in the brief must show the question objected to and the grounds of objection, the ruling of the court thereon, and that an exception was properly taken, the answer to the question, if any, together with sufficient of the surrounding evidence, if any, showing the connection in which such question was propounded, and also there must be an assignment of error in the record and brief properly raising the alleged error on appeal. The appellate court will not review or consider such ruling upon an assignment of error alone. The statement of fact contained in the brief must show all the facts and procedure upon which the assignment of error is based.

[4] Appellant further assigns as error seven particular instructions given by the court to the jury. It will serve no useful purpose to set out in full herein such lengthy instructions. The principal ground of objection is that the court invaded the province of the jury in stating that certain facts were undisputed, and that there was no self-defense

shown by the testimony of defendant. This court held in the case of *State v. Kinney*, 21 S. D. 390, 113 N. W. 77, that an instruction in a criminal case was not erroneous for assuming facts proved by undisputed evidence. In the present case the facts assumed by the court in his instruction were undisputed, and the instructions complained of clearly within the rule of the *Kinney Case*.

Finding no error in the record, the judgment appealed from is affirmed.

HARRIS v. LYONS et al.

(Supreme Court of South Dakota. Oct. 25, 1912.)

1. TRIAL (§ 61*)—ORDER OF PROOF—EVIDENCE IN CHIEF.

In claim and delivery for a team of horses, in which the complaint was in the ordinary form, plaintiff was only required, in proving his main case, to prove ownership of the horses, demand therefor, and defendant's refusal, and was not bound to prove the facts alleged in the answer, which set out the whole transaction between the parties, but should properly have met the proof relating to such facts after defendant had introduced evidence thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 146, 147; Dec. Dig. § 61.*]

2. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—ORDER OF PROOF.

The proof of the entire transaction between the parties by plaintiff in a claim and delivery proceeding as a part of his main case, instead of merely proving ownership, demand for possession, and refusal, which was all he was required to show in the first instance, was advantageous to defendant, rather than harmful.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

3. CONTRACTS (§ 34*)—CONDITIONAL SIGNATURE.

Where a contract provided that it should not be "binding until all the parties above mentioned have signed the same," it was not binding upon the parties named therein if one of them did not sign it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 162-166; Dec. Dig. § 34.*]

4. APPEAL AND ERROR (§ 232*)—OBJECTIONS TO EVIDENCE—SUFFICIENCY.

An objection to evidence tending to show estoppel, merely on the ground that it was not admissible under the pleadings, was insufficient to raise the objection that it was not admissible, because no estoppel had been pleaded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1430, 1431; Dec. Dig. § 232.*]

5. APPEAL AND ERROR (§ 934*)—PRESUMPTIONS—SUPPORT OF JUDGMENT.

It will be presumed, on appeal, in support of a judgment for plaintiff that the jury found certain facts as claimed by plaintiff; such facts being necessary to support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781; Dec. Dig. § 934.*]

6. CONTRACTS (§ 34*)—VALIDITY—EXECUTION BY ALL PARTIES—EQUITABLE ESTOPPEL.

A supplemental contract recited the sale to plaintiff and R. of certain machinery by defendants, provided that it should not become binding until all of the parties named therein had signed it, but after its execution, without being signed by R., defendants stated to plaintiff that it did not make any difference whether R. signed it, and that it was binding on defendants and plaintiff in any event, and that defendants did not rely upon R.'s liability upon the supplemental contract, but only upon the original contract; and plaintiff, acting on such representations, proceeded to carry out the supplemental contract. Held, that defendants were estopped from claiming the invalidity of the supplemental contract by failure of R. to sign it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 162-166; Dec. Dig. § 34.*]

7. SALES (§ 168½*)—TEST OF PROPERTY.

If the parties to a contract for the sale of machinery agreed that the purchaser of the machinery should test it before closing the contract, the trial thereof should be a fair test, in good faith, in the manner provided by the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 409-421; Dec. Dig. § 168½.*]

8. REPLEVIN (§ 71*)—ADMISSION OF EVIDENCE.

In claim and delivery proceedings for horses, which plaintiff agreed to exchange with defendant for machinery under a contract to which R. was originally a party with plaintiff, though his signature to a supplemental contract relating to the machinery had been waived by defendant, in which plaintiff claimed that the machinery would not work as agreed, evidence by R. that plaintiff was the purchaser of the machinery, and that R. did not receive any consideration for signing the contract, was not material to any issue.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 285-291; Dec. Dig. § 71.*]

9. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of the evidence was not prejudicial to defendant, R. not being a party to the action, since its only effect would be to throw light on the intent of the parties in waiving the condition of the supplementary contract requiring the signature of all parties thereto, including R.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

Appeal from Circuit Court, Spink County; Alva E. Taylor, Judge.

Action by Frank Harris against B. F. Lyons and D. W. Lyons, copartners under the style of Lyons Bros. From a judgment for plaintiff and an order overruling a motion for a new trial, defendants appeal. Affirmed.

Bruell & Morris, of Redfield, for appellants. Roy T. Bull, of Redfield, for respondent.

SMITH, J. Action in claim and delivery to recover possession of a team of horses of the alleged value of \$200. Verdict and judgment for plaintiff. Defendants appeal from the judgment and an order overruling motion for a new trial.

A brief statement of the pleadings and of the evidence offered at the trial is necessary to an understanding of the errors assigned and discussed in appellants' brief. The complaint is in the ordinary form in claim and delivery. The answer denies that the plaintiff is the owner of or entitled to the possession of the property, and the wrongful detention thereof. The answer further alleges that about August 25, 1910, plaintiff and one J. E. Rowe purchased of Nichols & Shepard Company, by written contract, a Hart-Parr traction engine, secondhand, and a ten-bottom Deere engine gang plow; that said purchasers were the owners at the time of the team of horses described in the complaint and contract, and agreed to turn in said team as a part payment of the purchase price of the outfit, and that this was the only part of the purchase price to be paid at the time of the delivery of the rig to Harris and Rowe; that said rig was delivered to plaintiff and Rowe under said contract; that immediately after the execution of said contract the same was assigned and transferred by Nichols & Shepard Company to the defendants, Lyons Bros., who ever since have been and now are the owners thereof; that after Harris and Rowe had secured possession of the rig they refused to deliver possession of the horses; that thereupon Lyons Bros., on the 12th day of September, 1910, began an action against Harris and Rowe to recover possession of said horses; that Harris and Rowe appeared in the action on the 13th day of September, 1910, and, pursuant to a written stipulation then made, the controversy was settled, and the horses in dispute were turned over to Lyons Bros., and the action dismissed; and that defendants thus came into, and ever since have been in, lawful possession of said horses.

To this answer plaintiff served and filed a reply, admitting the purchase of the rig, but alleging that the signatures to the written agreement of sale made at the time were obtained by false and fraudulent representation as to the ownership of the property and the contents of the instrument; and further alleging that at the time of said sale it was represented that all of said machinery was in good first-class working condition and would do good work; and it was agreed that when said machinery was shown to be in a good, satisfactory condition and able to do the work for which it was intended, and plaintiff had learned to operate the same, settlement should be made and the horses delivered; that said conditions and agreements were fraudulently omitted from the written agreement of purchase and sale; that said rig was delivered to the plaintiff, who attempted to operate said engine and plows with the assistance of divers persons skilled in running such machinery, but that the same could not be operated and refused

to plow; that plaintiff notified defendants that he would not accept the same or make settlement therefor; that thereupon defendants brought action of claim and delivery for the recovery of possession of said horses; that while said action was pending defendants represented to plaintiff that said engine was then in good working condition and would do good work, and if plaintiff would then give said engine a second trial, in case the same did not prove satisfactory, the defendants would take the same back; that defendants would discharge the action in court and furnish a competent person to operate said engine, and that the horses should remain in possession of defendants until said engine was given such trial; that, pursuant to said agreement, an instrument was drawn up in writing and signed by plaintiff and defendants, and the pending action dismissed by stipulation. The written instrument referred to is in the following language:

"Exhibit A.

"Whereas Lyons Bros., of Redfield, S. D., parties of the first part, did, on Aug. 25, 1910, sell and deliver to Frank Harris and J. E. Rowe, parties of the second part, one 10-bottom Deere stubble gang plow and one secondhand 22-45 H. P. gas engine of Hart-Parr make, together with such equipment as is mentioned in the written contract made between the parties hereto on said date; and whereas, the plows are satisfactory to the second parties, but they have not had sufficient opportunity to test said engine and ascertain if it is according to contract: Wherefore it is agreed that second parties may have three days to test said engine, as follows: That said engine will pull continuously in a good and workmanlike manner said gang plows when plowing with eight bottoms at a depth of from four to six inches deep; that after using said engine for a period of three days it should prove unable to do said work as aforesaid, first parties agree to take the same back and surrender the span of horses this day delivered to them by second parties. If said engine does said work as aforesaid, then second parties agree to sign the notes described in the contract of Aug. 25th, and fully perform all the terms therein contained. It is also agreed that said test of said engine shall be made as soon as first parties furnish a competent engineer to run said engine for said test; that said engineer shall be paid by first parties, but second parties shall board him and shall pay for all gas and oil used in making said test. If said contract is closed as aforesaid, first parties agree to furnish an engineer for an additional three days to run said engine for second parties free of charge, except second parties shall board him. This contract shall not supersede the contract made on Aug. 25, 1910, but shall be considered as supplementary thereto, and shall not

become binding until all of the parties above named have signed the same. Replevin action between these parties to be dismissed at cost of first parties. Dated Sept. 14th, 1910. Lyons Bros., by B. F. Lyons. Frank Harris."

The reply further alleges that after this written agreement was entered into defendants furnished divers persons skilled in the operation of traction engines and plows, who attempted to operate said machinery, but that the same refused to work, and such persons were compelled to abandon attempts to operate the same; that after said machinery was thus fully tried and found unfit for work plaintiff notified defendants that he would not accept the same, and demanded a return of the horses, which demand was refused.

At the trial plaintiff was sworn as a witness in his own behalf, and, in substance, testified that on the 25th of August, 1910, he was the owner of the team of horses in controversy; that he had a conversation about that time with the defendants in regard to buying the gasoline engine and plowing outfit; that on or about the 14th of September, 1910, he had another conversation with Barney Lyons concerning the horses, which conversation took place at his counsel's office; that he then signed the agreement with Lyons Bros., marked "Exhibit A," and that Barney Lyons signed the same, on behalf of the firm of Lyons Bros., at the same time. Exhibit B was then shown to the witness, who testified that it was the paper referred to in Exhibit A; that the first time he saw Exhibit A thereafter was on August 25th, at Lyons Bros.' office. Exhibits A and B were offered and received in evidence over defendants' objection. Plaintiff was thereupon interrogated by his counsel at great length, and, over numerous objections and exceptions, was permitted to testify concerning attempts made after September 14, 1910, by himself and the defendants and certain experts to make the machinery do satisfactory work, which attempts, he testified, were failures. The witness was further permitted to testify, over proper objections, that at the time of the original agreement for purchase of the property Lyons Bros. inquired of Harris what security he wanted to give, and that "Mr. Rowe volunteered and spoke up and said, 'I will go on the note with him;'" that Mr. Rowe's statement was made in response to the inquiry of Barney Lyons about security. The written instrument, Exhibit B, signed by Harris and Rowe and Lyons Bros., referred to in Exhibit A, is set out in the record on this appeal as follows: "Exhibit B is an order, signed by Frank Harris and J. E. Rowe, running to Nichols & Shepard Co. for a traction engine, a set of plows, and other property, which they agree shall be secondhand machinery, and for which they agree to pay as follows: One bay span of

geldings; one note for \$700, due Nov. 1, 1911; one note for \$700, due Nov. 1, 1912; one note for \$600, due Nov. 1, 1913. With interest on notes at 6 per cent. per annum. Contract is dated August 25, 1910"—and not otherwise.

In the assignments of error in the record, appellants specify 11 particulars in which the evidence is alleged to be insufficient to sustain the verdict, 100 assignments of error in rulings on evidence, and 21 assignments of error in refusing instructions requested by defendants' counsel and errors in instructions given the jury, and in refusing to set aside the verdict and grant a new trial.

[1] It is manifestly impossible to consider these assignments of error seriatim. The case was tried upon the issues raised by the complaint, answer, and reply. At the trial plaintiff apparently deemed it incumbent upon him to present the entire transaction covered by the allegations contained in the complaint, answer, and reply. And many of the rulings upon the introduction of evidence complained of and assigned as error are upon objections founded upon the theory that under the complaint the plaintiff should not be permitted to prove the entire transaction, but should have been confined to the allegations of the complaint in claim and delivery. It is plainly apparent that the plaintiff was not required and should not have been permitted in his main case to present proof of the entire transaction between the parties. He should have proved his ownership of the horses, demand for possession of the same, and the refusal of defendants to surrender possession, and rested his case. Defendants then could have introduced evidence of the transaction pleaded in the answer, and plaintiff, without any reply, would have been at liberty to prove all the facts alleged in his reply connected with the transaction set out in the answer. This would have been the appropriate procedure. But, had this procedure been followed, the evidence before the court and jury could not have been other or different from that offered and received on the trial, and contained in the record; and we are wholly unable to perceive in what way appellants could be or have been injured or prejudiced by the irregular course actually pursued, and, unless injury or prejudice to defendants' rights has in some way resulted, this court would not be justified in granting a new trial. Apparently appellants' counsel treated the reply as a proper pleading in the case. No motion was made to strike it out. The reply itself merely advised defendants of facts by means of which the plaintiff might seek to avoid the matters of defense pleaded in the answer.

[2] It seems to us, therefore, that when the plaintiff assumed the burden of proving the entire transaction in the first instance it was distinctly to the advantage of defend-

ants, rather than to their injury. No further attention will therefore be paid to the numerous assignments of error upon rulings on the introduction of evidence, in which the objections are predicated upon this alleged irregularity in procedure. At the trial no attention was paid by either party to the terms and conditions of the memorandum of agreement, Exhibit B, originally entered into between Harris and Rowe and the Nichols & Shepard Company, which was assigned to the defendants, Lyons Bros. No attempt appears to have been made by plaintiff to prove that this agreement was procured by fraud or artifice, as alleged in the reply. The entire case seems to have been upon the theory that the rights of both parties were wholly fixed and determined by the stipulations and agreements contained in Exhibit A, the supplemental contract.

It is appellants' contention, however, that this supplemental contract was never in force, inasmuch as it was never signed by J. E. Rowe, one of the parties named therein, because it contains an express stipulation that it "shall not become binding, unless all of the parties above named have signed the same." At the trial plaintiff sought to show that after the execution of the contract, Exhibit A, by Lyons Bros. and Harris the signature of Rowe thereto was waived, and that defendants are not now in a position to insist upon the invalidity of the contract for that reason. Plaintiff, while upon the witness stand, was asked the following question: "I will ask you whether or not you had a conversation with Barney Lyons in my office on September 14, 1910, after you had signed Exhibit A, in reference to Mr. Rowe's signing the same? (Objected to as incompetent, inadmissible under the pleadings, tending to vary the terms of a written instrument, no proper foundation laid. Overruled. Exception.) Answer: He said they were binding on himself and me, but not on Mr. Rowe; but he said: 'That don't make any difference whether Rowe signs it or not. If that engine don't go out and give thorough satisfaction, I will pull it in, and he can have his horses. I don't want Mr. Rowe to have something that he can't use. It is worth the money.' (Motion to strike out the answer denied. Exception.)"

Plaintiff also, over proper objections and exceptions, was permitted to introduce certain evidence tending to show that Rowe had no interest in the transaction, other than as a surety on the original contract, Exhibit B. It is quite clear that, unless this evidence was properly received and was sufficient to constitute a waiver of the condition in the contract, Exhibit A, requiring the signature of all the parties named therein, before the same became binding, the contract was ineffective, and could not have been properly received in evidence for any purpose.

[3] The first question presented is wheth-

er the contract was properly received in evidence over defendants' objection that it was incompetent under the allegations of the pleading. The contract, Exhibit A, was fully set out in plaintiff's reply. The condition requiring the same to be signed by all the parties named therein, before the same should become binding, was disclosed by the pleading itself. The plain object of this reply was to defeat the matters pleaded in the answer. The original contract, as set out in the record, contained no condition or provision under which the plaintiff would be entitled to a return of the horses. It contained neither warranty nor any condition entitling the plaintiff to a trial of the plowing rig, and a return, should it prove unsatisfactory. It is clear, therefore, that plaintiff's entire right to a return of the horses depended upon the terms and stipulations contained in this contract, Exhibit A. Upon its face, in the absence of further allegations, this contract was not binding upon the parties named therein, because the contract itself disclosed that it was not signed by Rowe. *Barber v. Burrows et al.*, 51 Cal. 404; *Waggeman v. Bracken*, 52 Ill. 468.

[4, 5] If this contract ever became binding upon the defendants, it was because of statements and acts of such character as to constitute a waiver of this condition in the contract operating as an estoppel to assert its invalidity. It will be observed that the plaintiff's reply, although it sets out the contract in full, fails to allege any of the facts which might be claimed to constitute such an estoppel. The only objection pertinent to the pleading which was made to the evidence offered and received to prove these facts is that the same was inadmissible under the pleadings. Such an objection does not disclose the grounds of the objection, which, if properly stated, would have been that such evidence was inadmissible, because no estoppel had been pleaded. The objection in the record, therefore, under the well-settled rule of this court, presents no question for review, and the evidence must be considered as having been properly received. Had the grounds of the objection been properly stated, thus advising plaintiff, he might, if necessary, have amended his reply by pleading an estoppel in connection with the contract itself. We must presume in support of the judgment that the jury found the facts thus testified to as claimed by plaintiff.

[6] The question then presented is whether defendants should be held estopped by their statements and acts, in connection with the stipulations in the contract, from asserting its invalidity. The statements of the defendant Barney Lyons were to the effect that it did not make any difference whether Rowe signed the contract or not; that it was binding on himself and the plaintiff in any event; and, acting apparently on these statements, plaintiff and defendants

then proceeded to carry out the stipulations of the contract as to a trial of the engine and plows—the defendants furnishing an engineer to run the engine for the test, and continuing to run the same during the three days specified in the contract. It also appears that Barney Lyons said they relied upon the liability of Rowe upon the original contract, and not upon the supplemental contract.

Upon these facts we are clearly of opinion the defendants should now be held to have waived the signature of Rowe to the latter contract, and should be held estopped to assert its invalidity upon this appeal.

Appellants, in their brief, discuss at some length the right of rescission upon a breach of warranty, and the necessity of a return or offer of return of the property warranted. No question of a breach of warranty or of rescission is presented by the record upon this appeal.

[7] Under the specifications of insufficiency of evidence to sustain the verdict, appellants' counsel say the record shows the plows worked satisfactorily to the plaintiff, and that the engine worked continuously in a good and workmanlike manner, pulling eight plows at a depth of from five to six inches; that plaintiff never attempted to give the engine a fair trial, but was endeavoring to find some way to escape from his obligations under the contract. The evidence relating to all these matters was conflicting, and was for the jury, and, we think, was fairly and fully submitted by the instructions given them. They were instructed that "the trial of the engine mentioned in Exhibit A should be a fair and bona fide trial on the part of both Mr. Harris and Lyons Bros., and in the manner provided in Exhibit A; and it is for you to determine from all of the evidence whether this engine, after a fair trial, did or did not meet with the requirements of Exhibit A (and by Exhibit A, whenever referred to, is meant the white paper, dated September 14, 1910, signed by Lyons Bros., by B. F. Lyons, and Frank Harris). If the engine, after a fair trial, did meet the requirements of Exhibit A, then plaintiff cannot recover." The court also instructed the jury: "According to the terms of Exhibit A, it was not to become operative until all the parties thereto had signed same, and you are instructed that this provision is binding on all the parties; but you are further instructed that this provision could, after the instrument was signed by Lyons Bros. and Harris, be modified, and the signature of Mr. J. E. Rowe could be waived; and if the parties who did sign Exhibit A afterwards changed same, or waived the signature of Rowe and went on and acted under the provisions of Exhibit A just as if Rowe had signed it, and knowing that he had not signed it, then the provisions of Ex-

hibit A are binding on the parties who did sign it. * * *

This instruction states the law correctly, as we view it, and under it the questions of fact were determined by the jury in favor of respondent. We cannot disturb the verdict. Defendants requested the court to instruct the jury "that if Exhibit A became operative, and the engine did not fulfill its requirements, that plaintiff had no right to return or offer to return both plows and engine and demand his horses, because he had already accepted the plows and found them satisfactory." Such an instruction would not be warranted by anything contained in the record, and was properly refused. It was clearly the intention of the parties to the contract that the engine and plows were to be used together, and not otherwise. 35 Cyc. 115 (b), and cases cited.

[8, 9] The witness Rowe, party to the contract, was permitted to testify, over appellants' objections, that it was stated at the time the rig was purchased through Lyons Bros. that Harris was the purchaser, and that the witness did not receive any consideration for signing the contract. Whether Rowe received any consideration was wholly immaterial to any issue in the case, and the objection should have been sustained; but Rowe is not a party to this action, and the question of his liability could in no way affect the defendants, except in so far as it might throw light on their intent to waive the condition in the contract requiring the signatures of all parties thereto. The evidence was not prejudicial to appellants, even if improperly received. We have considered all the assignments of error, and have carefully examined the whole evidence; and, even though the verdict of the jury might be different from that which the court would have found, yet the facts are for the jury to decide, and we find in the record sufficient evidence to sustain the finding, if believed by them to be true.

We find no reversible error in the record. The judgment and order of the trial court are therefore affirmed.

STATE ex rel. NULL v. POLLEY, Secretary of State.

(Supreme Court of South Dakota. Oct. 25, 1912.)

1. JUDGES (§ 39*)—DISQUALIFICATION—INTEREST.

The rule that a judge may not sit in a case in which he is interested is subject to the demands of necessity, and the Supreme Court must hear an application for a writ of prohibition to the Secretary of State to prevent him from certifying to the various county auditors the names of candidates for the position of judges of the Supreme Court to be voted for at the approaching general election, on the ground of the invalidity of law under which the election is to be held, though three

of the five judges composing the court may have their terms of office extended by the court's decision, and one of them is a candidate for re-election, since the refusal to hear the application would leave the relator without any forum in which he could be heard; there being no provision of law providing for any substitutes for judges of the Supreme Court who may be disqualified.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 184, 186; Dec. Dig. § 39.*]

2. JUDGES (§ 3*)—COURTS—JUDGES—ELECTION.

Const. art. 5, § 26, relating to election of judges, and providing that the Legislature may provide for the election of such officers on a different date from that on which an election is held for any other purpose, and, for the purpose of making such provisions may extend or abridge the term of office for any of such judges then holding, but not for more than six months, gives a continuing power to the Legislature to fix the time of judicial elections, and for that purpose to change the terms of judges in office at the time the Legislature acts, and is not limited to the judges first elected under the Constitution.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 4-10; Dec. Dig. § 3.*]

3. STATUTES (§ 181*)—LEGISLATIVE INTENT.

Effect will be given by the courts to the intent and purpose existing in the legislative mind.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

4. JUDGES (§ 3*)—TERMS OF OFFICE—ELECTION—CONSTITUTIONAL PROVISIONS.

Const. art. 5, § 26, provides that the Legislature may provide for the election of judges on a separate day from any other election, and for that purpose may extend or abridge the term of any judges then holding office, but not for more than six months. Laws 1893, c. 84, required the holding of the next judicial election in November of that year, and established the term of the judges of the Supreme Court at six years. Laws 1901, c. 118, provided that at the general election of 1904, the judges of the Supreme Court should be chosen for the term next succeeding that for which such judges were then serving, that the terms of the judges elected in 1899, and the terms of their successors should each be six years and six months, and that the election of such judges thereafter should be at the general election next preceding the expiration of their respective terms of office. The right to hold a judicial election in 1912 was attacked on the ground that the power given the Legislature by Const. art. 5, § 26, was exhausted by a single exercise in 1893, and that the extension by the act of 1901 of the terms of the sitting judges and their successors invalidated the act. *Held*, that it was immaterial whether the extension of the terms of judges was within the power of the Legislature or not, since that provision was merely incidental to the fixing of the time of the judicial election, which the Legislature could do, and should only be considered as an existing fact in determining when the election was ordered to be held.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 4-10; Dec. Dig. § 3.*]

Proceeding by the State, on the relation of T. H. Null, by prohibition, to restrain Samuel C. Polley, Secretary of State, from certifying the nomination of candidates for the office of supreme judge. Demurrer to the petition sustained, and motion to quash the proceeding is granted.

The Attorney General and Perry F. Loucks, of Watertown, for defendant.

SMITH, J. Order to show cause why a writ of prohibition should not issue restraining defendant as Secretary of State from certifying to the county auditors of the several counties in the state, the nomination of candidates for the office of supreme judge to be voted for at the general election to be held in November, 1912. The Attorney General, Royal C. Johnson, consents to, and in effect joins in, the application for the writ in behalf of the state of South Dakota, on the ground that the questions involved are of great public interest and importance. The writ was returnable on the 16th day of September, 1912, at which time defendant Polley, as Secretary of State, appeared by the Attorney General and Perry F. Loucks, his counsel, and filed objections to further proceedings herein, and a motion to dismiss the same, and to vacate and discharge the order to show cause, upon the ground that three of the judges of this court, namely, Judges Corson, Haney, and Whiting are directly interested in the determination thereof, for the reason that they are incumbents of the office of judge of the Supreme Court, that their current terms of office may be extended by the effect of the decision, and that Judge Whiting is the Republican nominee for reelection.

[1] The objection thus interposed that a majority of the judges of this court are disqualified to act in this proceeding presents a question embarrassing in its nature, but which must be decided and determined in this proceeding. It is elementary that no man may sit in judgment upon his own cause, and no citation of authorities is necessary to demonstrate the law. It is, however, almost universally held that the rule is one which must yield to necessity. In 23 Cyc. 581 (f), it is said: "The rule as to disqualification of judges must yield to the demands of necessity, where disqualification, if permitted to prevail, destroys the only tribunal in which relief may be sought and thus effectually bars the door of justice. The disqualified judge is bound to hear and decide the cause." The same rule is stated in 17 Am. & Eng. Enc. of Law (2d Ed.) 744 (6b).

It was suggested in argument by defendant's counsel that the rule as stated in 23 Cyc., supra, is not sustained by the authorities there cited. In this contention defendant's counsel are in error. In the recent case of *Galey v. Board of Commissioners*, 174 Ind. 181, 91 N. E. 598, Ann. Cas. 1912C, 1099, the Supreme Court of Indiana adopted and laid down the rule as stated in *Philadelphia v. Fox*, 64 Pa. 170, where the court, speaking by Mr. Justice Sharswood, says: "The true rule undoubtedly is that whenever it becomes necessary for a judge to sit, even where he has an interest, where no provision

is made for calling another in, and where no one else can take his place, it is his duty to hear and decide, however disagreeable it may be. *Matter of Ryers*, 72 N. Y. 1, 28 Am. Rep. 88." In *State ex rel. Cook et al. v. Houser*, Secretary of State, 122 Wis. 534, 100 N. W. 964, the court held as stated in the syllabus: "All common-law rules as to the disqualification of judges give way to the stern rule of necessity, permitting one to act judicially, though he would be disqualified otherwise, if, were he not to act, there would be no tribunal to furnish a remedy for the case in hand." In *Bliss v. Caille Bros. Co.*, 149 Mich. 601, 113 N. W. 317, 12 Ann. Cas. 513, the court says: "It is well established that the rule of disqualification of judges must yield to the demands of necessity, as, for example, in cases where applied, it would destroy the only tribunal in which relief could be had. See cases collected in 23 Cyc. 581, note 76." In *Philadelphia v. Fox*, supra, Justice Sharswood says: "My brother Hare and myself were both members of the society, and would gladly have excused ourselves from taking any part in the decision, but it was impossible. Without one of us, at least, there could have been no court. We heard and tried the case in favor of the society, and that judgment was affirmed by this court."

* * * The true rule unquestionably is that wherever it becomes necessary for a judge to sit, even where he has an interest, where no provision is made for calling another in or where no one else can take his place, it is his duty to hear and decide, however disagreeable it may be. The rights of the other parties require it." The same rule obtains in the English courts. *Dimes v. Grand Junction R. R.*, 3 H. of L. Cases, 759; *Thelluson v. Rendlesham*, 7 H. of L. Cases, 429; 11 Eng. Reprint, 172. Decisions of other states might be cited sustaining the rule as stated above, but we deem it unnecessary. The objection to the qualification of three of the judges of this court to act in this case, if sustained, would disqualify a majority of the court. Section 7, art. 5, of the Constitution of this state declares: "A majority of the judges of the Supreme Court shall be necessary to form a quorum, or to pronounce a decision, but one or more of said judges may adjourn the court from day to day or to a day certain." If three of the judges of this court are disqualified, the remaining two are powerless to pronounce a decision upon the rights of the parties in this case. Neither the Constitution nor any law of this state provides for the calling in of a judge of another court or member of the bar to act in the place of a disqualified member of this court. A clearer case of absolute necessity on the part of the judges to act could hardly be conceived. Under any other rule, the parties to this controversy would be without a forum in which their

respective rights could be determined. Every circuit judge of the state is equally interested with the members of this court in the question of pending judicial elections. In view of the conclusion reached, the question under discussion becomes of little importance to the defendant who enters the objection. But, even if our conclusion had been the reverse, the rule of necessity would have been the same, and we should have felt compelled to disregard the objections and render a decision. Had we declined to act in such case, plaintiff would have been without a remedy, and defendant, whether his proposed acts were legal or illegal, would be out of reach of the law, and would be a law unto himself. In such cases the rule of disqualification of judges is deemed of less importance than the denial of the constitutional right to a forum in which rights may be adjudicated. And, however embarrassing the situation may be to us, we are unanimously of opinion that this court should not abdicate its functions and duties in any case, where such action would, in effect, deprive the citizen of his constitutional rights.

The only question presented upon the merits is whether a judicial election should be held under the Constitution and laws of this state in the month of November, 1912. It is plaintiff's contention that, under the Constitution of this state, no judicial election can be held except at a time provided by legislative enactment, and this court so held in *State ex rel. McGee v. Gardner*, 3 S. D. 553, 54 N. W. 606. Section 24 of the Enabling Act provides: "That the constitutional conventions may by ordinance provide for the election of officers for full state governments including members of the Legislatures and Representatives in the Fifty-First Congress * * * and when such state has been admitted into the Union * * * the officers of the state governments framed in pursuance of said Constitutions * * * shall proceed to exercise all the functions of state officers." Section 19, art. 26, of the Schedule and Ordinance adopted by the constitutional convention, provides: "The judges of the Supreme Court and circuit courts shall hold their offices until the first Tuesday after the first Monday in January A. D. 1894, at 12 o'clock m. and until their successors are elected and qualified, subject to the provisions of sec. 26, art. 5 of the Constitution." Section 28, art. 5, of the Constitution provides: "Judges of the Supreme Court, circuit courts and county courts shall be chosen at the first election held under the provisions of this Constitution, and thereafter, as provided by law, and the Legislature may provide for the election of such officers on a different day from that on which an election is held for any other purpose and may for the purpose of making such provisions, extend or abridge the term of office for any of such judges then holding, but not

in any case more than six months." Plaintiff's counsel contends that section 19, art. 26, of the Schedule and Ordinance, relates exclusively to the terms of officers chosen at the first election under the Constitution; that this first term of judicial office alone is subject to the provisions of section 26, which provides that the Legislature may "extend or abridge the term of office for any of such judges then holding, but not in any case for more than six months," and should be held to confer upon the Legislature constitutional authority to extend or abridge the term of office of the judges chosen at the first election held under the Constitution, and none others. Counsel further contends that, after the expiration of the terms of the first judges elected under the Constitution, the Legislature was without power to act under this clause of the Constitution, and that the terms of office of judges thereafter elected can neither be extended nor abridged by legislative enactment. The decision of this court in *State ex rel. McGee v. Gardner*, supra, was handed down February 24, 1893, in which it was held that, until the Legislature had made provision for judicial election none could be legally held. Thereupon the legislative assembly, being then in session, enacted chapter 84, Laws of 1893, approved March 4, 1893, authorizing the next judicial election to be held in November, 1893, and every six years thereafter, and providing that the judges so elected should qualify and enter upon their duties in January, 1894. This enactment fixing the time of judicial elections did not attempt to extend or abridge judicial terms of office, but the act did fix the judicial election at a time other than that on which general elections were held in the state. It appears to be counsel's contention that the Legislature, having once acted under this provision of the Constitution authorizing the fixing of the judicial election at a time other than the general election, the specific legislative power thus granted has been exhausted, and may not again be exercised. In this we think counsel are clearly in error. The rule that a constitutional term of office may neither be extended nor abridged by legislative enactment must be presumed to have been known and acted upon by the constitutional convention in its wisdom saw fit to authorize a specific departure from this rule to accomplish a specific purpose named.

[2] The particular thing the Legislature could not have done without this authority was to extend or abridge the constitutional term of judicial office, and it is clear to our minds that the purpose of the latter clause of section 26, art. 5, was not to authorize the fixing of the date of judicial elections, but to authorize the Legislature to lengthen or shorten a judicial term, should they deem it expedient so to do, to accomplish the pur-

pose of fixing a date for judicial elections different from that on which an election is held for any other purpose. The preceding portion of section 26, art. 5, prescribes the time of judicial election as "the first election held under this Constitution," and thereafter, "as provided by law * * * as provided in the following clauses of this section." The power to "provide by law," and to determine when judicial elections shall be held, is thus vested in the Legislature with no limitations except such as may be found in the Constitution itself, and we find none. It follows that the power to fix the time of judicial elections is a continuing one, and may be exercised as in the wisdom of the Legislature may seem best for the public good.

[3,4] In an attempted exercise of this power, the Legislature enacted chapter 118, Laws of 1901, which provides: "Sec. 1. At the general election in 1904, the judges of the Supreme Court and circuit courts shall be chosen for the term next succeeding the term for which the said judges are then serving. The term of the supreme judges elected in 1899 shall be six years and six months, and the term of their successors shall be six years and six months * * * and the election of the supreme * * * judges thereafter, shall be held at the time of the general election next preceding the expiration of their respective terms of office. * * *" It is plaintiff's contention that this act is unconstitutional, in that it attempts to fix the terms of the judges then serving and of their successors to be elected at the election to be held in 1904, each as six years and six months. It seems clear to our minds that the main purpose of this enactment was to fix the date of judicial elections thereafter to be held, and the attempted extension of the constitutional term of office was incidental to that purpose. That the Legislature intended to fix a date for judicial elections is apparent beyond controversy. It is the duty of the court, if possible, to ascertain and give effect to the intent and purpose existing in the legislative mind. At what time, and in what year, did the legislative assembly understand and intend that judicial elections should be held? In seeking to ascertain this thought and this purpose, it seems to us wholly immaterial whether that part of the act attempting to extend the constitutional term to six years and six months be held constitutional or unconstitutional. The two periods of six years and six months each may at least serve to fix and to ascertain and determine the particular year in which the Legislature understood and declared that such election should be held. This legislative enactment declares, in effect, that 13 years after the election of 1899 a judicial election shall be held, with an intervening election to be held in 1904.

And, even conceding that the Legislature is without power to enlarge the constitutional term of office, the result is the same. The members of the court elected in 1899 have served for six years and six months. Their successors who were duly elected in 1904 have served six years, and are legal incumbents of the office, whose places can in no event be filled, except at a judicial election provided by law. It follows that the question of the constitutionality of those provisions of the act which attempt to extend the terms of office becomes wholly immaterial, and need not be further considered in this case. We are firmly persuaded that by this enactment it was the purpose and intent of the Legislature to provide for a judicial election to be held at the general election in 1912.

For the reasons stated, the demurrer to the petition is sustained, and the motion to quash the proceeding is granted.

McCOOK COUNTY v. BURSTAD et al.

(Supreme Court of South Dakota. Oct. 25, 1912.)

1. COSTS (§ 299*)—LIABILITY OF COMPLAINANT—MALICIOUS PROSECUTION.

Under Justices Code, § 117, providing that a justice or committing magistrate may, upon the filing of an information or complaint, require the filing of an undertaking to secure costs if it shall be adjudged that such prosecution was malicious or without probable cause, and Code Cr. Proc. § 145, providing that, upon the discharge of defendant in a preliminary examination for a public offense, the magistrate, on finding the prosecution was malicious or without probable cause, may tax the costs against the complaining witness, no recovery of the costs and expenses of a prosecution for rape in which the accused was secured by a requisition from another state could be had against the complainant, though by his consent the affair was settled by the marriage of his daughter to the accused, where there was no showing that the charge was malicious or without probable cause.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1141, 1142; Dec. Dig. § 299.*]

2. CONTRACTS (§ 75*)—CONSIDERATION—PERFORMANCE OF OFFICIAL DUTY.

The complainant could not be charged on a contract given by him to pay such costs if the accused was brought back for trial and the marriage between him and the complainant's daughter took place, as it was the duty of the state's attorney to have procured such requisition and the return of the accused without requiring the execution of the undertaking, which was therefore without consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 273-285; Dec. Dig. § 75.*]

Appeal from Circuit Court, McCook County; Joseph W. Jones, Judge.

Action by McCook County against Ed. J. Burstad and another. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

E. H. Wilson, of Salem, for appellant. Krause & Krause, of Dell Rapids, for respondents.

McCOY, P. J. [1] Plaintiff's complaint, in substance, alleges that defendant Ed. J. Burstad made complaint in due form of law before a justice of the peace of McCook county charging one Schmidt with having committed the crime of rape upon a daughter of said defendant under the age of 18 years; that said Schmidt was then in the state of California, and said defendant requested the state's attorney of said county to procure a requisition for the return of said Schmidt to this state, to the end that he might be prosecuted for said criminal offense; that thereupon the said state's attorney informed defendants that, if said Schmidt were so returned, it would not result in a prosecution, but in the marriage of the daughter of defendants to said Schmidt, and that said Schmidt could not be prosecuted without the evidence of the daughter, and that he would not proceed in the matter of procuring said requisition, unless security for costs were given to save the said county harmless from costs and expense, whereupon defendants executed an undertaking in due form of law agreeing to pay all costs and expense of said requisition in case the said Schmidt was brought back for trial and a marriage should take place between him and said daughter of defendants; that at the time of the execution of said undertaking and as an inducement to said state's attorney to incur the expense of said requisition the said defendants represented that said daughter was enclosed by said Schmidt, and that they had full control of said daughter, and that they would not consent to her marriage with said Schmidt; that thereafter the said requisition was procured, and said Schmidt returned to the state of South Dakota, and a preliminary hearing had before said justice of the peace, and said Schmidt held and bound over by undertaking to appear at the next term of the circuit court to be held in and for said county; that at the next term of the circuit court said state's attorney made and filed an information against said Schmidt, charging him with the crime of rape, and that before the trial of said action, and after all the costs and expense of said requisition had been incurred, the defendants wrongfully and unlawfully consented to said marriage of

their daughter to said Schmidt, and that said marriage could not have taken place without the consent of defendants, the said daughter then being a minor under the age of 18 years; that defendants well knew that said prosecution could not proceed without the evidence of said daughter; that the attorneys for said Schmidt notified said state's attorney that they would object to the evidence of said daughter, she then being the wife of Schmidt, and that the said state's attorney was compelled to dismiss said prosecution; that plaintiff, said county, necessarily paid out and expended in the procuring of said requisition and the returning of said Schmidt to this state the sum of \$324.50, no part of which has ever been repaid by defendants to plaintiff, although having been requested so to do.

To this complaint the defendants interposed a demurrer on the ground, among others, that it did not state facts sufficient to constitute a cause of action against defendants or either of them. The court sustained the demurrer, and plaintiff duly excepted, and now urges the said ruling of the court as error. We are of the opinion the learned trial court ruled correctly. There is nothing in the complaint to show that the said charge against Schmidt was malicious or without probable cause, so as to bring the giving of such undertaking within the provisions of the statute of this state with reference to the giving of security for costs by the prosecutor in criminal cases. Section 145, Code Crim. Pr.; section 117, Justices Code.

[2] The said undertaking was a contract wholly without consideration. It was commendable on the part of the state's attorney to save his county from all unnecessary expense in the matter of a criminal cause, but nevertheless, under the facts of this case, it was his plain duty to have procured said requisition and the return of said Schmidt without requiring defendants to execute said undertaking. Contracts given under such circumstances are generally held to be without consideration. 9 Cyc. 347; 11 Cyc. 287. The consent of defendants to the marriage in question, instead of being wrongful and unlawful, was commendable. It saved the daughter from shame and humiliation, and made legitimate her child. It also saved the county the further expense of the prosecution.

The order and judgment appealed from is affirmed.

TOWN OF WELLS v. SULLIVAN.

(Supreme Court of Minnesota. Nov. 22, 1912.)

(Syllabus by the Court.)

WITNESSES (§ 287*)—CROSS-EXAMINATION—REDIRECT EXAMINATION.

Where a witness on cross-examination admits that he is not friendly to one of the parties, it is not proper on redirect examination to show by him why he was unfriendly. *Held*, upon the facts disclosed by the record herein, that the admission of such evidence was reversible error.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 930, 1000-1002; Dec. Dig. § 287.*]

Appeal from District Court, Rice County; Arthur B. Childress, Judge.

Action by the Town of Wells against Stephen A. Sullivan. Judgment for plaintiff. From an order denying a new trial, defendant appeals. Order reversed, and new trial granted.

Anson L. Keyes, of Faribault, for appellant. E. H. Gipson, of Faribault, for respondent.

START, C. J. This action was brought in the district court of the county of Rice to enjoin the defendant from obstructing an alleged highway over his land. A controlling issue on the trial of the case was whether there was a public road at the locus in quo. This question was submitted to a jury, and a verdict returned that there was such a highway. The other issues were determined by the trial judge in favor of the plaintiff, and judgment was ordered for it. Thereupon the defendant made a motion for a new trial on the ground of an alleged error of law committed on the trial, which was duly excepted to. The motion was denied, and the defendant appealed from the order denying his motion.

There is here no settled case containing all of the evidence, but a bill of exceptions showing the alleged error, and which contains, as certified by the trial judge, "all of the evidence and proceedings necessary to explain it, and relevant to the matters therein objected to, or relevant to said matters." It appears from the record that no legal proceedings were ever had in reference to the laying out of the alleged highway, and that, if in fact the locus in quo was a public highway, it was such by reason of a dedication thereof by the owner of the land. The plaintiff called a witness, Peter Orth, who gave material testimony tending to show such a dedication. On his cross-examination he was asked as to his feeling toward the defendant, whether it was friendly or not. The witness answered: "I don't like his way of dealing; that is all the feeling." On his redirect examination he was asked and permitted to answer, over the objection and exception of the defendant, a question as follows: "Q. If your feeling is unfriendly,

why is it unfriendly?" "A. I can do it in five minutes. It is about 1903 he owed me some money. Well, I was trying to get the interest from him. I got some the second year, and that was all I got in six or seven years. Well, the thing went on. I used to send him letters, and I used to go to his house. I watched every time he came to town. He would slip out on the road when he noticed me coming. Well, I didn't get nothing out of him at all. I gave the notes to the bank. He didn't pay any attention to the bank. When it was getting a long delay, I gave it—I gave it to a lawyer, with object to begin action against him. That was two years ago last spring. Well, the next thing, I think, the statement that he made that he didn't owe me a dollar; that he had every dollar paid, and the last payment was made, and he had witnesses and he paid it the last time. He didn't have it paid. I had the note, and he had no receipt, and still he had the nerve to say he had paid every dollar. At the fall term of court I got a judgment against him for over \$400. He never appeared; at last I had to sue him to get the money out of him."

The trial court gave the defendant permission to make his statement as to this matter; but he made none, nor was the witness cross-examined as to his testimony given in response to the question objected to. The defendant, as a witness on his own behalf, gave competent and material testimony tending to show that the locus in quo was not a public highway, by dedication or otherwise. The ruling of the trial court in receiving the testimony objected to is the only question presented by the record for our decision. The ruling was clearly erroneous; but the question here is: Was it prejudicial error? *State v. Kight*, 100 Minn. 371, 119 N. W. 56. The evidence objected to and received was of a character naturally and obviously tending to prejudice the jury against the defendant, and discredit him and his testimony. The ruling was, therefore, reversible error, unless it appears from the record that it did not prejudice the substantial rights of the defendant.

It is urged in effect by respondent in this connection that inasmuch as the record does not purport to contain all of the evidence given on the trial, there being no settled case, it must be presumed that the error, if any, was harmless. This is not a correct statement of the law. See *Dunnell's Digest*, § 7180. But, were it otherwise, it would not be applicable to this case; for the court's certificate to the bill of exceptions negatives any presumption that there was any evidence other than as therein stated. The bill of exceptions is sufficient to present the question whether the error was prejudicial. The record shows that the testimony of the witness Orth and that of the defendant as to the vital issue in the case,

the dedication of the alleged public way, was conflicting, and that the natural tendency of the evidence erroneously received was to prejudice the substantial rights of the defendant. While a new trial for the erroneous admission of evidence should be granted with caution, and in no civil case where it fairly appears that the error was not prejudicial to the substantial rights of the appellant, yet we are constrained to hold upon the record in this case that the admission of the evidence complained of was reversible error.

Order reversed, and a new trial granted.

McELENNEY et al. v. DONOVAN et al.
(Supreme Court of Minnesota. Nov. 8, 1912.)

(Syllabus by the Court.)

1. DEEDS (§ 211*)—EVIDENCE—VALIDITY—CAPACITY OF GRANTOR—UNDUE INFLUENCE.

In this an action to set aside a deed to a daughter of the grantor, the evidence sustains the finding of the jury that the grantor was competent, and also that no undue influence was exerted upon him.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.*]

2. EVIDENCE (§ 478*)—OPINION EVIDENCE—MENTAL CONDITION.

A witness who has had business transactions with a person, has known him, and observed and talked with him, may, after having detailed the business had and observations made of such person, properly give an opinion concerning his mental state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2242-2244; Dec. Dig. § 478.*]

3. WITNESSES (§ 140*)—COMPETENCY—TRANSACTIONS WITH PERSONS SINCE DECEASED.

A child of the grantee in the deed sought to be set aside is not an interested party, prohibited by the statute from testifying to conversations between the deceased grantor and his son.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 598-618; Dec. Dig. § 140.*]

4. DEEDS (§ 196*)—VALIDITY—PRESUMPTIONS—RELATIONS OF PARTIES.

The jury were properly instructed that the burden was on plaintiff to prove the incompetency of grantor and the undue influence alleged; also that there was not any evidence of fiduciary relations, or relations of confidence and trust, between grantor and grantee, that would give rise to the presumption that undue influence had been used by or in behalf of the grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-593, 649; Dec. Dig. § 196.*]

5. OTHER ASSIGNMENTS WITHOUT MERIT.

Other assigned errors examined, and found without merit.

(Additional Syllabus by Editorial Staff.)

6. DEEDS (§ 203*)—VALIDITY—EVIDENCE.

In an action to set aside a deed, there was no error in excluding a question to the attorney who prepared the deed, whether the grantor gave any reason for disinheriting all his children and giving all his property to one, and requiring witness to answer whether the

grantor stated any reason why he made the deed at that time.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 602, 604-611; Dec. Dig. § 203.*]

7. APPEAL AND ERROR (§ 1065*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

In an action to set aside a deed, where the questions of the mental capacity of the grantor and of undue influence were submitted to the jury, an instruction that, when the jury had returned its answers, the court would go all over the case and determine whether the deed should be set aside, and it would be in the final analysis a question for the court, but that the court would be governed by the answers the jury made, whether the facts relating to those questions were true or not, was not prejudicial to either party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. § 1065.*]

Appeal from District Court, Waseca County; Arthur B. Childress, Judge.

Action by Mary Ann McEleney and others against Elizabeth Donovan and another. From an order denying a new trial, plaintiffs appeal. Affirmed.

R. T. Boardman, of Minneapolis (P. McGovern and Henry Gallagher, both of Waseca, of counsel), for appellants. John Moonan, E. B. Colleston, and Charles Spillane, all of Waseca, for respondents.

HOLT, J. Action to set aside a conveyance on the ground that it was obtained by undue influence, and that the grantor was mentally incompetent at the time of its execution. Both issues were submitted to a jury, and answered in defendants' favor. The appeal is from an order denying plaintiffs a new trial.

The plaintiffs are three daughters of Michael McGonagle, the grantor in the deed sought to be annulled. The defendant Elizabeth Donovan is his youngest daughter, and the grantee in the deed. The other defendant is her husband. The grantor died December 26, 1910, at the age of 85 years, leaving four sons, four daughters, and the children of a deceased son as his heirs. As the sons started out for themselves, he had given each a farm. He retained the 200-acre farm he had conducted while the family was growing up, and had evidently determined to give that to his four daughters, in addition to \$500 given to each, except the defendant Elizabeth, who then received only \$300; for he had made two wills and a codicil to that effect. The first will was made about 11 years, and the codicil to the second 2 or 3 years, prior to his death. His wife died 12 or 13 years before he did, and soon after he rented out the farm, and had made his home with defendant for the last 11 years of his life. He was on very friendly terms with all the children, and made them visits, some of these lasting for several months. About the 1st of November, 1910, advancing age and impaired heart action confined him to the house. Because of bron-

chial trouble and the weak heart, he was for the most part, in November and December, 1910, compelled to sleep in a chair. On the 19th of November he signed a deed to the land, wherein the defendant, Elizabeth, was grantee; but four days later, becoming dissatisfied because he had made no reservation for himself, the deed in suit was executed, wherein it was stipulated that he should have \$200 a year from the rent of the farm, and the rent of one 40 should go to the son John, who was mentally weak, for life.

The errors assigned are: That the verdict is not justified by the evidence, and contrary to law; erroneous rulings on the admission of certain testimony; objectionable instructions to the jury; and refusal to give a requested instruction.

[1] The execution of the deed by the grantor was one of the questions submitted to the jury, although this was alleged in the complaint and admitted in the answer. Therefore the assignment of error that the verdict is not justified by the evidence must be confined to the answers given to the other two questions submitted, viz.: "Was Michael McGonagle of sufficient mental capacity to make a deed on the 23d of November, 1910? Answer: Yes. If you find that Michael McGonagle did execute said deed, and was of mental capacity to make such deed, was said deed procured by undue influence, exerted upon him by defendants, or either of them? Answer: No." It is sufficient to say that his attending physician, present at the time, and another physician of his acquaintance, who saw him at about the days on which the deeds were executed, the two different attorneys whom he consulted about the transaction, and who prepared, witnessed, and took the acknowledgment of the deeds, testify to his mental competency to transact his business. These are also corroborated by neighbors, attending nurses, and acquaintances. To be sure, there is evidence from plaintiffs, two sons, and one or two other persons, that the grantor, upon the 19th and 23d of November, 1910, was in a stupor, did not take notice of what was being done, and did not recognize those about him. We cannot escape the conviction, after a careful reading of the evidence, that it would have been extremely difficult for a jury to have reached any other conclusion than that Mr. McGonagle was mentally competent to transact his own business when he made the conveyance.

The same may almost as confidently be asserted in support of the jury's finding on the proposition of undue influence. The son, who usually assisted the grantor in important transactions, knew of the deed within a day or two after it was made. He remonstrated neither with his father nor defendants. The old gentleman had made his home with defendants for more than 11 years, was attached to the children in the

family, knew that his youngest daughter and her husband had had sickness and financial reverses to contend with, and it was not strange that he should come to the conclusion that this daughter was in more need of his bounty than the other children. That defendants may have been anxious to get the farm is undoubtedly true; also that they were not eager to start the storm, which was sure to come when the other children ascertained what had been done, by telling them about it; but this desire and secrecy does not necessarily prove that undue influence was used. The jury having found, on conflicting evidence that no undue influence was used by either of defendants, and this having been approved by the trial court, we are clear that the record does not justify us in disturbing such finding.

[2, 6] The errors assigned as to rulings on the admission of testimony do not appear substantial. Thus, on objection, the attorney who prepared the deed, when called as a witness by plaintiffs, was not permitted to answer the question: "Did he give any reason for disinheriting all his children, and giving all his property to one?" But he was required to answer this, which appears to us a more proper question: "Did he state any reason why he made the deed at this time?" Witnesses who had known the grantor for a long time, and had had business or professional transactions with him, after testifying to these, were permitted to express their judgment as to his mental condition, and we think rightly so. *Woodcock v. Johnson*, 36 Minn. 217, 30 N. W. 894; *In re Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

[3] A daughter of defendant was allowed to testify to a conversation she overheard between the grantor and his son Michael, over plaintiff's objection that she, being an interested party, could not testify to a conversation between the deceased grantor and his son, and for the further reason that the statute prevents the son from refuting her testimony. In 40 Cyc. p. 2285, it is stated: "Nor is a witness so interested as to be disqualified merely because, as heir to a living party to the suit, he may ultimately share in the property to which the suit relates"—citing *Harraway v. Harraway*, 136 Ala. 499, 34 South. 836, and *Boyd v. Boyd*, 163 Ill. 611, 45 N. E. 118.

[5] No specific mention need be made of any other rulings assigned as error, for a mere inspection of the record proves them devoid of merit.

[7] As to the instructions complained of, one is that the court, after stating to the jury that the questions submitted were to be answered simply by "Yes" or "No," continued: "When you have returned your answers, then the court will go all over the evidence, and all over the case, and determine whether or not the deed should be set aside. It will be in the final analysis of

the case a question for the court to decide; but those particular issues are to be submitted to the jury for your determination first. Of course, the court will be governed by the answers that the jury makes to these particular questions in determining whether or not the facts relating to those questions are true or not." The appellants urge that, even including the last sentence, they were prejudiced, because the jury were virtually told that their verdict was of no great consequence to the litigants, because the court was the final arbiter. It is perhaps as difficult to discern the purpose of the instruction as to point out wherein either litigant was prejudiced thereby.

[4] The court, in effect, charged that the burden was on plaintiffs to show that the grantor was not of sound mind when the deed was executed, as well as to establish the use of undue influence in its procurement, and refused to give an instruction that, if they found that a relationship of confidence and trust existed between the father and daughter, then the burden would fall on defendants to show that the daughter took no advantage of the father in her own interest, and not on plaintiffs to prove that defendants, or either of them, had unduly influenced the father, or that he was not competent to transact any business, but instead instructed that there was no evidence of any fiduciary relations between the father and defendants.

The action is to set aside a deed on the ground that the grantor was not competent to transact business and the grantee used undue influence. A deed, duly witnessed and acknowledged by a grantor, is proof that whatever title the grantor had and purported to convey vested in the grantee, without any further testimony as to the mental condition of the grantor; and the burden is undoubtedly on the one who seeks to have the deed annulled to prove the facts upon which the action is predicated. Counsel admits this general rule, but contends that in this case certain facts and circumstances appeared which shifted the burden of proof to the defendants, and the court should have so charged the jury. We doubt whether any practical gain is made in the administration of justice by the adoption of a rule requiring a jury to stop at intervals in the trial to determine which litigant wins if the trial there ends. The minds of jurors differ. One may conclude a fact is proven, when the others are still doubting or unconvinced. In a certain sense, during the trial of the case, the burden continually shifts or changes, in that after one witness has testified the court or jury might conclude that, if there was no further proof, the facts testified to by such witness are established; but, as other witnesses are heard, the conclusion first arrived at is overcome. It is also true that the proof of certain facts in a trial may give

rise to presumptions of the existence of an ultimate fact or issue necessary to establish, and that, unless evidence is then adduced to overcome such presumption, the case ends. This is sometimes referred to as shifting of the burden of proof, but we think improperly.

The fact is, the burden in every case rests on the litigant who has the affirmative of an issue to prove it; otherwise, his opponent wins. It seems neither useful nor proper to inquire how he maintained this burden at any particular stage in the trial. The important consideration is: Where is he left when all the evidence is in? Does the fair preponderance thereof then establish the issues he by his pleadings undertook to establish? *Tyner v. Varlen*, 97 Minn. 181, 106 N. W. 898, *Fischer v. Sperl*, 94 Minn. 421, 103 N. W. 502, and *Clarity v. Davis*, 92 Minn. 60, 99 N. W. 363, relate to wills, where, of course, the burden is upon proponent to establish the will by proof that it is the act of a testator who was then capable and competent; but we do not think the effect of these decisions is to support appellants' contention. In an action of this kind the burden is always on the plaintiff to prove the undue influence or incompetency alleged. *Mr. Justice Bunn*, in *Howard v. Farr*, 115 Minn. 86, 131 N. W. 1071, said: "There is no reason for not applying the familiar rule that the party who seeks to set aside a solemn instrument like a deed on the ground of fraud or undue influence, which is a species of fraud, has the burden of proof." Such is also the rule in *Prescott v. Johnson*, 91 Minn. 273, 97 N. W. 891, *Rader v. Rader*, 108 Minn. 139, 121 N. W. 393, and *Naeseth v. Hommedal*, 109 Minn. 153, 123 N. W. 287.

We conclude the court was right in stating to the jury that there was no proof of any fiduciary relations between grantor and grantee in the deed. This term is sometimes used as equivalent to confidential relations, but perhaps not accurately; for the former arise from some trust, either voluntarily assumed by one person toward another, or by law imposed. The relation between parent and child is also spoken of as one of confidence and trust. But we have not found or been directed to any decision holding that, upon it being shown that the relation of parent and child exists between donor and donee, the presumption of undue influence follows. The existence of the relationship is an important factor to consider, and must cause the court or jury to carefully scrutinize the evidence, to see whether an advantage has been taken by the donee over the donor by reason thereof. We think that, before presumptions of undue influence may be drawn from the fact that a donee is the child of the donor, it must appear that such donee stood to the donor in a relation other than the ordinary intimate, and even affectionate, relation existing between parent

and child. It must be shown that the donee occupied a position to dominate the donor, or exert an influence over him, by virtue of being intrusted with the donor's business affairs.

In this case it does appear that, if any relationship of trust and confidence in relation to business affairs existed between the father and any of the children, such child was the son Michael, who was informed of the deed soon after its execution. The defendants never appeared to have attended to the father's business, nor to have taken charge of any of his valuable papers, nor to have advised him in regard to his business affairs. The inference is strong that the father had not leaned so much on the daughter as she on him. The dutiful care which this daughter rendered her father, the friendly assistance in the matter of noting down what his desires were when his defect of speech prevented others from fully understanding him, and the alacrity with which she and her children did his bidding when informed that he wanted to deed the farm to her, fall short of showing such confidence and trust between the parent and child that a presumption of undue influence arises, under the rule announced in *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. 918, and the authorities generally.

We discover no prejudicial error in the record.

Order affirmed.

GRBICH v. PITTSBURGH IRON ORE CO.
(Supreme Court of Minnesota. Nov. 15, 1912.)

(Syllabus by the Court.)

PLEADING (§ 20*)—ALTERNATIVE ALLEGATIONS.

Allegations of the complaint considered, and *held*, that they do not come within the rule that where the complaint alleges in the alternative two statements of fact, one sufficient to constitute a cause of action and the other not, they neutralize each other. The complaint states facts sufficient to constitute a cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 43; Dec. Dig. § 20.*]

Appeal from District Court, St. Louis County; J. D. Ensign, Judge.

Action by Tony Grbich against the Pittsburgh Iron Ore Company. From an order overruling a demurrer to the complaint, defendant appeals. Affirmed.

Washburn, Bailey & Mitchell, of Duluth, for appellant. Theo. Hollister and Frank Hicks, both of Duluth, for respondent.

START, C. J. Appeal from an order of the district court of the county of St. Louis overruling the defendant's demurrer to the complaint. The here material allegations of the complaint are to the effect following:

The defendant, at the times herein stated,

operated an iron mine, known as the "Brunt Mine," near Virginia, in this state. On October 2, 1911, and for some time prior thereto, the plaintiff was in the employ of the defendant in the mine in the work of making gopher holes, which was done by making holes in the bank of earth which covered the ore, large enough so that those engaged in the work could crawl therein. The holes were so excavated and extended from 20 to 30 feet. They would then be loaded with explosives and fired, for the purpose of breaking up the bank so that it could be removed. The plaintiff, while engaged in such work at the rear of a hole extending into the bank some 15 feet, heard a whistle blown in the open pit, and also heard other employes of defendant call to him to come out of the hole, as a blast was about to be set off in the open pit. Thereupon he immediately backed out of the hole, and when he was out of it, and in the act of raising himself to a kneeling position, an explosion occurred at that moment, and dirt and rock were thrown into his face and eyes, whereby his eyes were permanently injured and he sustained other serious injuries. It was the duty of the defendant to exercise reasonable care to furnish the plaintiff a safe place in which to work, and to warn and caution him of the dangers incident to his work, which were unknown to him. There were a large number of men in the employ of the defendant in the open pit of the mine, using dynamite and other explosives; and to do the work with reasonable safety it was necessary that the defendant have some person who should have charge and supervision of the use and handling of the explosives. The defendant had no such person in its employ, but allowed a large number of its employes engaged in such work, who used explosives, to go to one central point, and obtain supplies from time to time as they needed them, without supervision or oversight from any one. The defendant provided no place within the pit where such explosives should be kept, but allowed and permitted the men who used the same to have and leave the same about wherever they saw fit. It was the custom in the mine, during the time the plaintiff was working therein, when blasting was to take place, for the steam shovel to sound several blasts with its whistle, and for employes of defendant to call out "Fire!" in time to permit men who were engaged in work in gopher holes to get out of them and get to a place of safety. The plaintiff relied upon this custom being observed at the time he was injured; but the defendant on this occasion carelessly and negligently failed and neglected to observe the custom, or to have it observed, and did not give plaintiff the usual or customary notice or warning, and the explosion which injured plaintiff occurred immediately after he was no-

tified that blasting was to take place, and before he had time to get to a place of safety. (After the explosion that caused plaintiff's injuries had taken place, there were upon the ground in the immediate vicinity where he was injured several sticks of dynamite. He does not know, and has no means of knowing, whether the blast that caused his injuries resulted from material thrown from a distance that struck and set off explosives lying upon the ground near where he came out of the hole, or whether his injuries were caused by material that was thrown by a blast a considerable distance away; but he does know, and alleges, that after he received notice and warning that a blast was about to take place at some place in the pit he was not allowed the ordinary and customary time after notice in which to get to a place of safety, and that his injury was the result of the carelessness and negligence of the defendant in regard to the matters above set forth.)

It is urged in support of the demurrer that the allegations of the complaint bring this case within the rule that where the complaint alleges in the alternative two statements of fact, one of which is sufficient to constitute a cause of action and the other not, they neutralize each other and demurrer will lie. *Anderson v. Railway Co.*, 103 Minn. 224, 114 N. W. 1123. This claim is based upon the allegations of the complaint which we have inclosed in parenthesis; but such allegations do not purport to be a statement of the ultimate facts constituting the defendant's alleged negligence. The allegations of the complaint, liberally construed as a whole, allege the duty and custom of the defendant to give its employes, including the plaintiff, timely notice of the explosion of a blast, so as to enable them to reach a place of safety before the explosion, a reliance upon the duty and custom by the plaintiff, and the negligent failure of the defendant to discharge the duty, in that the notice and warning that a blast was about to take place were not timely given, so that the plaintiff could get to a safe place, which resulted in dirt and rock being thrown by the blast into his face and eyes, whereby he was seriously injured. These allegations state facts sufficient to constitute a cause of action. *Aho v. Adriatic Co.*, 117 Minn. 504, 136 N. W. 310.

The alternative statements in question do not neutralize the substantive allegations as to the defendant's negligence and the resulting injury to the plaintiff. The alternative allegations are somewhat indefinite; but they may be fairly construed, as against a demurrer, that the plaintiff does not know whether his injuries were directly caused by material thrown by a blast at a distance, or from material thrown from the blast, which struck and set off explosives lying on the ground near where he came out of the hole.

It is clear that neither of these allegations qualifies or neutralizes the gist of the plaintiff's alleged cause of action, the defendant's negligence in failing to give him timely notice that the blast was about to be set off, whereby he was injured. We hold that the alternative allegations referred to do not bring this case within the rule as to such allegations, and that the complaint states a cause of action.

Order affirmed.

STATE v. McGRATH.

(Supreme Court of Minnesota. Nov. 11, 1912.)

(Syllabus by the Court.)

ASSAULT AND BATTERY (§ 82*)—CRIMINAL LAW (§ 829*)—HOMICIDE (§ 151*)—BURDEN OF PROOF—REQUESTS FOR INSTRUCTIONS—INSTRUCTION ALREADY GIVEN.

In cases of homicide or assault, no burden rests upon defendant to prove that his act was justifiable, because in self-defense; but the jury, to convict, must be satisfied beyond a reasonable doubt that the act was not justifiable on such ground. In this case, *held* error to refuse defendant's request for an instruction to that effect; the matter not being so specifically covered in the general charge as to make it reasonably certain that the jury was not misled.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 127; Dec. Dig. § 82; **Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829; **Homicide*, Cent. Dig. §§ 276-278; Dec. Dig. § 151.*]

Appeal from District Court, Aitkin County; W. S. McClenahan, Judge.

Edward J. McGrath was convicted of assault in the second degree, and appeals. Reversed, and new trial granted.

J. C. Hessian, of Aitkin, for appellant. Lyndon A. Smith, of St. Paul, and Louis Hallum, of Aitkin, for the State.

BUNN, J. Defendant was tried in the district court for Aitkin county on an indictment alleging assault in the first degree. He was convicted of assault in the second degree. A motion for a new trial was made and denied, and defendant sentenced to the state prison. He appealed to this court from the judgment, and also from the order denying a new trial.

The sole question involved is whether it was error to refuse to give the jury the following instruction, requested by defendant: "No burden of proof rested upon the defendant to prove that he acted in self-defense. The burden of proof is upon the prosecution to satisfy or convince you beyond a reasonable doubt that the act of defendant was not self-defense."

The bill of exceptions does not contain the evidence, but it states that "on said trial there was evidence received tending to prove the charge alleged in the indictment; and there was evidence received tending to prove defendant's defense of self-defense, and suffi-

cient to entitle the same to be considered by the jury on the question of defendant's defense of self-defense." The charge of the trial court shows that the shooting which was alleged in the indictment was admitted by defendant, and that the sole issue for the jury was whether the defendant was justified. The request refused accurately stated the law, and unless it is clear that the charge as given gave the rule so that the jury could not be misled, it was error to refuse the request. *State v. McPherson*, 114 Minn. 498, 131 N. W. 645.

It is a more or less general impression that when a defendant, accused of crime, admits the act, but relies on self-defense, accident, or an alibi, the burden is upon him to establish his defense. Notwithstanding that it is pretty well understood in a general way that a defendant, accused of crime, is protected by the presumption of innocence until his guilt is established beyond a reasonable doubt, yet we find intelligent men speaking of the duty of a defendant to prove his innocence, and especially in cases where the act is admitted, and the question is whether it was done with guilty intent, where intent is an element, or whether it was justifiable or excusable, in cases of assault and homicide. Probably every lawyer, and certainly every judge, understands that the state must prove, not only the act, but the intent with which it was done, and, in a prosecution for assault or murder, that the act was not done in self-defense. But jurors are not lawyers and judges, and, in the absence of clear, explicit instructions from the court, may often be impressed with the idea that a defendant, who tries to justify or excuse his act, must make out his defense by a preponderance of the evidence.

In the case at bar, the court in its charge speaks of "the position" of defendant being that the shooting was justifiable, and of "the defense of self-defense—justification." The language tends to convey a wrong impression, unless carefully explained. There is nothing in the entire charge, except the language which is below quoted, which in any way tended to remove the quite natural impression which the jury might have that the defendant was obliged to show that he acted in self-defense. In the case of the defenses of insanity, or intoxication, the burden is upon defendant, by virtue of our statute; and the uneducated mind does not easily distinguish in this regard between such defenses and those of self-defense, accident, or an alibi.

It remains to consider whether the refused request was in substance given in the general charge, in language that the jury could not misunderstand, and which would make clear to their minds that the jury, to convict, must be satisfied beyond a reasonable doubt that defendant did not act in self-defense. After fully, clearly, and fairly stating the law on

the subject of when an assault is and is not justified, the trial court said: "The defendant in a criminal case is entitled to an acquittal, unless the trial jury is satisfied beyond all reasonable doubt that he is guilty. In other words, the burden is upon the state to establish the guilt of this defendant beyond all reasonable doubt. * * * The jury must be satisfied beyond all reasonable doubt of the guilt of this defendant, and in this case that means that the shooting was without justification, and, if your verdict be of assault in the first degree, was with intent to kill and without justification; if of assault in the second degree, it was without justification and without an intent to kill."

In legal effect the language of the charge has the same meaning as the language of the refused request. The court told the jury that the state must prove beyond a reasonable doubt that the shooting was without justification; it refused to tell them, as requested, that no burden of proof rested on the defendant to prove that he acted in self-defense, or that the burden of proof was upon the state to satisfy the jury beyond a reasonable doubt that defendant did not act in self-defense. While a legal mind might understand, from the instruction given, that no burden rested on defendant, and that he was entitled to an acquittal unless the evidence satisfied the jury beyond a reasonable doubt that he did not act in self-defense, the correctness of an instruction is to be governed by a consideration of how a jury might understand the language, not how it is understood by judges and lawyers. The words of Justice Brown in *Mailand v. Mailand*, 83 Minn. 453, 86 N. W. 445, are in point: "Instructions of a trial court should be viewed by an appellate court, so far as possible, from the standpoint of the jury. It will not do to construe them in the light of strict, abstract legal principles. The real question, in all cases where exception is taken to the charge, is: What might the jury have understood from the language of the court? An instruction may be analyzed, and made clear and consistent with the rules of law applicable to the case, and at the same time, when viewed from a practical, common-sense standpoint, appear clearly misleading and prejudicial to the party excepting."

This language was used in a civil case, and where there was not a request to instruct in language that could not be misleading. It is the more applicable in a case where the liberty of defendant is at stake, and where such a request has been duly made, refused, and the refusal excepted to. We think that, when viewed from the standpoint of the jury, it cannot be said that the instruction given might not be misleading, to the prejudice of defendant. The instruction refused was one which could not have been misunderstood. To say that the state must prove that the shooting was without justification is certain-

ly not as plain and as easily understood a statement of the law as saying that no burden of proof rests on the defendant to show that he acted in self-defense, and that the jury must be satisfied beyond a reasonable doubt that he did not act in self-defense. It was not so well calculated to remove from the minds of the jurymen the natural assumption that self-defense was a defense to be proved by the party making it. Trial courts should exercise care to make the jury understand clearly that each element of a crime must be proved beyond a reasonable doubt to justify conviction—should realize that the men who compose our juries are not versed in legal terms, and often quite unable to grasp the real meaning of instructions given, unless couched in the plainest and most emphatic words.

Our conclusion is that it was prejudicial error to refuse the instruction requested by defendant.

The judgment of conviction is reversed, and a new trial granted.

PALMERLEE v. NOTTAGE et al.

(Supreme Court of Minnesota. Nov. 15, 1912.)

(Syllabus by the Court.)

1. LIBEL AND SLANDER (§ 10*)—COMPLAINT—SUFFICIENCY.

A publication which charges by way of insinuations and comparisons that cause exists for the removal of a public official, because of favoritism, nepotism, and malfeasance in office, is libelous per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 41, 91-96; Dec. Dig. § 10.*]

2. LIBEL AND SLANDER (§ 10*)—COMPLAINT—"TO WORK."

An article stating that it is easy "to work" the county commissioners held actionable; for the word "work," in the connection and manner in which it appears in the publication, conveys a reflection upon the competency and integrity of the officials.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 41, 91-96; Dec. Dig. § 10.*]

Appeal from District Court, Dodge County; Arthur B. Childress, Judge.

Action by A. S. Palmerlee against G. W. Nottage and others. From a judgment overruling demurrer to the complaint, defendants appeal. Affirmed.

Lord & Ronken, of Kasson, for appellants. S. L. Pierce, of Dodge Center, for respondent.

HOLT, J. The defendants own and publish a newspaper in Dodge county. In 1911 plaintiff was a member of the board of county commissioners. During the year there was an agitation to change the location of the county seat, and special election for that purpose was to be had on July 11th. On June 29, 1911, the defendants published in

their paper the article hereinafter referred to. Plaintiff brought this suit for libel, setting out two causes of action. Defendants demurred to each separately, and from the order overruling the demurrers this appeal is taken.

[1] The article serving as the basis for the first cause of action is as follows:

"Do you know that on Friday, June 23, last, a petition was filed with Governor Eberhart asking for the removal of five of Hennepin county's commissioners from office? If not, we refer you to the Twin City papers of above date. The charge against these commissioners is 'favoritism, nepotism and malfeasance in office.' Do you realize that any taxpayer of Dodge county can bring a similar petition and use the identical claim that Hennepin county is using?"

We have no hesitancy in holding that the court rightly overruled the demurrer to this cause of action. The article conveys the thought that the county commissioners had been guilty of malfeasance in office. There is no occasion to initiate steps for the removal of a commissioner unless there has been official misconduct. A charge need not be made directly—indeed, the venom and sting of an accusation is usually more effective when made by insinuations. The floating calumny which each reader may affix to any and every official act which has aroused suspicion may lay hold of is capable of inflicting graver injury and injustice than a direct, specific charge, which may be squarely met and refuted, if untrue. The contention that the article is a legitimate criticism cannot be adopted, for no act of the commissioners is referred to. Calling names is not criticism.

[2] As to the second cause of action, the complaint contains allegations that a committee called the "Press Committee" had been appointed to write newspaper articles favorable to removal of the county seat, and then avers that in an article in their paper of June 29, 1911, entitled: "Four-year-old Tommy Jones to His Teacher," the defendants published the false and defamatory matter of and concerning plaintiff: "Teacher—What was it created for?" (Meaning what was the said Press Committee created for.) "Tommy—To bamboozle de people, work de county commissioners (dat is easy enough)." It is to be noticed that an effort is made in the characters selected, the spelling and language used, to ridicule and reproach. Ability to work usually designates a good and redeeming quality in man. To say of a person that he is easily worked is applied generally in a disparaging sense. And in the language of the street or in such use of expression as here employed, to "work" a public official means to obtain from him something which the law does not permit. One definition in the Century Dictionary of "to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

work" is: "To manage or turn to some particular course or way of thinking or acting by insidious means." A public official who can be worked is commonly understood to be one who is either so incompetent as to be easily led away from the path of duty by the designing, or one who, for a consideration, would so depart.

The one doubt which may be suggested against the complaint on the second cause of action is that the county commissioners cannot act, except as a body; therefore to work the board one needs only work the majority; hence the minority is not touched by the accusation. But the charge is not made against the board as such, and the complaint alleges that the language was used of and concerning plaintiff. In alleging a cause of action for libel in this state (section 4152, R. L. 1905), "It shall be sufficient, instead of stating extrinsic facts showing the application to plaintiff of the defamatory matter complained of, to allege, generally, that the same was published or spoken concerning the plaintiff; and if such allegation is controverted, the plaintiff is bound to establish on the trial that it was so published or spoken." We think this complaint comes within the rule of *Petsch v. Dispatch Printing Co.*, 40 Minn. 291, 41 N. W. 1034. See, also, a case in point, *Wofford v. Meeks*, 129 Ala. 349, 30 South. 625, 55 L. R. A. 214, 87 Am. St. Rep. 66, where a member of the commissioners' court (county commissioners) brought an action for libel, and it was urged against his right to maintain it that he was not named in the libel, and he may have voted against the making of the contracts charged to have been fraudulently made, "and therefore he is not, and cannot be, referred to in the publication. This proposition might be tenable, if the complaint admitted the making of the contracts charged to have been corruptly entered into by the publication. But it is absolutely without merit in the face of the averment that the entire publication is 'false, untruthful, scandalous, malicious, and defamatory'; and especially is this true where the defendants, by their motion to strike the substantial allegations of the complaint, confess the truth of every material averment thereof."

The order appealed from is affirmed.

BRUCE v. HOIDAL et al.

(Supreme Court of Minnesota. Nov. 15, 1912.)

(Syllabus by the Court.)

CREDITORS' SUIT (§ 39*)—BILL—DEMURRER.

A complaint in the nature of a creditors' bill, from which it appears that another action has been begun and is still pending to determine the liability of a resident defendant on the facts stated in the bill, such action not having proceeded to judgment or verdict, though a writ of attachment has been issued therein, but no

property sought to be reached by the present suit has been levied upon, *held* demurrable, for the reason that plaintiff has neither exhausted nor fully made use of the legal remedies afforded in such pending action.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 154-164; Dec. Dig. § 39.*]

Appeal from District Court, Hennepin County; Horace D. Dickinson, Judge.

Action by Nels Bruce against J. S. Hoidal and another. From an order sustaining demurrer to the bill, plaintiff appeals. Affirmed.

Olof L. Bruce, of Minneapolis, for appellant. Wright & Matchan, of Minneapolis, for respondents.

HOLT, J. Appeal from an order sustaining a demurrer to a complaint in the nature of a creditors' bill. To an understanding of the question presented, this short summary of the facts alleged may be sufficient: June 18, 1910, plaintiff contracted to buy from defendant Hoidal certain lands in Canada. In September following Hoidal induced plaintiff to turn over to him the purchase price, but has failed to deliver the deed as agreed, or give possession of the land, and by reason thereof plaintiff lost, in addition to the land, the opportunity to crop it, and he asks for specific performance or damages. In November, 1909, plaintiff claims Hoidal sold him 28 shares of stock, fraudulently representing such stock to be worth par, or \$100 per share. Nineteen of the shares thus sold were accepted by Hoidal as part payment of the Canada land, when he induced plaintiff to pay the purchase price as above stated, and at the same time he obtained possession of the other 9 shares. These he refuses to return, and plaintiff avers that, when he ascertained that Hoidal had misrepresented the value of the shares, he offered to rescind. The shares were not worth more than one-third of the represented value. Plaintiff has begun two actions in the district court of Hennepin county against Hoidal, one of which is for specific performance or damages for breach of the contract to convey the said Canada lands, and the other for deceit in the sale of said 9 shares of stock. Then it is alleged that on June 10, 1910, Hoidal, who had bought and paid for valuable land in Polk county, conspired with his uncle, Weum, the other defendant herein, to place such land beyond the reach of Hoidal's creditors, and for that purpose the conveyance was taken in the name of Weum, in trust for Hoidal. Hoidal has no other property, except certain real estate in Minneapolis, Minn., and it is averred that as to the latter he has placed mortgages thereon for more than its value, but that these mortgages were so placed for the purpose of defrauding his creditors and placing the property out of their reach. In said pending actions against Hoidal a writ of attachment is-

sued; but there is no allegation that the same was levied either upon the Polk county land or upon the real estate in Minneapolis. Plaintiff in the present action asks that the court adjudge the legal title to the Polk county land to be in Hoidal, and that said land be attached and held to respond to any judgment that may be entered in said pending actions against Hoidal.

For the purpose of this decision we may assume that the allegations in the complaint are sufficient to show that the land in Polk county, although the legal title thereto is in Weum, is in fact Hoidal's, and may be reached by the creditors of the latter, regardless of the time the indebtedness was incurred. Therefore we may regard the pleading as in the nature of a creditors' bill. In this state the rule appears well settled that in such an action the complaint must show that the creditor has exhausted his remedy at law, or at least proceeded far enough to have obtained a judgment against defendant or a lien on the property by him fraudulently attempted to be covered up. *Massey v. Gorton*, 12 Minn. 145 (Gil. 83) 90 Am. Dec. 287; *Wadsworth v. Schisselbauer*, 32 Minn. 84, 19 N. W. 390; *Spooner v. Travelers' Ins. Co.*, 76 Minn. 311, 79 N. W. 305, 77 Am. St. Rep. 651; *Williams v. Kemper*, 99 Minn. 301, 109 N. W. 242. However, where it appears that the remedy at law is unavailing, because the debtor has absconded or is a nonresident, equity will give relief. *Overmire v. Haworth*, 48 Minn. 372, 51 N. W. 121, 31 Am. St. Rep. 660; *Rule v. Omega Stove & Grate Co.*, 64 Minn. 326, 67 N. W. 60. But such is not this case. On the contrary, plaintiff has elected to bring two separate actions against Hoidal without therein joining Weum, or attempting to reach property in Weum's hands belonging to Hoidal. He has therein obtained writs of attachment, but has not caused the same to be levied on the Polk county lands, nor on the Minneapolis real estate of Hoidal, so far as the allegations go. It occurs to us that the pleader has succeeded in showing that he has an ample statutory remedy. But, if he has not, he can, by the use of the attachment, secure himself, or at least obtain a position where he has some basis for asking equitable relief.

The cases of *Pendleton v. Perkins*, 49 Mo. 565, and *Gates v. McClenahan*, 124 Iowa, 593, 100 N. W. 479, relied on by plaintiff, do not sustain him, but are in accord with the holding of this court in *Overmire v. Haworth*, supra. It is not necessary here to consider the doctrine announced in *Case v. Bauregard*, 101 U. S. 638, 25 L. Ed. 1004, *Chamberlin v. Jones*, 114 Ind. 458, 16 N. E. 178, *Miller v. Hughes*, 38 S. C. 513, 17 S. E. 366, and *Early Times Distillery Co. v. Zeiger*, 9 N. M. 31, 49 Pac. 723, to the effect that it is not necessary under certain conditions to exhaust the legal remedies against a debtor before suit

in the nature of a creditors' bill; for, as above stated, it appears that in the actions pending plaintiff has remedies that he has not exhausted, nor used to an extent of becoming effective.

Order affirmed.

WORDEN v. BIELENBERG.

(Supreme Court of Minnesota. Nov. 15, 1912.)

(Syllabus by the Court.)

1. DAMAGES (§§ 109, 110*)—INJURY TO REAL PROPERTY—"PERMANENT INJURY"—"TEMPORARY INJURY."

A "permanent injury" to real property, as distinguished from a temporary or continuing injury, is one of such a character, and existing under such circumstances, that it will be presumed to continue indefinitely. A "temporary or continuing injury" is one that may be abated or discontinued at any time.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 273-278; Dec. Dig. §§ 109, 110.*

For other definitions, see *Words and Phrases*, vol. 6, p. 5312.]

2. MUNICIPAL CORPORATIONS (§ 395*) — EXCAVATION IN STREETS—DAMAGES TO ADJOINING OWNER.

The trespass complained of in this action, the excavation in the street adjacent to plaintiff's property, to a depth substantially on the grade established by the city, held a permanent and not a continuing injury, and that the measure of plaintiff's damage is the diminution in the market value of his property.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 946-948; Dec. Dig. § 395.*]

Appeal from District Court, Ramsey County; Oscar Hallam, Judge.

Action by Alvre O. Worden against Charles Bielenberg. Verdict for plaintiff, and from an order granting a new trial, he appeals. Affirmed.

R. G. O'Malley, of St. Paul, for appellant.
O. E. Holman, of St. Paul, for respondent.

BROWN, J. Plaintiff owns a lot in the center of block 87, West St. Paul, which he occupies with his family as a residence. The lot fronts on Robie street. Defendant owns all the lots in this block to the east of plaintiff's lot and up to the line of Livingston avenue, and also all the lots west of plaintiff's property, all fronting on Robie street. All the property, including the adjacent streets, is underlaid with a deposit of limestone, of marketable value. In 1885 the city council by appropriate proceedings established the grade of Livingston avenue at 2 feet below the natural level of the ground; and in 1905 the grade of Gorman avenue, to the west of the block, at about 20 feet below the natural level of the ground. The grade of Robie street, fronting plaintiff's property, and extending between Livingston avenue and Gorman avenue, has never been officially established or changed from the natural level. Defendant, under what he

claims constituted lawful authority from the city council, the validity of which is not now material, excavated Livingston avenue and removed therefrom all the limestone to a depth of about 18 feet. This was 16 feet below the established grade. He also removed the stone from his own land to the same depth, up to the line of plaintiff's property. Thereafter the city council re-established the grade of that street to correspond substantially with defendant's excavation. Defendant also removed the stone from Roble street up to the line of plaintiff's lot. He presented on the trial no authority for this action, from the city council or otherwise, and his conduct was therefore wrongful and unlawful. By reason of the excavations so made by defendant, and by others upon the other side of the block, plaintiff's access to his property has been interfered with, and the natural conditions wholly destroyed.

Plaintiff brought this action for damages, alleging the wrongfulness and unlawfulness of the acts of defendant. At the trial below it was contended that the injury and wrong complained of was continuing, and that the plaintiff was entitled to the diminished rental value of his property as damages for the wrong. The court sustained this view of the case, and received evidence and charged the jury accordingly. Defendant duly excepted. Plaintiff had a verdict. Defendant moved for a new trial, assigning as error that an incorrect rule of damages was applied; it being contended that the injury and damage to plaintiff was permanent, and that the difference in value before and after was the proper rule of damages. The trial court sustained defendant, and held that the rulings upon the trial were erroneous, and granted a new trial. Plaintiff appealed.

[1] The only question presented is whether the trespass complained of is permanent or continuing. The result of our examination of the subject and of the authorities is that the injury is permanent, entitling plaintiff to recover in one action all damages suffered in consequence of the wrong. A permanent injury to real property, as distinguished from a temporary or continuing injury, is one of such a character and existing under such circumstances that it will be presumed to continue indefinitely. A temporary or continuing injury is one that may be abated or discontinued at any time, either by the act of the wrongdoer, or by the injured party. The injury here complained of is the act of defendant in making the excavations in the street; not in acts committed from day to day in doing the work, but the wrong resulting from the completed act. One of the streets excavated was left practically upon the grade as established by the city. This is permanent, at least presumably permanent, from the facts disclosed.

It is not at all probable that the grade of the street will ever be restored to the natural level of the land, and neither defendant nor plaintiff could lawfully go thereon and restore the same to its former condition.

[2] The contention of plaintiff that defendant could be compelled to do this is clearly not sound. The authority conferred upon the municipality over the streets thereof is supreme, and any wrongful interference therewith by third persons constitutes a trespass or a nuisance, as the case may be, of which, as a general rule, only the public can complain. No suit could be maintained to compel defendant to restore this street to its natural condition, unless the city was made a party, in which event it is manifest that the city would interpose in defense its authority over the street, and successfully contest the relief sought on the ground that the street was at an established grade and ought not to be disturbed. While no grade has ever been established for Roble street, it seems certain that that thoroughfare will be made to correspond to the connecting street grades established for Livingston avenue and Gorman avenue. In this situation, and with no present or remote prospect that either of the streets will ever be restored to their former level, the injury complained of must be held permanent. The facts bring the case within the rule laid down in *Baldwin v. Railway Co.*, 35 Minn. 354, 29 N. W. 5.

Counsel called in question the soundness of that decision, but we discover no sufficient reason for departing from it. It seems in harmony with the general principles of the law on the subject, and we follow and apply it. See, also, *Ziebarth v. Nye*, 42 Minn. 541, 44 N. W. 1027. In the case of *Harrington v. Railway Co.*, 17 Minn. 215 (Gil. 188), cited by plaintiff, the wrong complained of was the continuous operation of trains, and not the act of defendant in constructing its road in the street. The injury involved in *Aldrich v. Wetmore*, 56 Minn. 20, 57 N. W. 221, and *Jungblum v. Railway Co.*, 70 Minn. 180, 72 N. W. 971, was continuing in character, and one that could be abated and discontinued at any time. Those cases are not in point.

Our conclusion, therefore, is that the injury here shown is of a permanent character, and the measure of plaintiff's damages is the diminution in the market value of his property.

Order affirmed.

STATE ex rel. KELLY v. WOLFER, Warden.
(Supreme Court of Minnesota. Nov. 15, 1912.)

(Syllabus by the Court.)

1. HABEAS CORPUS (§ 113*)—APPEAL—TRIAL DE NOVO.

Since an appeal in habeas corpus proceedings is, by R. L. 1905, § 4602, required to be

tried in this court in the same manner "as if the writ had originally issued out of this court," errors and irregularities occurring on the trial below need not be considered.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 102-115; Dec. Dig. § 113.*]

2. HABEAS CORPUS (§ 30*)—GROUNDS—IRREGULAR JUDGMENT.

Where a court has jurisdiction of the person and the subject-matter, and could render a judgment upon a showing of any sufficient state of facts, any judgment which it may render, however erroneous, irregular, or unsupported by evidence, will be sustained as against an attack by habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

3. HABEAS CORPUS (§ 30*)—SENTENCE TO REFORMATORY—SUFFICIENCY OF JUDGMENT.

Under R. L. 1905, § 5454, authorizing the court to sentence to the reformatory any person not less than 16 nor more than 30 years of age, etc., and who has been convicted of a crime punishable by imprisonment in the state prison, the fact that a judgment of conviction of such a crime, upon which the defendant is sentenced to the reformatory, fails to state the age of the defendant, does not render it subject to attack on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

4. CONSTITUTIONAL LAW (§ 80*)—ADMINISTRATIVE OFFICERS—JUDICIAL FUNCTIONS.

R. L. 1905, § 5455, amended by Laws 1911, c. 61, authorizing the Board of Control to transfer prisoners from the reformatory to the state prison, and vice versa, is not unconstitutional, as constituting a legislative attempt to vest administrative officers with judicial functions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 140, 143-147; Dec. Dig. § 80.*]

(Additional Syllabus by Editorial Staff.)

5. CRIMINAL LAW (§ 1205*) — NATURE OF "PUNISHMENT."

"Punishment," as anciently regarded, was deemed largely compensatory; the natural and logical conception of a sentence for crime being that the punishment should be nicely graduated to the nature and circumstances of the offense. But the modern conception of "punishment" takes practically no account of compensation, but commits the offender to the charge of the officers of the state as a sort of penitential ward, to be restrained as far as necessary to protect the public from recurrent manifestations of his criminal tendencies, and, if possible, reformed, cured of his criminality, and finally released, a normal man and rehabilitated citizen.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3268, 3270; Dec. Dig. § 1205.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5850, 5851; vol. 8, p. 7775.]

Appeal from District Court, Washington County; P. H. Stolberg, Judge.

Habeas corpus by the State, on the relation of John F. Kelly, against Henry Wolfer, Warden. Judgment for defendant, and relator appeals. Affirmed.

John F. Kelly, of St. Paul, for appellant. L. A. Smith and C. Louis Weeks, both of St. Paul, for respondent.

PHILIP E. BROWN, J. On June 23, 1910, one Kelly was convicted, in the district court

of Hennepin county, of the crime of forgery in the second degree, and was then and there sentenced to imprisonment in the state reformatory until he should "thence be discharged by due course of law or by competent authority." On February 23, 1912, by order of the State Board of Control, made pursuant to the authority vested in them by R. L. 1905, § 5455, the said Kelly was transferred to the state prison. On July 22, 1912, a writ of habeas corpus in his behalf was sued out of the district court of Washington county—the petition therefor alleging that his imprisonment was illegal and without authority of law, in that (1) there was an agreement between the prisoner and the trial judge, prior to the former's conviction, which was upon a plea of guilty, that his imprisonment under such conviction should not exceed 18 months, and that the plea of guilty was entered in reliance upon such agreement, and in order that the prisoner might be cured of a drug habit; (2) that the judgment of conviction did not state on its face that the prisoner was "not less than 16 or more than 30 years of age," and thus failed to show the age limit of sentence to the reformatory, while in fact the prisoner was over 30 years of age at the time of his sentence; (3) that the law authorizing the prisoner's transfer to the state prison was and is unconstitutional and void, and that, as there is no law for his return to the reformatory, he should be discharged. The court below quashed the writ, and remanded the prisoner to the custody of the respondent; and this is an appeal from its order in such regard.

[1] 1. The appellant complains here of certain rulings below; but it is not necessary either to state or decide the questions thus sought to be raised, for under R. L. 1905, § 4602, an appeal in habeas corpus proceedings is tried in this court in the same manner, to quote the statute, "as if the writ had originally issued out of this court." See Dunnell's Minn. Dig. § 4142; State v. Riley, 116 Minn. 1, 133 N. W. 86. In view, however, of the fact that the case was submitted to this court upon the record made in the proceedings below, and precisely as if the trial here were upon an ordinary appeal, we will consider the point most earnestly urged by the relator in this connection, namely, that the bill of exceptions states that the original "writ, warrant, or other written authority" under which the prisoner was detained was not produced and exhibited to the trial court, to the extent of saying that the record does not bear him out in this contention.

[2] 2. Coming, then, to the first and second grounds of discharge alleged in the petition, as above stated, we find that neither of them can be sustained. When one is confined under the final judgment of a court, he can be released on habeas corpus only for jurisdictional defects. Such writ cannot be allowed to perform the function of a writ of error or

appeal. If the court has jurisdiction of the person and the subject-matter, and could render a judgment upon a showing of any sufficient state of facts, any judgment which it may render, however erroneous, irregular, or unsupported by evidence, will be sustained as against an attack by habeas corpus. *Dunnell's Minn. Dig.* § 4129; *State v. Riley*, supra. Tested by these rules, the grounds stated in the first and second subdivisions of the petition for the writ in the instant case cannot be sustained.

Furthermore, in regard to the second of these contentions, the record shows that the prisoner was examined by the court on oath concerning his age before imposing sentence, and that he stated it to be 29 years. The relator contends that this cannot be considered, or is at least open to contradiction by evidence introduced by him below to the effect that there was no such testimony; the basis of such contention being that the minutes of the court which showed such testimony were not signed by the judge. All that is necessary, however, to prove the minutes of a court, is a copy thereof, attested by the clerk and under the seal of the court, and this is what we find the record in the instant case.

[3] And again, with regard to this second ground for a discharge alleged by the relator, we think that the customary presumption in favor of the regularity of a judgment must here prevail. See *Ex parte Marlow*, 75 N. J. Law, 400, 68 Atl. 171; *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89. See, also, *In Matter of Gregory*, 219 U. S. 218, 31 Sup. Ct. 143, 55 L. Ed. 184. We have no statute in this state requiring that the judgment shall contain anything whatever concerning the age of the prisoner, and in the absence of such a statute we do not think any recital in this regard is necessary in order to validate a sentence to the reformatory. One might as well argue that, because our statutes forbid the sentence of a minor under a certain age to the state prison, every judgment of conviction for a crime punishable by confinement in such prison must show that the prisoner is over that age. There is nothing that militates against our conclusion in this regard in the cases cited and relied upon by the relator, namely, *State v. Whittier*, 108 Minn. 447, 122 N. W. 319, *State v. Billings*, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. Rep. 525, *State v. Kinmore*, 54 Minn. 135, 55 N. W. 830, 40 Am. St. Rep. 305, and some others. None of these cases are in point, for all of them bear upon the question of jurisdiction of the proceedings. Here there was unquestionably jurisdiction of the person and the subject-matter, and if the sentence of the prisoner to the reformatory was improper it involved a mere error or irregularity, which is not ground for discharge on habeas corpus. *Ryan v. Rhodes*, 167 Ind. 121, 76 N. E. 249,

78 N. E. 330; *People v. House of Refuge*, 46 Misc. Rep. 131, 93 N. Y. Supp. 218.

[4] 3. The relator's last contention is that the statute, R. L. 1905, § 5455, authorizing the Board of Control to transfer prisoners from the reformatory to the state prison, is invalid under Const. art. 3, § 1, as being a legislative attempt to authorize purely ministerial officers to exercise judicial functions. The generic question raised by this contention is not a novel one. It is long since that criminology gave us our modern conception of criminality, from which has arisen an ever-increasing tendency to regard "punishment" for crime as being not so much compensatory as reformatory, and from this tendency, in turn, have sprung laws greatly amplifying and extending the administrative functions incident to the execution of the penalties prescribed by law for crime and imposed by the courts upon those who have incurred the same. It is not at all strange, then, that, in the course of legislative attempts in the various states of the Union to meet the requirements of this extended administrative system, laws should sometimes be passed which at least seem to attempt to vest administrative officers with powers properly appertaining to the judicial or executive departments of the government. Bitter attacks have been made upon some of these laws, most notably upon the so-called indeterminate sentence system, with its credits for good behavior, upon the parole system, and upon the prison transfer system; such attacks being grounded variously upon the contentions that the legislation assailed attempts to vest administrative officers with the judicial power of sentence or the executive power of pardon, or else is an unauthorized delegation of legislative powers. See *Murphy v. Com.*, 172 Mass. 264, 52 N. E. 505, 43 L. R. A. 154, 70 Am. St. Rep. 266; *Com. v. Brown*, 167 Mass. 144, 45 N. E. 1; *Ex parte Marlow*, supra; *Miller v. State*, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109. In each of these cases the indeterminate sentence system was sustained, though not without serious consideration, and, in Indiana, some dissent. See, also, *Flite v. State*, 114 Tenn. 646, 88 S. W. 941, 1 L. R. A. (N. S.) 520, 4 Ann. Cas. 1108, where the credit system was sustained, subject to certain limitations, and the cases were reviewed, and in *re Conditional Discharge of Convicts*, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658, where the validity of the parole system was considered. Likewise see *In re Murphy*, 62 Kan. 422, 63 Pac. 428, upholding the Kansas prison transfer act, and *People v. Mallary*, 195 Ill. 582, 63 N. E. 508, 88 Am. St. Rep. 212, declaring a somewhat similar law invalid. By citing these cases, however, we do not mean either to approve or disapprove of their holdings upon the specific questions therein involved. We cite them merely because they are pertinent to the considerations to which we have

adverted and involve the same general principles which we must apply in the instant case.

Coming, then, to the matter immediately before us, the argument against the validity of the law in question is, in substance, as follows: That the Legislature has no power to vest a ministerial body with judicial functions; that the imposing of a statutory penalty for a crime is a judicial function, and where the statute prescribes alternate penalties the selection of the penalty which is to be imposed in a particular case is also a judicial function; that the Minnesota statutes under consideration authorize confinement either in the reformatory or the state prison, it being within the discretion of the court which punishment shall be inflicted; but that the statute assailed authorizes the Board of Control subsequently to transfer from the reformatory to the state prison, and hence the final choice between the two penalties provided by statute is left to such board, who, in effect, are thus authorized either to review the action of the court in choosing the reformatory, instead of the state prison, as the place of the prisoner's confinement, or else to impose a new criminal penalty without judicial trial, for matters occurring subsequently to the original commitment.

We think, however, that this argument is fallacious. R. L. 1905, § 5052, provides: "Forgery in the second degree shall be punished by imprisonment in the state prison for not more than ten years." Under this statute alone—Laws 1911, c. 298, providing for indeterminate sentences, not being in force at the time of the conviction in the present case—it would have been the duty of the court, upon the prisoner's conviction, to sentence him to the state prison for a definite term of not more than 10 years. But R. L. 1905, § 5451, provides: "Any person not less than sixteen nor more than thirty years of age, convicted of a crime punishable by imprisonment in the state prison, and never before sentenced to a state prison or reformatory, may be sentenced to the reformatory, which sentence shall be without limit as to time. * * * Such imprisonment not to exceed the maximum term." And section 5451 provides that in similar cases, with some slight difference as to age not material here, the sentence may be to the state prison on the reformatory plan "in like manner and on like conditions as are provided for sentence to the reformatory."

These two statutes, taken together, purport to authorize the court, in its discretion, to sentence the prisoner either to the reformatory or the state prison for a nominally indefinite term, not to exceed 10 years for the crime here involved; such term, however, being legally considered to be 10 years, subject to a prior termination upon certain contingencies not necessary here to mention. See *Murphy v. Com.*, supra; *Miller v. State*,

supra. Under the three statutes which we have cited, therefore, it appears that the penalty provided by law for the crime here involved was, to a certain extent, in the alternative, thus calling for the exercise of judicial discretion in determining which should be imposed; but these statutes must be read in connection with still another statute, namely, R. L. 1905, § 5455. This section, as it stood at the time of the prisoner's conviction, and also as amended by Laws 1911, c. 61, is as follows: "The Board of Control may transfer from the reformatory to the state prison, from the state prison to the reformatory, and from the state training school to the reformatory whenever, in its judgment, such transfer will be advantageous to the person transferred, or to the institution from which such transfer is made"—with certain other provisions not here material.

Therefore, by reading this section into the sentence of the court, which must be done (*Miller v. State*, supra; *Rich v. Chamberlain*, 107 Mich. 381, 65 N. W. 235; *In re Murphy*, supra), the only alternative feature of the penalty prescribed by the statutes lies in the length and character of the term, that is, whether for a definite period of not more than 10 years, or for 10 years, subject to a possible prior termination; and when the prisoner in this case was sentenced to the reformatory, the court exercised all the judicial discretion vested in it by the statutes or the Constitution, for, whether the sentence is to the reformatory or to the state prison, the Board of Control, which has charge of both institutions, has power under section 5455 to transfer from the one to the other.

[5] But it is this power of transfer that is attacked as involving an exercise of judicial functions, and if it really does call for the exercise of judicial, as distinguished from merely administrative or regulatory, functions, it cannot, of course, be sustained. We think, however, that the power of transfer thus conferred upon the board is purely administrative. As we have already indicated, one of the principal aims, if, indeed, not the predominant one, of our penal system, is reform, and such is the policy which controls the conduct and management of the state prison no less than of the reformatory. Practically every law enacted in this state for many years, relative to sentence and imprisonment for crime, evidences this aim; and this conception of "punishment" of necessity involves an extension of the administrative side of the penal system, and imperatively demands greater freedom and wider powers on the part of the executive and administrative officers in carrying out the sentences of the courts. This new conception of "punishment"—new in the history of jurisprudence, but old and well established in this state—likewise has a direct bearing upon the office of a judicial sentence, which is now and always has been merely to di-

rect that the punishment provided by the law be administered to the person convicted of the crime. Anciently, when, under the barbarous doctrine of an eye for an eye and a tooth for a tooth, "punishment" was deemed to be, as the word implies, largely compensatory, the natural and logical conception of a sentence for a crime was that the "punishment" should be nicely graduated to the nature and circumstances of the offense; this idea being reflected in the Constitutions of some of the states by a provision that the punishment shall be proportionate to the offense, and this provision likewise being interpreted as requiring that the prisoner should suffer in proportion to the lightness or the enormity of his crime. And so long as this compensatory conception of "punishment" obtained, it might seem logically to follow that the adjudging of the penalty with great certainty and precision was essential and necessarily involved the exercise of judicial functions, and that any law attempting to deprive the courts of any of their powers in this regard would be an invasion of the province of the judiciary. The modern conception of "punishment," however, and the one that, so far as we can ascertain, has always obtained in this state, takes practically no account of compensation; the only survival thereof being found in the attempt at prevention by means of deterring examples and by confinement of and restrictions upon criminals considered dangerous to be at large, which latter system, especially when viewed from the criminological viewpoint is closely analogous to the system of confinement of and restraint upon persons of unsound mind. Obviously, then, the office of a judicial sentence for crime cannot, under this conception of "punishment," be altogether the same as when society demanded payment, complete and more or less in kind, for infractions of its laws. No longer is proportionate punishment to be meted out to the criminal, measure for measure; but the unfortunate offender is to be committed to the charge of the officers of the state, as a sort of penitential ward, to be restrained so far as necessary to protect the public from recurrent manifestations of his criminal tendencies, with the incidental warning to others who may be criminally inclined or tempted, but, if possible, to be reformed, cured of his criminality, and finally released, a normal man, and a rehabilitated citizen.

Such is the province of judicial sentence for crime in many of the states, and it should be the same, we think, in all of them. In any event, we are satisfied that this conception of a sentence is the only one that can obtain in this state. Neither in our Constitution nor in our statute law do we find any remnant of the compensatory idea of punishment. Our Constitution does not contain any provision which, by any process of construction, requires penalties to be

weighed in the balance with crime. It follows, then, that a much larger field of operation has necessarily been thrown open to those to whose charge criminals are committed for the purpose of the execution of the sentences pronounced against them, and we will say, without further preliminary, that so far as we have found it necessary in this case to examine our laws in this regard, including the transfer law herein assailed, we have not found them obnoxious to any constitutional objection. As we have had occasion recently to say: "Constitutions are not made for existing conditions, nor in view that the state of society will not change or improve, but for future emergencies and conditions, and their terms and provisions are constantly expanded by construction to meet the advancing and improving affairs of men." *State v. Mankato*, 117 Minn. 458, 465, 136 N. W. 284, 286, quoting from the opinion of Mr. Justice Brown in *Elwell v. Comstock*, 99 Minn. 261, 109 N. W. 113, 698, 7 L. R. A. (N. S.) 621, 9 Ann. Cas. 270.

Failure to heed these weighty words would necessarily result in political and social stagnation. The changes in the conceptions of "punishment" and of sentence for crime, to which we have adverted at some length, necessarily require that the constitutional division of the government into three departments should receive, so far as the question here under consideration is concerned, a more liberal construction than might have been logically possible when this provision was inserted in the first American Constitution, at which time the law had not, perhaps, abandoned the compensatory conception of punishment. We hold, therefore, that R. L. 1905, § 5446, authorizing the Board of Control to transfer to the state prison a prisoner originally sentenced to the reformatory, or vice versa, does not violate Const. art. 3, § 1; for we consider this power to be a mere matter of administration and control, in thorough keeping with the broad and humane policy underlying our penal system. In support of this conclusion we might refer to the provisions of our statutes which indicate that the reformatory and the state prison are merely branches of one great institution, from which it might be argued that, as between the two, the place of confinement is not a judicial matter (see *In re Murphy*, supra; *Rich v. Chamberlain*, supra; *O'Brien v. Barr*, 83 Iowa, 51, 49 N. W. 68); and likewise we might, for the purpose of distinguishing them, discuss the case of *People v. Mallary*, supra, and other cases which may seem to be more or less in conflict with the conclusion which we have reached. But to do so would be but to invite controversy, predicated largely upon technical refinements as to the meaning of words and terms, such as "penal" and "infamous." We will say, therefore, that while we have carefully examined these statutes

and cases, as well as the other cases to which we have been cited, and also many additional cases which we have found in the course of our own research, we base our conclusion primarily upon an independent consideration of our own Constitution and statutes, which we have endeavored to interpret in the light of the ideals and conceptions of the people of this state as reflected in its written laws.

It appears from the record that the prisoner in this case was transferred to the state prison upon his own request; but we have not allowed this fact in any way to influence our determination of the case, and the conclusion which we have reached is in no wise based thereon.

Order affirmed.

GOOD ROADS CONST. CO. v. PORT HURON, ST. C. & M. C. RY. CO.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. STREET RAILROADS (§ 99*)—INJURIES AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

Pub. Acts 1903, No. 71, makes it unlawful to use a steam engine, etc., on any public highway, unless the owner or employé running it shall send a person before it at least 10 and not more than 40 rods to warn persons using the highway of its approach. Plaintiff operated a steam engine road roller which was struck by defendant's interurban car at a public highway crossing. The outfit consisted of the engine road roller with four dirt wagons attached, making the outfit 100 feet long, and its speed was from 1½ to 2 miles an hour. It approached the crossing in charge of the engineer, who ran the engine, to within five or six feet of the near rail, got off, and stood in front of the engine so as to get a good view of the track, and looked up and down, but did not see anything or hear a whistle, and then got on his engine, blew the whistle, and started, and, when the front roller of the engine was on the far rail, he saw a car approaching and reversed and jumped off the engine. *Held*, that the engineer was guilty of contributory negligence in attempting to cross the track as he did.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209-216; Dec. Dig. § 99.*]

2. STREET RAILROADS (§ 113*)—INJURIES AT CROSSINGS—EVIDENCE—CHANGES AFTER ACCIDENT.

In an action for damage to a steam road roller struck at a crossing by an interurban street car, evidence as to changes in the premises after the accident was immaterial, unless perhaps a view of the premises had been ordered.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 229-238; Dec. Dig. § 113.*]

3. TRIAL (§ 28*)—VIEW OF PREMISES—DISCRETION OF COURT.

The question of granting a view of the scene of a collision between a steam road roller and an interurban street car rests in the sound discretion of the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 77-79; Dec. Dig. § 28.*]

4. APPEAL AND ERROR (§ 261*)—PRESENTATION BELOW—IMPROPER ARGUMENT.

Unless the court was requested to reprimand counsel for improper argument or to

take any other action, the question is not raised for review by merely excepting to the argument.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1500; Dec. Dig. § 261.*]

5. STREET RAILROADS (§ 113*)—CROSSING ACCIDENTS—ADMISSION OF EVIDENCE—OTHER ACCIDENTS.

In an action for damage from a collision between a steam road roller and defendant's interurban car, evidence of the street car being stopped to avoid collision on prior occasions at the same crossing, and that plaintiff's outfit had also caused a car to stop on the crossing on another occasion, was not admissible, not being sufficient to charge defendant with notice, so as to require it to operate its cars at a decreased rate of speed at that point.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 229-238; Dec. Dig. § 113.*]

6. EVIDENCE (§ 456*)—OPINION EVIDENCE—EXPLAINING RULES.

In an action against a street car company for damage from a collision of a steam road roller with an interurban street car at a public highway crossing, defendant's assistant superintendent was called to explain one of its rules requiring cars to enter slowly all curves, viaducts, etc., and run slowly over them and leave them slowly, and testified that the slight curve near the place of the accident was not called a curve within the meaning of the rule, and the rule did not limit speed of the car while passing over that part of the track where the curve was so slight. *Held*, that the evidence was admissible in explanation of the rule; the witness not having attempted to define the word "curve."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2105, 2106; Dec. Dig. § 456.*]

7. STREET RAILROADS (§ 118*)—CROSSING ACCIDENTS—INSTRUCTIONS—"GROSS NEGLIGENCE."

In an action against a street railroad company for damage caused by a collision between a steam road roller and an interurban car at a public highway, the court instructed that plaintiff could not recover unless the injury occurred by reason of the gross negligence of defendant and by that was not meant that the motorman actually intended to do the particular wrong complained of, that by gross negligence is meant intentionally failing to perform a manifest duty in reckless disregard of the consequences as affecting the life and property of another, and also implies a thoughtless disregard of the consequences without the exercise of any effort to avoid them, and unless the motorman, after he saw plaintiff's steam roller upon the track, and had no reason to believe it would vacate the track, did nothing to prevent the collision, but ran on in reckless disregard of the consequences, the jury could not find for plaintiff. *Held*, that the instruction was not erroneous.

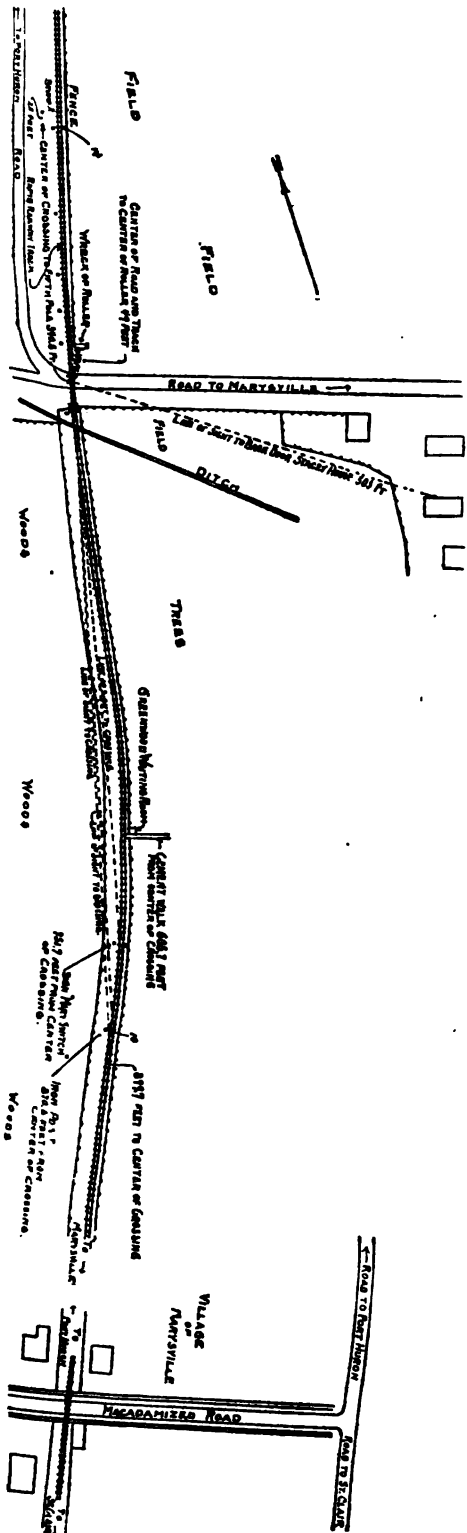
[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258-269; Dec. Dig. § 118.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3168-3173; vol. 8, p. 7675.]

Error to Circuit Court, St. Clair County; Eugene F. Law, Judge.

Action by the Good Roads Construction Company against the Port Huron, St. Clair & Marine City Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The following is the diagram referred to in the opinion:



Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, BIRD, and KUHN, JJ.

Burt D. Cady, of Port Huron (Clifford W. Crandall and Frank R. Schell, both of Port Huron, of counsel), for appellant. P. H. Phillips, of Port Huron (Joseph Walsh, of Port Huron, of counsel), for appellee.

STONE, J. This is an action to recover the value of a steam engine road roller belonging to the plaintiff, which it claims was struck and destroyed by a car of the defendant under the following circumstances:

On September 14, 1909, the defendant was engaged in operating an interurban railway from Marine City to the city of Port Huron. Said railway crossed a public highway, running nearly east and west, situated in the township of Port Huron, St. Clair county, being the first highway north of a certain stop known as Greenwood on said railway. The location of the crossing and the distance from the center thereof to certain specified points along the said railway are shown on the annexed plan or diagram. The plaintiff was engaged in the business of constructing gravel and macadam roads, and at the date above mentioned was constructing such a road at a hamlet called Marysville, located a short distance south of said crossing. It hauled its material by means of its engine road roller with four dirt wagons attached, making an outfit about 100 feet in length over all. This conveyance traveled along the highway at from 1½ to 2 miles an hour; that being its utmost speed. About 1 o'clock in the afternoon of the day in question plaintiff's said engine road roller, with the four dirt wagons attached, approached said crossing from the east, in the sole charge of its engineer, one Saul Tice. He ran the engine up to within five or six feet of the east rail of the defendant's track when he stopped. He got off the rear of the engine, and walked in the neighborhood of 25 or 30 feet to the track. He went forward, and stood in front of the engine. He was close enough to the east rail so that he got a good view of the track. He looked up and down the track, and could see beyond Greenwood on the south. He saw no car coming in either direction, and heard no whistle. He then walked back, got up on the engine, blew the whistle, and started the train ahead. When the front roller of the engine was on the west rail of the track, he saw a car coming from the south beyond Greenwood waiting room, about the time it came around a slight curve. He testified that he immediately blew his whistle, threw the reverse lever, and jumped out of the south side of the engine, and that defendant's car hit the engine about the time he landed from his jump. He testified that, when he first saw the car, it was so close to him that he did

not have time to back his engine a sufficient distance to clear the track. The width of the space inside the track or rails was 4 feet 8½ inches, and the bearing on each rail was 2½ inches. It was conceded that the defendant's car was running at the rate of 50 miles an hour at the time it came around the curve, and also that for at least a third of a mile south of this crossing the defendant ran over its private right of way. The car violently struck the road roller, throwing it a distance of 49 feet to the northeast, as indicated on the diagram. It was conceded at the trial that the road roller was practically demolished, and was after the injury of no value except for scrap iron. It appeared that plaintiff's engineer had been employed at said work for some months, and was familiar with the location of defendant's track and the crossing, and with the fact that both local and limited cars were frequently run over the line. The evidence showed that the motorman gave a whistle at about the same time the plaintiff's engineer sounded his whistle, and there was testimony that the motorman applied the air brake on the car. It being conceded that the car when it came in view was running at the rate of 50 miles an hour it would travel about 74 feet a second, and the road roller's rate of speed would be from 2 to 3 feet per second.

The trial judge ruled, and instructed the jury, that the plaintiff was guilty of contributory negligence in attempting to cross the track in the manner in which it did, and in the handling of the outfit, and submitted to the jury the question whether the defendant was guilty of gross negligence in the operation of the car. It appeared that plaintiff's engineer was alone, and unattended by any other person in the operation of the roller and outfit.

[1] Considering the length of plaintiff's outfit and its slow movement, it seems clear to us that the trial court did not err in holding that it was guilty of contributory negligence in the manner in which it attempted to cross the track. Our Legislature has sought to protect the public in the use of vehicles or trains such as the plaintiff was operating. Our statute (see Act 71, Public Acts of 1903), which regulates the use of steam engines, steam wagons, and other vehicles which are in whole or in part operated by steam on the public highways of this state, makes it unlawful to permit or use the same to pass over, through, or upon any public highway, road, or street, unless such owner or owners, agent, servant, or employé shall send before the same a person of mature age at least 10 rods, and not more than 40 rods, in advance to notify and warn persons traveling upon or using said highway or street with horses or domestic animals of the approach of such carriage, vehicle, or engine. Considering the time consumed by plaintiff's engineer in returning from the

track, and getting upon and starting his engine, and also considering the rapidity with which the defendant's car was running, it is not strange that a collision took place which might have been avoided had the plaintiff exercised ordinary care and prudence by the use of a flagman or other precaution, as above indicated, or had he remained upon the engine and reversed the motion of the train, for it is undisputed that, when he first saw the car, it was from 700 to 800 feet away, and would require at least ten seconds to reach the crossing, whereas in two or three seconds the engineer could have backed his train off the track. But it may be said that the engineer had not time to act deliberately in this latter regard. However, it seems very clear to us that had he exercised the prudence and care which the circumstances required, by calling to his assistance persons to guard the track while he was crossing with his slow-moving outfit, not only would the plaintiff's property have been saved, but the life of the motorman also, which seems to have been sacrificed by the want of proper care and management on the part of the plaintiff.

The jury returned a verdict for defendant, and judgment was entered accordingly, and the plaintiff has brought the case here upon writ of error, assigning numerous errors to the rulings of the court, the refusals to charge, and the charge of the court.

It is the contention of the defendant that the evidence did not warrant the submission of the case to the jury upon the question of gross negligence of the defendant. We do not agree with this claim, and think the court did not err in submitting the question to the jury.

There are 33 assignments of error in the record, but appellant's counsel discuss the alleged errors under the following subheads:

(1) The refusal of the court to permit the plaintiff to show changes in the premises.

(2) Failure to reprove counsel for using improper language.

(3) Refusal to permit evidence of the narrow escape from prior collisions to be considered as tending to establish notice.

(4) Permitting defendant's assistant superintendent to testify that a curve is not a curve within the meaning of defendant's rules, and refusing to charge on this point as requested.

(5) Defendant's negligence.

(6) Alleged contributory negligence of plaintiff.

(7) Refusal to direct a verdict for plaintiff.

(8) Improper statement as to the elements of plaintiff's case.

(9) Gross negligence.

(10) Prejudicial repetition of the sentence: "Plaintiff cannot recover," and other like phrases.

[2, 3] (1) Upon the first point it seems the plaintiff sought to show changes in the prem-

ises after the accident. Clearly this was immaterial, except perhaps in the event that the plaintiff had received an order from the court permitting the jury to view the scene of the accident. No direct request was made of the court for such view. If such request had been made and refused, error could not have been assigned thereon; the whole matter resting in the sound discretion of the court. *Dupuis v. Traction Co.*, 146 Mich. 151-162, 109 N. W. 418. We do not think there was any reversible error in the ruling of the court upon this subject.

(2) Failure to reprove counsel for using improper language. This question arose in the cross-examination of the witness Charles A. Bailey, sworn on behalf of the plaintiff. In his direct examination it appeared that he went to the crossing with a Mr. Moore about an hour after the accident, and took some views upon the track, placing Mr. Moore at the crossing while the witness went south. On his cross-examination he testified as follows: "I made an observation about 30 feet south of the station (Greenwood station). This point is not shown on the map. I stopped there because it was the farthest point south I could have a perfect unobscured view of Mr. Moore standing on the crossing. Q. From that point you could see Mr. Moore on the crossing, but from any other point farther south it would be impossible to see, or else very difficult, is that true? A. Well, you could see the road roller further south, but I couldn't see Mr. Moore any further south, and that is the reason I did not go any farther. Defendant's Counsel: Now, if your honor please, I ask to have this answer as stated struck out, and I take exception to it. This man is not an ordinary witness. He is the head and shoulders of the company, a man experienced in law, and he knows that that answer to that question is improper, and I desire to take exception to it. Q. Now, I ask you to answer this question? Plaintiff's Counsel: I desire to take an exception. A. I did answer your question, that that is the farthest southern point I could see Mr. Moore. Plaintiff's Counsel: I desire to take exception to the statement of Mr. Walsh that this witness was the head beetler of this company, and that he was not an ordinary witness, and that he was experienced in law, as being improper; there being no evidence to support any such statement. Defendant's Counsel: Well, the jury will judge of that, I guess. Plaintiff's Counsel: And an exception to that remark."

[4] It will be observed that the court was not called upon by motion, or otherwise, to either reprimand counsel, or take any other action, or make any ruling thereon. Under repeated decisions of this court, relating to remarks of counsel, such exceptions are of no validity. It is not necessary to cite our numerous decisions upon this point. Neither do we think the remark of counsel was of

such a serious or prejudicial nature as is contended for by appellant.

[5] (3) Appellant next urges that the refusal of the court to permit the witness Tice to give testimony relative to some prior occurrences as tending to show notice to the defendant was error. There is some question whether the record discloses any ground for this exception. Objection was made by defendant's counsel to the question relating to such claimed prior occurrences on the ground that it was immaterial, and, even if it occurred, it would not be notice to the company to the extent claimed by the plaintiff. The ruling of the court was that the witness could not be examined as to the stopping of the car under the circumstances claimed for the purpose of fixing notice on the company. Counsel took no exception to this ruling. Counsel for plaintiff then proposed to show by the witness that on three different occasions a car did stop, and the court again held that this could not be shown for the purpose of fixing notice upon the company. No exception was taken to this ruling. Counsel for plaintiff then asked the court if he would be permitted to show that the company could stop and control their cars between the crossing and the curve. After a colloquy between the court and counsel the court stated: "You may show that there was an obstruction on the track, and they did stop. If it is necessary in that particular, you may ask the witness if there was an obstruction on the track, and he will answer the question by yes or no, and ask him if they did stop the car before reaching the obstruction." This latter statement by the court was excepted to by appellant, after which the witness proceeded to testify upon the subject. Was this evidence admissible as tending to show notice to the defendant? It is the position of appellant that the nature of these claimed occurrences was such as would likely lead to discussion and report to the company. We do not think that the cases cited by appellant sustain the position claimed. Where there are defects that have been of long standing, they have been allowed to be shown.

In *Smith v. Sherwood Township*, 62 Mich. 159, 28 N. W. 806, the action being one to recover damages because of a horse becoming frightened at a hole in the planks of a bridge, it was held that the plaintiff might show that it had existed for a considerable length of time; and this court held that evidence introduced showing instances of other horses shying at the hole tended to show that knowledge of such conditions was brought to the attention of the township authorities. A like question arose in *Moore v. City of Kalamazoo*, 109 Mich. 176, 66 N. W. 1089, which was an action against the city for injuries received by stepping into a hole in a defective sidewalk. Evidence that

there were other defects in the immediate vicinity, and that other persons had stepped into the same hole in the walk, was held admissible as bearing upon the question of notice. We think the instant case can readily be distinguished from the cases cited. There was here no hole or obstruction which would be a continuing notice of the dangerous condition. The mere occurrence of the car having been stopped on prior occasions would not probably be of sufficient importance to be reported to the company, or cause any comment, or operate as a notice. Because this same plaintiff on a prior occasion was crossing the track of the defendant at this particular place with an equipment that was so imperfect as to cause its stoppage on the railroad crossing, it can hardly be said that because of that fact the defendant should be charged with notice, and therefore required to operate its cars along the stretch of track approaching this crossing at a decreased rate of speed for the reason that such condition was likely to recur. But, as we have already said, the testimony offered was received, but not used for the purposes of notice. Neither are we able to find that the court was requested to charge the jury upon that subject by the appellant.

[8] (4) It is claimed that there was error in permitting the defendant to explain the meaning of its rules by parol evidence. The rule referred to was defendant's rule 295, reading as follows: "Enter slowly all curves, special work, temporary tracks, subways and viaducts; run slowly over them and leave them slowly." It is claimed by appellee that this rule did not apply to the running of interurban trains in the country, but related to the operation of its cars in the city of Detroit; the rule having been labeled "The Rules of the Detroit United Lines." The assistant superintendent testified that the defendant had curve signs at all curves that were designated curves, and that the slight curve shown upon the diagram here was not called a curve within the meaning of railroad terms, and within the meaning of the rules of the defendant. We think that the witness was here testifying to a fact as to the application of its rules to a certain condition. We think it was competent for him to state that it was not intended to limit the speed of cars while passing over this particular portion of the track, or any other portion where the deviation from a straight line was so slight. The witness did not attempt, as is claimed by appellant, to give the meaning of the word "curve," but was only stating its application to a portion of the road. The reason for the rule must be apparent. Its only purpose must have been, and is, to avoid the danger of high speed on such portions of the tracks as curve sufficiently to make fast running over them hazardous.

[7] (5) We have examined with care the

remaining subheads and assignments of error relating to the requests of appellant to charge and the charge of the court. We find no reversible error in this branch of the case. While there is some confusion in the charge, yet it distinctly appears that the court submitted the case to the jury upon the subject of gross negligence. We think that the language of the court with reference to the definition and subject of gross negligence cannot justly be complained of by the appellant. The court, among other things, charged the jury as follows: "If, therefore, you find from the evidence that the defendant, if guilty of anything, was only guilty of ordinary negligence, and was not guilty of wilful or wanton and reckless conduct, your verdict should be for the defendant, as the rule is that, if the plaintiff is guilty of negligence contributing to the destruction of its property, it cannot recover unless the defendant was guilty of gross negligence, and, under the law of this state, it is contributory negligence for a person to propel and cross a railroad track with a traction steam road roller with a train of four wagons, in all 100 feet in length, and requiring some minutes to cross, without sending a man up and down the track to flag approaching cars. * * * Now, gentlemen, this is a question for you to determine from all the facts and circumstances in evidence in the case. You may consider the evidence in reference to the distance at which the road roller could be seen by the defendant company; the degree of the curve in the track; the blowing of the whistle; the distance in which a car can be stopped running at 50 miles an hour; the distance the car was from the steam roller when the defendant company anticipated, or should have anticipated, danger, and its ability or inability to avoid the collision if it anticipated, or should have anticipated, danger. So the plaintiff cannot recover in this case unless you find by the fair preponderance of the evidence, as above described to you, that injury occurred by reason of the gross negligence of the defendant. But it is not meant that the motorman must have actually intended to do the particular wrong complained of. By gross negligence is meant intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exercise of any effort to avoid them. Unless, therefore, you find from the evidence that the motorman after he saw plaintiff's steam roller upon the track, and when he had no reason to believe it would vacate the track before the car would reach the highway crossing did nothing to prevent the collision, but ran on in reckless disregard of the consequences, you cannot find a verdict for the plaintiff, and must find for the defendant." We are of

opinion that the question of gross negligence was here fairly submitted. *Labarge v. Pere Marquette R. Co.*, 134 Mich. 139, 95 N. W. 1073; *Knickerbocker v. Detroit, etc., R. Co.*, 167 Mich. 596, 133 N. W. 504.

We find no reversible error in the record, and the judgment of the circuit court is affirmed.

ABEL v. ROOSENRAAD.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 256*) —ESTABLISHMENT OF CLAIMS—APPEAL.

Where, in proceedings to establish claims against a decedent's estate, claimant appealed from a judgment allowing his claims in part, but the estate did not appeal from the allowance, and it was not claimed that one of the claims allowed was unjust, the court properly allowed such claim to stand as a part of the verdict and judgment in the case.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 850-856, 860-863, 910-919; Dec. Dig. § 256.*]

2. EXECUTORS AND ADMINISTRATORS (§ 221*) —CLAIMS AGAINST DECEDENTS' ESTATES— ACTIONS—EVIDENCE—ADMISSIBILITY.

Where, in proceedings by a child to establish a claim against the estate of his deceased father for services rendered after attaining full age, there was evidence of a promise by the father to compensate for the services rendered, the admission in evidence of notes executed by the father for services and delivered to a third person was proper to show what the father considered the services worth.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 901-903½, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876; Dec. Dig. § 221.*]

3. WORK AND LABOR (§ 7*)—SERVICES BY CHILD FOR PARENT—RECOVERY.

A child seeking to recover from a parent for services rendered need not establish a formal contract for services; but, where the facts attending the performance of the services and the acceptance thereof rebut the presumption that the services were gratuitous and authorize the inference that both parties acted under the understanding that they were to be paid for, the parent is liable.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 11½-22; Dec. Dig. § 7.*]

4. EXECUTORS AND ADMINISTRATORS (§ 221*) —ESTABLISHMENT OF CLAIMS—EVIDENCE— ADMISSIBILITY.

Where, in a proceeding by a child to establish a claim against the estate of his deceased father for services rendered, there was evidence of a promise on the part of the father to compensate for the services rendered, and evidence to support the child's claim, the admission in evidence of a note executed by the father for services and delivered to a third person to support the claim was not erroneous on the theory that the note was not valid as a gift for want of delivery.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 901-903½, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876; Dec. Dig. § 221.*]

5. EXECUTORS AND ADMINISTRATORS (§ 221*) —ESTABLISHMENT OF CLAIMS—EVIDENCE— ADMISSIBILITY.

Where, in proceedings by a child to establish a claim against the estate of his deceased

father, the court permitted counsel to show any statements made by the child at other times, the exclusion of prior claims not verified and not presented to or filed with the commissioners was not erroneous.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 901-903½, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876; Dec. Dig. § 221.*]

6. TRIAL (§ 193*)—MISCONDUCT OF TRIAL JUDGE—IMPROPER REMARKS.

Where, in proceedings to establish a claim against a decedent for services rendered decedent in his lifetime, the claimant sought to recover \$1,700 and showed that the decedent had executed two notes for \$1,700 for services rendered and had delivered them to a third person, and the court left the jury to find the value of the services rendered, if any, the inadvertent remark of the court, in its instructions, that the jury should figure interest on the \$1,700 and add it up and announce the verdict, was not ground for reversal as suggesting a verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 436-438; Dec. Dig. § 193.*]

Error to Circuit Court, Ottawa County; Albert B. Cogger, Judge.

Proceedings by Henry Abel against Cornelis Roosenraad, executor of John William Abel, deceased, to establish a claim against the estate of the deceased. From a judgment allowing the claim, the executor brings error. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OS-TRANDER, and BIRD, JJ.

Benn M. Corwin, of Grand Rapids, for appellant. Smedley, Linsey & Lillie, of Grand Rapids, for appellee.

STONE, J. This claim was filed in the probate court of Ottawa county against the estate of John W. Abel, deceased, to recover for services performed by claimant for his father, in his lifetime, after claimant had become 21 years of age. John W. Abel died leaving a widow and ten children—two by a former wife and eight by his widow. During the father's lifetime he had made several wills, each time disposing of his property in a different way. So far as appears by this record, in every will except the last one, the testator gave each of his boys a piece of land, and provided that each boy should pay a certain amount of money to one of his sisters. The last will was made March 17, 1910. By it the testator gave to his widow one-third of all of his estate, and the remainder was to be divided equally among all of his children, share and share alike. The testator died in September, 1910, and the last will was duly admitted to probate.

After the will was probated, claimant went to the office of the executor, who was also the justice of the peace who drew the will and the notes hereinafter referred to, and made proof of claim based on the two notes as such, and some small items of expense that had arisen about the time of the fa-

ther's death, in connection with the farm that claimant had occupied. At the first meeting of the commissioners on claims some question was raised in regard to claimant's claim, and he withdrew the first claim filed and made out a new one, as follows:

Expenses on 80 acres of land of J. W. Abel, and for moneys expended in clearing, seeding and planting same over and above amount seeded and planted and cleared when taken.

To clearing 6 acres @ \$18.00.....	\$ 108 00
To dynamite	2 25
To wheat, 8 bushels @ .95.....	7 60
To clover	7 00
To timothy	1 50
To 15 loads of gravel @ 1.50.....	22 50
To 60 rods ditching @ .75 a rod....	45 00
	\$ 193 85

~~To 0 and 1 months labor for John W. Abel at \$200.00 per year, previous to claimant's marriage..... \$1,200 00~~
~~\$1,450 85~~

This claim was verified by the claimant by an affidavit attached to the claim signed by him and sworn to, in which he swore that there was then due and unpaid on same, over and above all legal set-offs, the sum of \$193.85. After further consideration claimant struck out the item of \$1,200 for labor, as appears by the erasures, and filed another claim for labor based on the two notes, as follows:

To services performed in labor for John W. Abel, as evidenced by two notes given by John W. Abel to Henry Abel, one of date of June 2, 1908, for \$700.00, and one of date of April 21, 1910, for \$1,000.00.. \$1,700 00

This was verified in like manner, the affidavit stating that there was then due and unpaid on said claim, over and above all legal set-offs, the sum of \$1,700. The commissioners on claims rejected the first and last items of said first claim and allowed the remaining five items, amounting to \$40.85.

On the second claim the commissioners rejected \$700, and allowed \$1,000, so that the commissioners allowed \$1,000 for labor and \$40.85 for money expended, making a total of \$1,040.85, but rejected the items for clearing and ditching, and the \$700 claimed to be for labor and services represented by the note of June 2, 1908. From this allowance by the commissioners the claimant appealed to the circuit court. On the trial in the circuit court the attorney for the claimant, in his opening statement to the jury, used the following language: "Now, in presenting these claims to the commissioners, Henry was informed that the notes were no good, that they didn't bind the estate. They were left with Mr. Roosenraad; they were not delivered. And so he put in a claim for services, for staying on the farm so many years after he was 21, amounting to \$1,700. He calls it \$1,700, not because it figures out exactly that, but because his father intended him to have it, having left two notes amount-

ing to \$1,700, and then he puts in a claim for things that he did after his father made his last will, and after these notes were given. He presented a claim to the commissioners on claims for this, \$1,700 and the \$193.85, making a total claim put in of \$1,893.85. The commissioners allowed \$1,040.85, which leaves \$853 that we are suing for to-day. The Court: Are you claiming the whole amount here? Mr. Smedley: I went on the theory that the balance that was not allowed is all that we are litigating; that is, \$853. The Court: Is there any appeal here by the estate? Mr. Corwin: No, but I think you can't separate this claim. He has got to prove his whole claim. Mr. Smedley: We can prove the whole claim, then have the jury subtract, or we can subtract \$1,040.85, what the commissioners have allowed."

Upon the trial it was the claim of the claimant and appellee that when he was 21 years of age, in 1899, he was about to leave home; but his father told him that he would like to have him (claimant) stay at home and work, and he would give him more than he could earn elsewhere; and that he remained at home and worked for his father until his marriage. It is also claimed that the father promised to give claimant 80 acres of land, and the father built a house on the piece of land about the time of claimant's marriage in 1905; that claimant and his wife moved onto the land soon after their marriage and have lived there ever since; that claimant had improved the house and farm, believing, or supposing, that it belonged to him.

By a will made in 1908 the father gave this same 80 acres of land to claimant. There was testimony tending to show that the father had frequently said that he intended to compensate claimant for his services. At the time of making the will of 1908 testator made the following note:

"700.00 Zeeland, Mich., June 2, 1908.

"After my death I promise to pay to the order of Hendrick Abel the sum of seven hundred dollars.

his
 "John W. X Abel.
 mark

"Signed in presence of:

"C. Roosenraad.

"H. P. Karsten."

There was evidence that the father left this note with the justice of the peace who had drawn the will and note. The justice testified that this note, with others to other children, was left with him until testator's death; then he was to notify claimant about it.

At the time of making the will of March 17, 1910, the will of 1908 was destroyed; but this \$700 note was not taken up. When the last will was made it was prepared by the same justice. About a month after it was signed and executed the testator came to

the justice and made another note, as follows:

"\$1,000.00 Zeeland, Mich., April 21, 1910.

"After my death I promise to pay to the order of Hendrick Abel one thousand dollars for labor and other services rendered since his 21st birthday to this date, over and above the \$700.00 note previously given.

his
"John W. X Abel.
mark

"Signed in presence of:

"Nellie Roosenraad.

"Cornelis Roosenraad."

Upon this subject the executor and justice, having been called as a witness for the claimant, testified, among other things, as follows: "At the time this will was made in March, 1910, the old will was destroyed. I tore it up at his request. He was alone. I don't know who came to town with him. I think Henry came with him to town, because, if I remember right, he called for him before he left. This note (referring to the \$1,000 note) is dated in April. About a month after he made the will he came to my office and made this note for Henry for \$1,000. Q. What talk did you have with him at that time? What did he say when he first came in? A. He told me at that time that under the circumstances, seeing that he had provided one-third for his wife, the balance to be divided equally among the 10 children, that Henry ought to have something for his work, and he said, 'Now you figure up how much that would be,' and if I remember right, at \$125 a year it came to \$1,000, and he said: 'Well, then he has got to have that for his labor.' Then I drafted that note. I wrote it the way it reads; that he was to have that over and above what—as you find it there. Q. Over and above the \$700? A. Yes, but the intention was— Q. Never mind what the intention was. What did he say? A. He told me at the time that it did not include the \$700. We, as Hollanders, may have a different way of expressing our ideas. The Court: Mr. Witness, just answer the question, and tell what he said to you. A. He said that \$700 was not included; that he was to have that \$1,000 for his labor. Q. He was to have the \$1,000 besides the \$700? A. No, sir; he didn't say that. Q. Well, you wrote it that way? A. That is what I wanted to tell. Of course, if I can't say it, why then I won't say it. The Court: You have a right to tell what he said and what you actually did, but conclusions and theories leave out; that is for the jury. Witness (continuing): After having our talk I wrote the note 'for labor and other services rendered for me since his 21st birthday to this date, over and above the \$700 note previously given.' He did not tell me at that time that he had given Henry 80 acres and built him a house on it, nor at the

time I drew the first will. He only told me that I was to draw the will, that Henry was to have a certain piece of land, but he didn't say where. Q. In regard to the \$1,000 note, when he made that, that was the time he made the last will, was it? A. No, sir; the last will was made in March, and this was given in April. At the time he made that note, he did not take it with him. He left it with me, and I filed it with the other papers. It was in my hands at the time he died. It was to be left with me until he died; then I was to notify the boys about it. The Court: Were you to give it to Henry? A. I was to leave it with the other papers until the will was to be probated. Q. What were you to do, give it to Henry? A. I was to notify the boys about it, that they had those notes in my place. I called their attention to it, too, at that time. After their father died I wrote to them, and when they came in I said their father had left these two notes for them. I told Henry that his father had left two notes there, one for \$700 and one for \$1,000. I showed them to him. He had them in his hands. He left them with me. When I say 'he,' I mean Henry. I showed him the whole papers, the will and the notes, and he took them and read them and handed them back to me."

The notes being offered in evidence, the following occurred: "Mr. Smedley: I think that they ought to be admitted in evidence. I offer them also for the purpose of proving how much the old man wanted him to have. This last note recites what it is for. Mr. Corwin: If your honor please, they are not admissible because there never was any legal delivery, and, no matter what the old man may have some time had in his mind that he intended to give him, it didn't make a perfect gift before his death, it cannot take effect afterwards, and there never was a delivery here, and therefore the note has no value either as evidence or for any other purpose. The Court: Well, gentlemen, I believe that the two notes are admissible. I don't understand that the claimant here is suing upon these notes as expressed contracts. Mr. Smedley: No, I am not. The Court: I think they are admissible as bearing on the claimant's claim. Mr. Corwin: Does your honor hold that those are admissible as evidence of debt against the estate? Mr. Smedley: I didn't offer them for that purpose, and the court says he doesn't admit them for that purpose. * * * The Court: I asked counsel if he depended upon these notes as expressed contracts binding on the estate. He said he did not. Now, the ruling I made was with that idea in view. I believe, in view of the particular language of the second note, that these notes are evidence, that is, competent to go to the jury as bearing on the claim of the plaintiff here—not necessarily conclusive, as a note should be. The objection will be over-

ruled and the notes received in evidence." An exception by contestant's counsel.

There was a good deal of conflict in the testimony with reference to the amount of services rendered by claimant, and the value thereof, and especially as to the ditching and clearing of land, and as to when the latter labor was performed, whether before or after making the last note.

The claimant's wife testified generally as to the services performed by the claimant and herself upon the farm, where the house had been built and where they resided; and she testified to conversations had with the testator after making the last will, in which the following occurred: "Q. Now, afterwards, did you learn that a new will had been made and the land taken away from Henry? A. Yes, sir; Father told me. He came down there all broken up one day, and he said that the things had been taken away from Henry, the land; but he had fixed it so that Henry was to have \$1,700 for his wages. He thought that that would make it about even." There was testimony tending to show that Henry worked the farm, which he occupied, on shares.

The trial at the circuit resulted in a verdict and judgment for the claimant for the full amount claimed, except for the item of ditching. There was also included in the verdict an item of \$29.83, which we shall have occasion to refer to later.

The contestant, being the executor, has brought the case here upon writ of error, and there are upwards of 20 assignments of error. The case, however, has been discussed by appellant under certain heads, and we will consider the questions in the order in which they have been discussed, as they are covered by the assignments of error. We quote from the brief of contestant's counsel as follows: "It is conceded on the part of the contestant that the deceased intended to pay claimant for his labor on the farm after he was 21 years of age, and before his marriage. This appears from the testimony of contestant, in regard to the making of the \$1,000 note by the father, and what the father said at the time the note was made. The only dispute is in regard to the amount which was to be paid for the labor. Contestant claims it was plainly fixed at \$1,000 by the father, and that the note for \$700 was intended as a gift over and above the labor. Contestant also claims that there was no contract or agreement to pay for clearing or ditching, and that the monthly settlements between father and son rebut any such agreement."

No time need be spent upon the item for ditching, as it is conceded by the attorneys for both parties that this claim was rejected by the jury, as it had been by the commissioners.

[1] The next subject discussed by contestant and appellant is an item of \$29.83, which was submitted to the jury. The ap-

pellant claims that this was improperly submitted to the jury by the trial judge, and that the record is barren of any suggestion of it until it appears in the charge of the court. Upon that subject the circuit judge in his charge said: "It appears in this case that on the 19th day of September, the father died, leaving an estate and some heirs. One of them is the claimant or plaintiff in this suit. It further appears in evidence, gentlemen of the jury, that in due course of time the plaintiff filed with the commissioners on claims, appointed by the probate court in that estate, two claims, one amounting to \$1,893.85, and the other amounting to \$29.83. It is admitted here—it is a proven fact upon this record—that the claim of \$1,893.85 was allowed at \$1,040.85; that the claim of \$29.83 was allowed by the commissioners. From that allowance there has been no appeal taken by the estate. Consequently, in any event, gentlemen, it will be your duty, under statements of counsel in open court, and under the undisputed evidence, to render a verdict in this case for the claimant for the sum of \$1,040.85 plus \$29.83, or \$1,070.68. There is no dispute about that."

An examination of the original record, in the hands of the clerk of this court, shows that in the certified copy of the record in the probate court, of the allowances and disallowances of claims, by the commissioners, the following appears:

Name of Claimant.	Amount of Claim.	Amount Thereof Disallowed.	Amount of Final Balance in Favor of Claimant.
Hendrick Abel	\$1,839.85	\$853.00	\$1,404.85
Hendrick Abel	29.83	Nothing	29.83.

It further appears that, on the attention of the attorney for appellant having been called to the omission to print that part of the record, the following stipulation was signed and filed in this case: (After entitling the case.) "In the above-entitled cause, the record was printed and there was omitted from the same the return of the probate court filed with the clerk of the circuit court for the county of Ottawa, and it is hereby stipulated by and between the parties to this suit, through their respective attorneys, that counsel on either side may have the right to refer to said return of the probate court, the same as if said return was printed in the record, and without the necessity of amending the printed record by adding the same thereto."

It is very evident that in charging the jury the circuit judge had before him, or at least had in mind, the report of the commissioners, which shows the allowance of the claim of \$29.83 unappealed from. He further states that the jury are to include that in their verdict under the statements of counsel in open court, and under the undisputed evidence. Nowhere is it claimed that this is an unjust claim against the estate of the

deceased. It was a part of the record of the proceedings before the court. The allowance was unappealed from. We see no injustice or impropriety in allowing it to stand as a part of the verdict and judgment in the case. It carried no interest according to the direction of the circuit judge. Under the circumstances, we think there was no error with reference to this item.

The next item discussed is that of clearing the land. This, it will be remembered, was the first item in the claim which had been disallowed by the commissioners. The evidence upon the subject of what this labor was worth, when it was performed, and whether before or after the making of the \$1,000 note, was quite conflicting, and there was evidence pro and con upon the subject. The ruling of the court limited this recovery to clearing done after the date of the last note. Of the merits of that claim the jury were the judges, and, as counsel for appellant has simply discussed the merits of the question, we must say that it was a question properly submitted to the jury.

[2] The next item in dispute was with reference to the so-called \$700 note, and the interest thereon. This subject presents a question of fact, nothing more nor less. The question was fairly submitted by the court to the jury, and we think properly so, and we find no error in the admission of evidence upon the subject. The notes were introduced in evidence in connection with the claim of the claimant, that the father intended to compensate him for the labor performed, and upon the theory that the notes were some evidence of what the father considered the services of the claimant worth. There being evidence of a promise to compensate on the part of the father, we think this subject has been covered by this court in the following cases: *In re Williams' Estate*, 106 Mich. 490, 64 N. W. 490; *Sammon v. Wood*, 107 Mich. 506, 511, 65 N. W. 529.

In the first above-cited case this court held that where a promise is made to compensate for services by will, and the promisor dies without so providing, the value of the services may be recovered as a claim against the estate, and a verbal contract to convey land may be resorted to in an action to recover for such services, for the purpose of negating the presumption that they were gratuitously rendered.

[3] In the last cited case it was held that an agreement to pay for services at death is valid and enforceable against the estate of the promisor. It is not essential to a recovery by a child for services rendered to a parent that a formal contract be established in relation thereto; but if the facts and circumstances attending the performance of the work and in its acceptance are sufficient to rebut the presumption that the services were gratuitous, and to authorize the inference that both parties acted under the understand-

ing that they were to be paid for, the parent is liable.

[4] Counsel for appellant next discuss the question as to whether the \$700 note was a valid gift, claiming that it was void for want of delivery and for want of a sufficient consideration. No time need be spent upon this question, because it appears that it was the claimant's position that his claim was not based upon the two notes, but was one for personal work and labor performed during the eleven years that he worked for the father after he became of age, being for six years before his marriage, and about five years after he married, while living upon the farm; the only object of introducing the notes being to show the language used by the deceased, and to support the testimony in addition to the notes themselves, that the father intended his son to have at least \$1,700, the amount of the two notes which he had left with the justice of the peace. It is sufficient to say that there was some evidence in support of this claim, and the question was properly submitted to the jury.

[5] Under the head of "Admissions," counsel for appellant next discusses the eleventh assignment of error, based upon the refusal of the court to allow claimant's erased claim to be read to the jury. The files in the case showing the claims being in evidence, the following occurred: "Mr. Corwin: For the purpose of the jury, then, I will read the part which was put in here, and which was afterwards stricken out, as testified to by this witness. Mr. Smedley: I object to him reading to the jury a claim that is not filed. Mr. Corwin: It shows the claim which he started to file, and which he changed. The Court: Are you simply reading what is on that paper? Mr. Corwin: What was put in and stricken out. We have a right to consider it as bearing on the bona fide claim of this man as to what his claims were and what he understood, and whether he understood it one way one minute and another way another minute; one thing one day and another thing the next day. The jury have a right to consider whether or not he is acting squarely in filing this claim. The Court: It already appears that he did change his claim. Mr. Corwin: Here is a claim where he goes to work and files a claim for a certain number of years work, at a certain price per year, and then he strikes it out and makes up his mind he wants something else. The Court: Just a minute, gentlemen. It is perfectly competent, Mr. Corwin, to show that this plaintiff had filed a claim different from the claim that is here now. That would be perfectly competent, or if he made statements at any other time differing from his claim here; but since because there is something in there erased, that is not the claim. It is erased as much as it could be. It is supposed to have been wiped out entirely. It is simply a method

of erasure, that is all. I don't believe that is a paper to exhibit to the jury. They have no right to consider it at all. Mr. Corwin: It shows, if your honor please, the value he placed, himself, on his own wages. The Court: It is simply a blank. You wouldn't have any right to consider it, any more than you would turn over here and consider it on that blank sheet there. Mr. Corwin: Note an exception."

Appellant's counsel claims that the question is governed by *Ludlow v. Pearl's Estate*, 55 Mich. 312, 317, 21 N. W. 315, where it was held that it was proper for the defense to show that the claim was originally smaller; that, while such showing would not have been conclusive, the original claim would be in the nature of an admission as to value. We have examined the printed record in the above case, and find that there the change and erasure were made during the examination of witnesses before the commissioners, "near when the evidence was all in." In the instant case, in the language of appellant's counsel: "It shows the claim which he started to file, and which he changed." We think the cases are not similar. It also appears that the claim was never verified except for the amount of \$193.85, and it is fair to infer that the claim for \$1,266 was never presented to, or filed with the commissioners. It may be doubted therefore whether it was a proper paper to be presented to the jury. In view of the offer of the court to permit counsel to show any statements made by claimant at other times, we are of opinion that the ruling was not reversible error.

[6] The only remaining subject discussed by appellant's counsel is that of a suggested verdict. The question arose in this way: In the course of its charge the court said: "Was there a contract under the rules which I have already given you? If there wasn't a contract, return a verdict of \$1,070.68. If there was such a contract, then what were the services worth? Were they worth more than the claims allowed? If they were, add that amount to the \$1,070.68 and figure interest on the \$1,700 and add it up and announce your verdict. Mr. Smedley: Your honor, you said, 'Find out how much it was worth, and then add interest on \$1,700.' Mr. Corwin: I noticed that myself. Mr. Smedley: You should have said: 'Figure interest on that amount.' The Court: Did I say \$1,700? Mr. Smedley: Yes. Mr. Corwin: In other words, suggesting a verdict to the jury. The Court (to the jury): In the first place determine what amount this plaintiff is entitled to, and then add interest on that at 5 per cent., leaving out the small item of \$29.83, and whatever you find, if anything, in regard to the ditch and the clearing of land. I will read a request handed up on that subject: 'If you find that the labor was to be paid for after the death of the father,

and you find that the labor is \$1,700, due at the death of the father, then he is entitled to interest at 5 per cent. on the \$1,700, or such other sum as you find is right, from the death of the father, namely, one year and one month. No interest can be allowed on the other small items, the \$29.83, the \$40.85, and the other item, if you find them in favor of the claimant."

Counsel for appellant strenuously urges that here was an intimation of what the court believed the evidence established, and that it was reversible error, and he cites many cases on the subject. In other parts of the charge the court had fully left to the jury the amount to be found for labor and services, if anything. We are of opinion that the court here made an inadvertent remark, which it promptly corrected, when its attention was called to it, and that no error, sufficient to reverse the case, was thereby committed. This court has held that, in determining whether remarks made by the court in the course of a trial were improper and prejudicial, the context, and the circumstances under which they were uttered, must be considered. *Lamb v. Lippincott*, 115 Mich. 611, 73 N. W. 887. It would be unfortunate to litigants, if an inadvertent remark of the trial judge, corrected at once, like the one we are considering, should be held to be reversible error.

We think that the case was fairly tried, and, finding no reversible error in the record, the judgment of the circuit court is affirmed, with costs against the estate.

ERICHSEN et al. v. TAPERT et al.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. COVENANTS (§ 6*) — EXECUTION BY ALL PARTIES—TIME EFFECTIVE.

A contract executed by property owners provided that "we and each of us, being the owners of one or more lots" in a certain subdivision "described as lots 50 to 74 inclusive, situate on the north side of said C. avenue and also lots numbered from 25 to 49 inclusive" situate on the south side thereof, in consideration of the mutual covenants contained herein, agree not to erect any other than a single dwelling house on each lot. *Held*, that the contract did not require that the owners of all of the lots described, numbered from 25 to 74, sign it before it should become binding upon those who signed.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 5; Dec. Dig. § 6.*]

2. COVENANTS (§ 1*) — BUILDING RESTRICTIONS—CONSIDERATION OF CONTRACT.

A mutual agreement by the owners of property on a certain street to observe the building restrictions imposed therein upon the lots as to the character of buildings to be erected, cost, etc., was a sufficient consideration to sustain the contract as to those property owners who signed it.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 1; Dec. Dig. § 1.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. COVENANTS (§ 84*)—PERSONS BOUND—"ASSIGNS."

A contract executed by property owners on a street imposing restrictions upon the lots for building purposes which recited that, "in consideration of the mutual covenants herein contained, we do hereby agree to and with each other and for our and each of our heirs, executors, administrators, and assigns," bound the successors in title of the signers as well as themselves personally, so that the covenant may be enforced by or against the grantee of an original signer, the word "assigns" including all who take immediately or remotely from the assignor, whether by conveyance, devise, or descent.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 90-92; Dec. Dig. § 84.*]

For other definitions, see Words and Phrases, vol. 1, pp. 577-582; vol. 8, p. 7584.]

4. COVENANTS (§ 6*) — RESTRICTIVE COVENANTS—SEPARATE INSTRUMENT.

The fact that an instrument executed by property owners, imposing building restrictions upon property on a street, was independent of the deed conveying title was immaterial to the validity of the restriction if supported by a valuable consideration.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 5; Dec. Dig. § 6.*]

5. COVENANTS (§ 103*) — RESTRICTIVE COVENANTS—WAIVER.

A prior erection, without objection, of a barn on the back of a lot which was subject to a building restriction prohibiting the location of any other than a single dwelling house on each lot, would not constitute a waiver of the restriction as to such lot so as to permit the erection on the rear of the lot of a store building.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 169; Dec. Dig. § 103.*]

6. COVENANTS (§ 103*) — RESTRICTIVE COVENANTS—VIOLATION.

Where a store building, if erected on the rear of lot 49 on a street in violation of a restrictive covenant imposed on that and adjoining lots, would abut on the easterly line of lot 47 for nearly half its length, and would be but 50 feet distant from lot 45, it cannot be said that the erection of the store building would not injure lots 45 and 47, so as to entitle the owners of those lots to enforce the covenant, even if actual injury were necessary.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 169; Dec. Dig. § 103.*]

Ostrander and McAlvay, JJ., dissenting.

Cross-Appeal from Circuit Court, Wayne County, in Chancery; James O. Murfin, Judge.

Action by Amelia Erichsen and others against Robert T. Tapert and others. From a decree in part for complainants, both parties appeal. Decree modified as stated.

The bill in this case is filed to enjoin a threatened violation of certain building restrictions claimed by complainants to cover the premises involved. The lot in question is No. 49, lying at the southwest corner of Chandler and Oakland avenues in the city of Detroit. A single family dwelling house now occupies the front portion of said lot facing Chandler avenue. The present owners desire to utilize the rear portion of the lot by building stores thereon facing Oakland avenue. Complainants insist that no struc-

ture can be erected upon said lot except a single dwelling house. The deed conveying this lot to the first owner after subdivision contained the following restriction: "It is further expressly understood that the said above premises are subject to the building restriction now existing on said subdivision, and that said party of the second part assumes all obligations in conformity with said building restriction." In October, 1904, an attempt was made by certain of the lot owners on said street to make the restrictions covering lots numbered from 25 to 74 more certain. To that end, the following agreement was executed by the owners of 26 of the 50 lots: "Know all men by these presents that we and each of us being the owners of one or more lots in the Chandler avenue subdivision of park lot five (5) of the subdivision of section fifty-seven (57), ten thousand acre tract, Hamtramck, Wayne county, Michigan, described as lots fifty (50) to seventy-four (74), both inclusive, situate on the north side of said Chandler avenue, and also lots numbered from twenty-five (25), to forty-nine (49), both inclusive, situate on the south side of Chandler avenue, in consideration of the mutual covenants herein contained, do hereby agree to and with each other, and for our and each of our heirs, executors, administrators and assigns, as follows: That, for the purpose of making and maintaining said Chandler avenue as a desirable residence street for private families, we do hereby agree for the consideration hereinbefore mentioned that we nor either of us will erect or cause to be erected any other than a single dwelling house on each lot planned and designed to be occupied as a dwelling for a single family; that we will not build such dwelling house nearer than twenty (20) feet from the Chandler Avenue street line, said twenty (20) feet not to include the porch of such dwelling house, nor nearer than five (5) feet from the side line of our said lots, so that a distance of ten (10) feet between the buildings shall be maintained on said Chandler Avenue; that said buildings shall be built of either brick, stone or frame, and shall cost at least the sum of twenty-five hundred dollars (\$2,500). It is also agreed between the parties hereto that 'Exhibit A,' hereto attached and made a part of this restrictive agreement, shows the number of the lot in said addition that each of the persons executing this agreement owns, and that said 'Exhibit A' shall have the same force and effect for the purposes of this agreement as if the same were written into the body of this agreement. In witness whereof we have hereunto set our hands and seals this 26th day of October, A. D. 1904." This contract was executed by Fred Vogt, who was at that time the owner of lot No. 49. It was also executed by the owner of lot No. 47, lying next

west of 49, and by the owner of lot No. 45, lying next west of 47. The agreement was duly acknowledged and placed of record. The question of the character of the general restriction covering this street was considered by this court in *Tillotson v. Gregory*, 151 Mich. 128, 114 N. W. 1025. A reference to that opinion will aid to a correct understanding of the situation. The court below enjoined the defendants from proceeding with the erection of the stores under the authority of *Tillotson v. Gregory*, but declined to construe the contract relied upon by complainants or to determine its effect upon the matter in controversy. The decree did not enjoin the erection of a structure upon the premises to be used for residence purposes, but provided "that this decree shall be without prejudice to complainant's right to take such further action as they may desire in case of a threatened or attempted violation of the agreement of October 26, 1904." From the decree entered both parties appeal.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, and OSTRANDER, JJ.

E. S. Clarkson, of Detroit, for complainants. A. G. Pitts, of Detroit, for defendants.

BROOKE, J. (after stating the facts as above). The bill seems to have been filed solely in reliance upon the contract and the answer meets the averments of the bill. The prayer for relief is that defendants be enjoined from erecting or causing to be erected upon said lot any building or buildings other than a barn or other outbuildings appurtenant to a single dwelling house for said lot, and that they be perpetually enjoined from using any dwelling thereon for any other than dwelling purposes for a single family. It is obvious that the decree as entered affords no protection to complainants if, as they aver, defendants should conclude to build in place of the stores a flat building for residence purposes only upon the rear portion of the lot in question. In such event, complainants would be compelled to file another bill to determine whether they are entitled to the relief sought in this proceeding. We think the meaning and effect of the agreement was fairly in issue in the court below, and that a determination of that issue should have been there made. In holding the defendants precluded from erecting structures for business purposes upon said lot the court was clearly right under our former decision. That decision did not, however, rest upon the agreement here in question. If it was in existence at the time of the trial of *Tillotson v. Gregory* in the lower court, it was not produced.

[1] To fully define the rights of the parties, it is necessary to pass upon the agreement. Defendants contend that the agreement by its terms was not to go into effect

until executed by the owners of all of the 50 lots, and that, as only a bare majority (26) signed, the contract never became effective or binding on those who did sign. A careful examination of the contract convinces us that it will not support this construction. The parties are described as "owners of one or more lots in the Chandler Ave. subdivision described as lots 50 to 74 both inclusive, situate on the north side of said Chandler Ave. and also lots numbered from 25 to 49 both inclusive, situate on the south side of Chandler Ave." Nowhere in the contract does it appear that the owners of all the lots described (numbered from 25 to 74) must sign the contract before it shall become operative or binding upon those who did sign. Moreover, the testimony in the case clearly shows that, when the contract was circulated among the lot owners, those who signed were advised that it was not thought possible to secure the signatures of all those who owned lots in the specified area.

[2] We think the mutual agreement to observe the restriction was an adequate consideration passing from each signer to the other signers, and likewise that it was valuable, clearly not so valuable as if all had signed, yet having a tendency to raise and maintain the character of Chandler avenue as a residence street.

[3] It is next contended by defendants that the agreement constitutes a purely personal covenant binding upon nobody but those who signed, if binding upon them. The contract reads: "In consideration of the mutual covenants herein contained (we) do hereby agree to and with each other, and for our and each of our heirs, executors, administrators and assigns, as follows." The word "assigns" comprehends all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law. 1 Words & Phrases, p. 577, and cases cited. There is no doubt that these defendants who hold their title from Vogt who signed the contract come within the legal definition of the word. The expressed purpose of the contract, and the fact that it was so executed as to entitle it to record clearly demonstrates that it was intended to be binding not alone upon the signers but upon all their successors in title as well. That the remedy may be had by and against the grantees of the respective parties is authoritatively settled. *Watrous v. Allen*, 57 Mich. 362, 24 N. W. 104, 58 Am. Rep. 363; *Whitney v. Union Ry. Co.*, 11 Gray (Mass.) 359, 71 Am. Dec. 715; *De Gray v. Monmouth Co.*, 50 N. J. Eq. 332, 24 Atl. 388; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *Brouwer v. Jones*, 23 Barb. (N. Y.) 153; *Hubbell v. Warren*, 8 Allen (Mass.) 178. See, also, 5 Am. & Eng. Enc. of Law, p. 11 et seq.

[4] The fact that the restriction is created in an instrument independent of the deed

conveying title is of no consequence, as long as there is a valuable consideration moving to and from the signers.

[5] It is further urged that the restriction has been waived by the complainants as to lot 49. It is shown that upon the rear end of said lot a barn some 25 by 27 feet was erected without protest after the contract was executed. We are not called upon here to determine what outbuildings are reasonably and necessarily appurtenant to a dwelling house for a single family. The erection of the structure contemplated by defendants, whether a flat building or stores, cannot be justified upon the ground that it is a necessary appurtenance to a single dwelling. The fact that it may be less obnoxious than the barn has no bearing upon the question.

[6] The claim is made that to enforce the restriction as to the rear portion of lot 49 would be of no advantage to complainants, while it would cause serious loss to the defendants. We do not think it can be said that the erection of such a structure would not be injurious to lots 45 and 47, owners of both of which signed the contract.

The view presented by the rear end of a row of stores or of a flat building is, we believe, considered neither attractive nor artistic. This building would abut upon the easterly line of lot 47 for nearly half its length, and would be but 50 feet distant from lot 45.

The decree of the court below will be so modified as to enjoin defendants from erecting any structure upon lot 49, except such as are permitted by the restrictive covenants contained in the agreement. Complainant will recover costs of this appeal.

MOORE, C. J., and STEERE and STONE, JJ., concurred with BROOKE, J.

OSTRANDER, J. (dissenting). I am unable to agree with my Brother BROOKE. As he states, the original deed to lot 49 of the subdivision in question contained the restriction: "It is further expressly understood that the said above premises are subject to the building restriction now existing on said subdivision, and that the said party of the second part assumes all obligations in conformity with said building restriction." In *Tillotson v. Gregory*, 151 Mich. 128, 114 N. W. 1025, the subject of the building restriction imposed upon lots in this subdivision was considered. It was said: "A careful reading of the tabulation made of the conditions in the deeds will not disclose a general, uniform, and certain plan of improvement, except that these lots were to be used for residence purposes, as distinguished from business purposes, and the building line was to be 20 feet from the street line, and the houses were to cost not less than \$2,500 and \$4,000, according to location." This ruling supports the injunction against erecting stores upon lot 49, which affords

complainants relief from the injury immediately threatened.

However, I agree that the force and effect of the instrument made in October, 1904, by some of the lot owners, is involved and ought to be determined, and upon that point am of opinion that the covenant contained in the instrument is not binding upon the present owner of lot 49. In the first place, the instrument intended to apply to 74 lots was executed by the owners of but 28 lots. In and of itself, therefore, it would not, and could not, accomplish the purpose therein stated, which was "that, for the purpose of making and maintaining said Chandler avenue as a desirable residence street for private families, we do hereby agree, for the consideration hereinbefore mentioned, that we nor either of us will erect or cause to be erected any other than a single dwelling house on each lot planned and designed to be occupied as a dwelling for a single family; that we will not build such dwelling house nearer than twenty (20) feet from the Chandler avenue street line, said twenty (20) feet not to include the porch of such dwelling house, nor nearer than five (5) feet from the side line of our said lots, so that a distance of ten (10) feet between the buildings shall be maintained on said Chandler avenue; that said buildings shall be built of either brick, stone or frame, and shall cost at least the sum of twenty-five hundred dollars (\$2,500)." In fact, the record discloses that Chandler avenue is not a street of single dwellings, and not one on which the dwellings erected are uniformly distant from street and side lines. In the second place, the instrument creates no easement upon lots, and is not binding upon the assigns of those who executed it. It contains a covenant, which is simply a contract, and is purely personal to those executing the instrument, relating only to their own acts. Easements—incumbrances on land—must be created by apt words, and a perpetual easement is not to be inferred from language clearly consistent with a mere personal undertaking. "In construing the covenant it is to be observed that the grantor, although speaking for himself and his successors, to the grantee and his successors, confined the restriction to himself alone, by agreeing that he, the grantor, would neither effect nor cause to be erected any building that should be regarded as a nuisance. According to the literal, and hence natural, interpretation of this language, the parties meant that the grantor should not personally do or cause to be done any of the inhibited acts. No doubt could arise as to the correctness of this construction, if the parties had not agreed in behalf of themselves and their assigns. The substance of the covenant, however, is limited to the covenantor, and purports to restrict his action only. While the capacity in which he assumes to contract is in behalf of himself and others, the actual contract,

or the thing agreed not to be done, is limited to his own acts. Clearly the inconsistency cannot be dispelled by subordinating substance to form, or by holding that the actual agreement is of less importance than the capacity in which it was made." This is the language of the court of errors of New York in construing a covenant contained in the very deed of the land. *Clark v. Devoe*, 124 N. Y. 120, 124, 125, 26 N. E. 275, 27 Am. St. Rep. 652. The reasoning of the court in that case is sound, is applicable here, and the case is authority for holding that the agreement of October, 1904, does not create an easement, and that lot 49 is subject only to the general restriction stated in *Tillotson v. Gregory*.

McALVAY, J., concurred with OSTRANDER, J.

HILL et al. v. TOWN et al.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. CORPORATIONS (§ 298*) — "QUORUM" — MAJORITY OF STOCK.

Pub. Acts 1903, No. 232, § 10, provides that a majority of the directors of every manufacturing or mercantile corporation convened according to the by-laws shall constitute a quorum for the transaction of business, and the stockholders holding a majority of the stock at any meeting shall be capable of transacting the business of that meeting, except as herein otherwise provided, and that at all meetings of such stockholders each share shall be entitled to one vote; stockholders being permitted to vote in person or proxy. Held that, in order to constitute a statutory quorum to hold a lawful meeting of stockholders for the transaction of business, a majority of all the stock must be represented in person or by proxy.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292-1317, 1319; Dec. Dig. § 298.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5895, 5896.]

2. CORPORATIONS (§ 298*) — CORPORATE PROCEEDINGS—STATUTORY QUORUM.

The requirement of the presence of a statutory quorum to enable the stockholders of a corporation to legally transact business are mandatory.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292-1317, 1319; Dec. Dig. § 298.*]

Case Made from Circuit Court, Eaton County; Clement Smith, Judge.

Information in the nature of quo warranto by Calvin H. Hill and others, relators, against Frank P. Town and others. Judgment of nonouster, and relators appeal on a case made. Reversed and judgment of ouster entered.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, KUHN, OSTRANDER, and BIRD, JJ.

Garry C. Fox, of Charlotte (Butterfield & Keeney, of Grand Rapids, of counsel), for appellants. Elmer N. Peters and L. H. McCall, both of Charlotte, and James M. Powers, of Battle Creek, for respondents.

McALVAY, J. In the circuit court for the county of Eaton relators on October 5, 1911, asked and were given leave to file an information in the nature of a quo warranto against respondents to determine by what right they assumed to act as directors of the Duplex-Power Car Company, a Michigan corporation, relators claiming that they were the lawful directors of such corporation, and that respondents unlawfully assumed such rights and authority as directors, and unlawfully used, held, and retained the factory, offices, and all the personal property of said corporation. A demurrer to this information was interposed by defendants, but, before a hearing was had thereon, relators discontinued as to one of the respondents, and filed an amended information. To this information, as amended, respondents entered a plea, in substance averring that they were the duly and lawfully elected directors of said corporation, admitting that relators were duly elected directors of said corporation at the annual stockholders' meeting held on August 6, 1910; that their said election was for the term of one year and until their successors should be elected; that the annual meeting for the following year, of which due notice was given to the stockholders of the corporation, was called to be held on August 5, 1911, and an adjournment was had to September 19, 1911; that at such adjourned meeting the respondents were regularly elected directors by a majority vote of the stockholders and stock present at such adjourned meeting, and that therefore relators ceased to be such directors, and respondents, by virtue of the said election, became and still continue to be the lawfully elected and qualified directors of said corporation, and that by reason thereof they are rightfully and lawfully acting as such directors. To this plea the relators filed a replication November 22, 1911, the material parts of which are as follows: That Act No. 232 of the Public Acts of 1903, and amendments thereof, require stockholders holding a majority of the stock in corporations incorporated thereunder to be present, either in person or by proxy, in order to lawfully do business at any meeting of said stockholders; that at the annual meeting of this corporation, which is incorporated under this act, held on August 5, 1911, there were not present stockholders, either in person or by proxy, holding a majority of such stock, and not a sufficient representation of stock to constitute a lawful quorum for the transaction of business, except that of adjournment to a future day, as provided by said act; that the adjourned meeting held September 19, 1911, was not a lawful meeting of the stockholders, for the reason that a lawful quorum was not present as provided by said act to transact any business other than to adjourn said meeting; that said act requires that all voting at such

meetings of stockholders shall be by shares of stock, one vote for each share; that the total shares of stock of the said corporation was at that time and still is 10,000 shares, and that at such adjourned meeting there was less than 1,100 shares represented by said stockholders present, either in person or by proxy; that the election of respondents at said meeting was therefore unlawful, and they were without right to exercise and enjoy the offices of directors in the corporation, or to use, hold, and retain its property. Respondents filed a rejoinder to this replication, denying the construction given to this act by relators. To this rejoinder relators filed a surrejoinder. Said cause was tried before a jury demanded by respondents to determine the disputed facts raised by the pleadings.

The findings of the jury are included in the opinion of the court. Of these findings it is only necessary to say it appears that the jury upon the first issue found that only 3,968 shares of stock of the corporation were represented by stockholders present and by proxies at the annual stockholders' meeting held August 5, 1911; and upon the second issue that no by-law providing as to what should constitute a quorum at any meeting of the stockholders was ever enacted.

It is admitted in the case that at the adjourned stockholders' meeting at which respondents claim to have been elected directors held September 19, 1911, not more than 1,100 shares of stock were represented by stockholders present and by proxies. In the opinion of the court in this case, which has been stipulated to be considered as the findings of the court herein, it was held that the respondents were legally chosen as directors of this corporation, and were not usurping such offices and should not be ousted; that the information in the case was not supported by the proofs and that the relief asked by relators should be denied, and a judgment of nonouster in the usual form, with costs to be taxed, was entered in said cause. From this judgment the case is before this court for review upon a case made.

For the purpose of a better understanding of the errors assigned, it will be necessary to quote the following material portions of the findings of the court: "This is a proceeding to test the right of respondents to hold and exercise the offices of directors of the Duplex-Power Car Company, a corporation doing business in the city of Charlotte, Mich. The capital stock of said company is \$100,000, divided into 10,000 shares of \$10 each. The company was organized under Act No. 232 of the Public Acts of 1903. The vital question at issue is whether a minority of the stockholders in interest can elect a board of directors. The relators contend that the respondents, having been elected at a meeting of the stockholders having a minority of the stock of the company, were

not legally elected, and are not the lawful directors, and that the relators, having been elected prior thereto, are the lawful directors of said corporation. It is not disputed that the relators were duly and regularly chosen as the directors of said company on August 6, 1910, and it is conceded that if the respondents were not legally elected on September 19, 1911, the relators would hold over, and would now be the legal officers of said corporation and should have a judgment of ouster against respondents. The respondents, if elected, were elected at an adjourned meeting on September 19, 1911. It is admitted in the case that the annual stockholders' meeting was legally called and held on the 5th day of August, 1911, and legally continued by adjournment to September 19, 1911. It is admitted that at the adjourned meeting of September 19, 1911, about 1,100 shares of stock were represented by stockholders present and by proxy, and that at that meeting each of the respondents received nearly, if not, the unanimous vote of all the shares present. The issues are practically framed by the pleadings. A jury was asked for, and called to determine certain issues of fact. These issues of fact were prepared and submitted to the jury by the court." Then follow the issues submitted to the jury, including the questions and answers thereto, the substance of which has already been given. The court proceeds: "I do not regard the first issue as important in the determination of this case. The determination of the second issue is important. It is conceded that there were present at the adjourned meeting at which respondents were elected only about 1,100 shares of stock. The answer of the jury to the question constituting the second issue being in the negative, the rights of relators and respondents are dependent upon the construction given section 10 of Act No. 232 of the Public Acts of 1903, the act under which the Duplex-Power Car Company was brought into existence. Section 10 reads as follows: 'A majority of the directors of every manufacturing or mercantile corporation convened according to the by-laws, shall constitute a quorum for the transaction of business; and the stockholders holding a majority of the stock at any meeting of the stockholders, shall be capable of transacting the business of that meeting, except as herein otherwise provided; and at all meetings of such stockholders each share shall be entitled to one vote. Stockholders may appear and vote in person or by proxy duly filed.' I am not in doubt as to what should be the interpretation of this statute. It is a self-evident proposition that the owners of a majority of the stock of any corporation have the power to control its affairs by electing a greater number of the board of directors. To do this, however, they must attend the meeting of the stockholders and care for their rights,

and, if they neglect to do this, they are bound by the action of those who do attend. That is conceded to be the common-law rule, and it is a rule well founded in right and common sense. In this case there is no claim that there was any fraud or any action on the part of the minority stockholders in interest or on the part of respondents by which the relators, or the majority stockholders in interest, were in any way deceived or misled as to the time to which the annual meeting was adjourned. 'The stockholders holding a majority of the stock, at any (this) meeting of the stockholders,' can transact the business of the meeting. That was what was done at the meeting of this corporation September 19, 1911, and I think it should be held as a matter of justice, and must be held as a matter of law, that the stockholders present at that meeting cannot be restricted in or denied their right to attend to the business for which the meeting was called, because of the absence of other stockholders. It is the judgment of the court that the respondents are not usurping the offices of directors of said corporation, but that they were legally chosen as directors and should not be ousted, and that the information in the nature of a quo warranto filed in this case is not supported by the proof and that the relief asked for by relators should be denied. Such an order will be entered with costs to the respondents. Dated February 28, 1912."

[1] The question involved in the case is a single one. It arises on the construction of section 10 of Act No. 232 of the Public Acts of 1903, quoted above in the findings of the court. A reading of the findings of the court shows that the construction given to this section was that it in no way changed the common-law rule, and that it authorized the transaction of business at any stockholders' meeting by those stockholders present without reference to the amount of stock of the corporation they represented in person or by proxy, and that the only requirement to make any action valid was that it received the votes of a majority of the stock present. Relators contend that in so holding the court was in error; that a fair construction of this section requires this court to hold that to authorize the stockholders at any meeting of the stockholders of such a corporation to transact business there must be represented in person or by proxy a majority of all the stock of such corporation. This provision has existed as a part of the law of this state for more than 50 years, and appears in all of the compilations of our statutes since 1853. The exact question is one of first impression in this court. In the case of *Star Line v. Van Vliet*, 43 Mich. 364, 5 N. W. 418, it is indicated that the court accepted the construction claimed by relators in the instant case. The dispute in that case arose over the claimed want of authority of a

committee appointed by the stockholders of the corporation (the affairs of which the stockholders were investigating) to bind the corporation by the employment of expert accountants. The court said: "Generally, no doubt, a stockholders' meeting would not be authorized to contract on such subjects, the ordinary management being with the directors; but, as the purpose here was in part at least to investigate what had been done under the superintendence of the directors, it was competent for the holders of a majority of the stock to do what was done. Comp. Laws 1871, § 2682. There is no ground on which the corporation can urge an intentment against the validity of the resolution, and arbitrarily deny its regularity and force. In view of the facts presented, every presumption is the other way. There was no offer of proof that the stockholders present at the meeting did not hold a majority of the stock." Section 2682 of the Compiled Laws of 1871, referred to by the court, contained in an act to authorize the formation of corporations for the purpose of engaging in commerce or navigation, is identical in all respects with the section now under consideration. This is the only case where any reference has been made to the question by this court.

In the State of New York the question here involved was passed upon by the Supreme Court, at Special Term, as follows: "By general law the stockholders present in person or by proxy at a meeting of stockholders constitute a quorum. 'The general corporation law (Laws 1892, c. 687), however, allows the directors to change this by by-law, and fix the amount of stock which must be represented in order to make a quorum. Section 11. In this company the following by-law was passed, viz.: 'A majority of the stock present in person or by proxy at any meeting of the stockholders shall constitute a quorum.' It is without any punctuation marks. Unless to establish a quorum different to that which the general law makes, this by-law could have had no object. It cannot be construed as meaning that a 'majority' of the stock actually represented at a meeting should be a quorum, for that would be unlawful. A majority cannot separate itself from the minority, and be a quorum. All present are the quorum. It must therefore mean that it is necessary that a majority of the stock of the company shall be present in person or by proxy to make a quorum. * * *'" In re *Rapid Transit Ferry Co.*, 19 Misc. Rep. 409, 43 N. Y. Supp. 538. Upon a hearing before the Appellate Division of the Supreme Court of that state, it approved of the construction given to this by-law by the lower court, but held that by reason of the statute making provision for the election of directors of corporations that the by-law did not apply. *Matter of Rapid Transit Ferry Co.*, 15 App. Div. 530, 532, 44

N. Y. Supp. 539. The construction of the following by-law of a corporation was before the Supreme Court of Maine: "No business shall be transacted at any meeting of the stockholders unless a majority of the stock is represented except to organize the meeting and adjourn to some future time." The court said: "What should constitute a quorum for the transaction of business at their meetings was a question which the stockholders had a right to determine (R. S. c. 48, § 6), and this they did by the adoption of the foregoing by-law providing that, unless a majority of the stock was represented, no business should be transacted at any meeting, except to organize and adjourn to some future time. At the annual meeting of June 8, 1885, at which it is claimed the new board was elected, 188 shares of the capital stock was represented, and no more. Was there a majority of the stock represented at that meeting? If not, there could be no legal election of officers at that meeting. We think a fair and reasonable as well as proper construction of the by-laws leaves no room for doubt as to what was intended by a 'majority' of the stock. It was divided into 400 shares, and it would take 201 shares to constitute a majority of that stock. The language of the by-law is plain and susceptible of no ambiguity. * * * But inasmuch as there was not, in fact, a majority of stock represented at that meeting, there could be no legal business transacted, except to organize and adjourn to some future time. Such was the language as well as the evident intent and meaning of the by-law, duly adopted for the government of the corporation. Consequently it was not in the power of a minority to do that which only a majority could legally accomplish. Hence, it cannot be held that the board which now represents this plaintiff corporation, and which claims the right to commence and prosecute this suit, was legally elected. The consequence is that the old board of directors, about whose election no question is raised, continued in office by virtue of the by-laws of the company, and were the only legal board of directors at the time this suit was commenced." *Manufacturing Co. v. Faunce*, 79 Me. 440, 443, 10 Atl. 250, 251. The authorities above cited favor the construction contended for by relators, and are all the authorities we have been able to find after a somewhat extended search. It is clear that the Legislature by this section under consideration intended to establish a quorum for all stockholders' meetings of corporations organized under this act, and the fact that the construction of an exactly similar statutory provision indicated by this court in *Star Line v. Van Vliet*, supra, has never been questioned, shows that such construction has been accepted. The construction which the respondents insist upon, as appears from the decision of the trial court

and their brief in this court, is, as already stated, that the only requisite to the validity of business transacted at a stockholders' meeting is that a majority of the stock present voted in its favor, without reference to the number of shares of stock represented at such meeting. Such a contention, reduced to its lowest terms, would authorize a meeting held by two stockholders, one representing one share of stock and the other representing two shares of stock, to lawfully transact business and elect a board of directors by two votes. We scarcely think that such can seriously be contended to have been the intention of the Legislature in enacting this law. The reasonable construction of this section is, as contended by relators, that, in order to hold a lawful meeting of stockholders for the transaction of business, a majority of all the stock of the corporation must be represented in person or by proxy to constitute a statutory quorum, and that, the majority of the stock being so represented, the meeting could then lawfully proceed, and business could be transacted lawfully by a vote of the majority of such quorum. Such construction does not require that a majority of all the stock of a corporation must vote in favor of every proposition before such meeting, but only a majority of the quorum. In the findings of the court it is said: "The vital question at issue is whether a minority of the stockholders in interest can elect a board of directors." This statement does not state the issue. The vital question at issue is whether this section fixes the quorum required to authorize the transaction of business at a meeting of stockholders, and what constitutes such quorum. As was said in *Re Rapid Transit Ferry Co.*, supra: "a majority cannot separate itself from the minority, and be a quorum. All present are the quorum." And a majority of the statutory quorum controls in such meeting.

[2] All of the authorities agree that the requirements of a statutory quorum are mandatory. It is urged that, under such a construction, a majority of the stockholders may absent themselves from meetings and prevent the transaction of any business by the stockholders, and continue indefinitely their control of corporate affairs. This is met by the reply that there could be no reason or inducement why a majority in interest of the stockholders should absent themselves from such meetings when by their presence and voting their stock they could control the affairs. And a conclusive answer is that a minority of the stockholders would have the right to enforce the attendance of stockholders sufficient to make the required quorum necessary to transact business and to permit a minority to exercise the right of cumulative voting by proper proceedings upon a sufficient showing in a court of competent jurisdiction. The court below was in error, and

should have granted relators the relief prayed for. Under the undisputed facts in this case, it appears that the respondents were unlawfully usurping the offices of directors in this corporation, and that relators, having been duly and regularly elected as such directors, and no successors having been legally elected, continued to hold such offices, and are now the lawful directors of such corporation.

Therefore the judgment of the circuit court is reversed, and no new trial will be granted. A judgment of ouster against said respondents and in favor of the relators will be entered in this court, with costs of both courts to be taxed.

TOWN et al. v. DUPLEX-POWER CAR CO. et al.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. CORPORATIONS (§ 609*)—MEMBERS—EQUITABLE RELIEF TO STOCKHOLDERS.

The general jurisdiction of equity over corporations does not extend to dissolving a corporation, winding up its affairs, and sequestrating its property, and equity will not ordinarily sequester corporate property or commit the management of its affairs to a receiver, whether on the application of stockholders or creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2420-2423; Dec. Dig. § 609.*]

2. CORPORATIONS (§ 320*)—EQUITABLE CONTROL—MISCONDUCT OF OFFICERS.

Under Comp. Laws, § 9757, and the following sections, the courts have power to entertain petitions of corporate shareholders to compel officers to account for official misconduct in the management of corporate funds, suspend, or remove them, restrain alienation of corporate assets, etc., and to sequester the property and appoint a receiver, and adjudge a dissolution in certain cases.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1431, 1433-1439; Dec. Dig. § 320.*]

3. CORPORATIONS (§ 320*)—STOCKHOLDERS—ACTION BETWEEN.

The bill in a suit by a minority of the stockholders of a corporation engaged in manufacturing cars for the appointment of a receiver to enjoin the foreclosure of a corporate mortgage, and for the distribution of the corporate assets, etc., charged on information and belief that the sale of the assets of the corporation was threatened to satisfy a mortgage which was executed for the purpose of procuring the sale to be made, so as to enable defendant stockholders and officers to secure control of the corporate assets contrary to complainants' interests, and by compelling them to sell their stock at an inadequate price. An ex parte showing, upon which the relief was granted, justified an inference that the creditors named in the mortgage, who were charged with conspiring with defendants to wreck the corporation, were using the trustee for that purpose, and it appeared that two boards of directors were each claiming to be the lawful board. The corporation was not shown to be insolvent, and there was a reasonable prospect that it could carry on its business and save its property. *Held*, that while it was not error to appoint a receiver on the ex parte showing if his powers were limited to merely preserving the corporate assets, and the threatened foreclosure of

the mortgage was properly enjoined upon condition that complainants indemnify the secured creditors, it was improper to enjoin the sale of the corporation's products, the vehicles manufactured by it; that, in effect, preventing the carrying on of the corporate business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1431, 1433-1439; Dec. Dig. § 320.*]

Appeal from Circuit Court, Eaton County, in Chancery; Clement Smith, Judge.

Suit by Frank P. Town and others against the Duplex-Power Car Company and others. Decree for complainants, and defendants appeal. Decree modified and affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ.

Garry C. Fox, of Charlotte (Butterfield & Keeney, of Grand Rapids, of counsel), for appellants. Elmer N. Peters and Lyman H. McCall, both of Charlotte, and James M. Powers, of Battle Creek, for appellees.

OSTRANDER, J. The bill is filed by a minority of the stockholders of the Duplex-Power Car Company, and it prays for the discovery and collection of the assets of the company, through a receiver, for a dissolution of the corporation and the distribution of its assets. There is also the prayer that the receiver carry on the business if the court deems it necessary to do so to protect stockholders and save assets. The defendant corporation and its directors and others of the defendants including the trustee named in a mortgage of corporate property, are restrained by an order of the court, made upon the filing of the bill, from selling, mortgaging, or otherwise incumbering any property of the corporation, and the said trustee is restrained from foreclosing the said mortgage. The bill was answered on oath; the material allegations thereof being denied. Later, before a hearing upon the merits, a modification of the injunction was refused, a receiver of the assets of the corporation was appointed, and, in addition to the usual powers of a receiver, he was authorized to "complete the cars now in course of construction and to employ such help as may be necessary therefor to sell not to exceed five of said cars, until the further order of the court, and at the best price that can be obtained. The cost of such completion to be a charge against the assets coming into his hands, and the receipt therefrom to be an asset belonging to said company. It is further ordered that said receiver may borrow money to an amount not to exceed one thousand dollars for the purpose of completing said cars and to pledge the assets of said company to pay the same, until the further order of the court." Defendants claim the benefit of an appeal "from the final order and decree, and other orders and decrees rendered in said cause on, to wit, April 23rd, A. D. 1912, and on other prior dates,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and filed and entered in said court and cause by the register thereof." It is the contention of appellants that the court exceeded its powers both in granting and keeping in force the injunction and in appointing a receiver.

The Duplex-Power Car Company was organized September 22, 1909, under Michigan laws by three of the defendants. In the articles of association its business is stated to be the manufacture and sale of commercial and pleasure motor cars, motor trucks, motor wagons, motor vehicles, and parts entering into the manufacture of the same. Its designated principal place of business is Charlotte, Mich., its capital \$100,000, and it is recited that \$64,000 of this was subscribed and \$55,700 paid in—\$28,000 in real estate in Charlotte and \$22,000 in machinery, tools, patterns, etc. It is charged in the bill that, when the articles were executed, the corporation did not own the said mentioned property, and has not since acquired it; that the property was not worth \$50,000, nor more than \$15,000; that none of the persons executing the said articles owned said property or have since acquired it; and that the corporation has never had any interest therein, except to occupy and use it. It is charged, upon information and belief, that the said incorporators fraudulently represented that the corporation owned the said property to induce complainants and others to purchase the stock of said company. It is further charged that the cars and trucks which it was proposed the said company manufacture were to be what is known as a "four-wheel drive," according to which the power is applied to each of the four wheels of the car, and that in the organization of the corporation one-half, or 5,000 shares, of the capital stock, was to be paid to the owners of the patent covering such four-wheel drive in consideration of the transfer of the patent right to the corporation, and the remaining 5,000 shares was to be known as treasury stock and sold at par for the purpose of creating a working capital; that between the organization of the company and the 1st day of June, 1910, complainants and others had subscribed and paid for \$15,000 of the treasury stock, which sum of money had been used to develop and perfect cars and purchase material for their manufacture, so that on June 1, 1910, the corporation was ready to manufacture and sell its cars, and had sufficient material on hand to manufacture 17 or 18 cars. Needing more capital, the remaining treasury stock was offered for sale and certain of the defendants agreed to purchase the balance of \$32,000 at par. The arrangements for this sale of capital stock were made by one Todd Lunsford, who caused an investigation to be made of the practicability of the four-wheel drive covered by the patent owned by the company. But it is said that this purchase of stock by defendants was not with an honest intent and purpose, but for

the purpose of acquiring eventually the property and the said patent to themselves to the exclusion of complainants and other stockholders; that said Todd Lunsford, on behalf of himself and his associates, refused to carry out the arrangement and to purchase the said capital stock unless complete control and management of the business was turned over to them; and that in consequence \$10,000 of the patent stock was transferred to him, and the remaining \$40,000 or thereabouts of the patent stock was transferred to a trustee or trustees with power to vote the same, after which Lunsford and his associates did pay \$32,000 in cash, and received certificates of stock therefor. This arrangement was completed on or about June 9, 1910, Lunsford was placed in management and control of the affairs of the corporation, elected treasurer, and made manager, and has since had the control and management of the corporation affairs. It is charged that he and his associates entered into a conspiracy to secure the property, including the letters patent, to deprive the remaining stockholders of their interest in the property, and to "freeze out" other stockholders; that he and his associates purposely dissipated and wasted the assets, and did not complete and place upon the market cars for which material had been purchased, leaving cars unfinished, so that they could not be sold, which cars, if finished, could have been sold for approximately \$70,000. Various other acts of omission and commission are charged to have been done in furtherance of the alleged conspiracy including the borrowing of \$9,700 from two of the defendants, some of one and some of the other, and giving notes therefor, when the money borrowed was not needed to pay running expenses; that on the 6th day of July, 1911, the company executed a chattel mortgage on all of its property to defendant Farlin H. Ball, of Oak Park, Cook county, Ill., as trustee, to secure payment of the money evidenced by said notes, the mortgage being made due and payable 30 days from date, in Chicago, with the right to take possession of the mortgaged property and to sell the same at private sale, without notice. It is charged that the money was not lent to the corporation nor was the mortgage given in good faith, but for the express purpose of embarrassing the corporation and acquiring its assets. It is charged that the books of account of the corporation have been inaccurately and imperfectly kept, so that an examination of them will not disclose what the actual expenses have been nor the true situation of its financial condition, and that this method of keeping the books was in accordance with the purpose of said conspirators. It is charged that the company at the time of filing the bill had cars manufactured and in process of manufacture of the value at the regular retail price of \$60,000 and upwards, and practically complete and

ready for market. Complainants offer to indemnify the noteholders and the trustee in the mortgage against damage or loss on account of the nonpayment of the said notes if the court shall determine that the money represented thereby is actually due and owing. It is further charged that the complainants have good reason to believe, and do believe, that the trustee is about to dispose of all the assets of the corporation under the power of sale contained in the mortgage and are justly apprehensive that he will do this unless restrained by injunction; that they have good reason to believe, and do believe, that the board of directors will sell and dispose of the personal property of the corporation unless restrained by injunction, to the irreparable injury of complainants. Amendments later made to the bill, pursuant to an order of March 18, 1912, charge that Todd Lunsford, before he and his associates acquired stock in the corporation, obtained a written agreement securing the right to name four out of the seven directors of the corporation; that at the annual meeting of the stockholders held August 6, 1910, he did, in fact, name all the directors, who were Calvin H. Hill, Charles B. Lamb, Fitch Beach, Todd Lunsford, William L. Cummings, Walter C. Powell, and Francis A. Messler; that for the purpose of making William L. Cummings a director Messler assigned to him 200 shares of the capital stock, and Cummings accepted the same, and became a member of the board of directors for the express purpose of enabling Todd Lunsford and his associates to carry out their fraudulent scheme and wreck the company; that Fitch Beach and Charles B. Lamb, if they were not parties to the scheme and plan to wreck the company, were deceived and misled by Todd Lunsford and induced to act in harmony with him and his associates in carrying out such scheme; that because of the connivance and active assistance of the board of directors, and the fact that five of the seven directors are parties to said scheme, it is impossible for complainants to protect their rights by appealing to the board of directors, and because the mortgage held by Farlin H. Ball was due on the 6th of August, 1911, it is impossible to bring the grievances of which they complain before a meeting of the stockholders, and because Todd Lunsford and his associates control a majority of the stock it is futile to expect them to correct the grievances of which complainants complain at a meeting of stockholders.

It has been stated that the material allegations of the bill, and it should be added of the amended bill, are denied by defendants under oath. It should be noted, also, that nineteen or more persons made defendants answer, admitting each and every allegation of the bill to be true according to their information and belief. In the answers of other defendants to the amended bill, it is

set up that at the meeting at which the directors who have been named were elected the complainants were present, or were represented, voted for them for directors of the company, and that every vote cast at the meeting was cast for them, and in the answer to the original bill it is alleged that at the annual meeting of the company held at its office in Charlotte on August 5, 1911, there were present a considerable number of stockholders; that a financial statement of the affairs of the corporation was made by the treasurer, and, in view of the fact that the bill of complaint in this cause had then been lately filed and an injunction issued restraining the officers and directors from selling any of the property of the company, it was not thought best by the majority of the stockholders present to elect a new directorate, but to allow the old directors and officers to hold over, and the meeting was adjourned to September 19 at 2 o'clock in the afternoon. On said last-mentioned date and hour there were present certain of the complainants constituting a minority of the stockholders, and holding not more than \$10,000 par value of the capital stock; that, because of a misunderstanding respecting the date to which the meeting had been adjourned, the majority of the stockholders did not attend; that the minority attending, finding that the majority had failed to attend, proceeded to elect as directors certain of the complainants, who organized as a board of directors and elected officers; that on the morning of September 20, 1911, these directors and officers so elected took possession of the office and plant of the defendant company, assumed to discharge the superintendent and custodian of the building, and to put a new custodian of their own selection in possession of the plant, took locks off the doors, and put on new locks, and have forcibly excluded the old and alleged rightful officers of the corporation, carried away and suppressed the corporate records and books of account and papers.

To complete the pertinent history of the proceedings, it should be stated that the injunction was issued August 4, 1911, when an order was made to show cause on September 5, 1911, why a receiver should not be appointed. Defendant Farlin H. Ball, the trustee named in the mortgage, and a nonresident of the state, conceiving that as to himself a separable controversy existed, removed the cause to the federal court for the Western District of Michigan, and by order of that court made January 18, 1912, the cause was remanded to the state court. At this time other nonresident and principal defendants had not been brought before the court, and they answered the bill in February, 1912. Later two motions were brought on for hearing. One of them was the motion of defendants for such a modification of the preliminary injunction as would permit the trustee to foreclose the mortgage; the other

the motion of complainants for leave to amend the bill and for the appointment of a receiver. The court on March 14, 1912, announced that the motion to amend the bill was granted, to modify the injunction and to appoint a receiver refused, and concluded: "I can see no good reason why this case should not be heard at the coming April term, and the interests of the parties to the cause will be best subserved if a speedy hearing is had." Accordingly, an order was entered March 18, 1912, pursuant to the said announcement, except that no reference is made therein to the motion for a receiver and the motion for a receiver is not therein denied. It was not until after April 8, 1912, that all answers to the amended bill of complaint were filed, or were required to be filed by the order of the court. The April, 1912, term of court began April 8th. A motion was made by defendants to strike the cause from the calendar. On April 16, 1912, the court made and filed the following opinion and decision: "I am of the opinion that this motion must be granted. In the memo opinion filed March 16, 1912, in this cause denying a motion for the appointment of a receiver the court said that there seemed to be no good reason why this case should not be heard at the April term, and that the interest of the parties would be best subserved by a speedy trial. I think that the case should be heard speedily, and I can see no good reason why it may not be. I do not think, however, that the defendants can be compelled to go to a hearing and having moved that the cause be stricken the motion is granted. The motion of the complainants filed March 1st last for the appointment of a receiver was denied, believing that the case would surely be heard this term. No order has as yet been signed denying the motion. The situation is such that the court feels it a duty to appoint a receiver if the case is to be continued. The complainants may have an order for the appointment of Frank P. Town as receiver of the Duplex-Power Car Company with such restrictions as will conserve the property and such bond as may hereafter be fixed by the court on application for the same." The order appointing the receiver followed.

The sufficiency of the bill is challenged by appellants; but not by demurrer and not with respect to the power of the court upon final hearing to wind up the affairs of the company, and for that purpose to appoint a receiver. Therefore we may say, as we did in *Woodmansee v. Ann Arbor Brick Co.*, 164 Mich. 688, 691, 130 N. W. 811, 312: "Whether the bill states a case for equitable cognizance is a question not presented on this appeal." It is proper, however, to give some attention to the scope and purpose of the bill and to some general rules governing the jurisdiction exercised in such cases.

[1] The general jurisdiction of equity over corporate bodies does not extend to the dis-

solving of the corporation, winding up its affairs and sequestrating corporate property. Courts of equity will not ordinarily, by virtue of their general equitable jurisdiction, or by virtue of their visitatorial powers over corporate bodies, sequester the effects of the corporation, or take the management of its affairs from its officers and commit it to a receiver, whether upon the application of creditors or of shareholders. High on Receivers, § 288 et seq.; *Fuller v. McCormick*, 156 Mich. 518, 121 N. W. 280. It was said in *Miner v. Ice Co.*, 93 Mich. 97, 112, 53 N. W. 218, 223 (17 L. R. A. 412): "The general rule undoubtedly is that courts of equity have no power to wind up a corporation, in the absence of statutory authority. This rule is, however, subject to qualifications." Following a statement of the facts of the particular case and references to authorities, the opinion (93 Mich. 117, 53 N. W. 224, 17 L. R. A. 412) continues as follows: "I think a court of equity, under the circumstances of this case, in the exercise of its general equity jurisdiction, has the power to grant to this complainant ample relief, even to the dissolution of the trust relations." *Miner v. Ice Co.* came into the court after a hearing on the merits in the court below. In *Torrey v. Toledo Cement Co.*, 150 Mich. 88, 113 N. W. 580, heard on demurrer to the bill, the court followed, upon the question of jurisdiction, *Miner v. Ice Company*. See, also, *Avery v. Brees Mfg. Co.*, 27 N. J. Eq. 412. These cases are exceptional and decision seems to proceed upon the theory that in the exercise of jurisdiction to relieve from fraud and the effects of breaches of trust relief may be granted to a suitor, although it involves sequestrating the property and winding up the affairs of a corporation; the result to the corporation being an incident merely of adequate and complete relief. In the New Jersey case referred to, a receiver was appointed merely to hold and preserve assets of a corporation, admittedly insolvent, with no available assets, against which numerous suits were pending.

[2] The courts have power, derived from the statute, to entertain the bills and petitions of shareholders of a corporation to compel officers of the corporation to account for official conduct in the management and disposition of corporate funds, to suspend and to remove them, to order new elections of directors, to set aside, and to restrain alienations of corporate assets. The courts have power, also derived from the statute, to sequester the property of a corporation and appoint a receiver thereof at the suit of a judgment creditor in certain cases, and in certain other cases to adjudge dissolution of the corporation. See 3 Comp. Laws, § 9757 et seq. It is plain that no statutory authority of the court is invoked by the bill of complaint, and that complainants seek the

exercise of powers belonging to the general equity jurisdiction of the court.

[3] It is equally plain that the case made by the original bill did not warrant the injunction which was granted. The stockholders of the Duplex-Power Car Company had joined in an adventure the success of which depended upon the application of certain alleged novel and patented ideas to motor cars, upon a demonstration of the practicability and popularity of the vehicle which it was proposed to manufacture. It was a going concern at that time, in the hands of duly elected officers. No device better calculated to destroy the corporation and all of its assets can be conceived than one which would interrupt its business, prevent the necessary demonstration of its vehicle, and wholly prevent the carrying on of the corporate business. This was the necessary effect of the injunction. It would have been proper enough to restrain a threatened foreclosure of the mortgage temporarily upon condition that the complainants furnished indemnity to those creditors of the company who were secured thereby. The injunction which was granted forbade the sale of vehicles and their removal from the company's place of business.

Nothing is claimed for those charges in the bill which relate to the original organization of the company and the alleged false representations contained in the articles of association. The bill proceeds upon the theory that the patent was acquired, is the property of the company, and that cars were being manufactured for sale. The insolvency of the company is not made to appear. On the contrary, the facts stated indicate solvency if the patent had any real value. The charges concerning mismanagement, lack of necessity for borrowing such money as was borrowed, and failure to realize money from the sale of cars are most general, lacking entirely in detail and in certainty. No specifications were furnished by way of affidavits filed with the bill. It must be inferred that because complainants charged upon information and belief a threatened sale of the assets to satisfy a mortgage given for the purpose of permitting such a sale to be made the court below granted the injunction preventing not alone such a sale, but also practically closing the doors of the institution. This upon an *ex parte* showing. The showing for a receiver was more complete. In addition to the allegations of the bill, the court had before it as affecting its judgment the fact that the cause had been removed to the federal court, which fact supported the inference that an apparently indifferent trustee in a mortgage was seeking in this way to escape the injunction of the state court, or that the creditors named in the mortgage, who were also charged with conspiracy to wreck the company, were using the trustee for their own purposes. The court also knew,

when the order for a receiver was made, that two boards of directors were each claiming to be lawful officers of defendant company. There was produced at the hearing certain correspondence which had fallen into the hands of complainants after the filing of the bill, which tended rather strongly to prove that the appealing defendants were conspiring together either to force the complainants to sell their stock in the concern at a price favorable to the purchasers or to effectually exclude them from beneficial interest in the company. No one can read the correspondence which was produced without being impressed with the idea that Todd Lunsford and certain other of the defendants were privately considering, and were affected by, the purpose to prefer themselves at the expense of complainants, and were not seeking the common good of the company and of all of its shareholders. Counsel for both parties recognize the general rule stated and applied in *Woodmansee v. Ann Arbor Brick Co.*, 164 Mich. 688, 130 N. W. 311, and in numerous cases which are cited in the opinion. Upon the authority of those and of other decisions, it is contended that the power to appoint a receiver for a corporation *pendente lite* is never exercised upon preliminary inquiry and upon a bill the essential facts of which are denied by sworn answers.

Attention has been directed to the fact that the court below had before it more than a sworn bill and sworn answers. Upon the application for a receiver, the court was bound to consider whether, in view of all facts presented, there was reasonable prospect that the defendant company would be able to carry on its business and save its property; whether, however lawful the debt secured by mortgage of its assets may be, the security was given and its foreclosure was contemplated with the purpose on the part of defendants to secure the property of the company for themselves; whether it was likely that with rival boards of directors contending for control of the company either could command business success; and, finally, whether the charges that defendants were conspiring to exclude and injure the complainants were not so well established by the correspondence produced and by other circumstances that a receiver with the duty of preserving the property of the corporation ought to be appointed.

We express no opinion upon the merits, or apparent merits, of the controversy. We are of opinion that the injunction granted was too broad, and should have been limited to restraining the trustees and all others interested from a foreclosure of the mortgage, upon condition, however, that complainants secure eventual payment of the debts secured by the mortgage, if found to be valid debts of the corporation. Likewise the order appointing the receiver should have confined him to preservation merely

of the assets of the corporation. Whether a case can be made which will warrant the court in winding up the affairs of the company in order to grant complainants proper relief must be determined at the hearing.

Appellants may have the order indicated herein, and will recover one-half the taxable costs of this appeal.

GERMAN CORPORATION OF NEGAUNEE
v. NEGAUNEE GERMAN AID
SOCIETY et al.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. CHARITIES (§ 48*)—CHARITABLE DISPOSITION OF PROPERTY—"BENEVOLENT"—"CHARITABLE."

Comp. Laws, §§ 8258-8263, as originally enacted, was entitled "An act to provide for the incorporation of benevolent societies," and authorized a corporation to provide for the relief of distressed members, the visitation of the sick, etc., and such other "benevolent and worthy purposes" and objects as affect the members of the corporation, and gave the corporation power to receive and enjoy property, and to sell, mortgage, and dispose of the same, provided that the proceeds arising from all estate and investments should be devoted exclusively to the benevolent purposes and objects of the corporation. *Held*, that the word "benevolent" has a much broader significance than the word "charity," and includes things which are in no sense charities, and refers to the kind intention of the donor rather than the condition of the donee, meaning in its broader sense liberality and generosity, though its meaning may be circumscribed by the circumstances, and, as used in the statutes, it denotes acts tending to relieve misfortune and confer a benefit on a needy member, though he may not be an actual object of charity, so that a conveyance by the society to all of its members was not a disposition for "benevolent purposes," and hence was beyond the powers of the society (quoting 1 Words and Phrases, 753-756).

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 78, 81, 104, 106; Dec. Dig. § 48.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1074-1088; vol. 8, p. 7600.]

2. DEEDS (§ 17*)—CONSIDERATION—SUFFICIENCY.

A consideration of \$1 was inadequate as a consideration of a conveyance of mineral rights worth \$500.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 26-37; Dec. Dig. § 17.*]

3. STATUTES (§ 208*)—CONSTRUCTION.

In determining the meaning which the Legislature intended a word to bear, the context must be considered as well as the lexicographical meaning of the word.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 285; Dec. Dig. § 208.*]

4. CHARITIES (§ 39*)—BENEVOLENT ASSOCIATIONS.

An association organized under the act (Comp. Laws, §§ 8258-8263) was a benevolent society, and not a business corporation organized for profit, irrespective of whether the members thereof regarded it as a profit-sharing corporation; since the law fixes its status.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 100; Dec. Dig. § 39.*]

5. CHARITIES (§ 48*)—BENEVOLENT SOCIETY—ACTS OF OFFICERS—CONVEYANCES.

A conveyance of mineral rights owned by a benevolent society which purported to be in the name of the corporation to all of the members thereof, when the society did not have power to make such a conveyance, was really a conveyance by the officers and members of the society to themselves, and was not in law a conveyance by the society.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 78, 81, 104, 106; Dec. Dig. § 48.*]

6. VENDOR AND PURCHASER (§ 215*)—BONA FIDE PURCHASER.

A grantee who accepted a deed with knowledge of the facts which made the deed to its grantor invalid did not receive title under its own deed, occupying the same position as its grantor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 449-452; Dec. Dig. § 215.*]

7. CORPORATIONS (§ 189*)—ACTIONS AGAINST OFFICERS.

Since a corporation is a legal entity distinct from its members, it may in a proper action recover property owned by it and unlawfully held by its officers and members in control of its affairs.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 706-722; Dec. Dig. § 189.*]

8. CORPORATIONS (§ 207*)—RIGHTS OF STOCK-HOLDERS—RECOVERY OF CORPORATE PROPERTY.

If a benevolent society through the wrongful acts of its officers unlawfully conveyed mineral rights to all of the officers and members, who, in turn, conveyed to complainant, who took with knowledge of a want of corporate authority to convey, any new member of the society could recover such property or mineral rights as against complainant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 797-805; Dec. Dig. § 207.*]

9. COSTS (§ 60*)—COSTS TO NEITHER PARTY.

Complainant sued to quiet title to mineral rights conveyed to it by members of defendant benevolent society, who, in turn, received a conveyance which purported to be from the society, but which was unauthorized, as being beyond the society's power to convey only for benevolent purposes; complainant knowing of the facts involving the conveyance to the members. The members of the society in taking the conveyance acted in good faith, and believed that they had a right to receive the property from the society because they included the entire membership. *Held* that, in view of such facts, costs would not be awarded to either party upon canceling the deed from the society to the members and from the members to complainant, and quieting title to the property in the society.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 261-271; Dec. Dig. § 60.*]

10. CORPORATIONS (§ 180*)—CORPORATE POWERS.

Corporate powers should be exercised to accomplish the objects for which they were created, and even a majority of the members should not use such powers to subvert the purpose of the incorporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 665-673; Dec. Dig. § 180.*]

11. CORPORATIONS (§ 314*)—OFFICERS—PERSONAL INTEREST.

Corporate officers cannot represent the corporation in a transaction in which they were

personally interested in order to obtain an advantage at the expense of such corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1393-1398, 1400; Dec. Dig. § 314.*]

12. DEEDS (§ 70*)—FRAUD—EVIDENCE—INADEQUACY OF CONSIDERATION.

If the inadequacy of consideration for a deed is so great as to shock the conscience, it constitutes evidence of fraud.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165-182; Dec. Dig. § 70.*]

13. CHARITIES (§ 40*)—BENEVOLENT CORPORATION—POWERS—HOLDING REALTY.

The constitutional provision prohibiting a benevolent corporation organized under Comp. Laws, §§ 8258-8263, from holding realty for more than 10 years, except when actually occupied by it in the exercise of its franchises, can only be enforced at the instance of the public.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 100; Dec. Dig. § 40.*]

Appeal from Circuit Court, Marquette County, in Chancery; Richard C. Flannigan, Judge.

Suit by the German Corporation of Negaunee, Mich., against the Negaunee German Aid Society and others, in which defendant named filed a cross-bill. From a decree dismissing the complaint and granting the relief prayed for by such defendant in its cross-bill, complainant appeals. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, OSTRANDER, STONE, and BIRD, JJ.

C. F. Button, of Marquette, for appellant. W. T. Potter, of Ishpeming, for appellees.

STONE, J. This case is here on appeal by the complainant from a decree dismissing the bill of complaint, and granting the relief prayed for in the answer and cross-bill of the defendant, the Negaunee German Aid Society.

The opinion of the learned circuit judge who heard the case so fully states the facts, and so clearly discusses the questions of law involved, that we insert it here, and adopt it as our own.

"The complainant is a corporation organized under the laws of Michigan for mining purposes. The defendant, the Negaunee German Aid Society, is a corporation organized under sections 8258-8263, Compiled Laws. It was organized January 10, 1887, for the purposes and objects authorized by the statute, viz., to provide for the relief of distressed members, the visitation of the sick, the burial of the dead, and such other benevolent and worthy purposes and objects as affect the members of the corporation. The other defendants are members of the Aid Society.

"One Charles L. Werner, who died May 23, 1894, was at the time of his death a member in good standing of the Aid Society. He left a will devising and bequeathing un-

conditionally all his property, real and personal, to the Aid Society. The will in due time was admitted to probate, and under it the Aid Society became the owner in fee of the lands described in the bill of complaint. Subsequently the Aid Society sold and conveyed the surface of these lands, reserving to itself, its successors and assigns forever, all ores and minerals therein, with the usual rights of exploration and mining. On the 8th day of May, 1906, the total membership of the Aid Society was 89. On that day, pursuant to resolutions passed by themselves, and in form authorizing the transaction, the mineral rights of the Werner lands were deeded by the Aid Society to its members share and share alike. The consideration expressed in the deed was the sum of \$1, which was paid. The complainant was organized July 14, 1909, and on August 19th of that year the Werner mineral rights were conveyed to it by deed in due form executed and acknowledged by the Aid Society's grantees of such rights. It is claimed the testimony does not disclose the identity of the incorporators of the complainant, or the names of the stockholders at the time of the filing of its bill, but the impression received by the court, from the witnesses and on the arguments, was that the members of the Aid Society, who received the deed of the Werner mineral rights, and the organizers and stockholders of the complainant, are identical. However that may be, it is true the complainant does not deny knowledge before, and at the time of the execution of the deed to it, of all the facts and circumstances surrounding the deeding of the mineral rights to the Aid Society members. About seven months after the conveyance by the society to its old members, a new member was admitted, and from time to time subsequently other new members to the number of 19 or 20 were taken in. Some of the new members knew of the situation of affairs relating to the Werner mineral rights before they sought admission to the society, while others knew nothing concerning the mineral rights transaction until after admission. None of the new members claim they were induced to join the society by reason of the supposed ownership by it of the Werner mineral rights.

"Shortly after the new members became affiliated with the society, they publicly denied a valid transfer of the mineral rights to the old members, and made such representations in that regard that third parties refused to deal with the complainant as the owner thereof. The complainant filed its bill against the society and the new members to quiet its title. The new members answered, disclaiming any ownership of the minerals in themselves, as individuals or members of the society, but insisting that the title to the minerals did not pass to the old mem-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

bers or the complainant, and remains in the society. The society also appeared and answered, denying the validity of the conveyances to the old members and the complainant, and asserting title in itself. The defendants, claiming for their answer the benefit of a cross-bill, prayed for a decree canceling the deeds to the old members and the complainant, and quieting the title in the society. The consideration expressed in the deed is the sum of \$1. The actual payment of the dollar is disputed. Relative to its payment, the testimony is in some confusion, but, on the whole, we conclude it was in fact paid. The Aid Society was endowed by the law of its organization with full power to purchase, take, receive, hold, and enjoy real estate and personal property, and to give, grant, sell, mortgage, lease, devise, and dispose of the same at its will and pleasure; but in the same section it is provided that the proceeds arising from all estate and investments of the society shall, after payment of all running expenses, be devoted exclusively to the benevolent purposes and objects of the corporation.

[1] "The act under which the society organized is entitled 'An Act to provide for the incorporation of benevolent societies.' Its purposes and objects are limited by the act to benevolent purposes and objects, and, while it may sell its real estate and other property at its will and pleasure, yet the proceeds must be devoted exclusively to benevolent purposes and objects. It would seem, therefore, that the powers of the society in regard to the disposition of property are limited to a disposition directly for a benevolent purpose, or for an adequate consideration to be devoted exclusively to benevolent purposes. Unless the consideration for the transfer of its property is the accomplishment of a benevolent purpose, the consideration must be money or moneys worth fairly proportionate to the value of the property conveyed, otherwise the provisions of the statute, which permits a conveyance of property on condition that the proceeds are devoted to benevolent objects, is defeated.

[2] "If the sole consideration for the deed in question here was the sum of \$1, then that the consideration paid for the conveyance of the mineral rights was inadequate is not open to question. The rights conveyed, according to the testimony, were worth at least \$500. This brings us to the question whether the object of the conveyance to the old members was a benevolent one. We are in accord with counsel for complainant that 'benevolent purpose or object' is not interchangeable with 'charitable purpose or object.' 'Benevolent' is a word of much broader significance than 'charity,' and includes what are in no sense charities. It rather signifies an act dictated by kindness, good will, or a disposition to do good. The act

is characterized by the good and kindly intention of the donor, rather than by the condition of the recipient, and in its broader sense it may be said to mean liberality and generosity, and in that sense might be applied to a straight gift of property by the society to its members. But the word has come to be used with different meanings according to circumstances, and, where its meaning is important in the determination of a question, the courts invariably search the circumstances of its use to ascertain the meaning intended. The word benevolent of itself, without anything in the context qualifying or restricting its meaning, will be taken in its broader sense, otherwise, if it is apparent from the surroundings, it was used in a stricter or narrower sense. 1 Words and Phrases, 753-756, and cases cited.

[3] "To ascertain the meaning which the Legislature gave the word, we may not stop upon recourse to a dictionary, but must go to the statute where the word is found, and determine from the context whether its meaning is narrowed down. 'To provide for the relief of distressed members, the visitation of the sick, the burial of the dead, and such other benevolent and worthy purposes and objects as affect the members of the corporation,' is the language of the statute, and that the word 'benevolent' as there used was intended by the Legislature to denote acts tending to the relief of misfortune, if not actual distress, must be clear. As there used, it means a benefit conferred on a member in need. The recipient may or may not be an object of charity, but, if not an object of charity, he must be the mark of ill fortune. It was not intended by the Legislature to class a gift by the society, whereby a rich member is made richer, a benevolent act. It must be held, therefore, that the sole consideration for the deed to the old members was the sum of \$1, and that the same was inadequate.

[4] "There is no justification in the statutes for the position taken for the complainant on the arguments and in the briefs, that the society is a business corporation for profit. The act provides solely for the incorporation of benevolent societies. As has been seen, the word 'benevolent,' even in its broader sense, signifies the conferring of benefits as distinguished from the distribution of profits, and that the act limits the objects of societies formed under it to the conferring of benefits, and excludes all objects of a profit-sharing nature, is too plain to require argument. Whether the members of the society regarded it as a profit-sharing corporation is of no moment. The law, and not the will of the members, fixes the status of the corporation.

[5] "The Aid Society was not really a party to the deed of the mineral rights. Every officer and member of the society was interested on the other side. The of-

ficers and members represented themselves. The corporation of which they were officers and members was not represented in the transaction. The officers and members dictated the terms of the sale, directed the execution of the deed, executed it themselves, and delivered it to themselves. The deed, therefore, was not, either in law or fact, executed or delivered by the society to its officers and members, but by its officers and members to themselves. The deed to the old members must be held void, because made upon inadequate consideration by and for the benefit of those in control of the corporation, and also for want of the necessary element of two parties to the contract. *Miner v. Ice Co.*, 93 Mich. 97 [53 N. W. 218, 17 L. R. A. 412]; *People v. Township Board*, 11 Mich. 222; *Railway v. Dewey*, 14 Mich. 477.

[6] "The complainant, having taken the deed to itself with knowledge of the particulars of the transaction between the society and its old members, stands in no better position. The deed to the old members being void, their deed to the complainant was ineffectual to pass title. The complainant took nothing by their deed. The position taken by complainant that, inasmuch as all of the officers and members of the society, at the date of the transaction, were parties to it, neither the corporation nor the new members will be admitted to complain, is unsound. *Clark & Marshall on Private Corporations*, p. 2297, and cases collected in note 565.

[7] "A corporation is a legal entity and artificial person distinct from its stockholders or members as individuals, and that it may, by a proper action, in the proper court, recover property owned by it, which is unlawfully withheld by its officers and members in control of its affairs, is entirely clear, and the fact that all of its members happened to be in opposition does not alter the case. In such a situation a corporation may sometimes be unable to get into court, but being in it may demand of all of its members, as well as of a part, the restitution of property unlawfully appropriated. The complainant has insisted throughout that the Aid Society concedes the conveyance of the mineral rights to the old members to be valid and binding upon it, and, further, that the answer of the society was put in without its sanction, and consequently that any defense presented in the name or on behalf of the society should not be considered by the court. The by-laws of the society provide for the election of a finance committee to consist of three trustees, who are clothed with 'the management of the entire property of the society, and shall be responsible for the same.' It happened that at the time of the filing of complainant's bill the finance committee, or, at least, a majority thereof, was made up of new members who discredit-

ed the conveyance of the mineral rights, and that committee employed a solicitor and gave instructions for the defense on the part of the society. It is true that a majority of the members of the society, counting the grantees of the mineral rights, were opposed to a defense on the part of the society. Under the by-laws, and in view of the special circumstances of this case, the finance committee had the right to defend in the name and on behalf of the society and to make all necessary provisions to that end.

[8] "Furthermore, the nature of this case is such that the defense of the society could be presented, and the case made by the cross-bill prosecuted by any new member of the society. *Miner v. Ice Co.* [93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412]; *Torrey v. Toledo Cement Co.*, 150 Mich. 86 [113 N. W. 580]; *Edwards v. Investment Co.*, 132 Mich. 1 [92 N. W. 491]. A decree is ordered dismissing the complainant's bill of complaint, canceling the deed from the society to the new members, and from the new members to the complainant, and quieting the title of the society to the mineral rights in controversy, as prayed in the cross-bill.

[9] "In taking from the society the deed of the mineral rights, the old members did not contemplate a fraud on the society. On the contrary, it appears quite conclusively they acted in the best of good faith throughout, fully and honestly believing they had a right, inasmuch as they included the entire membership of the society, to conclude the transaction which was made. Under these circumstances, costs will not be awarded to either party."

But little need be added. It is very evident that the property in question was willed to the defendant, the Negaunee German Aid Society, to be used for the purposes and objects for which such society was formed. Those objects and purposes are distinctly stated in the statute.

[10] Corporate powers should only be exercised to accomplish the objects for which they were called into existence, and even a majority should not control those powers to pervert or destroy the original purposes of the corporators.

[11] The officers of the corporation had no right to represent the corporation in any transaction in which they were personally interested in obtaining an advantage at the expense of the company they represented. *Ten Eyck v. Railroad Co.*, 74 Mich. 226-232, 41 N. W. 905, 3 L. R. A. 378, 16 Am. St. Rep. 633; 1 Mor. on Private Corporations, § 517. To permit the officers and members of the Aid Society (even in its corporate name) to deed to themselves the mineral interest in question under the circumstances here shown would be to pervert and destroy the purposes of the society. The statute provides that "the proceeds arising from said estates and investments shall, after the pay-

ment of all running expenses, be devoted exclusively to the benevolent purposes and objects of the corporation." Such deed operated as a fraud upon the society, and was a gross abuse of the trust. *Sparrow v. E. Bement & Son*, 142 Mich. 441-453, 105 N. W. 881, 10 L. R. A. (N. S.) 725. Complainant's counsel quotes the following from the constitution of said society: "For profit making the best for the society is to accumulate real estate so that the necessary capital can then be withdrawn from the society treasury, when three-fourths of its members vote so to do." If this provision means what counsel claims for it, it is in conflict with the statute authorizing the organization of the society. The consideration expressed in this deed to the 39 members was \$1. A fair conclusion from the evidence is that it cost the society \$10 to make its deed. The undisputed evidence shows that the property was worth at least \$500, and probably much more. Counsel urges that mere inadequacy of price is not ground for setting aside a sale, either in law or equity, and cites 6 Am. & Eng. Ency. of Law (2d Ed.) 696 et seq. On page 699 is the following: "But, though inadequacy of consideration is not itself a distinct ground of defense at law nor of relief in equity, yet it is evidence of fraud which is both; and while, as evidence, it is ordinarily entitled to very little weight when standing alone, yet when it is coupled with other circumstances showing overreaching or oppression, or when the parties stand in such relation that this will be presumed, inadequacy becomes a material element of constructive fraud."

[12] It is also well settled that, where the inadequacy is so great or gross as to shock the moral sense, it is a suspicion or evidence of fraud. It should be borne in mind that there was here no dissolution of the corporation, as was the case in *Hopkins v. Crossley*, 138 Mich. 561-565, 101 N. W. 822, 823. It was there said: "Had not the corporation been dissolved, we cannot doubt that it could recover the fund, and devote it to its own purposes, as provided in section 6 of its own organic act." We are not prepared to say that under the circumstances of this case the defendant Aid Society could not have maintained an original bill to set aside the conveyance. Having been brought into equity as a defendant, it certainly was entitled to the benefit of its cross-bill.

[13] Complainant's counsel raises the constitutional question that the defendant corporation could not hold real estate for more than 10 years except when actually occupied by it in the exercise of its corporate franchises. It is a sufficient answer to say that this constitutional provision can only be enforced at the instance of the public. *Pere Marquette R. Co. v. Graham*, 136 Mich. 444-450, 99 N. W. 408.

The decree of the circuit court is affirmed, with costs of this court to the defendant the Negaunee German Aid Society.

SONSMITH v. PERE MARQUETTE R. CO.
(Supreme Court of Michigan. Nov. 8, 1912.)

1. MASTER AND SERVANT (§ 198*)—INJURIES TO SERVANT—RAILROADS—FELLOW SERVANTS.

Where plaintiff was injured while acting as head freight brakeman of a train by the negligence of a switching crew in detaching certain of the rear cars from the train, and afterward returning them with such force as to cause the train to move while plaintiff was in a dangerous position and without notice to him, the members of such crew were plaintiff's fellow servants, for whose negligence the railroad company was not liable at common law.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 493-514; Dec. Dig. § 198.*]

2. MASTER AND SERVANT (§ 137*)—INJURIES TO SERVANT—RAILROADS—NEGLIGENCE.

Where a switching crew detached the rear portion of a freight train which had been made up and was about ready to depart, in order that a switch might be opened, and thereafter restored the detached cars to the train, without warning to the train crew, in such a manner that the train was caused to move forward while plaintiff, the head brakeman, was in a dangerous position, resulting in injury to him, the switching crew was chargeable with actionable negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.*]

3. MASTER AND SERVANT (§ 145*)—INJURIES TO SERVANT—RAILROADS—RULES—APPLICATION.

A railroad rule provided that trainmen, car repairers, and other employes who had occasion to work under or about cars or engines should not commence work requiring them to place themselves in a position which would result in personal injury to themselves in case the car or engine should be moved until they had first protected themselves with proper signals provided for in the rule that employes who displayed such signals were alone authorized to remove them, and that, when a car or engine was so protected, it should not be coupled to or moved, and other cars or engines should not be placed on the same track so as to intercept the view of the signals without first informing the brakeman. *Held*, that such rule did not as a matter of law require a head brakeman of a freight train to place a signal at the rear of the train between the tracks for his protection before going in between the engine and the first car of the train to cut off the air.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 288; Dec. Dig. § 145.*]

4. MASTER AND SERVANT (§ 204*)—INJURIES TO SERVANT—ASSUMED RISK—VIOLATION OF STATUTE.

A servant does not assume the risk of injury from a master's violation of a statute.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 544-546; Dec. Dig. § 204.*]

5. CONSTITUTIONAL LAW (§ 245*)—EMPLOYER'S LIABILITY ACT—RAILROADS—EQUAL PROTECTION OF LAWS.

Pub. Acts 1909, No. 104, withdrawing from common carrier railroad companies within the state the right to urge the defenses of

fellow servant, assumed risk and contributory negligence in case of injury to an employé, provided the employé's negligence is less in degree than the negligence of the railroad company, etc., is not unconstitutional as depriving common carrier railroad companies of the equal protection of the laws because the act did not apply to private railroads within the state; the legislative classification of common carrier railroads being neither arbitrary nor unreasonable, but one warranted by propriety and necessity.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 702; Dec. Dig. § 245.*]

6. CONSTITUTIONAL LAW (§ 801*)—EMPLOYEE'S LIABILITY ACT—DUE PROCESS OF LAW.

Pub. Acts 1909, No. 104, withdrawing from common carrier railroad companies the defenses of fellow servant, assumed risk, and contributory negligence under certain circumstances in actions for injuries to servants, is not unconstitutional as depriving such railroads of their property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 848-850, 857; Dec. Dig. § 301.*]

7. CONSTITUTIONAL LAW (§ 89*)—MASTER AND SERVANT (§§ 180, 204, 228*)—FREEDOM OF CONTRACT—EMPLOYER'S LIABILITY ACT.

Pub. Acts 1909, No. 104, abolishes the defenses of fellow servant, assumed risk, and contributory negligence under certain circumstances in actions against common carrier railroad companies for injuries to servants, and section 4 provides that no contract of employment, insurance, relief, benefit, or indemnity for injury or death entered into by or on behalf of the employé, or the acceptance of any such insurance, relief, benefit, or indemnity by the person entitled thereto shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employé, provided that on the trial of such action the defendant may set off any sum it has contributed toward any such relief, benefit, or indemnity that may have been paid to the insured employé, or, in case of his death, to his personal representative. *Held* that, the Legislature having power to withdraw from common carrier railroad companies the right to such defenses, section 4 was not unconstitutional as abridging their right to freely enter into contracts with their employées.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 157; Dec. Dig. § 89; * Master and Servant, Cent. Dig. §§ 359-361, 363-368, 544-546, 670, 671; Dec. Dig. §§ 180, 204, 228.*]

8. NEGLIGENCE (§§ 1, 4*)—"ACTIONABLE NEGLIGENCE"—WHAT CONSTITUTES—"ORDINARY CARE."

"Actionable negligence" is the absence of ordinary care, and "ordinary care" is that care which is exercised by the great mass of mankind. If the defendant's conduct does not measure up to this standard, it is negligent, whether it falls much or little below the standard.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 1, 6; Dec. Dig. §§ 1, 4.*]

For other definitions, see Words and Phrases, vol. 1, pp. 148, 149; vol. 8, p. 7563; vol. 6, pp. 5029-5042; vol. 8, pp. 7739, 7740.]

9. NEGLIGENCE (§ 98*)—INJURIES TO SERVANT—COMMON CARRIER RAILROADS—STATUTES—DUTY OF COURT.

Pub. Acts 1909, No. 104, renders common carrier railroad companies liable for injuries to employées caused by the act of a fellow servant, withdraws from the railroad company the right to plead assumed risk, and also declares that the injured servant may recover notwithstanding he has been guilty of contributory negligence, provided the servant's negligence was of a lesser degree than the negligence of

the railroad company, its officers, agents or employées, etc. *Held*, that while, under the statute, a railroad company cannot be made liable for injuries to a servant without proof of actionable negligence attributable to the company, yet if there is such proof, and it also appears that the injury was caused by a mutual fault of both, the question whether plaintiff's negligence was of lesser degree than that of defendant should be determined, not with reference to whether defendant's negligence was slight or gross, but by whether the fault of the defendant was the "greater."

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 93, 165; Dec. Dig. § 98.*]

10. NEGLIGENCE (§ 141*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—LESS FAULT—SUBMISSION TO JURY.

The issue as to whether the negligence of an injured servant of a common carrier railroad company was of a lesser degree than that of his fellow servants by which he was injured, when submitted to the jury, should be submitted in terms of care or fault, rather than in terms of degrees of negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 382-399; Dec. Dig. § 141.*]

11. DAMAGES (§ 173*)—EARNING CAPACITY—EVIDENCE.

In an action for permanent injuries to plaintiff while acting as an extra freight brakeman, there was evidence of the life expectancy of a man of plaintiff's age, that his antecedent earnings had been \$38 a month, and that he had worked 16 days in October and 13 days in November. *Held*, that a computation of the present worth of an earning capacity based on an annual income of \$300 and \$800 a year was not wholly speculative and its admission was not error; the court having charged that it was introduced merely as an aid to them, and that they were not bound by it, but should determine from all the evidence the amount plaintiff was entitled to recover, if anything, for loss of earnings.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490-492, 501; Dec. Dig. § 173.*]

Error to Circuit Court, Saginaw County; William B. Kendrick, Judge.

Action by George Sonamith against the Pere Marquette Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before MOORE, C. J., and OSTRANDER, STEERE, BROOKE, and STONE, JJ.

Bills, Streeter & Parker, of Detroit (S. L. Merriam, of Detroit, and Weadock & Weadock, of Saginaw, of counsel), for appellant. Fred L. Travers, of Saginaw (Miles J. Purcell, of Saginaw, of counsel), for appellee.

OSTRANDER, J. On the 29th of November, 1909, the stone run train, so called, consisting of 35 or 36 cars, was made up on the main track of the Bad Axe Division of defendant's road; the track running substantially east and west. The plaintiff was employed by the defendant as an extra brakeman, and was assigned to duty on the stone run train. Some time between 4 and 5 o'clock in the morning of November 29th, he reported himself at the yards, arriving there be-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fore the locomotive arrived, or any of the trainmen connected with his run. The train was equipped with air brakes and automatic couplers. It was made up by a switching crew employed in the yards, the duties of which crew consisted in assembling the cars and coupling them together (they coupled by impact), leaving the connections for the air to be made by the car inspectors. Testimony for the plaintiff tended to prove that he found the train apparently complete except the locomotive, with the caboose or way car at the rear, unlighted, and the air couplings all made. When the locomotive, the other brakeman riding on it, came into the yard, plaintiff turned at least one switch to permit it to come in upon the proper track, and when it backed down to the train and was connected therewith, as it was by impact, he made the connection of the air hose between the locomotive and the first car of the train. His testimony tends further to prove that he arranged with the other brakeman that he, plaintiff, should act as head brakeman; that the other brakeman, going down the train, lighted the lamps in the caboose, including the markers on the rear and the lamp in the cupola of the way car. The locomotive having been coupled to the train, the plaintiff proceeded down the side of the train with his lantern, and at the rear end of the first car discovered a leak in the air hose, examined it, and told the engineer what he had discovered. The engineer with a torch examined the point at which the air was escaping, plaintiff being on the other, the north, side of the train. Some one, plaintiff says, said: "Shut off the air." He, plaintiff, proceeded to the rear of the engine (tender) to turn the angle cock which controlled the admission of air into the train. In doing this, he stepped in between the rails and the car and tender, but, before he had reached the angle cock, a movement of the train from the rear took place, he was caught by the heel of his right foot, thrown down, and his leg was so injured that amputation was necessary. He produced testimony tending to prove that the movement of the train which resulted in his injury came about in the following manner: As it stood, made up in the yard, the stone run train blocked a spur track. The switching crew desired to use this spur track. The switching crew therefore uncoupled several cars, four or five or six, with the way car, from the rear of the stone run train and pulled these cars away, thus opening the spur track. Later they pushed the cars so detached from the stone run train into their original position, and did this at the instant when plaintiff had placed himself between the rails at the head of the train next the engine. He seeks in this suit to recover damages for the injury he thus received. In his declaration he alleges his duties in the premises as follows: "To assist in the

switching of cars in connection with his work as brakeman, to attach or couple the air brakes between the cars, and between the train and the engine when required to do so, and to do and perform such other usual, ordinary, and necessary things as are incumbent upon and incidental to the work of a brakeman in performance of his duty as such in the transportation of freight and the safety of the property of said company and that to be transported." He alleges the duties of the defendant to have been: "Not to push, switch, or shunt cars against the train or cars about or upon which said plaintiff was at work without first giving said plaintiff notice thereof; not to attach cars to the train about or upon which said plaintiff was at work without notice to him; not to remove cars from the train about or upon which said plaintiff was at work without notice to him; knowing or having good reason to know that employes of said defendant, including plaintiff, were at work upon or about the train, cars, and engine herein-after referred to, not to remove from said train any car or cars without first giving said employes, including said plaintiff, so at work as aforesaid, and hereinafter described, due and timely notice thereof; knowing, or having good reason to know, that employes of said defendant, including plaintiff, were at work upon or about the train, cars, and engine, hereinafter referred to, not to push, switch, or shunt cars against said train, cars, or engine without first giving said employes, including said plaintiff, so at work as aforesaid, and hereinafter described, due and timely notice thereof." He alleges the failure of defendant to observe these duties. The declaration does not count upon or refer to any statute of this state.

Plaintiff, who was 23 years of age, with a life expectancy of more than 40 years, recovered a verdict and judgment for more than \$12,000, and it is claimed by defendant that for various errors committed upon the trial the judgment ought to be reversed. A motion was made by defendant at the close of plaintiff's case for a peremptory instruction to the jury upon the grounds (1) that no negligence of defendant had been made out; (2) that plaintiff had been shown to be guilty of negligence contributing to his injury; and (3) that the negligence alleged was that of fellow servants of plaintiff and of the degree of which plaintiff was himself guilty. This motion, as will presently appear, involved a peremptory instruction as to the meaning and effect of certain provisions contained in Act No. 104, Public Acts of 1909, and of the validity of the said act. The motion was denied, an exception was taken, and error is assigned upon this ruling. The taking of testimony having been concluded, the motion for a peremptory instruction was renewed and again denied, the ruling being followed by an exception. Error is assigned

upon certain portions of the charge, and upon exceptions to rulings admitting a certain computation of the present worth of plaintiff's probable earnings and certain impeaching and rebutting testimony. There are other exceptions and assignments of error, but they are not argued in the brief for appellant. If there is no testimony fairly tending to prove that the conduct of defendant's servants which was the immediate cause of the injury was negligent, plaintiff cannot recover. This is so whether Act No. 104, Public Acts of 1909, is or is not valid and applicable legislation.

[1] If the conduct was negligent, still those guilty of it and plaintiff himself were servants of the same master and engaged in a common employment. In such a case, under the rules of the common law, plaintiff cannot recover; and this is so whether he himself was or was not negligent. Whether plaintiff was negligent is of no consequence, unless Act No. 104, Public Acts of 1909, is valid legislation of the provisions of which plaintiff may have the advantage; in which case his negligence must be compared with that of which the switching crew was guilty.

[2] We have concluded, but not without some misgiving, that there was testimony tending to prove the negligence of the switching crew. That they had the right to uncouple and remove a portion of the train cannot be doubted. That they did this in a proper manner is established. The coupling, when the cars were restored to the train, was carefully and properly made. If the switching crew was negligent, it was because they failed to give warning to the train crew, including the plaintiff, that the coupling, involving a probable movement, though a slight one, of the whole train, was about to be made. There was testimony tending to prove that, when the cars were removed from the train by the switching crew, the way car of the train was lighted and the locomotive connected, and that, when the cars were restored to the train, there was air in the hose on the standing cars. This, it may be inferred, was notice to the switching crew that the trainmen had arrived, and were probably somewhere about the train, and it is insisted upon the part of the plaintiff that, having this notice, a coupling should not have been attempted without assurance that the trainmen were none of them in a position to be injured, or until after due warning had been given to them of the proposed movement. Defendant says that it had formulated and published certain rules which, if obeyed, would have made it impossible for plaintiff to be injured, upon obedience to which rules the switching crew had the right to rely. There is a rule of defendant which, if it had been obeyed by plaintiff, would have effectually protected him from anything but the results of wanton conduct of the switching crew. It is that "trainmen,

car repairers and other employes who have occasion to work on, under, or about cars or engines are forbidden to commence such work, the nature of which requires them to place themselves in a position which might result in personal injury to themselves in case the car or engine should be moved, until they have first protected themselves with the proper signals provided for in this rule. Employes who display the signals herein provided are alone authorized to remove such signals. When a car or engine is thus protected it must not be coupled to nor moved. Other cars or engines must not be placed on the same track so as to intercept the view of these signals without first notifying the workmen." No such signal was displayed. Defendant had also issued a bulletin order, dated May 11, 1909, reading: "To Train and Engine Men: Your attention is called to instructions issued some time ago, regarding testing air on freight train before leaving terminals. 'After the engine is coupled on to the train and the air cut in, the air inspector will start at the head end of the train, and the rear brakeman will start from the rear end; they will move toward each other, meeting about the middle of the train, for the purpose of finding leaks, etc. When this has been done, they will give the engineer a signal to apply brakes; the engineer will do so, making a twenty (20) pound reduction; the inspector will then start toward the head end, and the rear brakeman toward the rear end, both inspecting the brakes, and seeing that they are all set. On arrival at the caboose, rear brakeman will give the engineer a signal to release brakes, and if they release all right, he will then give a "high-ball" to pull out.' Brakeman and inspector will have with them a supply of airbrake defect cards, and tack them on all cars having defective brakes, stating the nature of the defects. J. L. Hayes, Trainmaster."

Plaintiff was head brakeman, and, according to this bulletin order, owed no duty to inspect the train for the purpose of discovering defects in the brakes and in their operation. But plaintiff says that, when he was injured, he was performing no service such as the rule above stated refers to, and was performing a service in the line of his duty. Upon this subject the trainmaster of defendant, who had charge of the yards at Saginaw and was called as a witness by defendant, testified: "I say it is the duty of a brakeman of a freight train to put a light at the rear of his train every time he goes between his train to perform his work in the yards, if he should go there. Suppose there is a leak in the air machinery when the air is put through the freight train, and it becomes necessary to cut off the air from the engine, the brakeman or inspector would cut it off. I understand Mr. Sonsmith was injured while he was doing

that very thing. Q. Then he was in the performance of his duty, wasn't he, in attempting to cut out the air from that train that morning? A. Yes, sir." He further testified: "Q. Well, the inspection of these brakes have got to be made, haven't they? A. Yes, sir. Q. It is their train while these brakes are being inspected? A. Yes, sir. Q. And they have got to attach the engine to the train; that has got to be done too, of course, before you can get the air through the train? A. Yes, sir. Q. The brakemen have got to loosen any hand brakes that may be tight, haven't they? A. Yes, sir. Q. They have got to do a number of incidental things, haven't they? A. Yes, sir. Q. Before the train departs; that is right, isn't it? A. Yes, sir. Q. And yet this train belongs to the switch crew right up to the time the lantern signal is given at night to pull it out? A. Yes, sir."

The traveling engineer of the defendant testified: "Q. Now, Mr. McLachlan, the duty of the brakeman was to cut out the air from the engine, wasn't it, when he found a leak in the car? A. Yes; I suppose he would do it as soon as he would get around to it."

The general yardmaster of defendant in charge of the Saginaw yards testified: "If a brakeman has taken it on himself to go in between the cars and make any repairs, he hasn't any right to do it unless he protects himself in the proper manner, with a red light at the end or red flag being placed out in the center of the drawbar on that train. Q. But, if the plaintiff happened to cut out the air from the engine, do you call that repairing the train? A. No; I don't. It is one of the incidental and ordinary duties of a brakeman, when they come in on the road, to shut off their air, and I believe it is the duty of the head brakeman to cut out the air when it is necessary from the engine in the train. It is not his duty to connect the air to the engine and the train. We have car inspectors to do that."

A freight conductor, a witness for defendant, testified: "Q. And the air connections are made by the brakeman in charge of the train between the engine and the first car? A. As a general rule. It is not the brakeman's duty, when a leak is discovered in the air machinery, if his train is in the yards, to disconnect the air from the engine. Q. Now, under the car inspector's duties, let me read you what the duties are in rule 597, and ask if this does not refresh your recollection in regard to the proposition: 'They [referring to car inspectors] must couple and uncouple all air and steam connections on passenger trains, carefully examine the couplings in all trains after they are made up and report to the trainmaster any imperfections.' Don't that refresh your recollection to the extent that it was one of the duties of the crew, to the

extent that it is only the duty of the car inspector by the rule, to connect the air on passenger trains? A. It is also their duty on freight trains. Q. Have you got any other rule? A. Well, it is done, and, if it wasn't their duty, it is a cinch they wouldn't do it. I cannot say how many times I ever saw them disconnect the air from the engine to take out a car for imperfections or defects. Sometimes you have to throw a car out, not very often. Q. Now, there is no question but what it was the duty of the brakeman to couple up the air to the train in question, is there? A. Well, they always do. The forward brakeman always takes care of that."

The engineer of the stone run train testified: "When I noticed this leak, I did not do anything toward trying to remedy it. I did not touch it. I was on the right-hand side of the engine. Sonsmith was on the opposite side. I don't know whether he was holding a light for me or not. I did not make an examination at the time that I noticed this leak, to see what was wrong. It blew my torch out, when he turned the air on it blew my torch out. I didn't make any further examination. About that time the cars moved ahead. * * * When the cars were moved ahead, I was just getting out between the cars, just getting out between the cars after I made this examination. When they moved forward, it indicated there was some one on the rear end of that train. Some engine or car was on the rear end shoving it ahead. When the leak was noticed, it was the proper thing to cut off the air. I couldn't tell you whose duty it was to cut off the air. Mr. Sonsmith turned it on, and I presume it was his duty to shut it off. I don't know that it was Sonsmith's duty to turn it off. I couldn't say as to that. Q. You presume it was his duty? A. Well, I don't say for sure for that. I was just getting out from between the cars when they were moved forward, being struck from the rear. I don't remember whether I said anything at the time the cars were moved forward or not. I saw Sonsmith after he was injured. I went to where he was lying on the ground. I saw his injuries. I said at that time that I just got out, and that it was a lucky thing for me that I escaped. They have an inspector that looks after the airbrake connections after the train is made up in the yard. I couldn't tell who makes the air connection between the engine and the train as the engine is being attached to the train. I don't know whose duty it was that morning to make the air connection on this stone run freight train in the yard. I don't know that Sonsmith did it. I didn't do it. I don't know as a matter of fact that it was the duty of one of the brakemen when the engine was coupled to the train in the yard for the brakeman to make the air connection to turn on the air between the engine and

the train. I am not positive that they do it right along either. I couldn't tell you whose duty it was to cut off the air if there is a leak in the air connection and that leak is discovered by the brakeman."

Plaintiff testified that he did not see the bulletin order which has been referred to, and never knew of a custom prevailing in the yards of defendant, if it did prevail, which permitted switching crews, without notice to train crews, to take cars from and restore them to a train which had been made up. Among other printed rules and instructions contained in the book furnished by defendant to employes is instruction No. 258, reading: "Employes of every grade are warned to see for themselves, before using them, that the machinery and tools which they are expected to use are in proper condition for the service required, and trainmen, especially, must examine and know for themselves that the brake shafts and attachments, ladders, running boards, steps, handholds and other parts and mechanical appliances which they are to use are in proper condition; if not, to put them in proper condition, or see that they are so put before using them."

[3] In view of the foregoing and other testimony, and assuming that the switching crew had the right to take away and restore cars to the train, we cannot say as matter of law that before attempting to cut off the air from the engine plaintiff was required by rule 26, a portion of which has been set out, to place a signal at the rear of the train between the tracks for his protection; nor can we say that the switching crew, in view of all the circumstances, was warranted in restoring the cars to the train without warning to the trainmen. The proper interpretation of rule 26 does not seem to us to be the one contended for by defendant, nor, as we have seen, is it the interpretation given to it by some at least of its superior agents. We conclude there was testimony from which the jury had the right to find that the switching crew were negligent, and that their negligence contributed to the plaintiff's injury. We come, then, to the questions which involve the meaning and the validity of Act No. 104, of the Public Acts of 1909, which is here set out:

"An act to prescribe the liability of common carrier railroad companies to their employes.

"The people of the state of Michigan enact:

"Section 1. Every common carrier railroad company in this state shall be liable to any of its employes, or, in case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin, for all damages which may result from the negligence of any such railroad company or from the negligence of any

of its officers, agents or employes, or by reason of any defect or insufficiency due to the negligence of any such common carrier railroad company in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves, coal docks or other equipment.

"Sec. 2. In all actions hereafter brought against any such common carrier railroad company under or by virtue of any of the provisions of this act to recover damages for personal injury to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery: Provided, that the negligence of such employe was of a lesser degree than the negligence of such company, its officers, agents or employes: Provided further, that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier railroad company of any statute enacted for the safety of employes contributed to the injury of such employe, and such employe shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

"Sec. 3. The words 'railroad company,' as used in this act, shall be taken to embrace any company, association, corporation, or person managing, maintaining, operating, or in possession of a common carrier railroad in whole or in part within this state, whether as owner, contractor, lessee, mortgagee, trustee, assignee or receiver.

"Sec. 4. No contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employe, nor the acceptance of any such insurance, relief benefit or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to, or death of such employe: Provided, however, that upon the trial of such action, the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit or indemnity that may have been paid to the injured employe, or, in case of his death, to his personal representative.

"Sec. 5. No action shall be maintained under this act unless commenced within two years from the time the cause of action accrued.

"Sec. 6. Nothing in this act shall be held to limit the duty of common carrier railroad companies, or impair the rights of their employes under existing laws of the state.

"Sec. 7. The provisions of this act shall not apply to employes working in shops or offices.

"Approved May 19, 1909."

It is contended that the statute violates section 16 of article 2 of the Constitution

of Michigan, which prohibits depriving any person of life, liberty, or property without due process of law, and that it violates the fourteenth amendment to the Constitution of the United States, which contains a like provision addressed to the states, and the further one that no state shall deny to any person within its jurisdiction the equal protection of the laws.

Counsel for appellant, in addition to briefs filed in the case at bar, have also prepared briefs in the case of Fernette v. Pere Marquette Railroad Co., 139 N. W. —, pending in this court. Elaborate briefs have been furnished by other counsel in two other pending cases involving the validity of the act in question, and the court has heard in this and other cases oral arguments of counsel. The questions presented are important, since to wholly sustain the contentions of appellant will require us to declare the legislation to be wholly void, a declaration which ought not to be made unless the court is fully satisfied that by no reasonable constructions of its provisions may the act be given a meaning and effect within constitutional restrictions. It must be clear that the Legislature has exceeded its constitutional powers, or else the act must be sustained. The Constitution of this state provides, as earlier Constitutions of the state have provided, that: "The common law and the statute laws now in force, not repugnant to this Constitution, shall remain in force until they expire by their own limitations, or are altered or repealed." Schedule, § 1. Two doctrines of the common law adopted in this state particularly applied in actions for personal injuries are, first, that no recovery can be had for the results of another's negligent conduct if the person injured, by his own negligence, contributed to his own injury; and, second, that one entering into an employment assumes the obvious and usual risks of the employment, among which is the risk that an injury may be received on account of the negligence of other employes engaged in the same general employment.

[4] An exception to the cases in which the last-mentioned doctrine can be applied has been made by this court by excluding those cases in which it appeared that the injury grew out of the violation by the employer of a statute enacted for the safety of the employe, in which excluded cases the rule is that the employe is not held to have assumed the risk arising from the violation of the statute by the employer. *Sipes v. Michigan Starch Co.*, 137 Mich. 258, 100 N. W. 447. It was also a rule of the common law that, if the plaintiff in an action for negligent injury dies, the right of action dies with him, and, if suit has been begun, the suit abates by his death. The common law has been altered by the Legislature by provisions which remove certain disabilities arising at common law after suit is begun. Provision

is made for the survival of actions which at common law abated by the death of a party thereto, among them actions for negligent injuries to persons, and such a provision was held to be equivalent to saying that a personal representative of the party might bring and defend such an action. 3 Comp. Laws, §§ 10,113, 10,117, 10,118. *Rogers v. Windoes*, 43 Mich. 623, 12 N. W. 882; *Norris v. Judge*, 100 Mich. 256, 58 N. W. 1006. In addition, provision has been made by the Legislature for actions by representatives of persons killed by wrongful act, neglect or default in cases where, if death had not resulted, the person injured might have maintained an action for his damages. 3 Comp. Laws, §§ 10,427, 10,428. It may be said generally that the measure of the damages recoverable under these provisions of the statutes is not the same. Under the law last above referred to, the recoverable damages are expressly limited to the pecuniary injury suffered by those made by the statute beneficiaries of the action and of its results.

[5] Act No. 104, Public Acts of 1909, is not an amendment of any other statute. It alters the rules of the common law with respect to a single class of employers and employes. As to all other employers and their servants, whether in like or in other circumstances, those rules remain unaltered. Defendant introduced testimony to prove that private railroads are operated in this state, using cars and locomotives, employing engineers, firemen, conductors, and brakemen, but transporting neither passengers nor freight for the public or for any but the owners of the roads. And it is contended that the act of the Legislature in question here violates the constitutional restrictions upon legislation which have been referred to because it arbitrarily places upon common carrier railroads a burden, and makes them exceptional and disfavored creatures in law, and arbitrarily favors and relieves from disabilities the employes of such railroads; thus denying to defendant the equal protection of the laws, and abridging the rights, privileges, and immunities of common carrier railroads. It is a part of the contention in this behalf that section 4 of the act takes away from such companies the right and privilege of freely contracting with employes.

All who pursue the business of carrying passengers or goods or information, for hire, for the public generally, railroad companies, express companies, telegraph companies, telephone companies, street car companies, owners and operators of omnibuses, cabs, carriages, carts, drays, trucks, sleds, boats, are common carriers. For the purposes of the act in question, the Legislature has singled out common carrier railroads. It has imposed upon them liability to employes different from that imposed by law upon other common carriers and upon employers gener-

ally in favor of their employes, who thus enjoy privileges which the law denies to employes of other common carriers and employes generally. That the legislation is discriminatory is plain. May it stand in the face of the prohibition against unequal laws in the federal Constitution? That depends, first, upon whether the classification made by the Legislature is an arbitrary or is a reasonable one, warranted by propriety or by necessity; second, upon whether there has been an unlawful infringement of the right of common carrier railroads to make contracts with their servants.

It is not beyond the power of the Legislature of a state to classify the subjects of its laws, and to make provisions applicable to one class of subjects which have no application to another class. It is unnecessary for us to decide for ourselves whether the act in question offends against the Constitution of the United States, as it is contended that it does, because the federal Supreme Court, the judgments of which upon such questions are final and binding upon the courts of the states, has determined the question adversely to appellant. A brief review of some of the decisions of that court touching the general subject will be of service.

The federal statute of 1906 (Act June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1911, p. 1316]) applied to every common carrier engaged in interstate commerce, in commerce in the territories and the District of Columbia, and the first section of the act was not otherwise unlike the first section of the Michigan statute. By a divided court it was held (Employer's Liability Cases, 207 U. S. 468, 28 Sup. Ct. 141, 52 L. Ed. 297) that the act was unconstitutional as applied to commerce among the several states, because providing that in such service the common carrier should be liable to any of its employes. The act was construed by the majority of the judges to mean *any employe*, whether employed in interstate or in intrastate business of the corporation. In *El Paso & N. E. Ry. Co. v. Gutierrez*, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. 106, the court had before it a judgment of the Supreme Court of the state of Texas, which sustained the federal act as applied to commerce in the territories. The judgment was affirmed. The act, as applied to commerce in the District of Columbia, was sustained by the Court of Appeals of the District in *Hyde v. Southern Ry. Co.*, 31 App. (D. C.) 466, in an opinion referred to with approval by the Supreme Court of the United States. *El Paso & N. E. Ry. Co. v. Gutierrez*, supra. In 1908 the act of Congress of 1906 was repealed, and in place of it the Congress enacted a similar law approved April 22, 1908 (35 Stat. 65, c. 149 [U. S. Comp. St. Supp. 1911, p. 1322]), which reads as follows:

"An act relating to the liability of common carriers by railroad to their employes in certain cases.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Sec. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama Canal zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. Provided, that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of

employés contributed to the injury or death of such employé.

"Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employés, such employé shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé.

"Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employé or the person entitled thereto on account of the injury or death for which said action was brought.

"Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

"Sec. 7. That the term 'common carrier' as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

"Sec. 8. That nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employés under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled 'An act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the states and between the states and foreign nations to their employés' approved June eleventh, nineteen hundred and six."

This act was before the court in various cases referred to in the reports as *Second Employer's Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327. Those portions of the unanimous opinion of the court which discuss questions presented by the record before us are here repeated:

"We come, then, to inquire whether Congress has exceeded its power in that regard by prescribing the regulations embodied in the present act. It is objected that it has (1) because the abrogation of the fellow-servant rule, the extension of the carrier's liability to cases of death, and the restriction of the defenses of contributory negligence and assumption of risk have no tendency to promote the safety of the employés or to

advance the commerce in which they are engaged; (2) because the liability imposed for injuries sustained by one employé through the negligence of another, although confined to instances where the injured employé is engaged in interstate commerce, is not confined to instances where both employés are so engaged; and (3) because the act offends against the fifth amendment to the Constitution (a) by unwarrantably interfering with the liberty of contract, and (b) by arbitrarily placing all employers engaged in interstate commerce by railroad in a disfavored class and all their employés engaged in such commerce in a favored class.

"Briefly stated, the departures from the common law made by the portions of the act against which the first objection is leveled are these: (a) The rule that the negligence of one employé resulting in injury to another was not to be attributed to their common employer is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employé; (b) the rule exonerating an employer from liability for injury sustained by an employé through the concurring negligence of the employer and the employé is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employés contributes to the injury, and in other instances is displaced by the rule of comparative negligence, whereby the exoneration is only from a proportional part of the damages corresponding to the amount of negligence attributable to the employé; (c) the rule that an employé was deemed to assume the risk of injury, even if due to the employer's negligence, where the employé voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employés contributed to the injury; and (d) the rule denying a right of action for the death of one person caused by the wrongful act or neglect of another is displaced by a rule vesting such a right of action in the personal representatives of the deceased for the benefit of designated relatives.

"Of the objection to these changes it is enough to observe:

"First. 'A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will * * * of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and

to adapt it to the changes of time and circumstances.' *Munn v. Illinois*, 94 U. S. 113, 134 [24 L. Ed. 77]; *Martin v. Pittsburg & Lake Erie R. R. Co.*, 203 U. S. 284, 294 [27 Sup. Ct. 100, 51 L. Ed. 184, 8 Ann. Cas. 87]; *The Lottawanna*, 21 Wall. 558, 577 [22 L. Ed. 654]; *Western Union Telegraph Co. v. Commercial Milling Co.*, 218 U. S. 403, 417 [31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815].

"Second. The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and, as whatever makes for that end tends to promote the safety of the employes and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution. *Lottary Case*, 188 U. S. 321, 353, 355 [23 Sup. Ct. 321, 47 L. Ed. 492]; *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186, 203 [31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7].

"We are not unmindful that that end was being measurably attained through the remedial legislation of the several states, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the states upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce. *The Lottawanna*, 21 Wall. 558, 581, 582 [22 L. Ed. 654]; *Baltimore & Ohio R. R. v. Baugh*, 149 U. S. 368, 378, 379 [13 Sup. Ct. 914, 37 L. Ed. 772].

"The second objection proceeds upon the theory that, even although Congress has power to regulate the liability of a carrier for injuries sustained by one employé through the negligence of another where all are engaged in interstate commerce, that power does not embrace instances where the negligent employé is engaged in intrastate commerce. But this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power. As was said in *Southern Railway Co. v. United States*, 222 U. S. 20, 27 [32 Sup. Ct. 2, 56 L. Ed. 72], that power is plenary, and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it. The present act, unlike the one condemned in *Employer's Liability Cases*, 207 U. S. 463 [28 Sup. Ct. 141, 52 L. Ed. 297], deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employes while engaged in such commerce. And, this being so, it is not a valid objection that the act embraces instances where the

causal negligence is that of an employé engaged in intrastate commerce; for such negligence, when operating injuriously upon an employé engaged in interstate commerce, has the same effect upon that commerce as if the negligent employé were also engaged therein.

"Next in order is the objection that the provision in section 5, declaring void any contract, rule, regulation, or device, the purpose or intent of which is to enable a carrier to exempt itself from the liability which the act creates, is repugnant to the fifth amendment to the Constitution as an unwarranted interference with the liberty of contract. But of this it suffices to say, in view of our recent decisions in *Chicago, Burlington & Quincy Railroad Co. v. McGuire*, 219 U. S. 549 [31 Sup. Ct. 259, 55 L. Ed. 328], *Atlantic Coast Line Railroad Co. v. Riverside Mills*, 219 U. S. 186 [31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7], and *Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission*, 221 U. S. 612 [31 Sup. Ct. 621, 55 L. Ed. 878], that if Congress possesses the power to impose that liability, which we here hold that it does, it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation, or device in evasion of it.

"Coming to the question of classification, it is true that the liability which the act creates is imposed only on interstate carriers by railroad, although there are other interstate carriers, and is imposed for the benefit of all employes of such carriers by railroad who are employed in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains or to hazards that differ from those to which other employes in such commerce not within the act are exposed. But it does not follow that this classification is violative of the 'due process of law' clause of the fifth amendment. Even if it be assumed that that clause is equivalent to the 'equal protection of the laws' clause of the fourteenth amendment, which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary. *Lindsley v. Carbonic Gas Co.*, 220 U. S. 61, 78 [31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160]. Tested by these standards, this classification is not objectionable. Like classifications of railroad carriers and employes for like purposes, when assailed under the equal protection clause, have been sustained by repeated decisions of this court. *Missouri Pacific Railway Co. v. Mackey*, 127 U. S. 205

[8 Sup. Ct. 1161, 32 L. Ed. 107]; *Louisville & Nashville Railroad Co. v. Melton*, 218 U. S. 36 [30 Sup. Ct. 676, 54 L. Ed. 921]; *Mobile, Jackson & Kansas City Railroad Co. v. Turnipseed*, 219 U. S. 35 [31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463]. It follows that the answer to the second of the questions before stated must be that Congress has not exceeded its power by prescribing the regulations embodied in the present act."

In *St. Louis, I. M. & S. Ry. Co. v. Conley*, 187 Fed. 949, 110 C. C. A. 97, the federal act of 1908 was considered. It was urged against its validity that it sought to deprive the defendant railroad company of the liberty and privilege of making contracts with its employes, and to impose upon it liabilities that were unreasonable, and not within the terms of its contracts with its employes, and thereby to deprive it of its liberty to make contracts and of its property without due process of law. This contention was overruled upon the authority of *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832, *Railway Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 828, and other cases, the court saying: "The primary object of the act was to promote the safety of employes of railroads while actively engaged in the movement of interstate commerce, and is well calculated to subserve the interests of such commerce by affording such protection; there being, as it seems to us, a substantial connection between the object sought to be attained by the act and the means provided to accomplish that object." By way of illustration it is said: "Thus, if Congress may require the use of safety appliances, it may prohibit agreements to dispense with them. If it may restrict employment in any service to eight hours a day, it may make contracts for longer service unlawful. The rule is, where the regulation is valid—that is, not being arbitrary or unrelated to a proper purpose—Congress may prevent it from being nullified by prohibitive contracts. In all such cases of interference with the right to contract, it has been held to be 'incidental to the main object of the regulation, and, if the power exists to accomplish the latter, the interference is justified as an aid to its exercise'"—citing *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780. The fourteenth amendment to the federal Constitution is addressed to the states, and not to the Congress. The foregoing cases are not authority precisely sustaining the validity of the act in question, although the reasoning indulged is appropriate to the precise questions presented here. But the precise questions here involved have been determined by the same court in favor of the validity of the legislation.

[6] In *Mobile, etc., R. Co. v. Turnipseed*, 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463,

there was involved a statute of the state of Mississippi and a portion of the Constitution of that state, and it was claimed that, as construed by the Supreme Court of Mississippi, the statute (section 3559 of the Code) violated the fourteenth amendment, because it denied to railroad corporations the equal protection of the laws. The statute, following the Constitution of the state, abrogated the common-law fellow-servant rule as to every employe of a railroad corporation. It was urged that this legislation, applicable only to employes of a railroad company, was arbitrary, and in denial of equal protection of law, unless limited in its effect to employes imperilled by the hazardous business of operating railroad trains or engines, and that the Mississippi Supreme Court had in prior cases so defined and construed the legislation. *Ballard v. Cotton Oil Co.*, 81 Miss. 532, 34 South. 533, 62 L. R. A. 407, 95 Am. St. Rep. 476; *Bradford Construction Co. v. Heflin*, 88 Miss. 314, 42 South. 174, 12 L. R. A. (N. S.) 1040, 8 Ann. Cas. 1077. It was contended that the provision had been construed in the case at bar as applicable to an employe not subject to any danger or peril peculiar to the operation of railway trains and that, therefore, the reason for the classification failed and the provision so construed and applied was a denial of the equal protection of the law. The action was tort for the wrongful killing of a section foreman in the service of the railway company, and he had a judgment which was affirmed by the Supreme Court of the state. Of this contention, the court, by Mr. Justice Lurton, said: "This contention, shortly stated, comes to this: That, although a classification of railway employes may be justified from general considerations based upon the hazardous character of the occupation, such classification becomes arbitrary, and a denial of the equal protection of the law the moment it is found to embrace employes not exposed to hazards peculiar to railway operation. But this court has never so construed the limitation imposed by the fourteenth amendment upon the power of the state to legislate with reference to particular employments as to render ineffectual a general classification resting upon obvious principles of public policy, because it may happen that the classification includes persons not subject to a uniform degree of danger. The insistence, therefore, that legislation in respect of railway employes generally is repugnant to the clause of the Constitution guaranteeing the equal protection of the law merely because it is not limited to those engaged in the actual operation of trains, is without merit." The opinion refers with approval to *L. & N. R. Co. v. Melton*, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921. In that case the injured person was a carpenter in the employ of the railroad company, and was engaged usually at bridge carpentering. When injured, he

was constructing the foundation of a coal tippie at which engines might coal. A timber intended to be a part of the foundation of the tippie was being raised by a block and tackle and Melton with the foreman, and under his orders was standing under the timber and engaged in placing props under it to prevent its lowering when the strain upon the rope passing through the pulley was relaxed. A link of the chain which held the pulley broke, the timber fell, Melton underneath it, inflicting serious injury. The chain which broke was furnished by the foreman, and had been put in position under his direction. Melton was a resident of Kentucky, but the injury occurred in Indiana. He began his action in Kentucky. The Employer's Liability Act of Indiana provides that: "Every railroad * * * operating in this state shall be liable in damages for personal injury suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence, in the following cases: First. When such injury is suffered by reason of any defect in the condition of ways, works, plants, tools and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such ways, works, plant, tools or machinery in proper condition. Second. Where such injury resulted from the negligence of any person in the service of such corporation, to, whose order or direction the injured employé at the time of the injury was bound to conform, and did conform." Laws 1893, c. 180.

One question raised in the court below was that the statute, in so far as it was made to apply to the facts in the case, was a violation of the equal protection clause of the fourteenth amendment. Of this it was said:

"That the fourteenth amendment was not intended to, and does not, strip the states of the power to exert their lawful police authority is settled, and requires no reference to authorities. And it is equally settled—as we shall hereafter take occasion to show—as the essential result of the elementary doctrine that the equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority; therefore that clause is not offended against simply because as the result of the exercise of the power to classify some inequality may be occasioned. That is to say, as the power to classify is not taken away by the operation of the equal protection of the law clause, a wide scope of legislative discretion may be exerted in classifying without conflicting with the constitutional prohibition.

"It is beyond doubt foreclosed that the Indiana statute does not offend against the equal protection clause of the fourteenth amendment, because it subjects railroad em-

ployés to a different rule as to the doctrine of fellow servant from that which prevails as to other employments in that state. *Tullis v. Lake Erie & W. R. R. Co.*, 175 U. S. 348 [20 Sup. Ct. 136, 44 L. Ed. 192]; *Pittsburg, etc., Ry. Co. v. Ross*, 212 U. S. 560 [29 Sup. Ct. 688, 53 L. Ed. 652]. But, while conceding this, the argument is that classification of railroad employés for the purpose of the doctrine of fellow servant can only consistently with equality and uniformity embrace such employés when exposed to dangers peculiarly resulting from the operation of a railroad, thus affording ground for distinguishing them for the purpose of classification from coemployés not subject to like hazards or employés engaged in other occupations. The argument is thus stated: 'Plaintiff in error does not question the right of the Legislature of Indiana to classify railroads in order to impose liability upon them for injuries to their employés incident to railroad hazards, but it does insist that, to make this a constitutional exercise of legislative power, the liability of the railroads must be made to depend upon the character of the employment and not upon the character of the employer.' Thus stated, the argument tends to confuse the question for decision, since there is no contention that the statute as construed bases any classification upon some supposed distinction in the person of the employer. The idea evidently intended to be expressed by the argument is that although, speaking in a general sense, it be true that the hazards arising from the operation of railroads are such that a classification of railroad employés is justified, yet as in operating railroads some employés are subject to risks peculiar to such operation and others to risks, which, however serious they may be, are not in the proper sense risks arising from the fact that the employés are engaged in railroad work, the legislative authority in classifying may not confound the two by considering in a generic sense the nature and character of the work performed by railroad employés collectively considered, but must consider and separately provide for the distinctions occasioned by the varying nature and character of the duties which railroad operatives may be called upon to discharge. In other words, reduced to its ultimate analysis, the contention comes to this: That by the operation of the equal protection clause of the fourteenth amendment the states are prohibited from exerting their legitimate police powers upon grounds of the generic distinction obtaining between persons and things, however apparent such distinction may be, but, on the contrary, must legislate upon the basis of a minute consideration of the distinctions which may arise from accidental circumstances as to the persons and things coming within the general class provided for. When the proposition is thus accurately fixed, it necessarily results

that in effect it denies the existence of the power to classify, and hence must rest upon the assumption that the equal protection clause of the fourteenth amendment has a scope and effect upon the lawful authority of the states contrary to the doctrine maintained by this court without deviation. This follows since the necessary consequence of the argument is to virtually challenge the legislative power to classify and the numerous decisions upholding that authority. To this destructive end it is apparent the argument must come, since it assumes that, however completely a classification may be justified by general considerations, such classification may not be made if inequalities be detected as to some persons embraced within the general class by a critical analysis of the relation of the persons or things otherwise embraced within the general class. A brief reference to some of the cases dealing with the power of a state to classify will make the error of the contention apparent.

"In *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 294, 296 [18 Sup. Ct. 594, 42 L. Ed. 1087], while declaring that the power of a state to distinguish, select, and classify objects of legislation was of course not without limitation, it was said: 'Necessarily this power must have a wide range of discretion.' After referring to various decisions of this court, it was observed: 'There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things.'

"Again considering the subject in *Orient Ins. Co. v. Daggs*, 172 U. S. 557 [19 Sup. Ct. 281, 43 L. Ed. 552], it was reiterated that the Legislature of a state has necessarily a wide range of discretion in distinguishing, selecting, and classifying, and it was declared that it was sufficient to satisfy the demand of the Constitution if a classification was practical and not palpably arbitrary.

"In *Minnesota Iron Co. v. Kline*, 190 U. S. 593 [26 Sup. Ct. 159, 50 L. Ed. 322], a statute of Minnesota, providing that the liability of railroad companies for damages to employes should not be diminished by reason of accident occurring through the negligence of fellow-servants, was held not to discriminate against any class of railroads, or to deny the equal protection of the laws because of a proviso which excepted employes engaged in construction of new and unopened railroads. In the course of the opinion, the court said (190 U. S. 598 [26 Sup. Ct. 161, 50 L. Ed. 322]): 'The whole case is put on the proviso, and the argument with regard to that is merely one of the many attempts to impart an overmathematical nicety to the prohibitions of the fourteenth amendment.' These principles were again applied in *Mar-*

tin v. Pittsburg, etc., R. R. Co., 203 U. S. 284 [27 Sup. Ct. 100, 51 L. Ed. 184, 8 Ann. Cas. 87], and the doctrines were also fully considered and reiterated at this term in *Southwestern Oil Co. v. Texas*, 217 U. S. 114 [30 Sup. Ct. 496, 54 L. Ed. 688].

"And, coming to consider the concrete application made of these general principles in the decisions of this court which have construed the statute here in question, and statutes of the same general character enacted in states other than Indiana, we think when rightly analyzed it will appear that they are decisive against the contention now made. It is true that in the *Tullis Case*, which came here on certificate, the nature and character of the work of the railroad employé who was injured was not stated, and that reference in the course of the opinion was made to some state cases, limiting the right to classify to employes engaged in the movement of trains. But that it was not the intention of the court to thereby intimate that a classification if not so restricted would be repugnant to the equal protection clause of the fourteenth amendment will be made clear by observing that the previous case of *Chicago, etc., R. Co. v. Pontius*, 157 U. S. 209 [15 Sup. Ct. 585, 39 L. Ed. 675], was cited approvingly, in which, under a statute of Kansas classifying railroad employes, recovery was allowed to a bridge carpenter employed by the railroad company, who was injured while attempting to load timber on a car. And in the opinion in the *Pontius Case* there was approvingly cited a decision of the Court of Appeals of the Eighth Circuit (*Chicago, R. I. & P. R. Co. v. Stahley*, 62 Fed. 363 [11 C. C. A. 88]), wherein it was held that under the same statute an employé injured in a roundhouse while engaged in lifting a driving rod for attachment to a new engine could recover by virtue of the statute. All this is made plainer by the ruling in *St. Louis Merchants' Bridge Terminal Ry. Co. v. Callahan*, 194 U. S. 628 [24 Sup. Ct. 857, 48 L. Ed. 1157], where, upon the authority of the *Tullis Case*, the court affirmed a judgment of the Supreme Court of Missouri, which held that recovery might be had by a section hand upon a railroad who, while engaged in warning passers-by in a street beneath an overhead bridge, was struck by a tie thrown from the structure.

"While, as we have previously said, it is true there are state decisions dealing with statutes classifying railroad employes sustaining the restricted power to classify which is here insisted upon, we do not think it is necessary to review them or to notice those tending to the contrary. They are referred to in the opinions rendered in the court below. Nor do we think our duty in this respect is enlarged because since the judgment below was rendered the court of last resort in Indiana (*Indianapolis, etc., Co. v. Kinney*, 171 Ind. 612 [85 N. E. 954, 23 L. R. A. (N.

S.) 711], and *Cleveland, C., C. & St. L. Ry. Co. v. Foland* [174 Ind. 411, 91 N. E. 594, 92 N. E. 185], decided April 20, 1910) has, upon the theory that it was necessary to save the statute in question from being declared repugnant to the equality clause of the state Constitution and the fourteenth amendment, unequivocally held that the statute must be construed as restricted to employes engaged in train service."

We have examined the opinion of the Circuit Court of Appeals in Chicago, etc., *Ry. Co. v. Westby*, 178 Fed. 619, 102 C. C. A. 65, relied upon by appellant, in which is considered the Employer's Liability Act of South Dakota, which provides: "Section 1. That every common carrier engaged in trade or commerce in the state of South Dakota shall be liable to any of its employes, or in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents or employes, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works." Laws 1907, c. 219.

The court concludes that the statute of Dakota is unconstitutional, cannot be construed so as to make it constitutional, or the unconstitutional part eliminated by striking out or disregarding any words or clauses of the act, but only by introducing into the statute words of limitation expressly restricting the general terms "every common carrier" and "any employe" to common carriers using dangerous power and machinery and their employes engaged in dangerous occupations about them. Such a limitation, it is said, would exclude from the operation of the act far the larger number of employers within its terms and probably a majority of the employes within its terms. The effect of the decision is to hold that there is disclosed no such reasonable ground for difference between those within and those without the class formed by the statute as bears any just or proper relation to the classification attempted by it, and that it cannot be sustained.

It will be noted that the statute of South Dakota applies to every common carrier and to all employes of common carriers, as did the federal act of 1906, while the Michigan statute applies to a single class of common carriers, namely, railroads. Much that is said in argument, in the opinion in the *Westby* case, in condemnation of the South Dakota law, sustains the classification made in the Michigan law. The legislation of the various states is not uniform and has been generally attacked as offending the fourteenth amendment to the federal Constitution in the classification attempted. In some of the states, notably the states of Iowa and

Indiana, the courts met these attacks by a construction of the law. As, for example, in *Indianapolis Traction Co. v. Kinney*, 171 Ind. 612, 617, 85 N. E. 954, 956 (23 L. R. A. [N. S.] 711), it was said: "Notwithstanding the language of the statute is 'that every railroad or other corporation, except municipal, operating in this state, shall be liable for damages for personal injury suffered by any employe while in its service,' it must not for a moment be understood that the benefits of the statute are extended to all employes of a railroad corporation, or to any other class of employes than those whose duties expose them to the peculiar hazards incident to the use and operation of railroads. There is no reason in fact or fancy why the benefits of the statute should be extended to the office and shop employes of railroad corporations, or to others removed from the dangers of train service, and denied to the multitude of other workmen engaged in businesses of like and equal hazard." In Wisconsin the validity of an act of similar import affecting "every railroad company" was sustained by a divided court in *Kiley v. Chicago, etc., Ry. Co.*, 138 Wis. 215, 119 N. W. 309, 120 N. W. 756. The Michigan statute excepts employes working in shops and offices. It includes in its terms all other employes of every common carrier railroad. The language employed is not ambiguous, and we find no occasion to give it by construction a meaning different from that expressed in its plain terms. It applies to all common carrier railroads and to all employes of such railroads except those working in shops and offices. Other railroads and the employes of them are not within its terms. Nevertheless, upon principle, the classification which is made is not clearly arbitrary and the act does not offend against the Constitution of the United States or the Constitution of this state.

[7] This is true, also, with respect to the provisions of section 4 of the act which are claimed to abridge the right to freely enter into contracts. This is demonstrated by authority already presented, in addition to which reference is made to *Chicago, etc., Ry. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328. Whether section 4 of the act can be held to relate to contracts made after an injury is received is not a question now presented for decision. It is contended, as we understand the brief, that plaintiff was negligent in the same degree that his fellow servants were negligent; that in such a case the court should determine as matter of law that plaintiff cannot recover. The argument involves, to some extent, the construction of that portion of section 2 of the act found in the first proviso: "That the negligence of such employe was of a lesser degree than the negligence of such company, its officers, agents or employes." The act must be construed, if it is possible to do so, so as to give effect to

the legislative intention. And this intention must be found in the act itself and in the conditions which it is assumed the Legislature sought to remedy. Nothing in the act indicated a purpose to interfere with the exercise of the judicial power, as it existed when the Constitution was adopted, a purpose wholly beyond the legislative power. But the intention to modify—alter—certain rules of the common law, uniformly applied and enforced by the courts, is evident, and this the Legislature undoubtedly may do. The term "negligence" is employed in the act.

[8] Actionable negligence is absence of ordinary care, and ordinary care is the care exercised by the great mass of mankind. If conduct does not measure up to this standard, it is negligent, whether it falls much or little below the standard. The act does not permit every employé of a railroad company injured in its service to recover damages for the injury. There must be actionable negligence, attributable to the company and causing, or contributing, to the injury, or there can be no recovery.

[9] The courts now, as formerly, have the power, and it is their duty, to determine whether there is evidence tending to prove actionable negligence attributable to the company. Courts have the power, and it is equally their duty to determine whether there is testimony tending to prove the mutual fault of the injured person and the company, and that the fault of each was in proximate relation to the injury. It may, indeed, be the duty of the court to determine that, while the fault was mutual, the fault of one of the parties was clearly greater than that of the other. As applied to this statute, we are of opinion that the terms slight, ordinary, and gross negligence, sometimes employed in opinions of courts and by authors of legal treatises, afford no proper basis for reaching the required determination. The question in all cases of mutual fault will be "whether the fault of the defendant was the greater." See *Jensen v. Wisconsin Cent. Ry. Co.*, 145 Wis. 328, 128 N. W. 982.

[10, 11] The court submitted to the jury this question of greater fault, although in terms of negligence. This, in our opinion, was required by the testimony produced. It is possible, and is suggested, that less confusion is likely to result in cases arising under the statute if the jury be instructed in terms of care or of fault rather than those of degrees of negligence. The testimony showed that plaintiff was an extra, not a regular, brakeman at the time he was injured, and his antecedent earnings had been some \$38 a month. He had worked but 16 days in October, and 13 days in November. A witness produced a computation showing the present worth of an annual earning of \$800 per year, with an expectancy of 40 years. The total was \$17,854.59. On cross-

examination the witness stated that he added the earnings of plaintiff for October and November for 29 days, assumed there were 26 working days in a month, and with these factors produced an annual earning of more than \$800. Witness had also made a computation based upon an earning of \$800 annually, the result of which was \$6,492.58. On a motion being made to strike out the testimony there was an extended colloquy of court and counsel, during which the court said: "The plaintiff doesn't claim, and there is no proof he will claim, 26 days. They simply claim this: That, if the plaintiff worked 26 days, he should be able to earn \$800, which amounts to a certain specific sum. If he should earn \$300, it would amount to a certain less sum, under the value for that period." And the court held there was testimony upon the subject, and then specially instructed the jury as follows: "The court will charge you, gentlemen of the jury, that this plaintiff is entitled to recover, if at all, the present value of his future prospective earnings; that his expectancy of life is 40.85 years. We have figured 40 years, so as to make it an even number. That means that according to the life table, which is made a part of the case when there is a permanent injury, in order to guide the jury as to the average length of life that a man 23 years of age will live—the court allows this table to be introduced. That means that the average man, or the average number of men, at 23 years of age will live 40 years. That does not mean that Mr. Sonsmith will ultimately live that long. He is chargeable with all of the vicissitudes of life. He may live longer than the expectation of life, or he may not live that long. But this is simply a guide for you in fixing the probable time that he may live, and then, in connection with that, fixing the probable loss. * * * Now we have said that working 26 days a month, as men ordinarily do as brakemen, at the wages that he did earn, he would earn \$825 in one year. Now, we don't need to say to you, gentlemen of the jury, that you are to accept that as final. You may do it. You may reduce it. That is simply a matter for you to consider. But Mr. Sonsmith is entitled to first what is stated there, loss of earnings from date of injury to date of trial, whatever sum in your sound judgment and discretion he is entitled to." In the general charge care was taken in the instructions concerning the measure of recoverable damages, and the court again said to the jury: "All these matters are to be borne in mind by you. There has been testimony introduced here, gentlemen of the jury, concerning the wages this man would earn, testimony as to what he actually earned, and as to what he was capable of earning. In taking that into consideration I wish to say to you that the testimony that has been introduced here is upon a certain

theory of employment, from the actual and entire time and the fractions of time and is simply introduced here to aid you in coming to a conclusion, should you determine that there is a liability and that the plaintiff shall have his recompense; and that the evidence introduced here as to what the plaintiff worked for the Pere Marquette, that was put in upon the basis of full time of all secular days, and is nothing that should impress you other than as a simple method in determining in a regular fair ratio what you think he would actually be employed by the defendant. These matters are all to be taken and considered by you as an entirety in coming to this conclusion. All these matters are to be borne in mind by you. The 40.85 years' expectancy is the average duration of life of a normally well man of his age; but, of course, does not absolutely show how long he will live. It is only evidence tending to show how long a man of his age and in good average health will live; and you are not bound fixedly or absolutely by it, but must determine as best you can, if you find it necessary, what will be the probability of his life. All these matters you will very carefully consider."

More speculative computations ought not to be received in cases of this nature, but we think the computation was not wholly speculative. There was some basis for it, and the court fairly advised the jury concerning its value and of their duty.

We do not find in the other exceptions any abuse of the discretion of the court, and upon the whole record are of opinion that the judgment must be, and it therefore is, affirmed.

BRUCE v. MICHIGAN CENT. R. CO.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. MASTER AND SERVANT (§ 228*)—INJURIES TO SERVANT—RAILROADS—STATUTES—CONSTRUCTION—"DEGREE."

Pub. Acts 1909, No. 104, § 2, provides that in all actions against any railroad company by an employé for personal injuries contributory negligence shall not bar recovery, provided the employé's negligence was of a lesser degree than that of the defendant, its officers, agents, or employes, etc. *Held*, that such act was not merely declaratory of the common law, and that the word "degree" should be construed in the sense of "less," as though the proviso was "provided the negligence of such employé was less than the negligence of such company, its officers, agents or employes."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.*]

For other definitions, see Words and Phrases, vol. 2, p. 1949.]

2. MASTER AND SERVANT (§ 228*)—INJURIES TO SERVANT—RAILROADS—DEFENSES—STATUTES—CONSTRUCTION.

Pub. Acts 1909, No. 104, § 2, provides that, where an employé of a railroad company is injured or killed, he shall not be held to have

been guilty of contributory negligence, provided his negligence was of a lesser degree than that of the company, its officers, agents, or employes, nor in any case where a violation by the railroad company of any statute enacted for the safety of employes contributed to the injury, and he shall not be held to have assumed the risk in such a case. *Held*, that the defenses of contributory negligence and assumed risk are not available as defenses to a suit for injury or death of an employé of a railroad company at all in cases where the violation of a protection statute contributed to the injury, nor are they available in cases where the negligence of the employé is less than the negligence of the company, its officers, agents, or employes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.*]

3. TRIAL (§ 133*)—MISCONDUCT OF COUNSEL—ARGUMENT—CURING ERROR.

Where, in an action for injuries to an employé of a common carrier railroad company, the court in various ways charged the jury that, if plaintiff's negligence was equal to or greater than that of the other employes of the defendant, plaintiff could not recover, error in an argument of plaintiff's counsel to the jury that plaintiff was entitled to recover unless his negligence was "grosser than theirs," instead of "equal to or greater," was cured.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.*]

4. MASTER AND SERVANT (§ 243*)—INJURIES TO SERVANT—RAILROADS—RULES—APPLICATION.

A special notice of a railroad's car department directed to foremen and car repairers provided that car repairers and other employes of that department having occasion to work on or about cars were forbidden to commence work requiring them to place themselves under or about a car whereby its movement would result in injury to them without first protecting the car with a blue flag or flags by day or blue lights at night. *Held*, that such rule did not apply to a roundhouse employé who was injured by the movement of a locomotive while he was at work in an ash or cinder pit without notice to him; he being neither a foreman nor a car repairer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 759-775; Dec. Dig. § 243.*]

Error to Circuit Court, Bay County; Chester L. Collins, Judge.

Action by George Bruce against the Michigan Central Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

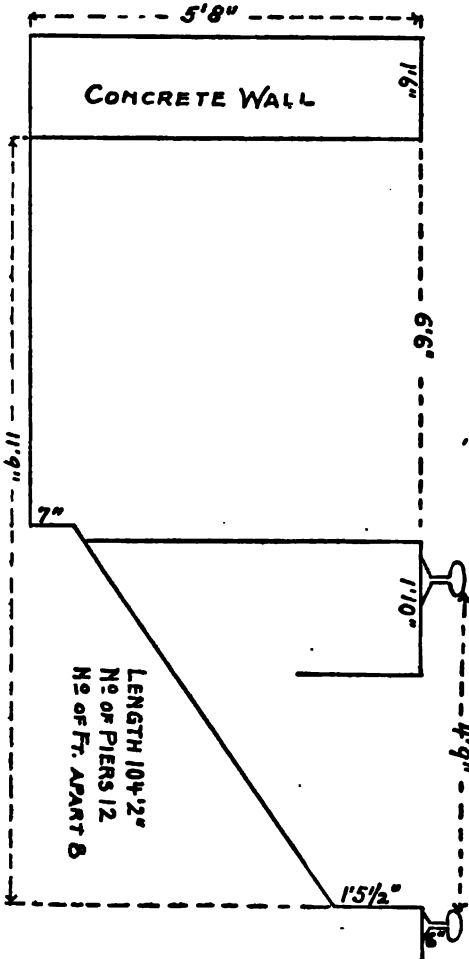
Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, BLAIR, STONE, and OSTRANDER, JJ.

Cooley & Hewitt, of Bay City (Humphrey & Grant, of Saginaw, of counsel), for appellant. Hall, De Foe & Henry, of Bay City (L. P. Coumans, of Bay City, of counsel), for appellee.

MOORE, C. J. This is an action brought by the plaintiff for damages alleged to have been sustained by him while in the employ of the defendant company. His right arm was cut off by the wheel of a locomotive

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tender while he was at work in an ash or cinder pit of which the following is a sketch:



He bases his right to recover under the provisions of Act 104, of the Public Acts of 1906. The only negligence claimed and for which recovery is asked is the moving of an engine from the cinder pit in the yard toward the roundhouse without ringing the bell before starting the engine. The plaintiff recovered a verdict on which judgment was duly entered for the sum of \$4,457. The case is brought here by writ of error.

Neither counsel discuss in the brief the question of the constitutionality of the law, and for that reason we make no further reference to that phase of the case. The claim of defendant is stated in part as follows in the brief: "It is the contention of defendant in this case, through its attorneys, that, briefly stated, this statute is simply declaratory of the common law as it now exists in this state, under the decisions of this court, with the single exception that the statute takes away the defense of contributory negligence where the duty vio-

lated by the defendant, which causes the injury, is a statutory duty enacted for the benefit of its employes." Counsel then quote from the act, and argue that the degrees of negligence were used advisedly. We again quote from the brief: "It is the contention of defendant that this provision of the statute is merely declaratory of the law as it existed before the passage of this act, and that is, that by the use of the term 'degree,' in speaking of negligence, such language was used in its ordinary acceptation and meaning; that through the decisions of this court negligence is understood to be of two degrees in Michigan—ordinary negligence, and what is known as gross negligence. This statute, being declaratory of the common law, meant that, if the defendant was guilty of gross negligence, the plaintiff's ordinary negligence would not bar recovery."

It is also argued that if the negligence of both was ordinary, or if both were guilty of gross negligence, there could be no recovery. These propositions are argued at great length; counsel citing authorities. It may be well to quote here the provisions of Act 104 which are germane to this discussion. The provisions of section 1 are broad enough to establish liability whenever negligence on the part of the defendant occurs. Section 2 reads as follows: "In all actions hereafter brought against any such common carrier railroad company under or by virtue of any of the provisions of this act to recover damages for personal injury to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery: Provided, That the negligence of such employé was of a lesser degree than the negligence of such company, its officers, agents or employes: Provided further, That no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier railroad company of any statute enacted for the safety of employes contributed to the injury of such employé, and such employé shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employé." It will not be necessary to quote the other sections of the statute.

[1] The important questions are what do the provisos in the section mean. It is said that, when taken in connection with the other provisions of the act, they are declaratory of the common law. If that was the sole purpose in enacting the law, why was the Legislature to the trouble of passing the statute at all? The decisions of this court had declared what the common law is in almost every conceivable case which could arise between a common carrier railroad

company and its employes, and, if this statute did nothing more, the work of the Legislature in its enactment would seem to be unnecessary. The word "degree" in the first proviso would seem to be the source of much trouble. We think reading the act as an entirety we should get at the meaning of the Legislature, if we read the first proviso as though it read as follows: "Provided that the negligence of such employe was less than the negligence of such company, its officers, agents or employes." This was the construction of the trial judge, and we think it the proper construction. A reference to any standard dictionary for a definition of the word "degree" will show that this construction of the meaning of the proviso is not at all forced.

[2] The second proviso of section 2 is also the source of trouble. It is said: The defenses of contributory negligence and assumed risk on the part of the plaintiff are not available as defenses, where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe, but that they are available as defenses in all other cases. This is not our interpretation of the statute. We gather from the language of the statute that these defenses are not available at all in cases where the violation of any such statute contributed to the injury or death. Nor may they be urged if the negligence of the employe is less than the negligence of the company, its officers, agents, or employes, while they are available if the negligence of the employe is not less than the negligence of the company, its officers, agents, or employes. This construction, it seems to us, harmonizes all the provisions of the statute.

[3] A group of assignments of error relate to the argument of counsel. It is said: "The effect of this language upon the jury must be apparent as tending to inflame them against a railroad company so unmindful of its employes as to violate the rules made by it for the safety of its employes and running over them when their danger was known to the company or those in charge of its engines."

As to this phase of the case the record discloses the following:

"During Mr. Couman's argument to the jury the following occurred:

"Mr. Coumans: Why did the man Davis, down there with his men, not have a flag out? Because he knew that the people on that engine paid no attention in God's world to a flag. They don't look for it, and a man standing on the ground—

"Mr. Humphrey: Note an exception to that.

"The Court: There is not a particle of testimony to that effect.

"Mr. Coumans: I will withdraw it, if there is no testimony. I understood him to say that.

"The Court: The testimony don't show it.
"Mr. Coumans: I will withdraw the proposition.

"Mr. Humphrey: Give us an exception to it.

"Mr. Coumans: Now, I ask you in all fairness what good is it going to do any man to ring a bell if that engine is coming onto him with such force that he could not get out of the way, even if he heard the bell ring?

"The Court: Mr. Coumans, your claim of negligence is that the bell was not rung. It is highly advisable for you to keep within your case if you wish to sustain a verdict in this court.

"Mr. Coumans: Under that we are entitled to recover unless our negligence was such, as I understand the court will charge you, grosser than what theirs was under that particular circumstance. Greater negligence—

"Mr. Humphrey: I take exception to that.

"Mr. Coumans: To what?

"Mr. Humphrey: It has not got to be greater. It is equal or greater."

The jury were told in the charge in various ways that, if the negligence of the plaintiff was equal to or greater than the negligence of the other employes, he could not recover. We think the trial court took care of this feature of the case.

[4] The following exhibit was offered in evidence:

"Michigan Central Railroad Co.

"Car Department.

"Special Notice.

"To Foremen and Car Repairers:

"Car repairers and other employes of this department, who have occasion to work on or about cars, are strictly forbidden to commence work on any car, the nature of which might require them to place themselves in a position on, under or about the car, whereby its movement on the track would result in injury to them, *without first properly protecting said car with a blue flag or flags by day or blue lights at night.* Any employe disobeying the above order will be liable to instant discharge. * * *

"Foremen are instructed to rigidly enforce the above order, and to keep a supply of blue flags and lanterns for that purpose constantly on hand. Foreman are also instructed to provide each of their car repair men with a copy of this notice, to fully explain it to them and to procure their acknowledgment thereof on this blank."

Neither the plaintiff nor the foreman put out a flag. It is said this special notice applied to the plaintiff, and for that reason he cannot recover. When hurt, he had not commenced work upon any car, nor was he about to do so. He was not employed in the car department. He was neither foreman

nor car repairer. We do not think this rule or notice applied to him.

The case was carefully tried and submitted to the jury in a clear and intelligent charge. The judgment is affirmed.

Because of the death of BLAIR, J., he took no part in this decision.

MEAD v. FIRST NAT. BANK OF LANSFORD.

(Supreme Court of North Dakota. Oct. 17, 1912.)

(Syllabus by the Court.)

COURTS (§ 183*)—COUNTY COURTS—JURISDICTION.

Section 111 of the state Constitution construed and held that county courts of increased jurisdiction are not vested with equity powers, but that their jurisdiction is restricted to actions formerly cognizable at law wherein the amount in controversy does not exceed \$1,000.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 412, 437-468; Dec. Dig. § 183.*]

Appeal from Renville County Court; Percy S. Crewe, Judge.

Action by Nellie Mead against the First National Bank of Lansford. From an order overruling a demurrer to the complaint, defendant appeals. Reversed.

Morton & Mohr, of Lansford, and Palda, Aaker & Greene, of Minot, for appellant, J. E. Bryans, of Mohall (R. H. Grace, of Mohall, of counsel), for respondent.

FISK, J. This is an appeal from an order of the county court of Renville county overruling a demurrer to the complaint on the ground that such court had no jurisdiction of the subject of the action. The action, as disclosed in the complaint, is one to determine adverse claims and to quiet title to certain real property therein described, and also for the recovery of damages for its use and for waste. The cause of action is therefore clearly one for equitable cognizance, and the sole question for our determination is whether, under the Constitution and statutes of this state, county courts of increased jurisdiction possess equity powers concurrent with the district courts in such cases where the amount involved does not exceed \$1,000.

Section 111 of the state Constitution confers exclusive original jurisdiction on county courts in probate and testamentary matters, as well as the appointment and control of guardians; and it also provides that, when the voters of any county having a population of 2,000 or over shall decide by a majority vote that they desire the jurisdiction of said court increased, "then said county court shall have concurrent jurisdiction with the district courts in all civil actions where the amount in controversy does not exceed one thousand dollars."

In 1909 the Legislature passed an act to govern the practice in county courts of increased jurisdiction (chapter 80, Laws 1909), section 1 of which defines the jurisdiction of such courts in the exact language of the constitutional provision above quoted. Such statute is quite comprehensive and purports to lay down a complete code of rules to govern the practice in such courts; but suffice it to say that the Legislature has not attempted by this statute nor by any other enactment to broaden the jurisdiction conferred by section 111 of the Constitution upon such courts, nor could it do so legally in the face of such constitutional provision which expressly defines the extent of the jurisdiction to be exercised by county courts of increased jurisdiction. We are confronted, therefore, solely with a question of constitutional construction. Did the framers of the Constitution intend by the words, "said county court shall have concurrent jurisdiction with the district courts in all civil actions where the amount in controversy does not exceed one thousand dollars," to confer upon such courts jurisdiction over equity causes? That this question must be answered in the negative is, we think, very clear. While it is true, as contended by respondent's counsel, that the words "in all civil actions" would, when taken alone, be broad enough to include all actions, whether at law or in equity, still, when we consider the qualifying words immediately following, "where the amount in controversy does not exceed one thousand dollars," we are forced to conclude that the intent was merely to confer jurisdiction in those actions wherein it is possible to measure in dollars and cents the amount in controversy. This being true, the cause of action in the case at bar cannot be embraced within such constitutional provision. As before stated, the action is to determine adverse claims and to quiet title to real property, and it cannot be said that the amount in controversy is any definite sum of money. In order to be embraced within the constitutional language above quoted, it must be a case where there is an "amount in controversy" which may be measured in money, for the subsequent language of the section contains the words, "does not exceed one thousand dollars." In defining the jurisdiction of district courts in section 103 of the Constitution, it is quite significant that the words "in all civil actions" were not used, but instead we find the expression, "It shall have original jurisdiction * * * of all causes both at law and equity"; and is it not fair to assume that, if it was the intention of the framers of the Constitution, in defining the jurisdiction of county courts of increased jurisdiction, to confer equity powers on such courts, they would have employed similar language to that employed in section 103,

merely adding the qualification as to the amount in controversy?

Most of respondent's argument is based upon the words in section 111 of the Constitution that "said county court shall have concurrent jurisdiction with the district courts in all civil actions. * * *" But the fallacy of such argument is made apparent upon reading the next section of the Constitution, relating to justices of the peace, where this identical language is used in defining their jurisdiction. Surely it will not be contended that such language confers on justices of the peace jurisdiction in equity cases. If respondent's contention is sound in the case at bar, then, upon like reasoning, justice's courts possess jurisdiction in all equity cases where the amount involved does not exceed \$200, except in those cases wherein the boundaries of or title to real property comes in question.

At and prior to the date of the adoption of our Constitution, original jurisdiction in equity cases was vested solely in the district courts, being the courts of general jurisdiction, and it is entirely clear that a change in this respect was not contemplated by the framers of the Constitution, for, as above stated, by section 103 these courts are given original jurisdiction "of all causes, both at law and equity." The same distinction that formerly existed between actions at law and suits in equity is here recognized in so far as the vesting of jurisdiction is concerned. The fact that under our reformed procedure all forms of actions are abolished, and legal as well as equitable remedies are administered in but one form of action known as a civil action, does not operate to change in any way the fundamental and long-recognized distinction existing between the principles which govern in the exercise of jurisdiction in law and equity cases. And we are convinced that, in conferring upon county courts and justices of the peace concurrent jurisdiction with the district courts in certain cases, the framers of our Constitution had in mind merely those cases formerly designated as actions at law, as distinguished from suits in equity, and wherein is directly involved a sum in money or personal property not exceeding a stated amount. This has evidently been the construction given the Constitution by our Legislature and by the bar generally ever since statehood, and, while not controlling, this is a fact entitled to much weight by this court. In the Code of Civil Procedure (sections 7512 to 7518, R. C. 1905), provision is made for the foreclosure of liens on personal property by actions in the district courts. No like provision is found for such foreclosures by actions in county or justice's courts. Again by chapter 80, Laws of 1909, being the practice act for county courts, we find that in section 3 the parties are given the benefit

of only those provisional remedies which are applicable to law actions as distinguished from equity causes; the provisional remedies of injunctions and receivers being omitted therefrom.

Our attention has been called to the case of *Lowe v. Abrahamson*, 18 N. D. 182, 119 N. W. 241, 19 L. R. A. (N. S.) 1039, 20 Ann. Cas. 355, which was an appeal from a judgment of a county court foreclosing an alleged farm laborer's lien, and it is said that we there, in effect, recognized the jurisdiction of the county court in such cases. This may be true, but no such question was there raised or called to our attention, and the sole question in fact considered was whether a woman employed on a farm as a domestic was a farm laborer and entitled to a lien for wages under section 6277, R. C. 1905. We do not deem this case binding on us as a controlling precedent in the case at bar.

Entertaining the foregoing views, we are compelled to reverse the order appealed from, and it is so ordered.

STATE v. MILLARD.

(Supreme Court of South Dakota. Oct. 25, 1912.)

1. EMBEZZLEMENT (§ 38*)—EVIDENCE—ADMISSIBILITY.

In a trial of a farm manager for embezzling a certain number of hogs between the 1st of December and the 15th of February following, evidence was admissible to show the number of hogs which the employer had on the premises on or about December 1st to show the number of hogs in defendant's care, in order to lay the foundation for proof of the number missing.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 61, 65, 66; Dec. Dig. § 38.*]

2. EMBEZZLEMENT (§ 35*)—VARIANCE.

Where an information charging embezzlement described the property as "65 head of red Duroc Jersey Hogs," and the witnesses spoke of them as "Duroc Jersey," and as "red hogs," there was no substantial variance, though the prosecuting witness admitted that the hogs were not pure bred Duroc Jersey.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 55-59; Dec. Dig. § 35.*]

3. EMBEZZLEMENT (§ 48*)—SUBMISSION OF ISSUES—VALUE.

Where, in a trial for embezzling hogs, the court informed the jury that the value of the hogs was material only to ascertain whether it was greater or less than \$20, and thus fix the degree of the offense, that the court submitted the question of value could not have led the jury to believe it was a civil action.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 72-75; Dec. Dig. § 48.*]

4. EMBEZZLEMENT (§ 44*)—PROOF OF AGE—SUFFICIENCY.

Evidence in a trial for embezzling hogs that defendant had been in the prosecuting witness' employ as manager of his farm for six years and was a man of family residing thereon was sufficient, in the absence of proof to the contrary, to sustain a finding that he was more than 18 years of age.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 67-70; Dec. Dig. § 44.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

5. EMBEZZLEMENT (§ 44*)—SUFFICIENCY OF EVIDENCE.

Where the evidence showed that defendant was manager of the prosecuting witness' farm, that the property converted consisted of hogs belonging to his employer and in defendant's possession as such manager to be held for his employer, and that his disposition of the hogs was without his employer's knowledge or consent, it was sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 67-70; Dec. Dig. § 44.*]

6. CRIMINAL LAW (§ 824*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Failure to instruct on circumstantial evidence was not reversible error, in the absence of a specific request therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

7. EMBEZZLEMENT (§ 11*)—DEMAND—PROOF.

In a trial of a farm manager for embezzling hogs of his employer, the state was not required to prove any demand to have been made upon the defendant for the property.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 9, 10; Dec. Dig. § 11.*]

Appeal from Circuit Court, Minnehaha County; Joseph W. Jones, Judge.

J. R. Millard was convicted of embezzlement, and he appeals. Affirmed.

Sam H. Wright, of Sioux Falls, for appellant. Royal C. Johnson, Atty. Gen., and Martin Bergh, State's Atty., of Sioux Falls, for the State.

CORSON, J. Upon an information duly filed by the state's attorney of Minnehaha county, the defendant was tried and convicted of the crime of embezzlement. The information charges, in substance, that the defendant between the 1st of December, 1911, and the 15th of February, 1912, being a clerk, servant, and employé of E. D. Clark, and being a person over the age of 18 years, and not being an apprentice of said E. D. Clark, did by virtue of his employment as such clerk and servant as aforesaid receive and take into his possession, care, and control from said E. D. Clark "55 head of red Duroc Jersey hogs" of the value of \$1,100, all of said property being the personal property of said E. D. Clark; that all said personal property was received by said Millard into his possession, control, and care by virtue of his employment as such clerk, servant, and employé of said Clark; that said Millard did willfully, unlawfully, feloniously, and fraudulently convert to his own use and embezzle all the personal property aforesaid, and by the means aforesaid the said Millard did commit the crime of embezzlement. From the judgment of conviction and order denying a new trial the defendant has appealed to this court.

It is disclosed by the evidence that Mr. Clark, the owner of the hogs, was a resident of Sioux Falls, and owned a farm of 200 acres about three miles from the city on

which he had in December, 1911, 142 hogs; that the defendant was in the employ of Clark in the management of the farm, and had control of four or five other employes who worked on the farm; that about the 15th of February, 1912, Clark made an examination of the hogs, and found that there were 55 missing; that he had several conversations with the defendant as to what had become of them. At first the defendant insisted that they must be on the place, but, on the hogs being counted and the 55 being found missing, he denied that he had any knowledge as to what had become of them. There was evidence tending to prove that the defendant had been seen on the road to Sioux Falls with teams hauling hogs, and there was evidence tending to prove that the defendant had sold hogs to a butcher in Sioux Falls, and that the value of the 55 hogs was between \$1,100 and \$1,200, and, so far as the record discloses, the defendant introduced no evidence accounting for the disappearance of these hogs or as to what had become of them.

The defendant assigns as error that the court erred in overruling certain objections to the introduction of testimony, in denying defendant's motion for directing a verdict in his favor, in giving certain portions of its charge to the jury, and in omitting to give certain instructions to the jury.

[1] Mr. Clark, a witness for the state, was asked the following question by the state's attorney: "State what quantity of hogs you had upon the premises, described here, on or about the 1st day of December, 1911." To this the defendant objected as incompetent, irrelevant, and immaterial under the allegations in this information, and especially for the reason that the allegation charges specifically that these hogs were turned over by Mr. Clark to the defendant. The objection was overruled, and the witness answered that he had 142 hogs. It is contended by the defendant that since the information stated that the hogs in question were received by the defendant into his care and possession between the 1st of December and the 15th of February, and did not allege that the complaining witness had any specific number of hogs on his premises within the dates named, that the state was permitted to change the issue in the case, and a positive variance was created in the issues by the ruling of the court above noted. We are of the opinion that the objection to the question was properly overruled, and that there was no variance. The question was a preliminary one, and it was clearly proper to show by the witness the number of hogs in the possession of the defendant belonging to the witnesses, as this was followed by his evidence tending to prove that on the 15th of February following, upon counting the hogs,

he found that 55 were missing, and the evidence was clearly competent, therefore, for the purpose of showing the number of hogs under the charge and control of the defendant in order to lay the foundation for proof of the number that were missing.

[2] It is further contended by the defendant that there was a fatal variance between the description of the property in the information and the proof. It will be observed that in the information the property is described as "55 head of red Duroc Jersey hogs." Clark, the owner of the hogs, in answer to a question, "What kind of hogs were they?" answered, "Duroc Jersey." Other witnesses spoke of them as "red hogs." We are of the opinion that this description of the hogs was substantially correct, although the witness Clark admitted that they were not pure bred Duroc Jersey. There is no allegation in the information that they were pure bred Duroc Jerseys, and hence there was no substantial variance between the description in the information and the description given by the witnesses. The object of the description of the hogs in the information was to notify the defendant generally of the description of the hogs with which he was charged with embezzling, and clearly the hogs were sufficiently identified by the description given by the witnesses, and the defendant could not have been misled by the mere fact that they were not proven to be pure bred Duroc Jersey hogs.

The case of *Loyd v. State*, 22 Tex. App. 646, 3 S. W. 870, relied on by the defendant, was a case where a party was charged with removing from the state mortgaged property with the intention to defraud the mortgagee, and the property was described in the indictment as "one chestnut sorrel pony * * * and one Studebaker two-horse buggy." The court says as to the horse and buggy: "The evidence is that the one removed from the state by the defendant was a sorrel, not a chestnut sorrel, as described in the indictment and mortgage, and it was further proved that there is a marked difference between the colors of sorrel and chestnut sorrel. As to the wagon, it was not proved that it was a Studebaker, nor even that it was a two-horse wagon. These defects in the evidence were called to the attention of the court by a special instruction requested by defendant, which was refused." It will be observed that in that case there was a material variance between the description of the horse in the indictment and the description of the horse given by the witnesses, and that as to the wagon there was no evidence as to the make of the wagon, or that it was, in fact, any such wagon as that described in the indictment. It will be noticed that there is a marked difference between the facts in that case and the case at bar. Assuming that a particular description of the property is necessary in an indictment

or information for embezzlement, we are of the opinion that the description of the property given by the witnesses in the case at bar sufficiently identified it as the property described in the information, and that there was no material variance between the description of the property in the information and the property as described by the witnesses.

[3] By assignment No. 3 it is claimed that the jury was impressed during the trial and while they were considering their verdict, with the theory that it was a civil action for the recovery of damages for the loss of the hogs alleged to have been embezzled from the fact that the court submitted to the jury and required them to find the value of the property. But we are of the opinion that there is no merit in this contention. The court in its charge to the jury instructed them: "In this proceeding the state accused the defendant, J. R. Millard, with the crime of embezzlement." And the court proceeded to instruct the jury fully as to what constituted the crime of embezzlement, and the jury having returned into court, the foreman remarked to the court: "We came before you to ask a question in regard (to) returning a verdict without inserting the amount of damages." To which the court replied: "We would have to ascertain the damage in some way or other. The crime of embezzlement is very much like larceny, and in cases of larceny, where the value is not to exceed \$20, it is petit larceny, and, if it exceeds \$20, it is grand larceny. The punishment in cases of embezzlement is precisely the same as in larceny. So we need to know the amount, or, at any rate, whether it is over \$20 or not. That is all we really need to know. The exact amount is not necessary to determine." We must presume that the jury were men of ordinary intelligence, and that they could not have inferred that they were trying a civil case from the language of the court, especially from his answer to their question.

The fifth assignment of error is, in substance, that there was a failure on the part of the state to prove the defendant was over the age of 18 years, that the evidence was insufficient to sustain the verdict, and that the court erred in its failure to instruct the jury upon the subject of circumstantial evidence. This assignment of error, in effect, contains three propositions: (1) That there was a failure on the part of the state to prove that the defendant was over the age of 18 years; (2) that the evidence was insufficient to sustain the verdict; and (3) that the court erred in its failure to instruct the jury upon the subject of circumstantial evidence. We will take up these propositions in their order.

[4] It is true that there is no direct evidence, so far as the record discloses, that the defendant was not within the age of

18 years, but there was indirect evidence to the effect that the defendant had been in the employ of the prosecuting witness as manager of his farm for six years prior to the filing of the information, and that he was a man of family residing upon the farm. We are of the opinion that from this evidence, in the absence of any evidence on the part of the defendant upon the subject of his age, the jury were clearly warranted in finding that the defendant was over the age of 18 years. In the analogous case of *State v. Ingraham*, 136 N. W. 258, the learned Supreme Court of Minnesota held: "It is suggested that there was no evidence that the prosecutrix was not the wife of the defendant. If it was incumbent upon the prosecutrix to prove a negative, the indirect evidence was ample to establish that the prosecutrix was not the wife of the defendant."

The contention of the defendant that the evidence was insufficient to sustain the verdict is, in our opinion, untenable.

[6] In 10 A. & E. Enc. of Law, 983, the required proof to sustain a conviction in a case of embezzlement is thus stated: "As a general rule, to make out a case of embezzlement under the statutes, it is necessary to show, first, that the accused falls within one of the classes of persons named, or occupies one of the fiduciary relations specified in the statute; second, that the thing converted or appropriated is of such a character as to be within the protection of the statute; third, that it belongs to the master or principal, or some one other than the accused; fourth, in most jurisdictions that it was in the possession of the accused at the time of the conversion, so that no trespass was committed in taking it; fifth, that a relation of trust or confidence existed, and that the property came into the possession of the accused, and was held by him, in some jurisdictions by virtue of his employment or office, and in others, for or in the name or on account of his master or employer; sixth, that his dealing with the property constituted a conversion or appropriation of the same; seventh, that there was a fraudulent intent to deprive the owner of his property." In the case at bar it would seem that all these requirements were complied with. It was shown that the defendant came within one of the classes of persons named, or occupied one of the fiduciary relations specified in the statute; that the property converted was of such a character as to be within the protection of the law; that it belonged to his employer, the prosecuting witness; that it was in the possession of the defendant as the manager of the property for his said employer, and that the property was held by him for and on account of his said employer; and that his disposition of the property was without the knowledge or consent of the owner, and was, therefore, an appropriation of the same. The evidence,

therefore, clearly warranted the jury in their finding that the defendant had disposed of the hogs with the fraudulent intent to embezzle them and to convert them to his own use, and the verdict of the jury is clearly sustained by the evidence.

[8] It is further contended by the defendant that the court erred in its charge to the jury in failing to instruct them upon the question of circumstantial evidence, but this contention is clearly untenable for the reason that the failure of the court to instruct the jury as to the nature of such evidence did not constitute reversible error as the court was not specially requested by the accused to give an instruction upon that subject. *Frye v. Ferguson*, 6 S. D. 392, 61 N. W. 161; *Garrigan v. Kennedy*, 19 S. D. 11, 101 N. W. 1081, 117 Am. St. Rep. 927, 8 Ann. Cas. 1125; *Belknap v. Belknap*, 20 S. D. 482, 107 N. W. 692; *Winn v. Sanborn*, 10 S. D. 642, 75 N. W. 201.

[7] It is further contended by the defendant that there is no evidence of any demand made upon him for the property, and that, in the absence of such a demand, he could not properly be convicted of embezzlement, but this contention is clearly untenable as the section of the Code (section 626) under which this information was drawn requires no such demand and refusal and no such demand or refusal is alleged in the information. It seems to be generally held that in cases of embezzlement no demand is necessary. In 15 Cyc. 495, the law upon the subject of demand is thus stated: "In order to constitute embezzlement, the accused must be shown to have fraudulently converted money or other property to his own, or some one's else, use, or to have fraudulently secreted it, with intent so to convert it. However, the weight of authority is to the effect that a demand for the money or other property alleged to have been embezzled need not be made by the prosecution, in the absence of statute to the contrary, except under the peculiar circumstances of the particular case." In the case of *People v. Ward*, 134 Cal. 301, 66 Pac. 372, the learned Supreme Court of that state, discussing the necessity of a demand in cases of embezzlement, says: "A demand is not 'an indispensable requirement of law in all cases,' as contended by the appellant, nor can it be true that 'without such demand, no offense exists.' A demand, followed by a refusal, if the other essential facts exist, is evidence of embezzlement, and sometimes indispensable evidence of it, but it is the fraudulent and felonious conversion of the money or other property that constitutes the offense, and that may often be proved without a demand. *People v. Bidleman*, 104 Cal. 608 [38 Pac. 502]; *People v. Royce*, 106 Cal. 173 [37 Pac. 630, 39 Pac. 524]; *Wharton's Criminal Law*, § 1030." In *Commonwealth v. Hussey*, 111 Mass. 433, the Supreme Court

of Massachusetts in discussing the question of demand says: "A fraudulent conversion to the defendant's own use would be embezzlement, whether demand were made or not, and, of course, such demand need neither be averred nor proved." *Commonwealth v. Mead*, 160 Mass. 319, 35 N. E. 1125; *State v. Reynolds*, 65 N. J. Law, 424, 47 Atl. 644; *Commonwealth v. Tuckerman*, 10 Gray (Mass.) 173.

Finding no error in the record, the judgment of the circuit court and order denying a new trial are affirmed.

HEFLEBOWER v. WILEY et al.

(Supreme Court of South Dakota. Oct. 25, 1912.)

1. QUIETING TITLE (§ 37*)—PLEADING (§ 377*)—ISSUES.

Plaintiff sued to quiet his title to land which his grantor had subsequently conveyed to defendant, C., who had gotten his deed on record ahead of plaintiff, and joined the grantor as the holder of a mortgage given him by C. The complaint in paragraph 6 expressly alleged that both the second deed and the mortgage were without consideration, and "were made and taken by all the parties thereto with full knowledge and notice" of the deed to plaintiff. Paragraph 7 alleged that the deed and mortgage were a cloud on plaintiff's title to the land. The answer denied that the second deed and the mortgage were without consideration, and, "answering paragraph 7" of the complaint, denied that plaintiff had or ever did have any title, interest, or claim in or to the land. *Held*, that there was nothing in the answer amounting to a denial of the allegation of the complaint that the second deed and the mortgage were with notice of plaintiff's prior deed, and hence such allegation stood admitted, and need not be proved by plaintiff to make out a case.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 78; Dec. Dig. § 37; * *Pleading*, Cent. Dig. §§ 1228-1231; Dec. Dig. § 377.*]

2. TRIAL (§ 396*)—FINDINGS—CONFORMITY TO ISSUES.

A finding in an action to quiet title that defendant took a conveyance of certain property without notice of a previous conveyance by the grantor is erroneous, where the answer of the defendant admitted, by failure to deny, an allegation in the complaint that the defendant took such conveyance with notice.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 935-938; Dec. Dig. § 396.*]

Appeal from Circuit Court, Sully County; J. H. Bottum, Judge.

Action by Frank Heflebower against Harrison D. Wiley and another. Judgment for defendant Charles R. Wiley, and plaintiff appeals. Reversed.

Frank Turner, of Faulkton, for appellant. J. H. Gropengleser, of Onida, and Sutherland & Payne, of Pierre, for respondents.

CORSON, J. This is an appeal by the plaintiff from a judgment in favor of the defendant Charles R. Wiley. The case was tried to the court without a jury, and at the

close of the plaintiff's evidence a motion was made by the defendant Chas. R. Wiley for judgment in his favor, which motion was granted, and the granting of this motion is now assigned as error.

The action was commenced to quiet title to 80 acres of land in Sully county, and to cancel of record a certain deed executed to the defendant Chas. R. Wiley and mortgage executed by him. The complaint, after alleging a chain of title from the United States government to one Harrison D. Wiley, alleges as follows:

"(4) That on the 27th day of December, 1907, the defendant Harrison D. Wiley (using his initials only, H. D.) for a full, valuable consideration, made, executed, acknowledged, and delivered to plaintiff herein his certain warranty deed, whereby he conveyed and transferred to this plaintiff the land in question.

"(5) That, notwithstanding the deed described and referred to in paragraph 4 of this complaint, the said Harrison D. Wiley did on or about September 7, 1908, execute to the defendant Charles R. Wiley a pretended warranty deed, whereby he, the said Harrison D. Wiley, attempted and pretended to convey and transfer to said Charles R. Wiley the land in question, "and that said pretended deed was on or about September 15, 1908, recorded in the office of the register of deeds at page 544, and that on the same day, and as a part of the same transaction, the said Charles R. Wiley executed back to said Harrison D. Wiley a pretended mortgage on the land described in this paragraph, pretending to secure the sum of \$800, which said mortgage was on September 15, 1908, recorded in the office of the register of deeds of said Sully county, in book 28 of Mortgages, at page 94.

"(6) This plaintiff specifically alleges that the said pretended deed and the said pretended mortgage described and referred to in paragraph 5 were wholly without consideration, and that the said pretended deed and the said pretended mortgage were made and taken by all parties thereto with full knowledge and notice of the deed from the said Harrison D. Wiley to this plaintiff, described and referred to in paragraph 4 hereof.

"(7) That the said pretended deed and the said pretended mortgage referred to and described in paragraph 5 hereof are a cloud upon plaintiff's title to said land."

Then follows a prayer that title be quieted in the plaintiff, and "that the pretended deed and pretended mortgage" be by judgment of the court "annulled, canceled, and forever set aside." The answer admits the chain of title from the United States to Harrison D. Wiley, and that Harrison D. Wiley conveyed the real property in controversy to defendant Charles R. Wiley, and took a

mortgage on the same for \$800 in payment. It then "specifically denies that said warranty deed was delivered to said Charles R. Wiley, defendant, without consideration, and that said note and mortgage were made, executed, and delivered to the defendant Harrison D. Wiley without consideration as alleged in paragraph 6 of said complaint. "Answering paragraph 7 of said complaint, defendants deny that plaintiff now has or ever did have any title, interest, or claim of any kind whatsoever in said hereinbefore described premises, and alleges that plaintiff has no claim upon, demand, title, or interest therein at this date."

The case being called for trial, the plaintiff introduced copies of the records of Sully county showing the title in Harrison D. Wiley on January 30, 1907. Plaintiff then introduced, over the objections of the defendants, a purported deed of the premises from H. D. Wiley to the plaintiff, bearing date of December 27, 1907, and recorded October 28, 1910. No other evidence was offered by the plaintiff except a lis pendens filed with the register of deeds of Sully county giving notice of the commencement of the action and its nature. The defendant Charles R. Wiley thereupon moved for a judgment in his favor upon the ground that the common grantor, Harrison D. Wiley, executed a warranty deed of said premises to the defendant Charles R. Wiley, which deed was duly recorded September 15, 1908, the presumption being that the deed previously recorded would take precedence over all unrecorded instruments. The court took the matter under advisement, and later granted the motion and made findings of fact and entered judgment in favor of the defendant Charles R. Wiley. The question before this court to decide, therefore, is whether or not plaintiff had made out a case by the evidence introduced, read in connection with the pleadings.

[1] It is contended by the plaintiff that the defendant did not deny generally or specifically "knowledge or notice" by him of the prior deed to the plaintiff at the time the second deed was executed to him, and hence it was unnecessary for the plaintiff to prove the allegations of the complaint that the defendant had such knowledge and notice of the existence of the prior deed, and that by the introduction of the records above referred to he established his right to a judgment in his favor. The defendant, however, contends that although there was no specific or general denial of the allegations of the sixth paragraph, alleging that he took the second deed with knowledge or notice, the whole answer was, in effect, a general denial of the facts alleged in the complaint, and that the first part of the answer above quoted is broad enough to put the plaintiff upon proof of the allegations of the complaint. The learned circuit court evidently adopted this theory in granting defendant's motion for

judgment in his favor. But in our opinion the court clearly erred in taking the view of the answer that it denied the allegations contained in the sixth paragraph of the complaint, alleging that he (defendant) took said deed with notice and knowledge of the plaintiff's prior deed, and in granting the defendant's motion. In the view we take of the case, the plaintiff is right in his contention that the allegation of notice and knowledge on the part of the defendant was not denied by the answer, and, under the pleadings and evidence at the time the plaintiff rested, he was clearly entitled to findings and judgment in his favor, as he had shown a complete title in himself. The contention of the defendant that the last paragraph of the answer in which the defendant denies "that plaintiff now is or ever did have any title, interest, or claim of any kind whatsoever in said hereinbefore described premises, and alleges that plaintiff has no claim upon, demand, title or interest therein at this date," is a general denial of the portion of the complaint above referred to, is, in our opinion, untenable.

[2] It is contended by the defendant that as the court made the following finding: "That the said Charles R. Wiley took the conveyance of said property in good faith and for a valuable consideration and without notice of any previous conveyance of said property or any part thereof"—and the evidence is not before the court by bill of exceptions, such finding must be taken as true. But, if the holding of this court is correct that the plaintiff's allegations that defendant took his subsequent deed with full knowledge and notice of plaintiff's prior deed was not specifically or generally denied by defendant's answer, the court's finding was not only not warranted by the pleadings, but clearly in contravention of the same, and therefore the finding was clearly erroneous and cannot be sustained. The trial court is not warranted in making a finding in contravention to the admissions in the answer, actual or implied, by not being denied, and hence this finding must be disregarded by this court.

The judgment of the circuit court, therefore, must necessarily be reversed, unless the respondent's further contention be sustained; i. e., that the record does not properly present the question to this court, for the reason that there is no proper assignment of errors, and no sufficient statement of facts upon which the appellant relies for a reversal. But we cannot agree with counsel for the respondent in this contention. The brief in this case on the part of the appellant was filed January 24, 1912, prior to the publication of the decision of this court in the case of *State v. Doran*, 134 N. W. 53, and hence under the decision in the case of *Atlas Lumber Co. v. Quirk*, 135 N. W. 172, this court will resort to the original record. In the lat-

ter case the court in its opinion said: "Respondent has raised the question that the statement of fact contained in appellant's brief is not sufficient to point out or establish error, in that the findings and pleadings are not made a part of such statement. Under the ruling of this court in *State v. Doran*, 134 N. W. 53, appellant's statement of facts was insufficient in some respects, but as the decision of *State v. Doran* had not been rendered at the time of the filing of appellant's brief, and in consideration of the chaotic state of our statute law upon the subject of what such statement should contain, we have resorted to the original record in this case." Upon an examination of the record in this case, it appears that the "specification of errors" is very full and complete, and states very specifically the errors upon which the appellant will rely for a reversal of the judgment.

For the error of the court in granting defendant's motion and in making the foregoing finding of fact, the judgment of the circuit court is reversed.

STATE ex rel. KRONSCHNABEL v. TAYLOR, Judge.

(Supreme Court of South Dakota. Nov. 12, 1912.)

1. JURY (§ 19*) — CUSTODY AND PROTECTION — DELINQUENT CHILDREN — STATUTORY PROCEEDINGS.

A proceeding under Pol. Code, §§ 3205-3214, for the removal of dependent or neglected children to homes for dependent children, is a special proceeding governed by the provisions of the chapter, and not by Code Civ. Proc. § 244, authorizing a court to call a jury to try certain issues triable to the court, and the court in such a proceeding has no authority to call a jury, and a continuance to allow of a jury trial is without legal authority.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 96, 104-133; Dec. Dig. § 19.*]

2. MANDAMUS (§ 45*) — EXCESS OF JUDICIAL AUTHORITY — INADEQUACY OF OTHER REMEDY.

Where the court, in proceedings under Pol. Code, §§ 3205-3214, for the removal of a dependent or neglected child to a home for dependent children, erroneously continued the proceedings to allow of a jury trial and thereby exceeded the authority vested in it, the petitioner entitled to a speedy determination of the proceedings for the protection of the state and of the child had no adequate remedy by appeal, but could by mandamus require the court to proceed and try the issues without a jury.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 45.*]

Mandamus by the State, on the relation of Frank C. Kronschnabel, against Alva E. Taylor, as judge of the circuit court in and for the Ninth judicial circuit. Writ issued.

Morris & Moriarity, of Redfield, and Crawford & Warren, of Huron, for relator. Gardner & Churchill and C. A. Kelley, of Huron, and Wm. Issenhuth, of Redfield, for defendant.

WHITING, J. This is an original proceeding seeking the mandate of this court requiring the defendant, as judge of the circuit court in and for Beadle county, to proceed and try the issues of fact raised in a special proceeding brought in such court. The facts are undisputed. The present relator filed in the said circuit court on August 5, 1912, a petition under the provisions of chapter 28, Political Code. In said petition it was alleged that one John Issenhuth had in his care, as his adopted daughter, one Celeste Issenhuth, a child of some eleven years of age, and that he had been guilty of certain wrongful conduct such as to render him wholly unfit to have the care and custody of such child. The petitioner asked that the custody of such child be taken from Issenhuth, and given to a society incorporated under the laws of this state for the purpose of securing homes for children. An order was issued requiring said Issenhuth to show cause why such petition should not be granted. Upon the return day of such order, August 10, 1912, Issenhuth was required to answer. He then demanded a jury trial of the issues of fact raised by the petition and answer. This demand was resisted, but the said court, the defendant herein presiding, made an order granting a jury trial and continued the cause to the October, 1912, term of said court, "for the purpose of submitting certain issues of fact to a jury for trial." During said October term, Issenhuth asked for a continuance of said proceeding for a time sufficient to allow him to procure the presence of certain witnesses. All jury cases for said term had been disposed of and the court continued the hearing of said proceeding to the January, 1913, term of said court. No claim is made that a continuance of the length of either continuance granted was necessary in order to give time sufficient to procure witnesses. It is apparent from the return filed herein by defendant that no continuance for a period greater than two or three days was necessary in order to give said Issenhuth sufficient time within which to procure his witnesses. It is therefore clear that both the continuances were granted by the court in order that the defendant as judge of such court might have the assistance of a jury in the trial of the issues of fact. The child has since the commencement of proceedings in the circuit court been in the custody of the sheriff, who, pursuant to the directions of the said court, has placed such child under proper care.

The defendant herein contends: (1) That mandamus should not issue in this case, for the reason that it does not appear that the relator is clearly entitled to the relief sought, nor that a plain duty of the defendant has been violated to the substantial injury of the relator or the public, nor that injustice or irreparable wrong will result from the

denial of the writ; (2) that, inasmuch as the defendant assumed jurisdiction of the matters presented before him in the trial court and considered the law and facts and rendered a decision thereon, mandamus will not lie to review such decision or to control the discretion vested in defendant; (3) that the duties of the defendant in passing upon the questions submitted to him were judicial, and not subject to review by mandamus.

[1] To our minds the right of relator to the relief sought in this court depends solely upon whether or not defendant, as the judge of the trial court, had any authority whatsoever to grant a jury trial. No claim is made in this court that he had any such authority and certainly the statutes of this state do not grant any. Section 244 of the Code of Civil Procedure authorizes a court to call a jury to assist in the trial of certain issues triable to the court. This section is a part of chapter 12 of such Code, which chapter relates to trials and judgments in civil actions only. Certainly no one would contend that the proceeding in the circuit court was a civil action. It was purely a special proceeding finding its authority solely in the statutes, and, like all other special proceedings, its conduct is governed by the express provisions of the statutes. There being no provision authorizing the calling of a jury, the defendant was wholly without authority to call one.

A reading of the chapter under which the proceedings in the circuit court were brought, taken into consideration with the nature of the proceedings, shows clearly that it was the purpose of the law that there be a speedy determination of the issues raised. It is important, not only to the petitioner, to Issenhuth, and to society that there be a prompt disposition of a matter of this nature, but it is especially important to the child, and certainly it is an inherent right vested in the child—a right which no one should deprive it of—to have its status speedily determined. It is not a case where a trial court has abused a discretion vested in it, but rather one where it has taken an action beyond its authority. As was said in the case of *State v. Johnson*, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33: "It is not entirely accurate to say that no act involving discretion can be controlled or corrected by mandamus. Where it clearly appears that discretion has been not merely abused but not exercised at all, or that the action taken by the inferior court is without semblance of legal cause and no other adequate remedy exists, mandamus will lie to compel the specific action which should have been taken."

* * * Such cases are, however, more apparent than real exceptions to the rule, because, when only one course is open to the court upon the facts presented, the pursuance of that course becomes the plain and absolute duty of the court, and a refusal becomes, in effect, a failure to perform a

duty within its jurisdiction." The trial court did not, and we are certain it would not, have granted a continuance for the period of either continuance, and based its order upon the need of time to procure the presence of witnesses. Such an order, under the facts shown, would have been a most serious abuse of judicial discretion. A continuance to allow of a jury trial was entirely without authority, and the clear duty of defendant was to refuse both continuances.

[2] Defendant urges that the relator had an adequate remedy by appeal. While the relator might, through appeal, get a reversal of the trial court's order granting a jury trial, while such appeal was pending, what would become of the right of relator and others to a speedy trial of the issues of fact? While such an appeal might correct the error of the court in submitting the issues to a jury, it would be an entirely inadequate remedy, as it could not restore to relator, to society, or to the child that right to a speedy trial to which each is entitled under the statute. As was said by the court in the case of *State v. Johnson*, supra: "The general law undoubtedly is that mandamus will not lie where there is a remedy by appeal or writ of error. * * * But the remedy by appeal must be substantially adequate in order to prevent relief by mandamus. If it appears that an appeal will not be an adequate remedy, mandamus may still issue in the discretion of the court." In *State*, etc., v. *Superior Court*, etc., 40 Wash. 443, 82 Pac. 875, 2 L. R. A. (N. S.) 568, 111 Am. St. Rep. 915, 5 Ann. Cas. 775, wherein there was an application for a writ of mandamus requiring a trial court to proceed to the trial of a cause wherein, as alleged by relator, the trial court had wrongfully granted a change of venue, the court said: "At the threshold of the proceeding, the respondent raises the objection that the relator has an adequate remedy by appeal, and that mandamus will not lie. If the contention of the relator is correct, viz., that the superior court of Spokane county had exclusive jurisdiction to hear and determine the garnishment proceedings without power or discretion to order change of venue, mandamus is the proper remedy. The mere fact that the superior court of Kittitas county, to which the proceedings have been transferred, may erroneously assume jurisdiction and that the proceedings may, in that way, eventually reach this court by appeal, is not in our opinion an adequate remedy."

Answering the several contentions of the defendant, we hold: While the granting of a jury trial and of the continuances based thereon were acts judicial in nature, they were beyond the authority vested in the defendant, and therefore matters in which he had no discretionary powers. By granting of the writ asked for, we are in no manner controlling any discretion vested in defendant as trial judge, but rather preventing him

from doing that which he has no authority to do. An injustice and irreparable wrong would be done relator if we denied the writ, because a plain duty of defendant has been violated to the substantial injury of relator, the public, and Celeste Issenhuth. For the above reasons, it is clear that the relator is entitled to the relief sought. Therefore it is ordered that a writ issue requiring the defendant as judge of the circuit court to proceed, with all due diligence and without the assistance of a jury, to the trial of the issues of fact in the proceeding wherein the present relator is petitioner and John Issenhuth and Celeste Issenhuth are defendants.

HEIMBERGER v. RUDD.

(Supreme Court of South Dakota. Oct. 25, 1912.)

1. BROKERS (§ 49*)—RIGHT TO COMMISSION.

A real estate broker, who procured a purchaser who entered into a binding contract upon substantially the terms stipulated in the employment contract, was entitled to commission, though he did not actually bring the parties together, and took no part in drawing up the contract between them.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 70-72; Dec. Dig. § 49.*]

2. BROKERS (§ 57*)—RIGHT TO COMMISSION—CHANGE IN TERMS OF SALE.

A real estate broker's right to a commission on a sale of property to a purchaser whom he had procured was not defeated by the fact that, without the broker's consent, the sale contract contained conditions slightly differing from those stipulated for in the broker's contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57.*]

3. BROKERS (§ 52*)—RIGHT TO COMMISSION—TITLE OF PROPERTY.

Where a binding sale contract had been entered into between the owner and a purchaser procured by the broker, the broker's right to a commission was not defeated by the fact that the legal title yet remained in the owner.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 73; Dec. Dig. § 52.*]

4. BROKERS (§ 88*)—ACTION FOR COMPENSATION—QUESTION FOR JURY.

Where a real estate broker's employment contract was oral and the evidence conflicting, the question of its terms was for the jury; the rule that the court shall construe and determine the meaning of a contract applying only to contracts in writing.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.*]

5. VENDOR AND PURCHASER (§ 3*)—"CONTRACT OF SALE"—"OPTION."

A contract binding one party to sell certain land upon certain terms, and binding the other party to purchase same upon such terms, was a "contract of sale," and not an "option."

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 3; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1531-1534; vol. 8, p. 7616; vol. 6, pp. 5000-5002; vol. 8, p. 7739.]

Appeal from Circuit Court, Davison County; Frank B. Smith, Judge.

Action by W. A. Helmberger against Ole Rudd. From judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Preston & Wagner, of Mitchell, for appellant. T. J. Spangler, of Mitchell, for respondent.

CORSON, J. This is an action by the plaintiff to recover of the defendant a commission on the sale of a quarter section of land. The action was tried to a jury, and the verdict and judgment were in favor of the plaintiff, from which judgment and order denying a new trial the defendant has appealed.

It is alleged in the complaint, in substance, that the defendant is the owner of a quarter section of land, and that the plaintiff is a real estate broker; that on or about the 12th day of April, 1910, the plaintiff entered into an agreement wherein, and by the terms of which, the defendant listed said described premises with the plaintiff for sale at the agreed price of \$50 per acre net to the defendant, and that the plaintiff was to have as compensation all that the same might be sold for over and above \$50 per acre; that it was agreed that the price fixed should be \$55 per acre, of which the defendant was to have \$50 per acre and the plaintiff \$5 per acre as commission; that under and by virtue of said agreement the plaintiff did produce a purchaser, C. M. Selgfried, who subsequently purchased the premises at \$55 per acre, making a total of \$3,800, of which the plaintiff claims to be entitled to \$800, and for which he demanded judgment.

The defendant in his answer admitted that the plaintiff was a real estate broker, and that the defendant was the owner of the premises described, and denied the other allegations of the plaintiff's complaint.

It is disclosed by the undisputed evidence that the plaintiff, on or about April 12, 1910, called at the residence of the defendant and inquired if his farm was for sale; that the defendant answered that it was, and that he wanted \$50 per acre for the same; that he listed the property with the plaintiff and gave him at the same time a description of the buildings and other improvements on the property, and it was agreed that the defendant should have \$50 per acre net and the crop for 1910, and that the plaintiff should have all over that sum that could be obtained for the property, and that the defendant should make the asking price \$55 per acre to protect the plaintiff in his commission; that the plaintiff thereupon proceeded to find a purchaser, and finally found one Selgfried, who was looking for a farm, pointed out to him the location on the map, gave him a description of the improvements, character of the land, etc.; that on further conversa-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tions with Seigfried in regard to the property the plaintiff arranged to go down with him to see the defendant and the property; that he informed Rudd that the parties he had in view, and to whom he expected to sell the land, were Seigfried and his son, who lived near Presho, S. D.; that a few days later Seigfried and his son went to the farm of the defendant, and on the 24th of May, 1910, a contract was entered into between the defendant and Seigfried by which Seigfried agreed to take the property at \$55 per acre; that the plaintiff demanded his \$5 per acre commission, as agreed, which the defendant refused to pay.

[1] While it is true that the plaintiff did not bring Seigfried and the defendant together, it was quite clear from the evidence that the plaintiff by his efforts caused Seigfried and his son to go to the defendant's place, where the contract for the sale was consummated, and that the plaintiff in fact found a purchaser ready, able, and willing to make a purchase of the property, and who entered into a binding contract with the defendant to purchase the same substantially upon the terms agreed upon between plaintiff and defendant. We are of the opinion, therefore, that the jury were fully warranted, under the evidence, in the finding that plaintiff was entitled to his commission of \$5 per acre, as agreed to by the defendant.

It is contended by the appellant that, as the plaintiff did not actually bring the purchaser and the defendant together, and took no part in the preparation and drawing up of the contract between Seigfried and the defendant, which was, in fact, drawn up by some party in a bank at Mitchell, he was not entitled to his commission. But this contention is clearly too restricted a view of the rights of a broker to his commissions in this class of cases. It seems to be a general rule that, where an agreement is made between a broker and the owner of real estate for the securing of a purchaser by a broker, if the broker is the procuring cause in producing a purchaser, who purchases the real estate, the broker is entitled to his commission.

In *Langford v. Issenhuth*, 134 N. W. 889, this court held, as appears by the headnote: "A broker is a procuring cause of sale if he is the original discoverer of the purchaser, and has started the negotiations by which a sale is finally consummated." And this court, in its opinion, quotes with approval the following from the case of *Smith v. McGovern*, 65 N. Y. 574, defining the words "procuring cause": "It means the original discovery of a purchaser by the plaintiff, and the starting of a negotiation by the plaintiff, together with the final closing by or in behalf of the defendant with the purchaser through the efforts of the plaintiff."

In *Minder & Jorgenson Land Co. v. Brustuen*, 26 S. D. 38, 127 N. W. 546, this court

held, as appears by the headnote: "A real estate agent, who produces a purchaser with whom his principal enters into a contract, is entitled to his commission, though, without fault of his principal, the transaction is not consummated."

In *Grieb v. Koeffler*, 127 Wis. 314, 106 N. W. 113, it was held by the learned Supreme Court of Wisconsin, as appears by the headnote: "A real estate broker is entitled to his commissions for finding a purchaser if, through his efforts, a purchaser is found within the time limited, or, in the absence of a limitation, within a reasonable time; and it is not necessary that he should bring the purchaser to the owner."

In *Reade v. Haak*, 147 Mich. 42, 110 N. W. 130, the Supreme Court of Michigan held, as appears by the headnote: "Where brokers were to receive commissions for procuring a purchaser at a price satisfactory to the principal, they were bound, as a condition of their right to demand commissions, to bring the buyer and seller to an agreement, but it was not necessary that they should conclude the sale in person; it being sufficient if their efforts were the procuring cause of the sale." See *Huntemer v. Arent*, 16 S. D. 465, 93 N. W. 653; *Scott v. Clark*, 3 S. D. 486, 54 N. W. 538.

It is clear from the evidence in the case at bar that the plaintiff found the purchaser for the defendant's property, resulting in the contract of sale of the property by the defendant to the purchaser so procured by the plaintiff; that he was the original discoverer of the purchaser, Seigfried, and started the negotiations resulting in the sale of the property to him.

[2] It is further contended by the appellant that in the alleged sale of the property by the defendant to Seigfried there was a change made in the terms of the sale from that originally proposed by the defendant's agreeing to give to the purchaser one-third of the corn crop for the year 1910; but this was a change in the terms that the defendant had a right to make, and did not affect his liability to the plaintiff for the commission agreed upon. *Huntemer v. Arent*, supra.

[3] It is further contended by the appellant that it is alleged in the complaint that the defendant, at the time the action was instituted (the 10th of August, 1910), was the owner of the property; and therefore, there being no sale of the property, the plaintiff was not entitled to recover his commissions in this action. While it is true it is alleged in the complaint that "the defendant, Ole Rudd, was and still is the owner," and that this allegation in the complaint was strictly true at the time, as the defendant had not conveyed the property to Seigfried, the purchaser, yet it affirmatively appears from the complaint and evidence in the case that the defendant had entered into a binding contract to sell the property to Seigfried upon

terms and conditions substantially as specified in said contract; and hence the fact that the legal title to the property still remained in the defendant did not prevent the plaintiff from recovering his commission. Plaintiff's right to his commission was not in any manner affected by the delay contracted for by the defendant in the execution of his deed of conveyance and the transfer of the possession of the property to the purchaser, Seigfried. By the terms of the contract, introduced in evidence, between the defendant and Seigfried, it is stipulated that certain payments should be made on the 1st of September, 1910, and mortgage and notes executed by Seigfried and his wife for the balance, and that possession should be transferred to them by the defendant on November 1st, and that the defendant would retain all the crop, except one-third of the corn crop. When the plaintiff had procured the purchaser, he had complied with the terms of his contract with the defendant, and had properly left the defendant and the proposed purchaser to make such terms in concluding the contract as the defendant might deem proper; and so long as the defendant secured the \$55 an acre for his land from the purchaser procured by the plaintiff, the plaintiff had earned his commission, and was entitled to recover the same.

[4] It is further contended by the appellant that by the terms of the agreement between the defendant and the plaintiff, when the plaintiff was employed to procure a purchaser for the farm, it was contemplated that the sale should be for cash, and that the time had expired which the plaintiff was to have in which to find a purchaser. But the plaintiff testified that no time was agreed upon in which he was to make the sale, and that the only condition as to payment was that the defendant should get as much money as possible on the sale and a mortgage for the balance. It is true there was some conflict in the evidence as to the time the plaintiff should have in which to find a purchaser; but, as the contract was oral, the question as to what the terms of the contract really were was for the jury to determine. Where the contract is oral, the questions as to its terms are left to the determination of the jury. It is only where the contract is in writing that the court is authorized to construe the same and determine the meaning of the contract. The jury, having found a verdict, therefore, in favor of the plaintiff, necessarily found that the contract was as testified to by the plaintiff; and the finding is conclusive upon this court. We must presume, as the charge of the court is not in the record, that the court correctly instructed the jury as to the law applicable to the case.

The further contention of the appellant that the change made in the contract with Seigfried, that he was to have one-third of the corn crop, had the effect of relieving the defendant from any liability to the plaintiff

under the contract made by him with the plaintiff is clearly untenable, as such a change in the contract by the defendant did not affect the right of the plaintiff to recover in the action, as this stipulation was made in the contract between the defendant and Seigfried under the rights remaining in an owner, and, so far as the record discloses, was made without the knowledge or consent of the plaintiff. The contract entered into by the defendant with Seigfried, the purchaser who had been produced by the plaintiff, and substantially upon the terms agreed to between the defendant and the plaintiff, clearly entitled the plaintiff to his commission; and the fact that the defendant made a slight change in the terms of the contract between him and Seigfried would not, in our opinion, deprive the plaintiff of the right to his commission. If the seller of property could, by a slight change in the terms of a contract of sale between himself and the purchaser, deprive a broker of his commission, it would afford such sellers of property an easy means of defrauding the brokers employed by them to find purchasers out of the commissions earned by them. In our view of the law, when a broker has produced a purchaser ready, able and willing to purchase the property upon substantially the terms agreed upon between the seller and the broker, and a contract is entered into between the seller and the purchaser substantially in accordance with the terms of the contract between the seller and the broker, the broker is entitled to his commission, notwithstanding the fact that the seller may, in his contract with the purchaser, make some slight change in the conditions stipulated in the contract between the seller and the broker.

[5] It is further contended by the appellant that the contract entered into between the defendant and Seigfried was an option contract, and that therefore there was no contract of sale entered into binding upon the purchaser; but this contention is clearly untenable, as the contract was a mutual contract, and not an option contract, as the purchaser, as well as the defendant, was bound by the terms of the same. The material parts of the contract are as follows: " * * * Said party of the first part has this day sold * * * [describing the property] for the sum of \$8,800.00 upon the following terms and conditions, to wit: \$500.00 cash, the receipt of which is hereby acknowledged. \$2,000.00 to be paid in cash Sept. 1st, 1910. For the balance of \$6,300.00 the said second party will give a note for like amount, signed by himself and wife. * * * It is agreed that the said first party shall retain all of the crop with the exception of a one-third of the corn crop. * * * It is mutually agreed that the possession of the above-described land shall be given the said second party November 1st, 1910, provided the terms of this contract have been complied with. The said

second party agrees to purchase * * * [the property] for the sum of \$8,800.00, and to pay for the same at the time and in the manner described above. * * *

It will thus be seen that Seigfried binds himself "to purchase * * * for the sum of \$8,800.00, and to pay for the same at the time and in the manner described above." In 21 A. & E. Enc. of Law an option is thus defined: "An option is a right acquired by contract to accept or reject a present offer within a limited or reasonable time in the future." A note on the same page gives the following definition of an option, as quoted from the case of *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723: "The obligation by which one binds himself to sell, and leaves it discretionary with the other party to buy, is what is termed in law an option, which is simply a contract by which the owner of property agrees with another person that he shall have the right to buy the property at a fixed price within a certain time"—citing *Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17.

It will be seen, therefore, that the contract in the case at bar was clearly a mutual contract, enforceable by both parties, and not an option contract.

Finding no error in the record, the judgment of the court below and order denying a new trial are affirmed.

STATE v. NIMROD.

(Supreme Court of South Dakota. Oct. 25, 1912.)

1. INDIANS (§ 26*)—CRIMES—JURISDICTION.

An Indian who has taken land in severalty under Dawes Act (Act Feb. 8, 1887, c. 119, 24 Stat. 388), and who has voluntarily taken up within the limits of the state his residence separate from any tribe of Indians, and who has adopted habits of civilized life, is amenable to the general criminal laws of the state as to all criminal offenses though committed within an Indian reservation, excepting only where the acts of Congress, by express provisions, in particular cases have made the laws of the United States applicable to such Indians.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 22; Dec. Dig. § 26.*]

2. INDIANS (§ 38*)—CRIMES—STATUTORY PROVISIONS.

An Indian who is amenable to the general criminal laws of the state, except where the acts of Congress, by express provisions, have made the laws of the United States applicable, may be prosecuted in the state courts for bigamy committed within an Indian reservation, notwithstanding Act Cong. Feb. 2, 1903, c. 351, 32 Stat. 793, conferring on the Circuit and District Courts of the United States jurisdiction over persons charged with enumerated crimes committed within Indian reservations, not including bigamy.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 22, 64, 66; Dec. Dig. § 38.*]

Appeal from Circuit Court, Charles Mix County; R. B. Tripp, Judge.

Joseph Nimrod was charged with bigamy,

and from a judgment sustaining a demurrer to the information the State appeals. Reversed and remanded.

Royal C. Johnson, Atty. Gen., Ambrose B. Beck, State's Atty., of Geddes, and G. M. Caster, of Lake Andes, for the State. H. D. James, of Warner, for respondent.

McCOY, P. J. The defendant, Joseph Nimrod, was charged with the offense of bigamy, alleged in the information to have been committed as follows: "That Joseph Nimrod, on the 1st day of November, in the year of our Lord one thousand nine hundred and nine, at the county of Charles Mix, and state of South Dakota aforesaid, and at the city of Wagner, in said county of Charles Mix, state of South Dakota, within the boundaries of the original Yankton Indian reservation, and upon deeded land for which the United States had heretofore issued a patent in fee, and released all its title, rights, and interest therein, did then and there willfully, unlawfully, and feloniously marry one Victoria Hedges, a female person, she, the said Victoria Hedges, being then and there a mixed-breed Indian woman of the half blood and a member of the Yankton Sioux tribe of Indians, and her, the said Victoria Hedges, then and there had for his wife, he, the said Joseph Nimrod, being then and there an Indian of the Yankton Sioux tribe of Indians, and he, the said Joseph Nimrod being then and there a married man, having been theretofore, and on the 17th day of September, A. D. 1905, at the city of Valentine, Cherry county, Nebraska, and outside of an Indian reservation, lawfully married to one Caroline Douville, who was thereafter known as Caroline Nimrod, and who was then and there a mixed-breed Rosebud Indian and a resident of the Rosebud Indian reservation in South Dakota, she, the said Caroline Douville, being then and there on the 1st day of November, 1909, alive and the bonds of matrimony and the marriage between him, the said Joseph Nimrod, and her, the said Caroline Douville, being then and there undissolved, the same never having been dissolved, terminated, or annulled by any court having competent jurisdiction, and that he, the said Joseph Nimrod, at the time of his said marriage with her, the said Caroline Douville, had been allotted land on the Yankton Indian reservation in South Dakota by the United States, and the said allotted land had prior thereto been patented to him by the United States under and in accordance with the provisions of the act of Congress approved February 8, 1887, entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the territories over the Indians and for other purposes,' and in accordance with an act of Congress approved February 28, 1891,

amending the said act of February 8, 1887, entitled 'An act to amend and further extend the benefits of the act approved February 8, 1887, entitled "An act to provide for the allotment of land in severalty to Indians on the various reservations and to extend the protection of the laws of the United States over the Indians and for other purposes,"' and that he, the said Joseph Nimrod, was born within the territorial limits of the United States, and that he, the said Joseph Nimrod, at the time of said marriage with her, the said Victoria Hedges, was under the supervision of the United States Indian agent at Greenwood, South Dakota, the same being the agency maintained by the United States for the benefit of the Yankton tribe of Sioux Indians, and that he, the said Joseph Nimrod, prior to the time of his said marriage to the said Caroline Douville, had voluntarily taken up within the limits of the state of South Dakota his residence separate and apart from any tribe of Indians within the United States and had adopted the habits of civilized life and was then and there a citizen of the United States and of the state of South Dakota." To this information the defendant demurred upon the grounds (1) that the alleged facts stated in the said information do not constitute a public offense; (2) that from the facts alleged in said information, if any crime or public offense was committed the same was not committed within the jurisdiction of this court. The said demurrer was sustained, and the state appeals.

[1] It is the contention of appellant that by reason of the defendant having taken land in severalty under the act of Congress of February 8, 1887 (the Dawes Act), and also having voluntarily taken up within the limits of the state of South Dakota his residence separate and apart from any tribe of Indians within the United States and adopted the habits of civilized life, he thereby became a citizen of the United States and of the state of South Dakota, and amenable to all the laws of the state, both civil and criminal. We are inclined to the view that appellant is right in this contention. It is contended by respondent that, inasmuch as it appears from the information that defendant is an Indian, and that the offense was committed by one Indian against another Indian within the boundaries of the Yankton Indian reservation, the United States has exclusive jurisdiction of the offense. There is much seeming conflict of authority on this question, but a careful examination of the decisions with the underlying reason, upon the particular facts of each case, removes much of such conflict. One of the best considered cases is that of *State v. Columbia George*, 39 Or. 127, 65 Pac. 604. The defendant was a Umatilla Indian, and it was held that the provisions of the Dawes Act do not apply to the Umatilla

Indians because the allotments on the Umatilla reservation were not made under the provisions of the Dawes Act, but under the provisions of another special act not containing like provisions as to citizenship and amenability of the allottees to the state laws. The court said: "The language of said first clause of section 6 (Dawes Act) 'that upon the completion of said allotments and the patenting of the lands to the said allottees,' has reference to the allotments and allottees under the act, and none other, and hence does not comprehend Indian allottees under special acts and therefore cannot affect the Umatilla Indians." Also, in this *Columbia George* case, in discussing the provisions of the Dawes Act, the learned court draws the plain distinction between Indian allottees who have voluntarily taken up their residence separate and apart from the Indian tribe and adopted the habits of civilized life and those who still retain to some degree the tribal relation, with the plain inference that those who have taken allotments under the Dawes Act, and have wholly abandoned the tribal relation, and have adopted the habits of civilized life would be amenable to the state laws. Section 6, Act Feb. 8, 1887 (the Dawes Act), provides that, upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens. In construing this act in relation to the commission of crimes by one Indian against another, in the state of North Dakota (*U. S. v. Kiya* [D. C.] 126 Fed. 879), the United States court said: "The language that such Indians 'should be subject to the laws, both civil and criminal, of the state or territory in which they reside,' is as plain and comprehensive as it could well be made. It could not have been the intention of Congress to render these Indians subject generally to the criminal laws both of the state and the nation. The language quoted plainly makes them amenable to the criminal laws of the state, and thereby removes them from the plane of national penal legislation, unless such legislation is by express provision in particular cases made applicable to them." Also see the cases of *State v. Williams*, 13 Wash. 335, 43 Pac. 15, and *State v. Howard*, 33 Wash. 250, 74 Pac. 382. In the first of these cases the Supreme Court of Washington said: "Our investigation of the authorities leads us to conclude that an Indian

who has severed his tribal relations may be prosecuted in the courts of this state without regard to whether the place of the commission of the offense is within or without the limits of a reservation." In the Howard Case, referring to this part of the decision in the Williams Case, the Supreme Court of Washington again said: "While the above language may not have applied to the facts of the case then under discussion, yet, based upon our discussion herein, and upon authorities cited in that opinion, we do not believe that it was an erroneous statement of the law. We do not believe it was the intention of Congress that an Indian without tribal relations who resides among the white people of the state and is amenable to the laws thereof can go within an Indian reservation and commit a crime against another Indian, and then assert that the courts of the state cannot try him for the crime. It has been often held that the state courts can try white men for crimes committed within a reservation, and we can see no reason in principle why the jurisdiction of the state shall not likewise extend to an Indian who is not allied with any tribe, and who is not therefore a subject of guardianship by the United States." While these two last cited cases are not based expressly upon the provisions of the Dawes Act, yet the Dawes Act was in force at the time of their rendition. The case of *United States v. Celestine*, 215 U. S. 291, 30 Sup. Ct. 93, 54 L. Ed. 195, is cited by appellant, but under the *Columbia George Case* the *Celestine Case* is not applicable to Indian allottees under the Dawes Act, the defendant in that case being a *Tulalip* Indian holding an allotment of land in severalty, not under Act Feb. 8, 1887, but under Treaty March 16, 1854, 10 Stat. 1043. In view of the fact that the information alleges defendant to be an allottee under the Act Feb. 8, 1887, and that he has voluntarily taken up within the limits of this state his residence separate and apart from any tribe of Indians, and has adopted the habits of civilized life, we are of the opinion that he is amenable to the general criminal laws of this state, as to all criminal offenses, excepting only where the acts of Congress by express provisions, in particular cases have made the laws of the United States applicable to such Indians as he.

[2] It is also contended by respondent that inasmuch as the crime of bigamy is not mentioned in the special act of Congress of February 2, 1903 (Act Feb. 2, 1903, c. 351, 32 Stat. 793), providing "That the Circuit and District Courts of the United States for the District of South Dakota are hereby given jurisdiction to hear, try, and determine all actions and proceedings in which any person shall be charged with the crime of murder, manslaughter, rape, assault with

intent to kill, arson, burglary, larceny, or assault with a dangerous weapon, committed within the limits of any Indian reservation in the state of South Dakota," it was intended that Indians should not be liable to prosecution for the offense of bigamy. According to the decision in *United States v. Kiya*, supra, if the allottee under the Dawes Act is amenable to the general criminal laws of the state, except where Congress has by express legislation, in particular cases, provided otherwise, it would seem to leave no room for doubt but what respondent was still liable to prosecution for bigamy under the state law. It would seem to necessarily follow that, if respondent is amenable to the criminal laws of the state by being an allottee under the Dawes Act, he is amenable to all the criminal laws of the state except where Congress has expressly legislated otherwise in particular cases. This is one of the particular cases where Congress has not legislated otherwise. Bigamy is one of the offenses created by the general criminal laws of the state. If an Indian in this state is exempt from prosecution for bigamy for such cause, for the very same reason he would be exempt from prosecution for forgery, embezzlement, incest, obtaining property by means of false pretenses and all other crimes under our statute not mentioned in this special act of February 2, 1903. It will be observed that this act of February 2, 1903, provides, "in which any person shall be charged with the crime of murder," etc., thereby making the said act apply to all persons whomsoever, whether Indians or whites. It does not purport to be limited to Indians only. There is no distinction between whites and Indians so far as the operation of this law is concerned. We are not prepared to concede that a white man could not be successfully prosecuted for bigamy although committed on an Indian reservation.

The judgment of the lower court sustaining the demurrer to the information is reversed, and the cause remanded for further procedure.

BARR v. BARR.

(Supreme Court of Iowa. Nov. 12, 1912.)

1. DIVORCE (§ 130*)—CRUEL AND INHUMAN TREATMENT—EVIDENCE.

Evidence held to sustain a divorce decree on the ground of cruel and inhuman treatment. [Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 442-445; Dec. Dig. § 130.*]

2. DIVORCE (§ 240*)—ALIMONY—AMOUNT.

Where defendant, in divorce proceedings by his wife, claimed that the net value of his property was only \$15,000, but it appeared that he had a farm of 500 acres, which was well stocked with horses, cattle, sheep, and hogs, and that if his property was estimated at its full market value, and the "water" was extracted from his alleged liabilities to certain

of his immediate relatives, it would be found that he was worth much more, an allowance to the wife of \$5,000 permanent alimony on granting her a divorce for cruelty was not error.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 675-678, 680; Dec. Dig. § 240.*]

Appeal from District Court, Delaware County; F. C. Platt, Judge.

Action for divorce. Decree as prayed, and defendant appeals. Affirmed.

Welch & Welch, of Monticello, for appellant. W. H. Norris, Carr, Bronson & Carr, and E. B. Stiles, all of Manchester, for appellee.

WEAVER, J. The parties were married in March, 1905. Defendant was then about 47 years old, owned a large farm, had been twice widowed, and was the father of one child, a daughter. The plaintiff was about 10 years his junior, was possessed of money or property to the amount of about \$1,200, and had no previous matrimonial experience. Not long after the marriage, the relations of the parties became more or less inharmonious. In the year 1909 their differences became so serious that plaintiff left home for a time. Defendant sought a reconciliation, confessed his fault in the matter, signed a written retraction of charges he had made against his wife, and she returned to him. The treaty of peace proved to be of little effect, and in March, 1910, this action was instituted for divorce upon the ground of cruel and inhuman treatment, endangering the life of the plaintiff. The defendant's answer consists of a simple denial of the charges of cruel treatment, and an allegation, stated generally and without specification of particulars, that the domestic troubles and difficulties of the parties "were provoked and caused by conduct of the plaintiff, which conduct on her part was without justification or right, and was not provoked by the defendant." After hearing the testimony upon the issues thus joined, the court found for the plaintiff and awarded her a divorce, with alimony in the sum of \$5,000 and attorney's fees. We are asked to reverse this decree on the ground that the evidence fails to establish any just cause for divorce. It is further insisted that, in the event that a reversal is not ordered, the allowance of alimony ought to be materially reduced.

[1] Counsel for the appellant favors the court with no argument whatever, except the bald statement that the plaintiff's case is "devoid of evidence to sustain" her charges of cruel treatment; that said charges, or most of them, have been specifically denied by the defendant as a witness in his own behalf; and that, the burden being upon the plaintiff, she must be held to have failed to show ground for relief. We find ourselves unable to so easily dispose of the questions at issue. Plaintiff's testimony tends to

show that defendant's treatment of her from an early day of their married life was not only abusive, but grossly inhuman; that he was a man of violent passion, subjecting her to unprintable personal indignities, striking and kicking her on numerous occasions, applying to her insulting and opprobrious epithets, charging her with unchastity, slandering her family, friends, and associates, depriving her of her accustomed social and religious privileges, and in many other ways making her life an unbearable burden. It is true that many of the particular incidents related by her are denied by him; but she is sufficiently corroborated, both by the testimony of other witnesses and by the admissions or concessions of the defendant, as to many of the material facts, to amply justify and sustain the finding of the trial court upon the merits of the case. For example, it is very clear that the defendant was of an unreasonably, if not insanely, jealous disposition; that he frequently, if not continuously, and in the vilest terms, charged her with unchastity. Not content with making these charges to the wife herself in the confidence and privacy of their home, he made them in the presence of others, and deliberately and repeatedly committed them to writing. He addressed a letter to his own young daughter, in which he charged his wife with adulterous and lascivious conduct, concluding the accusation in terms which even a grossly depraved man would hesitate to use in addressing a common prostitute. He tortured the plaintiff by repeated written threats of suicide, coupled with accusations, open or veiled, of marital infidelity. Some of these writings were addressed to others, and some to the public. He removed the receiver from the telephone to prevent her holding conversations with neighbors. Without her consent he obtained possession of his wife's keys, opened her private desk or safety deposit box, and took possession of a note for \$600, which he had given her for money she had lent him soon after they were married. When his wife's sister, who was visiting the family, occupied a bed with the plaintiff, defendant forced himself into the bed with them, and according to the two women he sought then and there to have intercourse with the sister, which she resisted, and finally, with the plaintiff, was driven from the room. The essential features of this testimony he admits, and says they had a "rotten time." He approached the hired girl with indecent proposals. On several occasions plaintiff was driven to leave her bed and room and pass the night with the domestic or with her daughter. It appears, not only from the wife's testimony, but from the admissions of the defendant and from the nature of his complaints in writing and otherwise, that he was inclined to brutal sexual

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

excess. It is more than likely that this conduct produced in the plaintiff, who appears to be a woman of some education and refinement, a feeling of intense repugnance, which she could not always repress. She would have been more than human and less than a woman of normally decent instincts had it been otherwise. He appears to have been incapable of explaining to his own mind a refusal or avoidance of his demands in that direction, except upon the theory that his wife was reserving her favors and embraces for others than himself, and he charged her with adultery with his own brother and the family physician and others. Of the truth of these charges there is not the slightest support in the record, except as it is insinuated in the testimony of a single witness. The general moral character of that witness was thoroughly impeached, and his story upon the face of it bears the stamp of improbability. There is much more testimony tending to support the plaintiff's allegation of cruel treatment at the hands of her husband; but we shall not burden this opinion with its further recitation. It is enough to say that as a whole the record reveals physical maltreatment and abuse of the plaintiff at the hands of her husband, coupled with deliberate injury to her self-respect and peace of mind, such as no woman of average strength and sensitiveness could bear for any great length of time without endangering her life or reason. The decree adjudging her entitled to a divorce has our full approval.

[2] Concerning the alimony allowed, if we were to take for granted the correctness of appellant's statement that the net value of his property is only about \$15,000, we might be induced to think that the allowance of \$5,000 was excessive. But in our judgment he clearly underestimates the value of his estate, and then reduces his net worth by a more or less doubtful claim of large indebtedness, the greater part of which he says is held by his immediate relatives. He has a farm of some 500 acres, which is well stocked with horses, cattle, sheep, and hogs, and we are satisfied that if his property is to be estimated at its full market value, and the "water" extracted from his alleged liabilities, it would be found to exceed his estimate very largely. We are not disposed to interfere with the judgment for alimony. The attorney's fees allowed by the trial court are not so large that we are inclined to interfere with them. Except such as have already been allowed, no other or additional attorney's fees will be assessed upon this appeal. Plaintiff having already received an allowance under order of this court for expenses in preparing her case for this court, the cost of her printing will not be taxed.

For the reasons stated, the decree below

will be affirmed, and the costs, except costs of plaintiff's printing, will be taxed to the defendant.

Affirmed.

STATE v. SHOEMAKER.

(Supreme Court of Iowa. Nov. 14, 1912.)

1. ABORTION (§ 8*)—NECESSITY—BURDEN OF PROOF.

In a prosecution of a physician for abortion, the burden is on the state to negative that defendant, in good faith and in the exercise of his best skill and understanding, believed it was necessary to save the patient's life.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. § 16; Dec. Dig. § 8.*]

2. ABORTION (§ 11*)—NECESSITY TO SAVE LIFE—EVIDENCE.

In a prosecution of a physician for abortion, evidence held insufficient to show that he did not, in good faith and in the exercise of his best skill and understanding, believe that it was necessary to save the patient's life.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. § 22; Dec. Dig. § 11.*]

Appeal from District Court, Polk County; C. S. Bradshaw, Judge.

The defendant was convicted of having attempted to produce a miscarriage, and appeals. Reversed and remanded.

Sullivan & Sullivan, of Des Moines, and W. S. Shoemaker, of Omaha, Neb., for appellant. George Cosson, Atty. Gen., and John Fletcher, Asst. Atty. Gen., for the State.

LADD, J. [1] The defendant, a practicing physician of Des Moines since 1883, is charged in the indictment with having attempted to produce a miscarriage on Stella Thorne about October 19, 1910. He admitted having used an instrument to relieve the womb of the foetus, but claimed to have done so to save life. As the foetus was emitted two days later, the main issue was whether defendant, in the exercise of his best skill and understanding in good faith, believed a miscarriage necessary to save the life of Stella Thorne. The burden of proof was on the state to negative such alleged necessity (State v. Aiken, 109 Iowa, 643, 80 N. W. 1073), and a careful examination of the record has convinced us that it has failed to so prove.

[2] Stella Thorne was an unmarried woman about 22 years of age, and had been pregnant three or four months when she first called on the defendant at his office. At that time, according to her testimony, she told him of her condition, and he promised to help her all he could, but said, if she was after an abortion, he could not perform it, felt her pulse, ascertained her temperature, and informed her she was in bad condition, looked like she had anæmia and declared she had already aborted, and needed assistance to take the foetus away. He

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

then said he must have \$50 before he would do anything, and, when she said she was without means, offered to accept part down and the remainder later. He also required her to employ a nurse, because her heart was weak. On Tuesday evening following she was accompanied by Harvey Ramey, who paid him \$35 and executed his note for the remaining \$15. The defendant then examined her, and on the next evening the operation was performed, and two days later the foetus was expelled. The witness further testified that she had not worked during the two weeks previous, but had walked down town nearly every day; that she had been taking medicine previously to produce an abortion, prescribed by a male and also a female physician; that she had said as much to him; that upon examination he had informed her that she was in a pretty bad condition, had anæmia, that her heart was weak, and that she had already aborted septic matter, and needed some assistance to take that away; and that she must have a nurse and (quoting): "He said it might be dangerous for me to wait three or four days, and he took me and made an examination in the private room, and when he examined me he found pain on the left side of my womb, and I had pains in my back and back of my head. After he made the examination, he found my womb standing wide open, and there was abrasions of the membranes around the womb, and that the membranes had been broken or abraded, and he said that it would be dangerous in that condition to let it remain very long, as it might kill me; that that thing that was in there would have to be taken away to save my life, and then I made arrangements to come down the next evening with the nurse, and I brought Miss Morris down." She also testified that she "was looking pale and sorrow." That she had been complaining of being sick before calling on defendant appears from the testimony of Mrs. Clark, at whose house she was rooming, and Harvey Ramey testified to her having nearly fainted at a theater shortly before, and to her statement that she was taking medicine to cause a miscarriage. Ramey testified further that: "The doctor told me in her presence that it was necessary for her to have a nurse, that she would have to be there the next evening, and the next evening Stella Thorne, the nurse, and myself came to the office again. When the nurse came, he explained to her that this was perfectly legitimate, and that it was necessary to have a nurse, because of Miss Thorne's weak condition, weak heart, and the taking of the medicines she had taken, and other things that she had done; and the doctor insisted that the nurse should stay with the girl from the start to finish, or he would not have anything to do with it, and I think the first time we were there he made an examination, and I was informed that evening that it was necessary for her to be

operated on at once, and the next evening was set for the operation, and the nurse came. He was in there not very long during the operation, and after that he gave her some medicine to take under certain conditions, and how to take it." The nurse testified that, prior to the operation, defendant explained to her how to administer the medicines he had prescribed; that he told her Miss Thorne was pregnant, and that "he had to operate on her to save her life," and that when the child came he told her to cremate it, and, on cross-examination, that: "The doctor said, the night I was at the office, it was necessary to have an operation to save her life. He also said that it was an important point that I should stay about the patient and not leave her. He said that her heart was weak by the absorption of septic matter from the womb and other things. He said it was no crime that I was committing, but a necessary matter; that there was no secret about it. He did not ask me to be secret about it, or not tell anybody. He told me not to leave her alone for any length of time, and if there was any change or anything to notify him by telephone." This is all the evidence adduced by the state tending to negative the exception in the statute that the attempt to produce the miscarriage was to save life.

On the other hand, defendant testified that what he did was necessary to save the life of the patient, that she had anæmia from septic poisoning, and that septic poisoning came from the absorption from the uterus, and concerning the examination: "I looked her over again, as I do any patient, felt her pulse, put her in the chair, made a practical examination, and examination over the region by percussion, the abdominal region, and found tenderness on percussion. I found the uterus rolled down on the outside, and very much soreness on the right-hand side of the patient in the broad ligaments or uterine region. Then I also made what is called a vaginal examination, and found the vagina hot, sensitive, and very tender. I found the mouth open, and I passed the finger in and found the cervix wide open. I passed my finger clear through to the inner mouth, and found it open, and I found the membrane tampered with, with an instrument, a catheter, or something of that kind, and the womb swollen; that is, the neck swollen and very sensitive." It will be observed that his testimony is in harmony with that of the witnesses of the state. The evidence concerning the condition of Stella Thorne is in no wise refuted, save possibly by the circumstance that she had walked back and forth from the office of the accused, and prior thereto had walked down town. Whether this would have been improbable or impossible, with her condition as described, the jury had no means of knowing. The record does not warrant the conclusion that defendant was "framing up"

a defense in event of prosecution, and, while appreciating the difficulties under which the state labors in this kind of a prosecution (State v. Lee, 113 Iowa, 348, 85 N. W. 619), we are not ready to sanction a conviction without prima facie proof, at least, that the miscarriage attempted was not necessary to save life.

Owing to our conclusion on this phase of the case, an examination of other errors assigned is not necessary. Because of the insufficiency of the evidence to justify the conviction, the judgment is reversed.

Reversed and remanded.

STATE v. BUTLER.

(Supreme Court of Iowa. Nov. 12, 1912.)

1. INDICTMENT AND INFORMATION (§ 191*)—OFFENSES INCLUDED—ASSAULT AND BATTERY.

Where the indictment for rape on a female under the age of 15 years did not allege the use of force and violence, the issue of accused's guilt of assault and battery was not in the case, though the evidence disclosed the exertion of some force.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 265, 604-621; Dec. Dig. § 191.*]

2. CRIMINAL LAW (§ 823*)—LOWER OFFENSES—INSTRUCTIONS.

Where, on a trial for rape on a female under the age of 15 years, the court stated the elements of the crime, and charged that, unless they were proved beyond a reasonable doubt, accused should not be convicted of that crime, that in the event of conviction of rape the lesser offenses were not to be considered, but if not found guilty the jury should inquire whether he was guilty of an assault with intent to commit rape, and that, unless found beyond a reasonable doubt to have so assaulted prosecutrix, he should not be convicted of such offense, and charged the necessity of proving penetration to constitute rape, and, in the event that was not done, then of so proving the assault with such intent, and that, if accused was not found guilty of either of the offenses, to determine whether he was guilty of simple assault, an instruction that, where one was charged with crime which included offenses of lesser degrees, the jury should find accused guilty of the highest offense charged of which the evidence proved him guilty beyond a reasonable doubt, was not erroneous, though it would have been better to have quoted Code, § 5377, declaring that, where there is a reasonable doubt of the degree of the offense, accused shall be convicted of the lower degree only.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.*]

3. CRIMINAL LAW (§ 629*)—WITNESSES—NOTICE OF PURPOSE OF CALLING WITNESS—SUFFICIENCY.

A notice, served on accused that the state would call as a witness a person, which stated that witness resided on a designated street, and that the witness would testify that she had resided next door to accused's place of residence during the previous year, was sufficient, within Code, § 5373, requiring the notice to give the name, place, residence, and occupation of the witness, but defects in the notice are not fatal, unless prejudicial, though the

name of the witness was not written correctly, and her occupation was not stated, otherwise than that of wife.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1420-1429, 1432-1436; Dec. Dig. § 629.*]

4. WITNESSES (§ 43*)—COMPETENCY—DEAFNESS.

A witness, otherwise competent to testify, is not rendered incompetent because she is deaf.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 101; Dec. Dig. § 43.*]

Appeal from District Court, Webster County; C. G. Lee, Judge.

The defendant, having been convicted of the crime of rape, appeals. Affirmed.

Frank Maher, M. M. Joyce, and Kelleher & O'Connor, all of Ft. Dodge, for appellant. George Cosson, Atty. Gen., John Fletcher, Asst. Atty. Gen., and B. B. Burnquist, Co. Atty., of Ft. Dodge, for the State.

LADD, J. [1] The indictment charged that defendant, on or about September 21, 1910, "did willfully, feloniously, and unlawfully assault one Vera Butler, and did then and there carnally know and abuse the said Vera Butler, she being then and there a female child under the age of fifteen years." The court advised the jury that included in the offense charged was that of assault with intent to commit rape, and also that of unlawful assault, but did not mention assault and battery, nor submit whether he was guilty thereof to the jury. Appellant argues that this was error, insisting that this offense was included in the allegations of the indictment and sustained by the proof. It will be observed, however, that the use of force and violence in the perpetration of the offense was not averred, and, even though the evidence may have disclosed the exertion of some force, as assault and battery was not included in the charge against the accused, there was no issue as to his guilt thereof, and for this reason it was not error to omit submitting the same to the jury. State v. Miller, 124 Iowa, 429, 100 N. W. 334; State v. Johnson, 133 Iowa, 38, 110 N. W. 170.

[2] II. Section 5377 of the Code declares that, "where there is a reasonable doubt of the degree of the offense of which defendant is proven guilty, he shall be convicted of the lower degree only," and with reference thereto the court instructed that "Included in the charge of rape are the following lesser offenses, which are stated in the order of their gravity, as follows: (1) Assault with intent to commit rape; and (2) an unlawful assault. It is the law that where a person is charged with a crime, which charge includes offenses of a lesser degree, the jury shall find the defendant guilty of the highest offense charged of which the evidence proves him guilty beyond a reasonable doubt, if it does so prove him guilty of any such of-

fense." The criticism of this instruction is that "it does not tell the jury that where there is a reasonable doubt as to the degree of the offense the conviction should be for the lesser." It is a little difficult to understand how the jury might exclude all reasonable doubt in convicting of a higher offense, without saying that no such doubt existed as to the degree. The court might well have indicated the law by quoting this statute, or more pointedly have expressed the precise rule on the subject. But other portions of the charge were such as to obviate any possible misconception of what was intended. Thus, in the fourth instruction, the elements constituting the crime of rape were stated, and the jury told that, unless each and all of these had been proven beyond reasonable doubt, the accused should not be convicted of having committed that crime. This instruction was followed by another, saying that, in event of conviction of rape, the lesser offenses are not to be considered; but, if not found guilty thereof, the jury should proceed to inquire whether he was guilty of an assault with intent to commit rape, and that, unless found beyond reasonable doubt to have so assaulted prosecutrix, he should not be convicted of this offense. In the seventh instruction, the necessity of proving penetration beyond reasonable doubt, to constitute rape, was pointed out, and, in event this were not done, then of so proving the assault with intent to penetrate. In the ninth instruction the jury was told, if the defendant was not found guilty of either of the above offenses, to determine whether he was guilty of the simple assault. The charge as a whole preserves to the defendant the advantage of the statute quoted, and was without error in this respect.

[3] III. The name of Mary Engels was not indorsed on the back of the indictment, and, when she was called as a witness, objection was interposed on this ground. It appeared that a notice had been served on defendant a sufficient time previous to the trial, but therein she had been designated as "Mrs. J. C. Ingalls, wife of J. C. Ingalls, living on 23d street, Ft. Dodge," and that, among other things, she would testify that "she had been living in the house first north of the Fred Butler house during the past year, and that she had seen Mrs. Fred Butler leave the home, and leave Vera Butler alone." It appeared at the trial that her husband's name was Chris E. Engels, but by mistake she had given her name to the county attorney as "Mrs. J. C. Engels," and that she had lived during the year previous in the house immediately north of that occupied by the defendant on Twenty-Third street. She had a son named C. J. Engels, who resided in another part of the city, and had never lived in the place designated in the notice.

The statute requires such a notice to give the name, place of residence, and occupation of a witness whose testimony is to be introduced (section 5373, Code); but defects of the notice in these respects are not fatal, unless prejudicial to the defendant. Here the notice not only designated the street on which the witness resided, but indicated she would testify that she had resided next door to defendant's place of residence during the year previous. Only she and her husband had lived there during that time. The defendant, then, could not have been misled as to who was intended, even though her name was not written correctly, nor her occupation stated, otherwise than that of wife. He was advised with sufficient certainty of detail to enable him readily to ascertain the identical person whom the state proposed to call as a witness, and of the substance of the testimony to be given, and, this having been done, the defendant was not prejudiced by the defects of the notice. See *State v. Rainsbarger*, 74 Iowa, 196, 37 N. W. 153; *State v. Mathews*, 133 Iowa, 398, 109 N. W. 616.

[4] IV. The suggestion that the deafness of Mrs. Atherton rendered her incompetent to testify is without merit. Even a deaf mute, if of sufficient mental capacity and able to communicate his ideas by signs or in writing, is a competent witness. *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90; *State v. Weldon*, 39 S. C. 318, 17 S. E. 688, 24 L. R. A. 126; *State v. Howard*, 118 Mo. 127, 24 S. W. 41. The corroborating evidence was sufficient to carry that issue to the jury, and the verdict has such support as to preclude any interference therewith on appeal.

The record appears to be without error, and the judgment is affirmed.

Affirmed.

BOYL v. MIDLAND LYCEUM BUREAU.

(Supreme Court of Iowa. Nov. 14, 1912.)

1. EVIDENCE (§ 455*)—ACTIONS ON CONTRACT—ADMISSIBILITY.

A contract between a lecturer and a lyceum bureau provided that the bureau engaged the lecturer for as much time as it would be able to use during a specified season at \$70 per week; that open date should be borne by the bureau, but no salary would be paid when two or more engagements were missed where blame attached to neither party; that any agreement by the bureau to take consecutive time did not apply to any open time between December 15th, and January 15th, nor to any other period of one or more weeks in which no bookings occurred, provided the bureau filled the guaranteed number of nights or weeks, if any were guaranteed; and that the lecturer would be sold in a circuit as a regular circuit number. It also provided that the bureau should have exclusive control of the lecturer's time and an option on his time for the four following years. In a letter accompanying the contract when forwarded for the lecturer's signature it was stated that the bureau's seasons did not run less than 100 nights, and that an agreement to put the lecturer in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a regular circuit was equivalent to guaranteeing him 100 nights, or more. The bureau exercised its option on the lecturer's time, and during four successive years furnished him at least 100 engagements, except during one year when it paid him for 100 engagements, although he filled less than that number. *Held*, that the letter accompanying the contract was admissible in an action on the contract to show what was meant by a "guaranteed number of nights," and by selling "in a circuit as a regular circuit number," either as a part of the contract or as an interpretation of its ambiguity; it being immaterial in which character it was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2104; Dec. Dig. § 455.*]

2. CONTRACTS (§ 190*)—CONTRACT TO LECTURE—CONSTRUCTION.

The letter in connection with the interpretation of the contract by the mutual acts of the parties in the course of performance showed that plaintiff was to be paid for 100 engagements each season as a minimum.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 834, 908½; Dec. Dig. § 190.*]

3. DAMAGES (§ 118*)—BREACH OF CONTRACT—CONTRACT TO LECTURE—CONSTRUCTION.

Where a contract between a lecturer and a lyceum bureau provided that where loss was sustained the lecturer should receive no salary, he met the full requirements of the contract by claiming no salary for an engagement which he failed to fill, and the bureau was not entitled to recover damages sustained by it from such failure.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 287; Dec. Dig. § 118.*]

Appeal from District Court, Polk County; Hugh Brennan, Judge.

Action upon a contract for services as a lecturer. There was a counterclaim for a breach of the contract. Verdict and judgment for the plaintiff, and defendant appeals. Affirmed.

S. B. Allen, of Des Moines, for appellant.
A. W. Brett, of Des Moines, for appellee.

EVANS, J. The defendant appellant is a lecture bureau. The plaintiff was one of its lecturers for a period of five years. The contract between the parties was entered into in January, 1905. The headquarters of the bureau were in Des Moines. The residence of the plaintiff was Camden, N. Y. After some oral negotiations, a written contract was formulated at the home office and forwarded to the plaintiff, and was duly executed by both parties. Such contract was as follows: "Contract. By and between Midland Lyceum Bureau, Des Moines, Iowa, party of the first part, and Elliott A. Boyl, of Camden, New York, party of the second part, witnesseth: That said party of the first part does hereby agree to engage and does engage said second party for as much time as they may be able to use during the season beginning in October, 1905, in the capacity of lecturer. Limited to ——. Said first party agrees to pay said second party for said services the sum of seventy (\$70.00) dollars per week (payable weekly), and all expenses; said expenses to mean

railroad fares, necessary drives, bus and baggage transfers, hotel bills, beginning at Camden, New York, and ending at last date; credential rebates for clergy rate (if secured) to belong to said first party. First party agrees to furnish printing except 2,000 advance enamel circulars and plates, cuts and designs for circulars and hangers. Witnesseth: That said second party does hereby agree to fill all bookings made for him on the dates assigned, and to report on Monday of each week, on blanks furnished by first party, the collections and disbursement (including his own salary) of the previous week up to and including Sunday, and to remit, with report, by draft or money order, the balance on hand. Said second party agrees to give six nights per week to the work, if so many should be required, and to take drives, night trains, and to endure other hardships where necessary. Second party agrees to follow railroad schedules furnished by first party and to depart from same only at his own risk, except in cases where a change of train time-tables shall render the schedules furnished first party inoperative, in which case he shall spare no effort to reach his date by any other route, or a long drive, if necessary. Second party agrees to pay all his expenses not named above, and to furnish or pay for 2,000 advance enamel circulars and plates, cuts and designs for circulars and hangers. Second party agrees to give first party exclusive control of his time from October 1, 1905, to October 1, 1906, and to give first party option on his time from October 1, 1906, to October 1, 1907, at \$85.00 per week, same terms as above; also from October 1, 1907, to October 1, 1908, at \$100.00 per week, same terms as above. Second party agrees to avoid making trouble at hotels or with committees or managers, the express understanding of this paragraph being that he shall be polite, agreeable and obliging at all times and endeavor to please both on and off the platform. (Second party also agrees that first party may cancel this contract for incompatibility, ill health, misconduct or unsatisfactory work) and where loss is sustained or rebates must be made to any committee because of his failure to please, said second party shall receive no salary for said engagement. It is mutually agreed that 'open dates' shall be borne by first party, but in any event no salary shall be paid when two or more engagements are missed due to blockades, washouts, epidemics, or other troubles where blame attaches to neither party, though first party shall pay all expenses of second party during that time; also any agreement by first party to take consecutive time does not apply to any time open between December 15th and January 15th, unless first party chooses to book said time, nor to any other period of one or

more weeks in which no bookings occur, provided first party fills the guaranteed number of nights (or weeks), if any are guaranteed, between October 1st and May 1st, of the season specified. It is also agreed that second party shall collect, report, and remit as agent of the first party, and as such is liable for all funds passing through his hands. It is also mutually agreed (that first party shall also have option on time of second party from October 1, 1908, to October 1, 1910, at \$100.00 per week, same terms as above. Also that second party shall be sold in a circuit as a regular circuit number.)"

At the time such contract was forwarded to the plaintiff for his signature, it was accompanied by the following letter known in the record as Exhibit B. Exhibit B. "Des Moines, Iowa, Jan. 14, 1905. Mr. Elliott A. Boyl, Camden, New York—Dear Mr. Boyl: We inclose contract made out for five years as per our agreement with you when I saw you. Will see what we can do with Waterloo and other assemblies and do all we can for you. I just returned home the 12th. I wish to reiterate our statement that our seasons do not run less than 100 nights. The only guarantee that you need along this line is our agreement to sell you as regular circuit number which we are willing to do. The only possibility of running less would come in case of an utter destruction of the Midland Bureau due to hard times or some great national calamity which would swamp us. We think you will see the absurdity of such a supposition and will understand as the rest of our talent understands that the agreement to put you in a regular circuit is equivalent to guaranteeing you 100 nights or more. We have talked over the matter of your doing agency work in Ohio and we are more than anxious to have you attempt it, feeling sure that you can make money and at very little risk of loss to yourself. Will make you a proposition along that line in a very short time. Best regards."

[1, 2] The plaintiff entered upon the performance of the contract and continued for four successive years, concerning which no controversy is presented. The defendant also exercised its option to demand the plaintiff's services for the fifth season beginning October, 1909. For that season, the defendant furnished the plaintiff 78 engagements. It is the contention of plaintiff that under the contract he was entitled to a minimum limit of 100 engagements. He brought this suit to recover compensation for the additional 22 nights claimed by him. It is the contention of defendant that it was bound to use plaintiff only for such engagements as it could secure, and not more, and that it could not secure more engagements for him than it did do for the last season, and that it terminated his contract on March 25, 1910. In support of his contention, the plaintiff introduced in evidence over the

objection of defendant the letter (Exhibit B). He contends that it was a part of the written contract, or, at least, that it was an accepted interpretation thereof. The defendant contends that it was no part of the contract, and that it should not have been admitted in evidence, and the points relied on for reversal concentrate upon this letter.

Turning now to the contract which is known in the record as Exhibit A and to the letter Exhibit B, we find them entirely consistent. Looking at the contract Exhibit A alone, it would not be intelligible to an ordinary person without the aid of extrinsic interpretation. The contract refers to a "guaranteed number of nights," but does not specify the number. It also contains the words "limited to ———." It also provides for an option to the defendant on the time of plaintiff "from October, 1908, to October 1st, 1910, at \$100 per week same terms as above." It also provides that the plaintiff "shall be sold in a circuit as a regular circuit number." It also gives the defendant the exclusive control of the time of the plaintiff for the entire period covered at a stated compensation per week. Exhibit B only purports to be an interpretation of Exhibit A as to what is meant by selling the plaintiff "as a regular circuit number." It is there stated that this "is equivalent to guaranteeing you 100 nights or more." The proviso of Exhibit A thus interpreted does not on its face convey any definite meaning. It was clearly proper that the parties put an interpretation upon it. For four seasons the defendant furnished plaintiff 100 engagements or more, except for the second season. For such season the engagements actually furnished were somewhat less than 100, but the plaintiff was compensated precisely as though the 100 engagements had been furnished. We have then the written interpretation agreed on in advance of performance, and a subsequent interpretation by the mutual acts of the parties in the course of performance, from both of which it appears that the plaintiff was to receive a minimum wage as for 100 engagements. We hold, therefore, that Exhibit B was clearly admissible. It is immaterial for the purpose of this case whether it should be deemed as a part of the contract or simply as an interpretation of its ambiguity. The real meaning of the terms used in Exhibit A could only be ascertained by resort to Exhibit B.

The appellant has specified a large number of points relied on for reversal, all of which bear directly upon the question now considered. Our conclusion thereon is quite decisive against the appellant upon the whole case.

[3] 2. By way of counterclaim, the defendant pleaded damages for breach of contract. Two items were claimed. One of them was conceded and presents no controversy. The other was an item for damages resulting to the defendant by reason of plaintiff's failure

to fill a date at Alma, Neb. It is claimed that the failure resulted in damage to the defendant to the amount of \$162. We can find no evidence in the record to show that plaintiff's failure to make the date at Alma, Neb., resulted through any fault of his own. Be that as it may, the contract especially provides that, "where loss is sustained," "said second party shall receive no salary for said engagement." The plaintiff received no salary for the Alma engagement, and claimed none. He therefore met the full requirements of the contract in that regard. The judgment below must be affirmed.

STATE v. ZECHMAN (two cases).

(Supreme Court of Iowa. Nov. 12, 1912.)

1. PHYSICIANS AND SURGEONS (§ 5*)—LICENSE TO PRACTICE—STATUTES—CONSTRUCTION.

Under Code, § 2577, providing that a physician's certificate of license granted by the state board of examiners shall be filed for record in the office of the recorder of the county in which the person licensed to practice resides, and that the same record must be made of the certificate in any county to which the holder may remove and in which he proposes to practice, a practitioner who has procured a proper certificate or license, and has had it recorded in the county of his residence, is entitled to practice in any county in the state without further record of his certificate, unless he is an itinerant physician described in section 2581.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 5; Dec. Dig. § 5.*]

2. PHYSICIANS AND SURGEONS (§ 6*)—LICENSE TO PRACTICE—INDICTMENT.

An indictment charging that defendant willfully and unlawfully practiced medicine and publicly professed to be a surgeon, physician, and obstetrician, and assumed the duties of such, and made a practice of prescribing and furnishing medicine for the sick, and publicly professed to heal and cure without having a certificate from the proper authorities so to practice, and without filing with the county recorder of P. county any such certificate, was not objectionable for failure to charge that P. county was the county of defendant's residence, since, if defendant did not have any certificate or license to practice medicine as alleged, he was not entitled to practice in any county, regardless of the question of record.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6-11; Dec. Dig. § 6.*]

3. PHYSICIANS AND SURGEONS (§ 6*)—PRACTICING WITHOUT LICENSE—CHIROPRACTICS.

Where, in a prosecution against physicians for practicing without a license, it was shown that defendants professed to be chiropractors maintaining an office in P. county, holding themselves out as prepared to treat patients for disease with the purpose of curing and healing them, and that they did so without procuring certificates from the state board of medical examiners, such proof showed a violation of the statute prohibiting persons from practicing medicine without a license in so far as defendants devoted themselves to and employed means of curing and healing and alleviating pain without a license, and hence they were not prejudiced by an instruction that they might be convicted if the jury found that,

without certificates, they did publicly profess to cure or heal, or devoted themselves to and employed means of curing and healing and alleviating pain, though the statute did not make any specific reference to the specific act of devoting one's services to and employing means of curing and healing and alleviating pain.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6-11; Dec. Dig. § 6.*]

4. PHYSICIANS AND SURGEONS (§ 6*)—LICENSES—"CHIROPRACTICS"—"PHYSICIAN."

One advertising and holding himself out as a chiropractic and offering to treat diseases by the methods dictated by that school is within Code, §§ 2579, 2581, requiring persons practicing as physicians to procure a license, and making it an offense for them to practice medicine without such license.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6-11; Dec. Dig. § 6.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5374-5376; vol. 8, p. 7754.]

Appeal from District Court, Polk County; Hugh Brennan, Judge.

The defendants were separately indicted, tried, and convicted for the crime of illegal practice of medicine, and each has appealed from such conviction. Affirmed.

Morris & Hartwell, of La Crosse, Wis., and F. G. Ryan, of Des Moines, for appellants. George Cosson, Atty. Gen., and John Fletcher, Asst. Atty. Gen., for the State.

MCLAIN, C. J. As the appeals in these two cases involve the same questions, they may well be considered and decided together.

1. The charge in the indictment in each case was that the defendant in Polk county "did willfully and unlawfully practice medicine and then and there publicly professed to be a surgeon, physician and obstetrician and assume the duties of such and make a practice of prescribing and furnishing medicine for the sick and publicly professed to cure and heal"; and, further, that the defendant "then and there did not have a certificate from the proper authorities so to practice and did not file with the county recorder of Polk county any such certificate to practice." And the court instructed the jury in each case that if defendant did publicly profess to cure and heal, etc., in Polk county without having procured a license, and filed the same with the county recorder of Polk county, then the defendant might be found guilty.

[1] The particular complaint for the appellants is that the indictments charged a failure to file a license with the county recorder of Polk county, without any allegation that defendant was a resident of that county, and that the court instructed the jury in each case that the practice of medicine in Polk county by defendant without recording a license in that county would constitute a crime, although there was no allegation or proof that the defendant was a resident of that county. The construction of the stat-

uta relied upon for the defendants is unquestionably correct, for it is provided in Code, § 2577, that the certificate of license granted by the state board of examiners shall be filed for record "in the office of the recorder of the county in which he (the person licensed to practice) resides," and that "the same record must be made of the certificate in any county to which the holder may remove and in which he proposes to practice." Plainly, under these statutory provisions, a practitioner who has procured the proper certificate or license, and has had it recorded in the county of his residence, is entitled to practice in any county in the state, unless he is an itinerant physician as described in Code, § 2581; and he is required to have it recorded in another county only in the event of a change of residence. Neither the indictment nor the evidence negatives the residence of the defendants in another county in the state, and the fact alone of the practice of the defendants in Polk county without a filing of a certificate in that county does not make out a case against the defendants in that respect.

[2] But we think that any prejudice to the defendants from the error of the court in the instructions to the jury in the matter here referred to is clearly negated by the record. The indictments sufficiently charged the defendants with practicing in Polk county without having a certificate from the proper authorities so to practice. If the defendants did not have such certificates, then their practice in Polk county or any other county in the state was unlawful without regard to the filing of a certificate in Polk county or any other county; for, if defendants did not have certificates, no such certificates could be filed anywhere. The charge of practicing without having procured certificates is fully made out in the indictment, and the additional charge of failure to file with the recorder of Polk county is in this respect surplusage. The charge of illegal practice of medicine, so far as these defendants are concerned, is fully made out by the allegation that they practiced medicine in Polk county without having any certificate entitling them to so practice.

Now it appears from the record that the defendants had no certificates whatever from the board of medical examiners of the state. They were, therefore, not entitled to practice medicine in any county of the state, and the county of residence was necessarily immaterial. The jurors could not have possibly predicated their verdicts on the failure of the defendants to record certificates in the proper county. They cannot, therefore, complain that, with reference to the recording of certificates which confessedly they never had, the jurors were improperly instructed.

[3] 2. There is also a complaint for appellants that the jurors were improperly in-

structed as to what constitutes a practice of medicine without a certificate as provided by the statute. In each case the court properly defined the practice of medicine, as described by Code, § 2579, and in several instructions told the jury, in effect, that, under the statute, it is unlawful without a certificate to "profess to be a physician, surgeon or obstetrician and assume the duties" of such profession or to make "a practice of prescribing or furnishing medicine for the sick," or to "publicly profess to cure or heal." But the court further instructed the jury that defendants might be convicted on a finding that without certificates they "did publicly profess to cure or heal" or did devote themselves to and employ "means of curing and healing and of alleviating pain," and, further, that defendants might be found guilty if it appeared that they "performed any services in a professional capacity in attempting to cure or heal or alleviate pain in those who applied" to them for treatment. The complaint of appellant in this respect is that persons, not physicians, may "devote themselves to curing, healing and alleviating pain" without any violation of the statute. And it is suggested that a nurse or a mother of an infant is not guilty of the illegal practice of medicine without a license, although devoted "to curing, healing and alleviating pain." It must be confessed that in using the language complained of the court did not accurately state the provisions of the statute, for we do not find in the statute any specific reference to the act of devoting one's self to and employing means of "curing and healing and of alleviating pain." It may well be suggested, however, that neither a professional nurse nor the mother of an infant devotes himself or herself to the employment of means of curing and healing and of alleviating pain.

However this may be, the record in this case shows without any possible ground of controversy that the defendants professed to be chiropractics, maintaining an office in Polk county, holding themselves out to treat and treating patients for disease, with the purpose of curing and healing, holding diplomas from a chiropractic school; and that they did so without having procured certificates from the state board of medical examiners. In view of these undisputed facts, it is plain that even in devoting themselves to and employing means of curing and healing and of alleviating pain without licenses they violated the statute. *State v. Heath*, 125 Iowa, 585, 101 N. W. 429; *State v. Corwin*, 151 Iowa, 420, 131 N. W. 659. While, therefore, the language used by the court, as above indicated, was in some respects inapt, it could not possibly have misled the jury into the error of finding guilt without proof beyond a reasonable doubt that defendants either professed to be physicians or made a practice of prescribing and furnishing medi-

cure for the sick or publicly pretended to cure or heal.

[4] The contention in argument for appellants that one who advertises and holds himself out as a chiropractic is not within the provision of the statute unless he actually undertakes in specific cases to cure and heal is not well founded. It is true that in *State v. Corwin*, supra, it appeared that defendant in that case not only advertised himself to practice according to that system, but also undertook in specific cases to heal. The statute applies equally to those who profess to be physicians and assume the duties of such profession and publicly profess to cure or heal and to those who make a practice of prescribing for the sick. That defendants did make a practice of prescribing their method of treatment for sick persons appears from their own testimony; but whether they did so or not, if they held themselves out as publicly professing to cure or heal, they were required to have certificates.

Finding no error in the record which could possibly prejudice the defendants in the presentation of their cases to the jury, we reach the conclusion that the conviction in each case must be, and is, affirmed.

STEPHENS v. BOYD.

(Supreme Court of Iowa. Nov. 14, 1912.)

1. EASEMENTS (§ 16*)—ADJOINING BUILDINGS—STAIRWAYS.

While G. was the owner of two adjoining lots numbered 3 and 4, respectively, he erected a brick building on lot 4, and on the inside of the north wall which was placed approximately on the boundary line between the two lots built a stairway running to the second story. Some years thereafter he erected a brick building on lot 3, and, in order to obtain access to the second story thereof, he so planned it as to use the stairway which had been erected in the building on lot 4, cutting a hole in the partition wall near the upper landing of the stairway, and erecting steps leading from this landing on to the second floor of the building on lot 3. While G. owned the property and after his conveyance thereof the stairway was continuously used as a means of ingress and egress to the second stories of both buildings. Held that, when G. severed the ownership of the two lots and conveyed the same by will or deed to different individuals, the grantee of lot 3 acquired an easement in the right to the use of the stairway on lot 4 appurtenant to lot 3 which passed with the grant of lot 3.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 43; Dec. Dig. § 16.*]

2. EASEMENTS (§ 16*)—ADJOINING BUILDINGS—COMMON STAIRWAY—WAY OF NECESSITY.

The owner of lot 3, in order to maintain his right to such easement, was not bound to show that it was a way of necessity.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 43; Dec. Dig. § 16.*]

3. ESTOPPEL (§ 88*)—RIGHT TO CLAIM EASEMENT.

Where defendant did nothing on the strength of plaintiff's admissions that he made no claim to a stairway in defendant's building,

and within a few hours after making the admission plaintiff brought suit to restrain defendant from removing the stairway on the theory that plaintiff was entitled to the common use thereof for the benefit of plaintiff's adjoining building, plaintiff was not estopped by his admissions to claim the right to such easement, nor were they conclusive against his right on the merits.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 235-241; Dec. Dig. § 88.*]

4. JUDGMENT (§ 707*)—CONCLUSIVENESS—PARTIES.

Where plaintiff, an adjoining landowner and claiming an easement in a stairway on the land in controversy, was not a party to an application by an executor to sell such land for the payment of the owner's debts after his death, and there was no showing that any question was involved in that proceeding, a decree ordering the sale of the property was not res judicata of plaintiff's right to such alleged easement.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. § 707.*]

5. ESTOPPEL (§ 35*)—TITLE—RELATION.

Where testator's daughter to whom a certain lot had been conveyed and devised, the title not to vest until testator's death, before that time conveyed the lot to plaintiff who immediately had his deed recorded, such deed passed all the daughter's interest in the lot and title immediately passed to plaintiff on the vesting of title in the daughter by testator's death.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 84; Dec. Dig. § 35.*]

6. EXECUTORS AND ADMINISTRATORS (§ 888*)—SALES TO PAY DEBTS—TITLE.

A purchaser at an executor's or administrator's sale to pay debts is not entitled to protection as a purchaser in good faith, and takes nothing more than the title held by the deceased.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1410-1416; Dec. Dig. § 388.*]

Appeal from District Court, Jackson County; L. J. Horan, Judge.

Suit in equity to enjoin defendant from tearing out a stairway which is used in common for adjoining buildings. The trial court dismissed the petition, and plaintiff appeals. Reversed and remanded.

W. C. Gregory, of Maquoketa, for appellant. Keck & Keck and F. D. Kelsey, all of Maquoketa, for appellee.

DEEMER, J. Plaintiff and defendant are the owners of adjoining buildings situated on lots 3 and 4, in block 19, in the city of Maquoketa, Iowa. These are inside lots fronting on the main street in said city, and there is no alley to the rear of plaintiff's lot 3. The two lots were originally owned and improved by one John E. Goodenow, now deceased, and plaintiff obtained title to his lot through one Mrs. H. C. Tinker. Mrs. Tinker obtained her title from her father, John E. Goodenow, in the manner hereinafter stated. Defendant obtained her title to lot 4 through one B. D. Ely; the latter obtaining his title in virtue of a sale of the property by the executor of the estate of John E. Goodenow, deceased, for

the purpose of paying claims against his estate. In the year 1857 Goodenow erected a brick building upon lot 4, and on the inside of the north wall of the building, which was placed approximately upon the boundary line between lots 3 and 4, he built a stairway something like two feet and ten inches in width, running to the upper story of the building. This stairway was constantly in use from that time down until the commencement of this suit. In the year 1873 Goodenow erected a brick building on lot 3, and, in order to obtain access to the second story thereof, he so planned it as to use the stairway which had been erected in the building on lot 4, cutting a hole in the partition wall near the upper landing of the stairway, and erecting some steps leading from this landing on to the second floor of the building on lot 3. During the time that Goodenow owned the two lots, this stairway was constantly and continuously used as a means of ingress and egress to the second stories of the two buildings. A temporary stairway at the rear of the buildings was constructed and used for a while, but this was torn down because it was thought to be unsafe. So long as these buildings were owned by Goodenow, no question arose, of course, as to the ownership of this stairway, or as to whether or not it was an appurtenance to lot 3. But, when he parted with his title to the separate lots and the ownership became several, the question of ownership and the nature of that ownership became vital. As already stated, plaintiff became the owner of the lot by deed from Mrs. H. C. Tinker. This deed was one of bargain and sale, without covenants of warranty, and was executed on November 12, 1909. It described the property as lot 3 in block 19, but in the habendum clause the appurtenances were covered by the stereotyped clause usually found in instruments of that character. Plaintiff immediately went into possession under this deed, and continued to use the stairway in question by himself or tenants without objection or protest down to near the time of the commencement of this suit. Mrs. Tinker obtained her title either by the will of her father, John E. Goodenow, or through a deed from him bearing date November 15, 1901. This latter deed was not actually delivered to the grantee until some time after the death of Goodenow, which occurred on September 3, 1902. This deed which was one with full covenants of warranty was deposited, by the maker with his will, with some attorneys in the city of Maquoketa, to be held until the death of Goodenow, and then delivered to the grantee therein named. As a matter of fact the deed was not actually delivered until some time in the year 1910, when it was filed for record, and is now one of the muniments of title. Goodenow's will makes the following reference to this deed:

"2. I give and bequeath to my beloved daughter, Mrs. H. C. Tinker, living in Chicago, Ill., the following premises situated in Jackson Co., Iowa, to-wit: Lot No. 3, Blk. 19, in the city of Maquoketa, Iowa; according to Perrin's survey, of 1873. * * *

"8. I have made and executed jointly with my wife a deed to the property given to my last named children, signed by myself and my wife, which deeds are to be left with my will and upon our death as aforesaid, my executor, D. H. Anderson, named shall hand to each of the persons therein named, a deed of the portion of property I intended for them.

"Said deed I executed and duly acknowledged on the 15th day of November, 1901."

After the death of Goodenow, his executor made application to the probate court for authority to sell lot 4 for the purpose of paying claims against the estate, and Mrs. Tinker was made a party to that application, and was properly served with notice thereof. This application was made some time in the year 1904, and, after a hearing was granted and pursuant thereto, the property was sold to B. D. Ely, and a deed of date of March 21st was executed and delivered to him. This deed described lot 4 by metes and bounds, and fixes the north boundary as the center of the brick wall between the two buildings. Mrs. Tinker made no appearance to the application, and the order of sale was made upon an application to sell lot 4 for the payment of debts. So far, there is no dispute over the facts, and, upon the record so made, plaintiff has at least a prima facie case. There can be no doubt of his ownership of lot 3, and whether his title came by will or deed is largely immaterial, except as it bears upon the question of former adjudication of the matters in controversy in the proceedings to sell lot 4 to pay debts.

[1] When Goodenow severed the ownership of the two lots, and conveyed the same either by will or deed to different individuals, the grantee of lot 3 took his property with an easement in lot 4 which was an appurtenance to lot 3, and lot 4 became burdened with an easement in favor of the owner of lot 3. This is hornbook law, supported by the following, among other, cases: *Marshall Ice Co. v. La Plant*, 136 Iowa, 621, 111 N. W. 1016, 12 L. R. A. (N. S.) 1073, *Carrigg v. Bank*, 136 Iowa, 261, 111 N. W. 329; *Teachout v. Duffus*, 141 Iowa, 466, 119 N. W. 983; *Keokuk Co. v. Weisman*, 146 Iowa, 679, 126 N. W. 60. And this easement passed with the grant of lot 3. *Keokuk Co. v. Weisman*, 146 Iowa, 679, 126 N. W. 60. See, also, *Baker v. Rice*, 56 Ohio St. 463, 47 N. E. 653; *Boland v. St. John's School*, 163 Mass. 229, 39 N. E. 1035; *Portman v. Topliff*, 138 Iowa, 19, 115 N. W. 508.

Appellee relies, however, upon three propositions in support of the decree of the trial court: First. She contends that the convey-

ance of lot 3 did not operate to transfer to the grantee an easement in lot 4, for the reason that the stairway was not essential to the use of the premises conveyed. Second. She insists and offered evidence to prove that plaintiff never made any claim to an easement in lot 4, but, on the contrary, distinctly asserted that he made no claim there-to, and that, by reason of these facts, he is estopped from claiming that any such thing exists. Third. She claims that the matter of an easement in lot 4 was adjudicated adversely to plaintiff in the proceedings brought by the administrator to sell the same to pay the debts of the deceased.

As to the first proposition, the record shows that the stairway was essential to the convenient use and enjoyment of lot 3, and we think it passed by the conveyance to Mrs. Tinker, and through her to the plaintiff.

[2] However, it was not necessary, we think, that plaintiff show a way of necessity. His grantor had so constructed and used the two buildings as to create an easement in favor of lot 3 as soon as he destroyed unity of title by the conveyance to his daughter. Of course, if there was another way whereby to reach the second story of the building on lot 3, that fact might, and should, be taken into consideration in determining whether or not the stairway was intended as a common entrance to the two buildings, or was simply a temporary expedient, subject to change at any time. But here there was no other available entrance to the second story from any street or alley, and it is clear to our minds that the stairway was erected to furnish that sort of entrance.

[3] 2. In support of the second proposition, defendant relies upon some declarations or admissions claimed to have been made by the plaintiff to the effect that he made no claim to the stairway. We are satisfied from the record that plaintiff, who was not versed in the law, did not think he had anything more than a permissive right to use the stairway until he consulted with a lawyer just before the bringing of this suit as to his rights in the premises. He took this advice because of a threat then made by defendant to tear out the stairway, and found that he was entitled to use the same. On the same day that he brought the suit he had a conversation with the defendant, or with her husband, or both, in which he admitted that he had no conveyance to lot 4, and doubtless in an effort to induce defendant not to tear out the stairway sought to excuse his conduct by placing the responsibility for his action upon his tenant, who he said was insisting upon the preservation of the way. But assuming for the purposes of the case that he admitted to defendant and her husband that he had no right to the stairway, as they claim he did,

it yet appears that on the same day and within a few hours after the admission was made and before defendant did anything on the strength of the admission plaintiff commenced this suit to enjoin the tearing out of the stairs. Under such circumstances, there is no estoppel, for defendant did nothing on the strength of plaintiff's admissions, and has in no manner changed her position since the admissions were made. *Byer v. Healy*, 84 Iowa, 1, 50 N. W. 70; *Guest v. Opera House*, 74 Iowa, 457, 38 N. W. 158; *Vogt v. Grinnell*, 123 Iowa, 332, 98 N. W. 782.

Plaintiff's admissions should doubtless be considered upon the main question as to whether or not there was an easement in lot 4, but they are not conclusive upon him. In considering them for the only purpose for which they may legitimately be used, we must also take into account the circumstances under which they were made, the knowledge that plaintiff had of his legal rights in the premises, and all the other facts in the case. The law upon the subject of easements in stairways used in common is not generally understood by laymen, and the profession is not agreed upon it. Indeed, in this very case counsel, after seeking aid from the books, are not agreed, and it is not surprising to find that plaintiff did not know his full rights in the premises, and may have assumed that he did not own any rights in lot 4 because of his unfamiliarity with the law of easements and appurtenances to real estate. If there were any doubt as to what would pass by the conveyance, and plaintiff, after being advised as to his rights, had disclaimed any right of easement, he should be held to his disclaimer. But that is not the record here, and he clearly is not estopped.

[4] 3. Her third and final proposition that all matters were adjudicated in the proceedings to sell the real estate of the deceased to pay debts is without merit. Plaintiff was not a party to the proceedings to sell lot 4. He was in possession of lot 3, and his deed thereto was executed November 15, 1901.

[5] This was before the death of Goodenow it is true, but by that deed he took whatever title his grantor Mrs. Tinker had, and, whatever her rights in the premises, these passed to plaintiff as soon as she took title to the lot. Testator died in September of the year 1902, and upon his death, if not before, title to lot 3 passed to his daughter, Mrs. Tinker. *Lewis v. Curnutt*, 130 Iowa, 423, 106 N. W. 914. The will itself was of record, and, although not probated for some time after testator's death, title, even if it passed through the will, related back to the time of testator's death. As Mrs. Tinker had already conveyed whatever interest she had to plaintiff, he, plaintiff, immediately became invested with Mrs. Tinker's title, and this related back to the time of testator's

death. Plaintiff's deed was recorded, as we understand it, shortly after it was made, but, if not, title passed as between testator, his heirs, and representatives upon testator's death. Plaintiff was not made a party to the proceedings to sell lot 4 for the payment of debts, and he had no notice thereof. Notice to his grantor who had parted with all her interest in lot 3 or the easement in lot 4 was not binding upon him, and he has not until this case was brought had his day in court. This, it seems to us, is a sufficient answer to the defendant's plea of former adjudication. Aside from this, however, it appears that the application made by the executor was simply to sell lot 4 for the payment of debts, and there is no showing that any question of easement was involved in that proceeding. It is doubtful if that question could have been considered or put in issue in the proceedings to sell the real estate, and certainly plaintiff's rights could not be foreclosed in an action to which he was not a party.

[8] A purchaser at an executor's or administrator's sale to pay debts takes nothing more than the title held by the deceased. He is not entitled to protection as a good faith purchaser, although there may be cases where equity will give him some relief, and, as a rule, he cannot rely upon a warranty either express or implied. *Summer v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; and cases cited in 18 Cyc. pp. 826 and 827. Even were this not so, he is bound to take notice of all of those things which would charge an ordinary purchaser. Here plaintiff was in the possession and use of the property, and of the stairway, and this in itself would be notice to any prospective purchaser of his rights. There was no adjudication binding upon plaintiff. We are satisfied from the whole record that plaintiff is entitled to the relief asked, and that the trial court was in error denying it.

The decree will, therefore, be reversed, and the cause remanded for one in harmony with this opinion.

Reversed and remanded.

FITCHPATRICK v. FOWLER, County Treasurer.

(Supreme Court of Iowa. Nov. 16, 1912.)

1. DRAINS (§ 86*)—ASSESSMENTS.

Under Code Supp. 1907, § 1089a26, providing that owners who waive in writing objections to the validity of a drainage assessment for benefits may have the same made payable in 10 annual installments, etc., such owners are not liable for the penalty provided later in said section, that such tax shall become delinquent on the ensuing 1st of March and bear the same interest and penalties as ordinary delinquent taxes; such part of the section being only intended as an inducement to obtain

settlements and waivers, and being applicable only to nonwaiving owners.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 90; Dec. Dig. § 86.*]

2. STATUTES (§ 245*)—CONSTRUCTION—PUBLIC IMPROVEMENTS.

The burden of special assessments upon private property should not be increased by implications not clearly necessary, and a statute authorizing a public improvement to be paid for by special assessments on the property benefited, however beneficial in its general application, should be given the most favorable construction of which it is reasonably capable.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 326; Dec. Dig. § 245.*]

Appeal from District Court, Story County; C. G. Lee, Judge.

The opinion states the case. Reversed.

J. A. Fitchpatrick, of Nevada, Iowa, pro se. H. E. Hadley, Co Atty., of Nevada, Iowa, for appellee.

WEAVER, J. Drainage district No. 1. in Story county was duly established, and for the cost of the improvement thus authorized assessment was laid upon the lands included therein. Among the lands upon which the burden was laid were three 40-acre tracts owned by one W. E. Brotharas, which were assessed an aggregate tax of \$3,289, and another 40 acres owned by J. F. Ogilvie assessed \$1,019. Availing themselves of the privilege provided by the statute (Code Supp. § 1989a26), these owners filed a waiver of all objections to the validity of the tax, and thereby became entitled to have the same made payable in 10 annual installments, with interest at 6 per cent. per annum. The body of the written waiver and agreement as executed by the landowners is in form as follows: "Nevada, Iowa, Oct. 5, 1907. In consideration of having the right to pay the assessment mentioned in the within certificate in installments as provided by law, I do hereby agree that I will not make any objection of illegality or irregularity as to said assessment, and that I will pay the same with interest thereon at the rate of 6 per cent. per annum from date of said assessment." Thereafter said owners neglected and failed to pay certain installments falling due, and abandoned the said lands, whereupon the plaintiff, who held mortgage liens thereon, foreclosed the same, and acquired the title. Plaintiff then applied to the county treasurer, and offered to pay all the delinquent installments, tendering and offering to the treasurer the principal sum of each of said installments, with interest thereon at 6 per cent. from the date of the certificates. The tender so made amounted to the aggregate sum of \$2,154 principal and \$993.49 interest. The treasurer refused the tender, claiming that, under the statute, a penalty of 1 per cent. per month had accrued upon all the installments as well as upon the unpaid interest from the date when they be-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

came delinquent. Plaintiff, declining to comply with said demand, brought this action, alleging the facts above set forth, asking a peremptory order or writ of mandamus requiring the treasurer to accept payment of said assessments on the basis of said tender, and, upon receiving said sum or sums, to make and deliver to the plaintiff suitable receipts therefor. To this petition the defendant demurred generally. The demurrer was sustained, and, plaintiff electing to stand upon the petition, judgment was entered against him for costs. From such ruling and judgment he appeals.

As the rights of the parties and the determination of the appeal depend entirely upon the construction to be given the section of the statute above cited, we here set it out in full: "Section 1989a28. How paid—improvement certificates. The special assessment for benefits made by the commissioners appointed for that purpose, as corrected and approved by the board of supervisors, shall be levied at one time by the board against the property so benefited, and when levied and certified shall be payable at the office of the county treasurer. If the owner of any parcel of land, lot or premises against which any such levy shall have been made and certified, which is embraced in any certificate provided for in this section, shall within thirty days from the date of such assessment promise and agree in writing indorsed upon such certificate, or in a separate agreement, that in consideration of having the right to pay his assessment in installments, he will not make any objection of illegality or irregularity as to the assessment of benefits, or levy of such tax upon and against his property, but will pay said assessment with interest thereon at such rate not exceeding six per centum per annum as shall be prescribed by resolution of the board, such tax so levied against the land, lot or premises of such owner shall be payable in ten equal installments, the first of which with interest on the whole assessment shall mature and be payable on the date of such assessment, and the others with interest on the whole amount unpaid annually thereafter at the same time and in the same manner as the March semiannual payment of ordinary taxes; but where no such terms and agreement in writing shall be made by the owner of any land, lot or premises then the whole of said special assessment, so levied upon and against the property of such owner, shall mature at one time and be due and payable with interest from the date of such assessment, and shall be collected at the next succeeding March semiannual payment of ordinary taxes. *All of such tax with interest shall become delinquent on the first day of March next after its maturity and shall bear the same interest with the same penalties as ordinary taxes.* And the board may provide by resolution for the issuance

of improvement certificates, payable to bearer, or to the contractors who have constructed the said improvement or completed part thereof within the meaning of this act in payment or part payment therefor, each of which certificates shall state the amount of one or more assessments or part thereof made against the property designating it and the owners thereof liable to assessments for the cost of the same, and said certificates may be negotiated. Such certificates shall transfer to the bearer, contractor or assign all right and interest in and to the tax in every such assessment, or part thereof, described therein and shall authorize such bearer, contractor or assignee to collect and receive every assessment embraced in said certificate, by or through any of the methods provided by law for their collection, as the same mature. Such certificates shall bear interest not to exceed six per cent. per annum, payable annually, and shall be paid by the taxpayer to the county treasurer who shall receipt for the same and cause the amount paid to be applied to the payment of the certificate issued therefor. Provided, that any person shall have the right to pay the full amount of the tax so levied against his property, together with interest thereon to date of payment at any time he desires to do so even before the maturity of any certificate issued therefor. No certificate shall be issued or negotiated for the use of the drainage district for less than par value with accrued interest up to the delivery or transfer thereof. Should the costs of such work exceed the amount of benefits assessed and certificates issued, a new apportionment and levy of tax may be made and other certificates issued in like manner."

Abbreviating as much as is practicable without obscuring the meaning of the text, so far as it is immediately involved in this litigation, the provision is that, if the property owner shall "promise and agree in writing" that he will waive all objections pertaining to the regularity and legal validity of the assessment upon his land "and will pay said assessment with interest thereon at a rate not exceeding six per cent. per annum," the tax shall be made payable in 10 annual installments, "but where no such terms and agreement in writing shall be made by the owner of any land" then the whole of said special assessment shall mature at one time and be due and payable, with interest from the date of such assessment, and be collected at the "next succeeding March semiannual payment of ordinary taxes." Thus far, there is no apparent difficulty of construction. The trouble, if any there be, comes in the application of the clause which immediately succeeds the one last quoted, and reads as follows: "All of such tax with interest shall become delinquent on the first day of March after its maturity and shall bear the same interest

with the same penalties as ordinary taxes." Stated briefly, the simple question is whether the words "such tax" are to be construed as including or applying to the entire assessment of the district lands without regard to the fact whether the taxpayer has or has not entered into the agreement aforesaid or is to be treated as applying solely to those cases in which no agreement is made and the entire tax becomes immediately due and payable.

The appellee contends for the construction first mentioned, and such is the view adopted by the trial court. The statute is not a model of clearness, but its general scope and purpose are not difficult of apprehension. One of its evident purposes is to foreclose, if possible, all question of the validity of the drainage proceedings, and thereby avoid litigation, and give assured value to the certificates or bonds issued in payment for the improvement. To insure this an offer is made of what we may call a premium for voluntary waivers to all legal objections to the assessment. The scheme by which this is to be accomplished contemplates in each instance that the property owner shall enter into a written contract, whereby, in consideration of time for payment of the tax, all of which would otherwise become due and payable at once, he waives all objection to the legal sufficiency of the assessment, and promises to pay the same in 10 equal annual installments, with interest at an agreed rate not exceeding six per cent. In other words, what was before a mere special assessment upon the property is converted into a binding promissory obligation to pay with a specified rate of interest; the payment being secured, of course, by the lien prescribed by the statute. It would further seem that, in order to stimulate these settlements, the statute proceeds to declare that, when the property owner fails to enter into such an agreement, "then the whole of said special assessment so levied upon the property of such owner shall mature at one time and be due and payable with interest from the date of such assessment and shall be collected at the next succeeding March semiannual payment of ordinary taxes. All of such tax shall become due and delinquent on the first day of March next after its maturity and shall bear the same interest with the same penalties as ordinary taxes."

[1] In our judgment "such tax" very clearly refers to the tax or assessment which has just been mentioned in the last preceding sentence or clause, and that is the assessment or tax "where no such terms and agreement in writing shall be made." This conclusion is emphasized and strengthened by the further provision in the same section that "such certificates shall bear interest not to exceed six per cent. per annum payable annually and shall be paid by the taxpayer to the county treasurer who shall

receipt for the same and shall cause the amount paid to be applied to the payment of the certificate issued therefor." In other words, we construe the language in question not as providing a penalty which shall apply alike to all cases without regard to the written waiver and agreement, but rather as a provision in terrore, under the influence of which the largest possible number of settlements and waivers may be obtained—the penalty to be exacted from those only who do not accept the offer of time. This reading requires no forced or strained construction of the statute. For the purposes of collecting such special assessments, they are by this enactment separated into two classes. One class embraces all assessments where the owners have entered into the prescribed contract, and the other class includes all where no such contract is made. Speaking of the first class, it is provided that such tax so levied shall be payable in 10 annual installments, with interest not to exceed 6 per cent. Here "such tax" is very clearly limited in its application to assessments of the first class mentioned. It is there provided, as we have already noted, that, when no contract is made, the whole of "said special assessment" upon the property of such owner shall be due and payable, with interest, and be collected with the next semiannual collection of ordinary taxes. "All of such tax with interest shall become delinquent on the first day of March next after its maturity and shall bear the same interest and penalties as ordinary taxes." Here "such tax" just as clearly refers to assessments of the second class as the like words earlier in the section refer to assessments of the first class. Such is the natural as well as the apparent grammatical connection between the words "such tax" and their antecedent.

[2] Even if the words here used should be thought involved in any ambiguity or doubt, it would be the duty of the court to solve that doubt in favor of the property owner if it can be done without violence to the other provisions of the chapter. The laws by which the cost of public improvements is met by special assessments upon private property supposed to be benefited are at best drastic and burdensome in operation, and the courts should be slow to increase those burdens by implications which are not clearly necessary. Reading between the lines of this record, we can see an illustration of the harshness of results which are not infrequently suffered by individuals who happen to get in the way of the march of public improvement. Here were evidently two landowners whose premises were already carrying a heavy load of mortgage indebtedness, and, when to this was added a tax of more than \$25 per acre, they were driven to throw up their hands in despair, and abandon the property to the tax gatherer and mortgagee. A statute which makes

such incidental results possible, however beneficial it may be in its general application, should be given the most favorable construction of which it is reasonably capable to keep its consequential hardships within the narrowest practical limits. *Sargent v. Tuttle*, 67 Conn. 167, 34 Atl. 1028, 32 L. R. A. 822. See, also, *Brick Co. v. Smith*, 103 Iowa, 308, 79 N. W. 77. The construction contended for by appellee is not necessary to give effect to the plainly indicated legislative intent, and cannot be upheld.

It follows that the judgment below must be reversed, and the cause remanded for further proceedings in harmony with the view here expressed.

Reversed.

BARCLAY et al. v. SCHOOL TP. OF WAPSINONOC et al.

(Supreme Court of Iowa. Nov. 15, 1912.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 57*)—NOTICE—BOARD MEETINGS.

Under Code 1897, § 2757, providing that special meetings of the board of directors of a school corporation may be called upon notice specifying the time and place, delivered to each member in person, notice by mail which does not reach the member to be notified is not sufficient, nor does the fact that the secretary made reasonable effort make the notice sufficient, even though the member to be notified is out of the state, and a meeting of the board without such actual notice to every member was invalid, and any action taken nugatory.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 140; Dec. Dig. § 57.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 111*)—SALE OF SCHOOLHOUSES—VOTE OF ELECTORS—INJUNCTION.

Authority to direct, sell, or otherwise dispose of a schoolhouse or other property belonging to a school corporation being expressly conferred upon the voters at an annual or special meeting to which such proposition may be submitted, a court of equity can only interfere with the action of the electors when such a matter, properly submitted to them, presents some clear ground of equitable relief, and the mere fact that a school building has been built but never used for any purpose does not give the taxpayer any vested rights therein so as to prevent the sale thereof by the electors.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 265-268; Dec. Dig. § 111.*]

Appeal from District Court, Muscatine County; A. P. Barker, Judge.

This suit in equity was instituted by certain electors and taxpayers of the defendant school township to set aside the action of the electors of said township in voting and directing the sale of a school building, and to restrain the members of the board of directors of the township who are made defendants with it from selling or otherwise disposing of said school building. There was a decree for the plaintiffs, and defendants appeal. Affirmed.

E. F. Richman and E. M. Warner, both of Muscatine, for appellants. E. C. Nichols, of West Liberty, for appellees.

McCLAIN, C. J. In March, 1906, at the regular annual meeting of the electors of the defendant school township, a tax of \$8,000 was levied on the taxable property in the township for the purpose of erecting a school building as near the geographical center of the township as practicable. In January of the following year, an action was instituted by certain qualified electors of the township to compel the board of directors to submit to the voters of the township a proposition to rescind the former vote. This action was determined adversely to the plaintiffs in that action. See *Kirchner v. Board of Directors*, 141 Iowa, 43, 118 N. W. 51. The new building was constructed and ready for occupancy in the spring of 1908, but it has never been occupied for school purposes; the separate schools in the seven subdistricts of the township being maintained in the buildings formerly used for that purpose. In October, 1909, at a special meeting of the board of directors, a special meeting of the electors of the township was called to vote upon the proposition to sell the central school building, and devote the proceeds to the repair of the old buildings in the various subdistricts, and at this special meeting of the electors the sale of the new building was ordered. The validity of the action of the board of directors in calling this special meeting of the electors is now assailed on two grounds: First, that at this special meeting of the board two directors were absent who had not been notified of that meeting as provided by law; and, second, that by the payment of the tax assessed for the purpose of building the central schoolhouse as ordered at the annual meeting of the electors in 1908 the plaintiffs and other electors and taxpayers acquired a vested right to have the building equipped and used as a school building and that the electors had no authority at a subsequent meeting to order its sale. Incidentally it appears that in reliance upon the vote of the electors at the special meeting the new building has been sold for \$510, on condition that the injunction sought in the present action be denied.

1. It appears that on September 29, 1909, the secretary of the board of directors attempted to call a special meeting of the board to be held on October 2d, with reference to calling a meeting of the electors to vote upon the proposition to sell the school building, and that he notified all of the directors but two of this meeting, and that the directors thus notified were present at such meeting, while the two directors not formally notified were not present; and it is conceded that if, as to either of these two

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

directors, there was an entire want of notice, then the action of the special meeting of the directors was invalid, and the action of the special meeting of the electors thus ordered was also invalid, and the relief asked in this action was properly granted. There is some doubt under the record whether one Herr, the president of the board, who was absent from the special meeting, was sufficiently notified or waived notice; but the lower court held there was no notice whatever to the other director who was absent (one Anderson), and, if this holding is sustained by the record, then we have no occasion to consider the objection made on account of the absence from the meeting of Herr.

It is provided in Code, § 2757, that special meetings of the board of directors of a school corporation may be called by the secretary at the written request of a majority of the board "upon notice, specifying the time and place delivered to each member in person, and attendance shall be a waiver of notice." Now it appears that on the 29th of September, when the secretary of the board gave notice to other directors of the special meeting to be held on the 2d of October, he did not give notice of any kind to Anderson who was at his home on that day, the secretary being misled by erroneous information derived from another person that Anderson was not at home and could not be reached personally; and that the secretary thereupon deposited in the mail, properly addressed to said Anderson, a letter notifying him of such proposed meeting, which letter was never, in fact, received by Anderson, who left home on the morning of the following day, and was absent from the state until after the proposed meeting was held.

[1] The statute evidently contemplates some form of specific personal notice on each member. Whether this notice must be in writing, or whether it may be waived otherwise than by attending the meeting, we need not now determine, for no actual notice of any kind was given to Anderson, and he had no information as to the proposed meeting. The statute does not authorize a mailing of notice, and, in the absence of any such authority, we are unwilling to hold that an attempt to give notice by mail, which does not reach the member to be notified, is sufficient.

It is contended that the secretary made reasonable effort under the circumstances, as they appeared to him, to give notice to Anderson, and that, had further effort been made after the 29th of September to serve him with personal notice, such effort would have been unavailing to secure his attendance, for the reason that he was absent from the state. It is sufficient to say that the statute does not provide that reasonable effort to give notice shall be sufficient. The personal delivery of some form of a

notice is required. When it appeared to the secretary that such notice on Anderson was impracticable with reference to a meeting on the third day following that on which notice to the other directors had been given, he still had the power to call a meeting of the directors at a later date of which notice might be given. It does not appear that Anderson had permanently left the state; on the contrary, he, in fact, returned to his home within a few days after the special meeting of the board was held. It was not therefore impracticable for the secretary to have called the special meeting of the board at such time as that notice thereof on Anderson could have been given. On account of the failure to give proper notice to Anderson, the special meeting of the board was not lawfully called, and its action in submitting to the electors the proposition to sell the school building was therefore invalid.

2. Counsel on each side of the case argue at some length the question whether the electors would have had authority at a special meeting properly called to practically rescind the previous action of the electors authorizing the erection of the school building by ordering its sale and we are specially asked to affirm the ruling of the lower court, holding that, after the erection of the building, the taxpayers acquired a vested right to have such building used for school purposes which cannot be defeated by subsequent action of the electors. If the taxpayers have such a vested right, it would no doubt be desirable that we now so declare in order that further controversy as to the sale of the building be avoided. The taxpayers of the school township would certainly be subjected to a hardship if a school building, costing \$8,000, is sold before it has ever been used for school purposes, and for a comparatively insignificant amount, in order to devote the proceeds to the improvement of other school buildings which were already in existence before the action of the electors was taken with a view to the substitution of a new central building for the existing buildings in the subdistricts. But we are far from satisfied that a court of equity has authority to interfere with the action of the electors at a regular annual meeting or a special meeting called to which the proposition may be submitted for the sale of such school building.

[2] The authority to direct the sale or other disposal of any schoolhouse or site or other property belonging to the corporation is expressly conferred upon the voters at an annual meeting or a special meeting to which such proposition may be submitted. See Code, §§ 2749, 2750, as amended. Certainly a court of equity should interfere with the action of the electors on a matter properly submitted to them for consideration only when some clear ground of equitable

relief is presented. It will not do to say that, when a school building has been erected in pursuance of the action of the voters, it can never be possible under changed conditions for the electors to order the sale of such building and the use of the proceeds for other legitimate purposes. How can a court determine whether there has been such change of condition as to justify the electors in ordering the sale of a building already constructed? Can a court say that it is reasonable for the electors to order the sale of a building after 20 years, or 15 years, or 10 years, and unreasonable to do so after 3 years have expired?

Much reliance is placed upon what is said by this court in *Benjamin v. District Township of Malaka*, 50 Iowa, 648, and *Kirchner v. Board of Directors*, 141 Iowa, 43, 118 N. W. 51, with reference to the vested right of a taxpayer to have the school building, to the erection of which he has contributed, devoted to the purposes for which it was erected. In the first of these cases the point actually decided was that a taxpayer might in a proceeding by mandamus compel the directors to carry into effect the action of the electors in appropriating money for the erection of a school building. It does not appear in that case that the electors subsequently attempted to rescind their action or order the sale or other disposition of the building for which money had been appropriated. What is said in that case with reference to a subsequent rescission by the electors of their action in relation to the erection of a schoolhouse appears to have been pure dictum. In the *Kirchner* Case it was held that a court would not interfere with the discretion of the board of directors in failing or refusing to call a special meeting of the electors on the petition of more than a majority of them to vote upon a proposition to rescind a former vote of a tax to build the schoolhouse to which the present controversy relates. As an additional reason for not granting the relief prayed in that action, this court said that as a legal proposition the rights of the taxpayers after the tax for the erection of the building had been paid were vested, and that such rights could not be disturbed by a vote rescinding the previous action of the electors. This expression of view was also in the nature of a dictum, for, having held that the board had a discretion as to whether it would call another meeting of the electors to vote on the proposition to rescind their previous action, there was no direct occasion to say that if the electors did, in fact, vote to rescind, such vote would be illegal. In *Hibbs v. Board of Directors*, 110 Iowa, 306, 81 N. W. 584, 48 L. R. A. 535, it was held that the electors at a regular meeting might rescind their action taken at a previous regular meeting ordering the collection of a tax for

the construction of a school building which had not been certified or collected, the reason assigned being that the taxpayers had not yet, by the payment of the tax, acquired any vested right. What was said in the case with reference to vested right, with a citation of the *Benjamin* Case, is only an implied recognition of the doctrine, and amounts to no more than a holding that, whatever may be its force in a proper case for its application, it was not pertinent to the facts under consideration. The appellant with reference to this proposition relies upon *School District No. 6 v. Aetna Insurance Co.*, 54 Me. 505, which seems to support the contention that a court cannot interfere with the discretion of the electors to act as authorized by statute in reference to the disposition of a building constructed by tax levied for that purpose. We are not now satisfied that we should follow or adhere to the views expressed in the two cases in this court above cited as to the vested rights of the taxpayers in a school building erected in accordance with the vote of the electors, and hold that, under no circumstances, can the electors at a subsequent meeting order the disposition by sale of a building so erected. We concede the desirability of having this unfortunate controversy as to the maintenance of a central school building definitely settled, but we are not willing to assert for the courts such a power of supervision over the duly expressed will of the electors as is contended for in this case.

For the reasons pointed out in the first division of this opinion, the action of the trial court is affirmed.

FORD et al. v. DOOLITTLE et al.

(Supreme Court of Iowa. Nov. 15, 1912.)

1. HIGHWAYS (§ 155*)—OBSTRUCTIONS—ACTIONS FOR REMOVAL—PARTIES ENTITLED TO MAINTAIN.

The road supervisor of a township may sue to remove an obstruction from a highway, and, where he joins with the township trustees in a suit for the removal of obstructions, the question of the right of the trustees to maintain the action is immaterial.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 482-486; Dec. Dig. § 155.*]

2. ADVERSE POSSESSION (§ 8*)—HIGHWAY—OBSTRUCTIONS.

Though a highway has been inclosed by cross-fences and occupied by abutting owners for more than 10 years, title to the highway is not acquired by adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 14, 27, 43-57; Dec. Dig. § 8.*]

3. HIGHWAYS (§ 79*)—OBSTRUCTIONS—ESTOPPEL.

A highway through a slough was graded in 1884, and again in 1894, and was continuously traveled until 1896. Thereafter travel practically ceased owing to the slough. Fences constructed on each side of the highway in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

1884 were not disturbed until 1909, when an abutting owner moved his fence to the center of the highway, notwithstanding the objections of the township trustees and road superintendent. An abutting owner in 1897 built a fence across one end of the highway, but put in a gate for the convenience of travelers, and such fence was maintained until 1909. A fence with a gate across the other end was erected by the road superintendent as a warning of trouble ahead, owing to the existence of the slough. Later the gate was closed, and a couple of cross-fences constructed near the middle of the road, which remained for 10 years. *Held*, that the public was not estopped from claiming the highway and the road superintendent could maintain a suit for the removal of the obstructions.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 279-287; Dec. Dig. § 79.*]

4. HIGHWAYS (§ 79*)—ABANDONMENT—ACTS CONSTITUTING.

The highway was not abandoned.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 279-287; Dec. Dig. § 79.*]

5. HIGHWAYS (§ 159*)—OBSTRUCTIONS—ACTIONS—PARTIES.

Where a defendant in a suit to remove obstructions from a highway had assisted in erecting the fence constituting the obstruction, and he and a codefendant asserted that the fence would be replaced on the removal thereof by the road superintendent, the defendant and codefendant were properly enjoined from interfering with the highway in a suit by the road superintendent for the removal of the obstructions.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 430, 431, 435; Dec. Dig. § 159.*]

Appeal from District Court, Hamilton County; Chas. E. Albrook, Judge.

Action to require defendants to remove an obstruction from the highway resulted in a decree as prayed. Defendants appeal. Affirmed.

D. C. Chase, of Webster City, and Wm. Whisler, of Williams, for appellants. Wesley Martin, of Webster City, for appellees.

LADD, J. The plaintiffs, Ford, King, and Laughton, are the trustees of Liberty township, in Hamilton county, and Welp, the highway supervisor or road superintendent in and for the said township and in this action, seeks to enjoin the defendants from obstructing an alleged public highway between sections 22 and 23 thereof. It appears that F. D. Doolittle owned the N. W. $\frac{1}{4}$ of section 23 and A. P. Doolittle the S. E. $\frac{1}{4}$ of the same section. Since the beginning of the action the latter departed this life, and his sole heir, Electa F. Doolittle, was substituted in his stead as party defendant. The defendant Schwandt owned the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 15, and the E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ and a part of the N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ of section 22 of the same township. The highway record in the county auditor's office indicated that a road had been established along the line between sections 22 and 23 as early as 1880, and had not been vacated. There was a pond or slough near the center north and south, and the road

was graded through this in 1884, and again 10 years later, and seems to have been traveled until 1896. Fences had been constructed on each side in 1884. In 1897 a fence with a gate in it was erected across the north end of the space set apart for a highway between the sections, and thereafter across the south end, with a gate in it, but later this gate was removed, and two fences constructed near the middle. The strip has been used since for hay or pasturage, though occasionally teams have been driven at least part way through, and then, the fence being torn down, through the adjacent field.

In August, 1909, F. D. Doolittle, with the assistance of R. L. Doolittle and another, set the fence on the east side over to the center of the highway on the section line, and, upon being notified by an officer to discontinue its construction and remove the fence, completed it, and thereafter, on being interviewed by plaintiffs, refused to remove it, though expressing a willingness to bide any order which might be made by the courts and this is the attitude of Schwandt, there being no doubt but that, had the road supervisor removed the fence, these parties would have replaced it. Nothing had been done by the public on the road since 1894, and it was included in a drainage district wherein the benefits to three miles of highway were assessed at \$495.70. The evidence tends to show that the water from the pond or slough has been drained by the improvement and the road may now be worked, and also that F. D. Doolittle circulated a petition along in 1895 or 1896 "praying that the road be opened." In this suit plaintiffs ask that defendants be required to remove the fence obstructing the highway, and enjoined from interposing like future obstructions. Plaintiffs dismissed as to Electa F. Doolittle, and the relief prayed was granted as to the other defendants.

[1] Their first contention is that plaintiffs cannot maintain the action. As to Ben Welp, the road superintendent, this court held otherwise in *Myers v. Priest*, 145 Iowa, 81, 123 N. W. 943. See *Patterson v. Vall*, 43 Iowa, 142. This being so, it is unnecessary to determine whether such an action might also be maintained by the other plaintiffs.

[2] Even though the highway may have been inclosed by the cross-fences and occupied by the abutting owners more than 10 years, title was not acquired thereto by adverse possession. *Rae v. Miller*, 99 Iowa, 650, 68 N. W. 899; *Biglow v. Ritter*, 131 Iowa, 213, 108 N. W. 218; *McElroy v. Hite*, 135 N. W. 20.

[3, 4] But a highway may be so occupied by the abutting owner that the public will be estopped from claiming it. *Davies v. Huebner*, 45 Iowa, 575; *Orr v. O'Brien*, 77 Iowa, 253, 42 N. W. 183, 14 Am. St. Rep. 277;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Smith v. Gorrell, 81 Iowa, 218, 46 N. W. 992; Rector v. Christy, 114 Iowa, 475, 87 N. W. 459. In the first three of these decisions, the portions of the highway in dispute had never been traveled. In Rector v. Christy the road was changed in location and a portion of the former highway, not in the new location and not in the line of travel, was included in the field of the abutting owner for a period of more than 10 years, and the public was held to have abandoned it. In Heller v. Cahill, 138 Iowa, 301, 115 N. W. 1009, and Lucas v. Payne, 141 Iowa, 592, 120 N. W. 59, also relied on by appellant, the public had never used the road. In the case at bar the highway had been opened, and, though there was a slough or pond near the center north and south, it was graded through this in 1884, and again in 1894, was continuously traveled by the public until 1896. Thereafter travel practically ceased, probably owing to the marsh mentioned, but the fences which had been constructed on each side in 1884 were not disturbed until 1909, when the Doolittles moved that on the east side over to the center of the highway or on the section line, notwithstanding its objections interposed by the trustees and road superintendent. If there be any foundation for the contention that the highway has been abandoned, or that the public is estopped from claiming it as such, this must be owing to the erection of the cross-fences in 1897 and subsequent thereto. F. D. Doolittle built the fence across the north end, but put a gate in it for the convenience of those driving through, and this was maintained by him until 1909. The fence across the south end was erected by the road superintendent also with a gate, and evidently as a warning of trouble ahead, owing to the existence of the marsh. Later this gate was closed, and a couple of cross-fences constructed near the middle of the mile road, but this was much less than 10 years previous to bringing the suit. If F. D. Doolittle was claiming the roadway, why did he leave a gate in the cross-fence through which the traveler might conveniently pass? Why were not the side-fences removed and the strip of land inclosed with the fields of the respective owners? It continued to be occupied as a separate and distinct parcel of ground, and in a manner to plainly indicate that, if the public had ceased to use it as a highway temporarily, the owners of the fee were merely enjoying its economic use, and not claiming it as their own. Apparently what defendants did prior to 1909 was not intended to be permanent, but merely to enable them to make better use of the highway as a pasture. The erection of the cross-fences under these circumstances cannot alone be said to be sufficient to warn the public of an adverse claim, especially as the particular road was but a portion of a highway extending sever-

al miles farther to the north and to the south, and therefore there was no sufficient basis for the pleas of abandonment and estoppel.

[5] Counsel argue that the petition should have been dismissed as to Schwandt and R. L. Doolittle. The latter assisted in the erection of the fence in the center of the highway, and both asserted that, had the road superintendent removed the fence, they would have replaced it; the former saying there would have been a contest.

This being so, there was ground for enjoining interference on their part. The decree was right, and is affirmed.

REINIGER v. BOARD OF REVIEW OF CHARLES CITY.

(Supreme Court of Iowa. Nov. 15, 1912.)

1. TAXATION (§ 40*)—ASSESSMENT—EQUALITY.

Acts 32d Gen. Assem. c. 60, which authorizes an appeal by an officer, interested municipality, or by a taxpayer from an assessment, does not affect the general rule which requires all assessments to be as nearly equal as the facts will justify.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 68–89; Dec. Dig. § 40.*]

2. APPEAL AND ERROR (§ 1094*)—ASSESSMENT—REDUCTION—CONCLUSIVENESS OF FINDING.

A finding of the district court on appeal from a tax assessment that it should be reduced will not be disturbed on appeal if supported by evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322–4352; Dec. Dig. § 1094.*]

Appeal from District Court, Floyd County; C. H. Kelley, Judge.

Appeal from a judgment of the district court reducing an assessment upon certain real estate in the city of Charles City owned by plaintiff from \$5,000 to \$4,200. Affirmed.

J. C. Campbell, of Charles City, for appellant. J. H. Lloyd, of Charles City, for appellee.

DEEMER, J. [1, 2] The city assessor valued plaintiff's real estate for assessment at \$3,200, and the board of review upon due notice raised the assessment from \$3,200 to \$5,000. Plaintiff appealed to the district court and upon a hearing there the assessment was reduced to the sum of \$4,200, and the board of review appeals. The property consists of two lots in what is known as block 47 in Kelly & Co.'s addition. These lots are near the business section of the city, and near the site selected for the United States post office. Immediately south of the lots is a lumber yard, and upon the southwest corner of the block is a church. Across the street to the east is a brick store building. The witnesses introduced at the trial

showed the property to be worth from \$7,000 to \$8,000, but their testimony was directed to other adjoining and adjacent property, showing that all of it was much undervalued both by the assessor and the board of review. It is claimed that the judgment rendered by the court placed a fair and equitable valuation upon the property considered with reference to other property in the vicinity, and this, we think, is true. But appellant contends that each assessment should stand upon its own bottom, and that the valuation fixed by the board should have been approved and confirmed by the district court. This is not the rule, unless it be true, as appellant contends, that chapter 60, Acts 32d G. A., makes it so. Under holdings prior to the adoption of that statute all assessments must be equitable and fair, and no piece of property made to bear an unfair or inequitable proportion of the public burdens. *Barz v. Board of Equalization*, 133 Iowa, 563, 111 N. W. 41, and cases cited. Acts 32d G. A. (chapter 60), hitherto referred to, did nothing more than authorize an appeal by any officer or interested municipality or by a taxpayer. It reads as follows: "Any officer of a county, city, town, township or school district interested or a taxpayer thereof may in like manner make complaint before said board of review in respect to the assessment of any property in the township, city or town and an appeal from the action of the board of review in fixing the amount of assessment on any property concerning which such complaint is made, may be taken by any of such aforementioned officers. Such appeal is in addition to the appeal allowed to the person whose property is assessed and shall be taken in the name of the county, city, town, township or school district interested and tried in the same manner, except that the notice of appeal shall also be served upon the owner of the property concerning which the complaint is made and affected thereby or person required to return said property for assessment. Upon trial of any appeal from the action of the board of review fixing the amount of assessment upon any property concerning which complaint is made, the court may increase, decrease or affirm the amount of the assessment appealed from." Surely it was not the intent of the Legislature in adopting this statute to change the general rule that all assessments must be as nearly equal as the facts will justify and equitable among the several property owners.

The trial court found that to make this equality the assessment of plaintiff's property should be reduced to the sum of \$4,200. With this conclusion we are inclined to agree. But, if we were not entirely satisfied, the finding of the court has such support that we should not interfere.

The judgment must be, and it is, affirmed.

DAY v. MERRICK.

(Supreme Court of Iowa. Nov. 14, 1912.)

1. FRAUD (§ 58*)—SALE OF LAND—DEFICIENCY IN ACREAGE.

In an action to recover damages for false representations as to number of acres in a farm purchased by him, *held*, that both defendant and his agent were guilty of deliberate fraud, for which plaintiff was entitled to recover.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

2. PRINCIPAL AND AGENT (§ 171*)—ACTS OF AGENT—FRAUD—RATIFICATION.

Where defendant completed a sale of land made by his agent with knowledge that the agent had fraudulently represented the acreage, receiving the consideration, he thereby ratified the acts of the agent, and bound himself by such representations.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 644-655; Dec. Dig. § 171.*]

Appeal from District Court, Wapello County; D. M. Anderson, Judge.

The facts are stated in the opinion. Reversed and remanded.

Gillies & Daugherty, of Ottumwa, and Hammett & Howard, of Huntsville, Mo., for appellant. Tisdale & Heindel, of Ottumwa, and W. P. Cave, of Moberly, Mo., for appellee.

SHERWIN, J. The plaintiff is, and was at the time of the transactions involved herein, a resident of Randolph county, Mo., and the defendant was then, and is now, a resident of Ottumwa, Iowa. In the fall of 1905, and for some time prior thereto, the defendant was the owner of a farm in Randolph county, Mo. Hick & Yutz, real estate agents, residing at Macon, Mo., had charge of this farm as agents of the defendant to the extent, at least, of renting and collecting the rents, and had at one time during the period prior thereto in the presence of the defendant sought to find a purchaser for the land without objection from the defendant. In the fall of 1905, Hicks & Yutz advertised the farm for sale in a local paper, describing it as containing 335 acres. The plaintiff saw and answered the advertisement, and about the 1st of November, 1905, Mr. Yutz took the plaintiff over a part of the farm and showed it to him, priced the farm at \$10,000, and stated that it contained 335 acres. The farm consisted of a more or less broken tract of land approximately 1½ miles in length and half a mile wide at its greatest breadth, having a winding creek for a boundary on the northeast side for about three quarters of a mile. Along the creek were high bluffs covered with timber, while further west the creek turned and crossed the farm from north to south. It is apparent from the record that it would be utterly impossible for any one to determine the number of acres in the tract merely by looking at it, or by going over it. Nothing came of the nego-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tations at that time. In December, 1905, one Aubrey R. Hammett began negotiations for the purchase of the farm through Hicks & Yutz, and several letters passed between them relative thereto. The negotiations proceeded on the basis of \$26 per acre for the farm, but Hammett was not satisfied to pay for the land on the basis of 335 acres, without first knowing that the farm contained that number of acres, and he employed a surveyor to survey and determine the matter. After the survey had been made, and on January 13, 1906, he wrote the letter following, and mailed one copy thereof to the defendant at Ottumwa, Iowa, and another copy to Oswald Hicks, of the firm of Hicks & Yutz, at Macon, Mo.: "H. S. Merrick & Oswald Hicks, Gentlemen: Mr. Williams, the gentleman I got to survey the Bradshaw farm, has just completed his survey and calculations thereof and makes same more than forty acres short of 335 acres. The shortage is so great as to suggest a possibility of a mistake, yet he may be correct and if so, I can't stand such a shortage. I am perfectly willing to take the land at \$26 per acre and let you name a surveyor and me one and have the two survey the farm and I will pay all the expenses in any way pertaining to same, but feel sure you would not expect me to pay for forty-odd acres I did not get." On January 22, 1906, Mr. Hammett again wrote Mr. Hicks as follows: "Dear Sir: I think Bradshaw is responsible to you for the shortage in the farm and you are the people to ask for a reckoning. You paid for 335 acres, it was represented to you as being 335 acres, you relied upon the representations to your damage and are the innocent injured as it were. Now, it is different with me; I have surveyed and found out that there is a shortage and am not relying upon anybody's representations, but upon my own knowledge and for me to buy your cause of action would be buying lawsuits, a thing I don't want to do." And again, on the 25th day of January, Hammett wrote Mr. Hicks in regard to the land, and sent him copies of two surveys of the farm, both of which showed that there was much less than 335 acres therein. January 26, 1906, Mr. Hicks wrote Hammett as follows: "Dear Sir: I am in receipt of your field notes in reference to the Bradshaw survey, for which I thank you and would be glad to pay for same if you will send me your bill. * * * All we wish is a corner to start from. * * * I have had a consultation with Mr. Merrick by letter and it is useless to consider or think of getting him to accept less than \$8,710 for the farm; however, he might knock off the ten dollars, and assign all cause of action against Mr. Bradshaw to you, if there should be any, or the suit could be brought in our name if necessary, but as a matter of fact I do not believe Mr. Bradshaw would hesitate to make the shortage good if the matter was brought before him. * * *

We have a contract with Mr. Bradshaw upon which this deal was made which calls for 335 acres without qualification."

The negotiations between Hammett and Hicks ended at that time. Early in January, 1906, the plaintiff herein again opened negotiations for the farm by correspondence, and on January 20, 1906, wrote Hicks as follows: "Referring to yours of Jan. 14th, will say that if the farm can be bought between \$25 and \$26 per acre, I will come and see you. If not, it will not be worth while to consume your time coming up." It will be noticed that this letter was written seven days after Hammett had written to the defendant and Hicks, notifying them of the shortage in the acreage of the farm. On January 22d, Hicks wrote the plaintiff as follows: "We have yours of 20th, 1906. If you will come up, we think there is no trouble in making a deal for \$8,710.00, which is \$26.00 per acre." On the 29th day of January, 1906, the plaintiff and Hicks agreed upon terms for the farm, and Hicks drew a contract covering the matter, which was signed by the plaintiff and forwarded by Hicks to the defendant in Ottumwa, Iowa. The description of the land in the contract was as follows: "All of the north half of the southeast quarter of section 19, and 255 acres being all that part of the south half of section 20, that lies south and west of Walnut creek, all in township 55, range 15, containing in all 335 acres, it being the intention of the said Henry S. Merrick to deed and convey to the said Day all of the interest which the said Merrick may have in and to the lands in the above sections, which were conveyed to the said Merrick by one Thomas H. Bradshaw and wife, Annie L. J. Bradshaw, by their deed of conveyance made on the 15th day of March, 1905, and recorded in Book 75, page 590 of the Records of the recorder's office of Randolph county, Missouri. In other words, the said Merrick is to convey the identical and exact number of acres to the said Day, which the said Merrick bought in the above-mentioned deed from Bradshaw." The deed from Bradshaw and wife to Merrick referred to in this contract conveyed: "The north half of the southeast quarter of section 19, township 55, range 14, and 255 acres, being that part of the south half of Sec. 20 that lies south and west of Walnut creek * * * and containing in all 335 acres." The 80 acres in section 19 is a full 80; the shortage being in the tract in section 20. The contract was sent to the defendant for his approval and signature, and was received by him. He did not sign it, however, but he at once made a deed to plaintiff on the terms stated in the contract, and forwarded it to Hicks, with authority to deliver same to plaintiff and collect the purchase price. Hicks notified the plaintiff, and in due time plaintiff accepted same and paid the full consideration agreed upon in the contract. In his deed the de-

defendant carefully avoided stating the number of acres in the farm and limited the general warranty clause by writing in with a pen these words, "claiming by, through, or under him." It was not until some time after he had purchased and paid for the farm that plaintiff learned that the farm did not contain 335 acres, and, after he had failed in an attempt to have the defendant adjust the wrong without litigation, this suit was brought to recover damages sustained by reason of false and fraudulent representations. The evidence was presented to a jury, but at its close the court sustained defendant's motion for a directed verdict, dismissed the case, and rendered judgment against the plaintiff for costs. The plaintiff appeals. The facts as we have recited them, and they are without serious dispute, are the strongest argument that can be made against the action of the trial court. The evidence of fraud on the part of Hicks is practically conclusive. The evidence tending to show that he was the defendant's duly authorized agent is ample to warrant a finding that he was such agent.

[1] But, if such were not the case, the evidence of fraud on the part of defendant himself is sufficient to take that question to the jury. The defendant had the contract before him when he made the deed. He was familiar with its contents, and could not help knowing therefrom that the plaintiff was bargaining for 335 acres, and expecting to get such acreage for the sum that he had agreed to pay for the farm. The defendant at that time knew that the farm did not contain the number of acres named in his deed from Bradshaw and in the contract that the plaintiff had signed, and, when he accepted the terms thereof and executed a deed in which he attempted to avoid liability for such shortage, he was, in our judgment, guilty of a deliberate fraud, which the law will and should redress, regardless of the acts of his agent Hicks. The evidence tends to support the claim of the plaintiff that he purchased the farm by the acre and not in gross, but, whether he did so or not, he is entitled to recover because of the fraud practiced by the defendant himself and by his agent. *Thomas v. Beebe*, 25 N. Y. 244; *Starkweather v. Benjamin*, 32 Mich. 305; *Cawston v. Sturgis*, 29 Or. 331, 43 Pac. 656; *Antle v. Sexton*, 137 Ill. 410, 27 N. E. 691; *McGhee v. Bell*, 170 Mo. 121, 70 S. W. 493, 59 L. R. A. 761.

[2] Furthermore, there is abundant evidence to sustain the proposition that the defendant ratified the fraudulent acts of his agent Hicks. By accepting the benefits of the transaction, he bound himself by the representations, and particularly is this true where the principal knows what such representations were, as did the defendant here. *Higbee v. Trumbauer*, 112 Iowa, 74, 83 N.

W. 812; *Lull v. Bank*, 110 Iowa, 537, 81 N. W. 784; *Deering v. Bank*, 81 Iowa, 222, 46 N. W. 1117; *Eadle, Guilford & Co. v. Ashbaugh*, 44 Iowa, 519; *Busch v. Wilcox*, 82 Mich. 336, 47 N. W. 328, 21 Am. St. Rep. 563. That his cause should have been submitted to the jury is very clear to us. See *Lenoch v. Yoss*, 136 N. W. 542.

The judgment is reversed, and the case remanded.

Reversed.

STATE v. O'CALLAGHAN.

(Supreme Court of Iowa. Nov. 12, 1912.)

1. CRIMINAL LAW (§ 511*)—WITNESSES—CORROBORATION OF ACCUSED.

While the testimony of a confessed accomplice is not sufficient to convict accused unless corroborated by other testimony tending to connect accused with the offense in addition to showing merely the commission of the offense or the circumstances thereof, yet it is not necessary that the accomplice's testimony be corroborated on every material fact; it being sufficient if he is so corroborated as to satisfy the jury that he spoke the truth with reference to the offense, and inspired the belief that his entire testimony is true though not otherwise corroborated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511.*]

2. CRIMINAL LAW (§ 511*)—BREAKING AND ENTERING—ACCOMPLICE'S TESTIMONY—CORROBORATION.

Where, in a prosecution for breaking and entering, defendant was a witness in his own behalf and did not deny his association with the others, including a confessed accomplice, who were guilty of the offense, and his meeting them not only about and near the building entered on the evening of the crime and prior to its commission, but also at the places named by the accomplice after the crime was committed, and he also admitted that he had a conversation with one of the men at a certain corner before the parties met on the evening the crime was committed, such facts furnish sufficient corroboration to the testimony of the accomplice connecting defendant with the offense to sustain a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511.*]

3. CRIMINAL LAW (§ 1170*)—APPEAL—PREJUDICE.

Where, in a prosecution for breaking and entering, defendant was permitted to testify that he had no talk with R., a confessed accomplice, prior to the burglary about meeting any one, and that he had not agreed to meet any one after the burglary, and that R. did not indicate to him that he had an agreement to meet any one at a specified corner or on a certain street, defendant was not prejudiced by the sustaining of an objection to a question whether he had any agreement to meet the other parties, alleged to have been connected with the offense, in front of the G. club, or to meet any one at that point, or, if he was to meet them, where the place was.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

4. CRIMINAL LAW (§ 1170*)—APPEAL—RULINGS ON EVIDENCE—PREJUDICE.

Where a confessed accomplice testified against accused, and also stated that he had not been promised immunity but hoped to get off easier because of his attitude in the matter, defendant was not prejudiced by the sustaining of an objection to a question asked the accomplice on cross-examination as to whether he had ever been tried and whether he had pleaded guilty or not guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

5. CRIMINAL LAW (§ 338*)—CROSS-EXAMINATION—ACCOMPLICE.

Where a confessed accomplice testified against accused, the court properly excluded a question on cross-examination with reference to the business of the witness' wife before he married her and as to their prior relations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 753, 755, 756, 787, 788, 801, 855; Dec. Dig. § 338.*]

6. CRIMINAL LAW (§ 1170*)—APPEAL—PREJUDICE—RULINGS ON EVIDENCE.

Where accused was permitted to deny any inference that the jury might draw from the testimony introduced by the state as to his having unlocked windows in the building burglarized prior to the burglary, defendant was not prejudiced by the sustaining of an objection to a question asking him whether he was in the basement of the building where the window was opened at any time and with whom.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

7. CRIMINAL LAW (§ 776*)—INSTRUCTIONS—GOOD CHARACTER—CIRCUMSTANTIAL EVIDENCE.

Where the evidence of accused's guilt was almost wholly circumstantial, an instruction that previous good character, while not in itself a defense, was a circumstance to be considered by the jury in connection with all the other evidence in determining the guilt or innocence of the accused, that it might be shown to rebut the presumption of guilt arising from circumstantial evidence and considered as tending to show that a man of such character would not be likely to commit the crime charged, and should be considered irrespective of whether other evidence was conclusive or inconclusive—it being for the jury to determine under all the facts and circumstances what weight should be given thereto—was proper and was not prejudicial as charging that good character could be considered only where circumstantial evidence was relied on.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1838-1845; Dec. Dig. § 776.*]

8. CRIMINAL LAW (§ 782*)—INSTRUCTIONS—FLIGHT.

An instruction that if the jury found beyond a reasonable doubt that the offense of breaking and entering was committed at the time and place substantially as charged in the indictment, and that defendant knew or had reason to know that the persons from whom he ran, if he did run, were officers, and that defendant ran away from them or attempted to escape arrest, then the jury were justified in considering such flight as a circumstance which prima facie was indicative of guilt to be considered in connection with all the evidence to aid in determining the guilt or innocence of the

accused was not erroneous in charging that flight was prima facie indicative of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1849, 1851, 1852, 1877, 1878, 1880-1882, 1906, 1907, 1909-1911; Dec. Dig. § 782.*]

9. BURGLARY (§ 41*)—BREAKING AND ENTERING—AIDING AND ABETTING—EVIDENCE.

In a prosecution for burglary evidence held sufficient to warrant a finding that defendant aided and abetted in the commission of the offense.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. § 41.*]

Appeal from District Court, Polk County; Chas. S. Bradshaw, Judge.

Defendant, with three others, was indicted for the crime of breaking and entering the Polk county courthouse. He was separately tried, found guilty of the offense charged, and sentenced to the penitentiary for the term of 10 years. From the judgment imposed, he appeals. Affirmed.

Sullivan & Sullivan and Parsons & Mills, all of Des Moines, for appellant. George Cosson, Atty. Gen., and John Fletcher, Asst. Atty. Gen., for the State.

DEEMER, J. [1] Some time after midnight of March 31, 1911, two men, known as Tom Hatch and Peter Juhl, who were jointly indicted with defendant, entered the Polk county courthouse through a basement window, went into the office of the county treasurer, and, finding an employé there asleep, they turned him over on his face, tied his hands behind his back, bound his feet together, and left him; one of the men saying, "You need not be alarmed, we are going to have some celebrating, probably a good deal of noise, and if you keep still you will not be hurt. I am a bad man, and a man of my word." The two then went into the main room of the treasurer's office where the door of the vault was located and tried to blow open the safe. Their efforts were unsuccessful, but the explosion was so loud that they thought it advisable to leave the building, which they did, retiring through the window by which they had entered. One J. A. Rhodes was also indicted with the defendant, and the four men, defendant, Hatch, Juhl, and Rhodes, were discovered by some policemen near what is known as Fourth and Chestnut streets shortly after the crime was committed, who attempted to arrest them. Hatch and Juhl escaped and have never been apprehended, but Rhodes was taken into custody, and O'Callaghan temporarily escaped, but was subsequently arrested. The claim made for the state is that all were engaged in committing the offense—Hatch and Juhl as principals, and Rhodes and O'Callaghan as accessories—and the principal question in the case is the sufficiency of the testimony to connect O'Callaghan with the crime. If the witness Rhodes is to be believed, there can be no doubt of defendant's guilt; but

he is a confessed accomplice, and his testimony is not sufficient unless it be corroborated by other testimony tending to connect the defendant with the commission of the offense. Such corroboration is not sufficient, however, if it merely shows the commission of the offense or the circumstances thereof. Code, § 5439; State v. Smith, 102 Iowa, 656, 72 N. W. 279. But it is not necessary that the accomplice be corroborated upon every material fact to which he testifies. It is enough if he be so corroborated on some of the material facts as to satisfy the jury that he spoke the truth with reference thereto, and thus induced the belief that his entire testimony is true, although not otherwise corroborated. State v. Feuerhaken, 96 Iowa, 290, 65 N. W. 299; State v. Hall, 97 Iowa, 400, 66 N. W. 725; State v. Allen, 57 Iowa, 431, 10 N. W. 805; State v. Hennessy, 55 Iowa, 299, 7 N. W. 641.

[2] Defendant had been employed in the county treasurer's office for about a month just preceding the burglary, and Rhodes testified that he made the arrangements with O'Callaghan to have a part in the commission of the crime and brought about a meeting between him (defendant) and Hatch about 10 days prior to the time the offense was committed. O'Callaghan was advised by Rhodes that Hatch had been implicated in a safe blowing at Foster's Opera House, and according to Rhodes defendant said that he knew where there was a good one, and that "it would take three overcoats to carry it away." Rhodes also testified that defendant met Hatch on Wednesday or Thursday night before the burglary at the corner of Fifth and Grand avenues, where they talked together for 10 or 15 minutes. On the evening just preceding the burglary, defendant and Rhodes were together in the vicinity of the courthouse and visited a number of saloons where they drank together. Later they went to the federal building, which is just east of the courthouse, and there met Hatch and Juhl. Defendant said that he would go over to the courthouse and see if the window was right, left the group for a few minutes, and upon his return said that it was all right, that he had raised it up an inch. He had told Rhodes before meeting the other parties that he had fixed the window so that it could be opened from the outside, and either he or Rhodes had communicated this information to the other parties. Discovering a light in the treasurer's office, O'Callaghan said to his companions that sometimes some of the employes worked rather late. As they stood there the light went out and then on again, and defendant and Hatch walked around to the southwest corner of the building to see if there were any lights in the south or west part of the structure, and Juhl and Rhodes went to the northeast corner to see if they could discover any lights. Having made these observations, the

parties all returned to the government building. The light was still burning in the treasurer's office, and it is claimed that defendant went into a hotel just north of the government building and telephoned to the treasurer's office to see if any one was there. After this the four went to the southwest corner of the courthouse, and defendant and Hatch made another trip around the building for the purpose of discovering if there were any more lights or other evidence of the presence of persons in the building. After their return they joined their companions, and about this time the light in the treasurer's office went out. At O'Callaghan's suggestion Rhodes then went to a point north and west of the building to see if any one came out at either the north or west door. When he returned he found the other three men in front of the entrance to the Union Station south of the courthouse. Hatch then said that he had seen some one in the building, and O'Callaghan remarked, "There was some hoosier by the name of Keller who sometimes slept there and that he would probably be asleep in a few minutes." All the parties then went to the east end of the Union Station, and there defendant and Rhodes stayed while Hatch and Juhl went to a basement window just south of the east entrance to the courthouse which they raised, and thus gained entrance to the building. Defendant and Rhodes watched their codefendants until they disappeared into the building, and, after some parleying as to where they should go, it was finally agreed that they should go to a nearby poolroom, which they did, there meeting some acquaintances of Rhodes, and the four there had a drink. From there this newly formed party went back to the Union Depot, and were there informed that some one had blowed a safe in the courthouse. Almost immediately they saw Hatch and Juhl coming down the street near the depot; one of them carrying a suit case. Defendant and his companion then turned west on Cherry street, the first street west of the courthouse, and went west to Eighth, thence north to Locust or Walnut street, and thence east again to the Kirkwood Pharmacy, Floyd Coon's Drug Store, and the Chicago Grill, respectively, where they tried to get liquor. From the place last named they went up Fourth street to its junction with Chestnut, at which place it is claimed by previous arrangement they were to meet Hatch and Juhl. At any rate, they here met the last-named persons, each of whom then had a suit case, and discovered upon inquiry from them that the enterprise had been unsuccessful. The four remained here 15 or 20 minutes, when some policemen appeared. Hatch and Juhl immediately stepped into an alley. Here some shots were exchanged between them and the police. O'Callaghan started to run west to Fifth street, and, reaching

that street, he turned north and ran in that direction. Rhodes was taken into custody, and O'Callaghan next appeared at what was known as Clark's Hotel, east of Third street, where he slept the remainder of the night. At that time he was rooming at a house on University avenue, but he did not attempt to return to his room.

This in substance is the testimony of Rhodes, together with some of the undisputed facts disclosed by the record. The testimony offered in support of Rhodes corroborates him with reference to his being with defendant and the other parties to the charge at every point save as to telephoning the treasurer's office from the hotel, and as to defendant's going over to the courthouse to see about the condition of the window. Defendant was a witness on his own behalf, and he does not deny his association with all of these men and his meeting with them, not only about and near the courthouse on the evening in question, prior to the commission of the offense, but also at the places named by Rhodes after the crime was committed. Indeed, he admits that he was with these men at the places named. He also admits that he had a conference with Hatch at the corner of Fifth and Grand avenues before the parties met, on the evening the crime was committed, at the government building. These facts alone, either admitted by the defendant or proved by independent testimony, were sufficient to justify a finding by the jury that Rhodes told the truth and that defendant in fact aided and abetted the commission of the offense.

[3] 2. Some rulings on the admission and rejection of testimony are complained of. Rhodes testified that it was agreed that he and defendant should meet Hatch and Juhl after the crime was committed on Chestnut street. Defendant, as a witness on his own behalf, was asked as to whether he had any agreement to meet these parties in front of the Grant club, or to meet anybody at that point, or, if he was to meet them, where the place was. Objections to such questions were sustained, and of this complaint is made. These rulings could not be sustained save for the fact that the witness was permitted to testify directly to the fact that he had no talk with Rhodes prior to the burglary about meeting any one, and further testified, without objection, that he had no agreement to meet anybody after the burglary was committed, and that Rhodes did not indicate to him that he had an agreement to meet anybody at Fourth and Chestnut, or on Chestnut. The rulings were without prejudice.

[4] On cross-examination Rhodes was asked as to whether he had ever been tried on the charge against him, and as to whether he had pleaded guilty or not guilty. It was sufficiently shown that Rhodes was an accomplice, and the nature of his plea, or whether he had been tried or not, was ma-

terial only to show that, because of his connection with the matter, he was unworthy of belief, or that, by reason of testifying against defendant, he had been promised, or was expecting, some kind of immunity. As to the first point Rhodes admitted his guilt, and as to the second he subsequently testified that he had not been promised any immunity, but that he hoped to get off easier because of his attitude in the matter. This was all that defendant was entitled to.

[5] Defendant also propounded questions to Rhodes about his wife's business before he married her, and as to their relations before that time, but objections thereto were sustained. There was no error here. We must assume that, no matter what the facts, the woman reformed upon her marriage to Rhodes. A part of an answer given by defendant to a question propounded to him was stricken as a conclusion. The ruling was correct.

[6] The following record discloses the next objection: "I was not down in the basement beneath the treasurer's office March 31, 1911. Q. Were you ever down in that place? A. Yes, sir. Q. At any time and with whom? (Objected to as incompetent, irrelevant, and immaterial, leading and suggestive. Objection sustained, and defendant excepts.) Q. Will you now state to the jury whether or not, in the afternoon or on the day of March 31, 1911, you unlocked any of the windows in the basement of the treasurer's office in the Polk county courthouse? A. I did not. I never told Rhodes that I had unlocked any windows or would unlock any windows. I never told Rhodes whether myself or the little fellows were down to see whether the windows were unlocked. Q. Were they down there at all? A. I did not know them. I never told Rhodes they were down there. I had no knowledge on the night or evening of March 31, 1911, or at any time prior thereto, that there was a contemplation of robbing or breaking into the courthouse of Polk county." We see no error here of which defendant may complain. He was permitted to deny any inference that a jury might draw from the testimony introduced by the state. So much for the rulings on testimony.

[7] 3. Defendant introduced testimony in support of his good character, and the trial court gave the following instruction with reference thereto: "(15) The defendant has introduced testimony tending to show his previous good character as to the trait involved in the offense charged in the indictment. It is competent for a person, accused of a crime, to prove, as a circumstance in his defense, that his previous character, as to the trait involved in the offense charged, was good. Previous good character is not, of itself, a defense, but it is a circumstance to be considered by the jury in connection with all the other evidence in determining

the guilt or innocence of the accused. *It is a circumstance which may be shown for the purpose of rebutting the presumption of guilt arising from circumstantial evidence.* It may be considered as tending to show that a man of such character would not be likely to commit the crime charged. It should be given consideration irrespective of whether other evidence is conclusive or inconclusive, and it is for the jury to determine, under all the facts and circumstances in the case, what weight should be given to such evidence." The sentence which we have italicized is complained of. It will be noticed that the instruction does not say that good character can be considered only where circumstantial evidence is relied upon. If it did, it would be wrong. As the case was bottomed almost wholly on circumstantial evidence, the trial court properly instructed that good character could be shown for the purpose of rebutting the presumption of guilt arising from such testimony. But it also instructed that it should be considered in its bearing upon the whole case, notwithstanding the conclusive or inconclusive character of the testimony, and given such weight as the jury thought it was entitled to. There was no error here. *State v. Krug*, 136 Iowa, 231, 113 N. W. 822.

[8] 4. This instruction was given upon the matter of flight or effort to escape: "(14) Evidence has been introduced tending to show an attempt, on the part of the defendant, to escape from the officers of the law. If you find from the evidence, beyond a reasonable doubt, that the offense of breaking and entering was committed, at the time and place substantially as charged in the indictment, and further that the defendant knew, or had reasons to know, that the persons from whom he ran, if he did so run, were officers of the law, and further that the defendant ran away from or attempted to escape arrest, then you are justified in considering such flight as a circumstance which, prima facie, is indicative of guilt, to be considered by you in connection with all the evidence, to aid you in determining the guilt or innocence of the accused. If, upon all the evidence, you entertain a reasonable doubt of defendant's guilt, you should acquit him." This is challenged because of the use of the words, "which prima facie is indicative of guilt"; and *State v. Poe*, 123 Iowa, 118, 98 N. W. 587, 101 Am. St. Rep. 307, is relied upon. The instruction there considered is not like the one here given. The case is ruled by: *State v. Richards*, 126 Iowa, 497, 102 N. W. 439; *State v. Kimes*, 152 Iowa, 240, 132 N. W. 180; *State v. Seymour*, 94 Iowa, 699, 63 N. W. 661. The authorities last cited sustain the instruction given. The instruction upon the necessity of testimony corroborating Rhodes is complained of, not because it is incorrect, but

because it did not go farther and state what would be corroborating testimony. The complaint is without merit. It is sufficient to say that the instructions given sufficiently covered the matter.

[9] 5. The verdict has sufficient support in the testimony, and a jury was fully warranted in finding that defendant aided and abetted in the commission of the offense. The case is much stronger than *State v. Arthur*, 129 Iowa, 235, 105 N. W. 422. Indeed, it is well to note in this connection that Arthur, defendant in that case, was finally convicted. See *State v. Arthur*, 135 Iowa, 48, 109 N. W. 1083. There was sufficient proof of a conspiracy to make the acts and declarations of one binding on all.

We have gone over the record with great care and discover no prejudicial error.

The judgment must therefore be, and it is, affirmed.

BRADDICH v. PHILLIPS COAL CO.

(Supreme Court of Iowa. Nov. 12, 1912.)

1. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a coal miner, injured by the fall of slate from the roof of the roadway between the room in which he worked and the entry, was guilty of contributory negligence held, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

2. MASTER AND SERVANT (§§ 118, 228*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where an operator of a coal mine agreed to double-timber the roof when notified by a miner that the same was necessary to protect any roadway, and the neck of a miner's room constituted the roadway between the room and the entry, it was the duty of the operator to double-timber the roof of the neck on notice by the miner, and the miner, failing to double-timber, was not guilty of negligence under Code, § 2491, providing that a miner, neglecting to properly support the roof and entries under his control, shall be guilty of a misdemeanor.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 177, 202, 209, 670, 671; Dec. Dig. §§ 118, 228.*]

3. MASTER AND SERVANT (§ 220*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Where a coal miner, injured by the fall of slate from the roof of the roadway between his room and an entry, knew that the roof sounded loose and drummy, but was not aware of the danger after the pit boss had assured him that he knew from his greater experience that the place was safe, and ordered him to go to work, the miner did not assume the risk of working under the roof not properly supported, especially where the jury could find that the operator promised to do the necessary timbering as soon as timbers could be had.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 625-637, 641, 644-647; Dec. Dig. § 220.*]

4. MASTER AND SERVANT (§ 286*)—INJURY TO SERVANT—NEGLIGENCE.

In an action for injuries to a coal miner by the fall of slate from the roof of the road-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

way from his room to the entry, the question of the negligence of the operator *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 236.*]

5. APPEAL AND ERROR (§ 882*)—QUESTIONS REVIEWABLE—INSTRUCTIONS.

An objection to an instruction, in substance the same as one requested by the party complaining, will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

6. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING ISSUES.

A requested instruction excluding material matters, which the jury has a right to consider in any view of the case, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

Appeal from District Court, Dallas County; W. H. Fahey, Judge.

Suit to recover damages for a personal injury. Verdict and judgment for the plaintiff. The defendant appeals. Affirmed.

Guernsey, Parker & Miller and C. Woodbridge, all of Des Moines, for appellant. Thos. A. Cheshire and H. L. Manion, both of Des Moines, for appellee.

SHERWIN, J. The facts, as gathered from briefs of counsel and from the record, are substantially as follows: The plaintiff is an Austrian by birth, and 36 years of age. He came to America from Austria six years before he was injured, but at the time of his injury he was unable to speak fluently or to understand fully our language. He had worked in coal mines during his residence in this country, all of such work, prior to his work for the defendant, having been done in Pennsylvania, Wyoming, and North Dakota. He commenced work for the defendant eight or nine days before he was injured. The defendant put him to work in a room that had been driven in from the entry about 15 or 20 feet, and, on the day that he was injured, he had extended the room so that the face of the coal was some distance farther away from the entry. Between the entry and the room where he was at work there was what is called the "neck of the room or entry"; a narrow opening for passage and for hauling coal from the room proper. The defendant company had not put a track from the entry to the plaintiff's room, and, at the time he was injured, he was engaged in loading coal in a car that was standing on the track in the entry at the neck of his room. At the time of his injury, he was in this neck of the room, about four feet from the car that he was loading, and another miner was in the room bringing coal therefrom and throwing it down in the neck of the room near the entry so that plaintiff could load it. Plaintiff was injured by the fall of slate from the

roof of this neck. At the time plaintiff began work in this room, the roof that fell upon him was solid and in good condition. Some three or four days afterward, however, some slate fell in the entry, and the plaintiff then sounded the roof in this neck of his room and it then sounded "drummy" and loose. He immediately informed the pit boss of its condition and asked him to cross-timber the roof to prevent the falling of the slate, because it was impossible to hold the slate up with props. To this request the pit boss replied that they did not have any timbers, but that he would cross-timber the roof as soon as they could get the timbers. Two or three days before the accident, the plaintiff told the timberman, who had charge of this entry, of the condition of this roof, and the timberman replied that he could not put timbers up because the company did not have them. The day before the plaintiff was injured, he had another talk with the pit boss about the condition of this roof, and asked the pit boss why he did not put up some crossplanks to hold the roof. The pit boss was angry and said to the plaintiff that he knew more about the coal mining business than the plaintiff did, and that he (the pit boss) knew that the place was safe, and he then said to the plaintiff, "You go in and go to work." The plaintiff testified that when the pit boss told him that his superior experience told him that the place was safe, and that it was, in fact, safe, he felt ashamed of himself because he had "been called down," and went to work, because he regarded the pit boss as more experienced in the mining business than himself. When the plaintiff went to work in this room, the neck thereof had not been opened sufficiently to admit the passage of a mule, and it was a part of the plaintiff's work to increase the depth of the passageway by either removing more of the roof or bottom. There was evidence tending to show that he had sufficiently enlarged this neck for the needed purpose a day or two before the accident by lowering the floor thereof. The plaintiff and one of his witnesses testified that he had not propped the roof of this neck; the plaintiff showing that props would not hold the roof, and that it was the duty of the defendant to cross-timber it. On the other hand, the defendant introduced testimony tending to show that the roof had three or four props under it in the morning of the day that it fell, and that these props had been blown out that forenoon by the plaintiff while blasting the floor loose. Plaintiff, however, and the miner who was working with him on that day, testified that no blasting was done at the time, and that no props were then in the neck of the room. It also appears that the timberman had done some timbering in this neck while plaintiff was

at work there, and at his request, but that there was not sufficient cross-timbering to hold the roof.

1. The appellant insists that the plaintiff was guilty of contributory negligence, as a matter of law, and that the court erred in refusing to so direct the jury, and erred in submitting the case to the jury. This contention is based on the following propositions, as stated by appellant in the brief of its counsel: "(a) He knew for several days before the accident that the roof of his room neck was likely to fall, since he testifies it was 'awful badly loose; sounded drummy;' and was so 'heavy' that he claims to have told the pit boss 'it was impossible to prop it.' (b) Knowing this, he continued to work under this roof, knowing it to be wholly unsupported, believing it to be an unsafe place to work, and without attempting himself to support it. (c) After having fired shots in the bottom of his room neck, he returned to work under the roof in question at noon of the day of the accident, without further sounding the roof or without attempting to prop it, notwithstanding warnings, and knowing the roof to be loose and dangerous. (d) The plaintiff was guilty of a misdemeanor, omitting to 'securely prop and support the roof of the room under his control,' at the time of his injury, and hence guilty of contributory negligence as a matter of law. It cannot be argued by plaintiff that there was no causal relation between his criminal omission to prop and secure the roof of his room, since he relies upon an alleged negligent failure of the defendant to do that very thing as the sole basis of his alleged right of recovery. (e) The alleged breach by defendant of the terms of the 'Des Moines Agreement' relative to double-timbering being necessarily known to the plaintiff at and before the time of the accident, so far from excusing plaintiff's gross negligence, was in law and in fact an additional warning to him to avoid the obvious impending danger of working under the unsecured roof, and intensifies, rather than lessens, the degree of the plaintiff's negligence. (f) The alleged assurances of safety by the pit boss and timberman do not afford plaintiff a legal excuse for exposing himself to the danger in question, because (1) they were remote in point of time; (2) they were given under conditions different from those existing at the time of the accident; (3) by persons not shown to have possessed knowledge equal to the knowledge possessed by the plaintiff of the danger he was incurring in working under a roof known by him to be loose, heavy, drummy, wholly unsupported, and unsafe at the time of the accident."

And in support of these several positions the appellant relies upon decisions of this and other courts, to which we shall give further attention later in this opinion. The plaintiff insists that the question whether

he was guilty of contributory negligence was one for the determination of the jury, and not for the court, for the following reasons, as stated by his counsel: "(1) The plaintiff was of Austrian birth, and was not very familiar with the English language. The record discloses that he had to have an interpreter when giving evidence in the case at bar. (2) While he had been engaged in the coal mining business for about six years prior to his injury, his experience in mining coal in Iowa and in the mine in which he was employed at the time of his injury was but seven working days. (3) The roof which fell and injured the plaintiff was in need of double or cross-timbering and became in this condition two or three days after the plaintiff began working. (4) When the plaintiff, by sounding the roof, learned that it needed double or cross-timbering, he informed the pit boss that he wished some crossbars placed under the roof, and the pit boss told him that they did not have any timbers and would do it as soon as they got them. (5) The day before the plaintiff was hurt, the plaintiff again requested the pit boss to put in some crossplanks, and the pit boss on that day became angry and said he knew more about coal mining business than the plaintiff, and he knew that the place was safe, and he said to the plaintiff, 'You go in and go to work.' (6) When the pit boss told the plaintiff the place was safe, and for him to go in and go to work, the plaintiff was ashamed of himself and thought he would go in and go to work, because, as stated by the plaintiff, he did not want to say anything more to the pit boss because he was more experienced in the mining business than the plaintiff. (7) The pit boss talked to the plaintiff in English. (8) The plaintiff also talked to the timberman, Frank Mikks, and the timberman talked to the plaintiff in the Austrian language, but used a little different dialect from that used by the plaintiff. (9) The plaintiff requested the timberman to double-timber this place when the timberman was sitting in the neck of plaintiff's room. (10) The timberman admits that the plaintiff said to him the roof needed timbering around the neck and mouth, and the timberman set in some timber. (11) About two days before the plaintiff was injured, he told the timberman that he needed some more timbers inside, and the timberman put in one more. The timber was put in at the entrance to the neck of the room at the left-hand side of the entry by digging a hole in the coal along the rib or wall of the entry, and putting bars across the room with a prop under one end, and the other end of the crossbar was placed in a hole in the rib or the wall. This cross-timber was a crosspiece under the slate. (12) The timberman swears that the roof of the room neck needed two more timbers, and the plaintiff requested these. (13) At the time the plaintiff asked the tim-

berman to put in these two other cross-timbers, the timberman said to him, 'I will see, I no got any timbers. I tell him I will put them in but I have not got any.' That was two or three days or something like that before the plaintiff got hurt. (14) The timberman testified that the company had enough timbers on hand on top to timber this place, but he did not always get timbers when ordered. That at times they sent down timbers and they were taken to some other place, but they usually sent timbers where they were told to, and as soon as they were told. (15) The testimony is conclusive that the roof at the place where it fell upon plaintiff should have been timbered and made safe by the defendant, because it required double or cross-timbering, and it was not the plaintiff's duty to do this kind of timbering. (16) The contract denominated 'the Des Moines Agreement,' which was marked Exhibit 'A,' and offered in evidence by the plaintiff, required the defendant to do double-timbering when it was necessary to be done, when requested by miners, and it is conceded that this agreement was binding between the plaintiff and the defendant at the time of his injury. (17) The plaintiff testified it was impossible to hold up the roof with ordinary upright propping. (18) To have attempted to put up anything else but cross-timbering would have practically closed the neck of the room. (19) The fact that the timberman had made two efforts toward cross-timbering the roof between the first request and the injury, and the statement of the pit boss that the roof was safe, and he knew this because of his superior knowledge, and for plaintiff to go in and go to work, followed by the shame of plaintiff because he had complained, put plaintiff off his guard and lulled him into insecurity."

Summarizing somewhat, there is evidence in the record tending to establish the following facts, and, in determining whether the plaintiff was guilty of contributory negligence, they must all be given weight and consideration: "(1) That the roof in the neck of his room was safe when he went there to work. (2) That, when it became unsafe, it required double-timbering. (3) That the plaintiff ascertained this fact and requested the pit boss to timber. (4) That the pit boss agreed to double-timber. (5) That the plaintiff notified the timberman. (6) That the timberman testified that he did no double-timbering. (7) That two days before the accident the plaintiff again notified both the pit boss and the timberman that additional double-timbering was needed in the neck of his room. (8) That the pit boss then told the plaintiff that his room was safe and that his (the pit boss') superior knowledge of mining and his experience in the mine caused him to know it was safe, and he ordered and directed plaintiff to go in and go to work. (9) That the plaintiff

then felt ashamed that he had formed the opinion that the place was unsafe, and went into the room and worked up to the time of his injury. (10) That the timberman testified that, during the time the plaintiff worked in the mine, he said to the timberman he wanted timber around the neck and mouth of the room, and the timberman set them in, and that two days before his injury the plaintiff said he needed some more timber inside, and the timberman put one more cross-timber in and the room neck still needed two other cross-timbers. (11) That these timbers were on top and the timberman had ordered they be sent down. (12) Add to this the further fact that the plaintiff had not worked but seven working days in this mine, or in any Iowa coal field, and was not familiar with the roof, or its characteristics, in this particular mine, as was John Bennett, the pit boss, who assured him it was safe, and ordered him to go to work."

In this case at bar it is established without conflict: First. That the plaintiff did not create the danger which confronted him, the coal in the neck of the room having been removed by another, and prior to the time he was employed. Second. That the danger did not arise from any fault of the plaintiff. Third. That the duty to double or cross-timber the neck of the room was the company's duty and not the plaintiff's. Fourth. That the plaintiff and defendant had contracted that it was the company's duty on the request of plaintiff to double-timber. Fifth. It is conclusively established by the testimony that the plaintiff made the request to double-timber to both the timberman and the pit boss."

[1] While the question whether the plaintiff was guilty of contributory negligence is a close one, we are of the opinion that it was a question that the jury should alone determine. *Nugent v. Cudahy Packing Co.*, 126 Iowa, 517, 102 N. W. 442; *Hardy v. C., R. I. & Pac. Ry. Co.*, 149 Iowa, 41, 127 N. W. 1093; 26 Cyc. 1235, and cases cited; 5 *Thompson on Negligence*, § 5383. The question of the servant's contributory negligence, where he is ordered into the place of danger by a person in authority, is fully discussed in *Hardy v. Railway Co.*, supra, and it will serve no useful purpose to again cover the ground. We think the principle there announced is clearly applicable to the facts in this case, and that the decision fully sustains appellee's contention that the question of plaintiff's negligence was for the jury. The plaintiff had had but slight acquaintance with this mine, or, in fact, with any Iowa mine, and he did not know certainly whether the loose slate would fall, and we think it cannot be said, as a matter of law, that the danger was so imminent to the plaintiff that he should not have continued work after the pit boss, with his superior knowledge of that particular mine, had assured him that

the place was, in fact, safe and had ordered him to go on with his work. In *Cook v. Smith-Lowe Coal Co.*, 135 Iowa, 31, 109 N. W. 798, we held the defendant liable to a new miner who had been sent into a room that required cross-timbering, which had been requested by the first miner but neglected by the company, notwithstanding the fact that the new miner had not done any propping and had not discovered that it needed double-timbering and had made no request therefor.

[2] In that case as in this, there was an agreement between the coal operators and the mine workers that "in case the room had been properly timbered, as above set forth, and the roof from any cause becomes so heavy as to require double-timbering, the company shall, when notified by the miner, do the necessary work to protect the roadway." Here it is shown without dispute that the neck of the plaintiff's room constituted the roadway between the room proper and the entry. It therefore clearly appears that it was the appellant's duty to double-timber the roof of this neck, and so far, at least, as that matter is concerned, that the neck of the room was under the control of the appellant, and not under the control of the plaintiff. Hence the plaintiff was not guilty of negligence under section 2491 of the Code, which provides that, if a miner "shall neglect or refuse to securely prop or support the roof and entries under his control," he shall be guilty of a misdemeanor. If it was the duty of the defendant to double-timber this neck, when notified of such necessity, and no such duty rested upon the plaintiff, it is clear that the plaintiff could not be held guilty of a misdemeanor because he did not double-timber. If it be conceded, for the purpose of argument, that it was the duty of the plaintiff to place props under this roof, even they would be of no avail, it does not follow that the plaintiff should be held guilty of negligence, as a matter of law, for his failure so to do, because there is evidence, to which we have already referred, that props were in place under a part, at least, of the roof before the accident, and further that they would have been sufficient to hold the roof had they not been blown out. In *Lammey v. Center Coal Co.*, 144 Iowa, 640, 123 N. W. 356, relied upon by appellant, it was held that it was the duty of the miner to do the propping, and that he had failed in his duty. In *Williams v. Coal Co.*, 146 Iowa, 489, 125 N. W. 232, the plaintiff was injured by a falling roof in his room, and at a place where it was not the duty of the defendant to prop or timber. *Oleson v. Coal Co.*, 115 Iowa, 74, 87 N. W. 736, was a case where the miner was removing a pillar of coal that had been left for the support of the roof, and it is not controlling under the facts in this case.

[3] 2. What has already been said on the

question of the plaintiff's negligence is, in a great measure, applicable to the claim that he assumed the risk of working under a roof that had not been properly supported by the defendant. The evidence tended to show that the defendant had, in fact, put in some cross-timbers. It is undisputed that at least one had been placed near the entry, and there is also evidence from which the jury may have concluded that other cross-timbers had been put in before the accident. While the plaintiff did know that the roof sounded "loose and drummy," there was evidence, to which we have already called attention, that the plaintiff was not fully aware of, and did not appreciate, the danger after the pit boss had assured him that he knew from his greater experience that the place was safe, and ordered him to go to work. Unless the danger was so apparent that any reasonably cautious man would have seen and appreciated it, it should not be said, as a matter of law, that the plaintiff assumed the risk. Moreover, the jury would have been warranted in finding that the defendant promised to do the necessary timbering as soon as the timbers could be got into the mine from the top. We think there was no error in submitting this question to the jury.

[4] 3. These facts which we have recited clearly show that the question of the defendant's negligence was for the jury.

[5] 4. The appellant's brief does not properly raise any questions as to the instructions, but we shall nevertheless notice some of the complaints made in the argument. Number 5, we think, is not open to the criticism made. The sixth instruction is, in substance, the same as the sixth request of the appellant, and, of course, no complaint thereof will now be considered. *Smith v. Railway Co.*, 88 Iowa, 173. The seventh and eighth instructions related to the plaintiff's contributory negligence, and the criticism thereof is answered by what we have already said on the subject. The tenth instruction was warranted by the evidence, and the eleventh was, we think, correct in telling the jury that it was not necessarily the duty of the plaintiff to double or cross-timber the roof of this neck. We have already discussed this question and need not repeat it.

[6] The eleventh and twelfth requested instructions were properly refused. The last excluded material matters, which the jury would have a right to consider in any view of the case. The controlling question in this case, as presented by appellant, is the negligence of the plaintiff contributing to his injury. We have given the record very careful consideration with reference to this matter, as well as the others urged by appellant, and, while we consider the question a very close one in this case, we reach the conclusion that the question of such negligence, and its companion one, the assumption of

risk, were, in the last analysis, for the jury. The judgment is, therefore, affirmed.

Affirmed.

STATE v. SORENSON.

(Supreme Court of Iowa. Nov. 12, 1912.)

1. BURGLARY (§ 32*)—EVIDENCE—CIRCUMSTANTIAL EVIDENCE.

Burglary may be proved by circumstantial evidence, and, though the mere entry by accused is not of itself proof of a felonious breaking, it is a circumstance as bearing on that question.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 84; Dec. Dig. § 32.*]

2. BURGLARY (§ 41*)—BREAKING—EVIDENCE—SUFFICIENCY.

Where, on a trial for burglary, the state, relying on circumstantial evidence, showed that accused was wrongfully in the building burglarized, that he was there for the purpose of committing larceny, and that he committed larceny, that all the windows were closed and that both doors were fastened and locked, and that there was no opening left through which he could have entered the building without a breaking, the inference that he entered by a breaking was justified, and a motion to direct a verdict of acquittal for failure to prove a breaking was properly denied.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. § 41.*]

3. BURGLARY (§ 36*)—BREAKING—EVIDENCE—ADMISSIBILITY.

Where the state on a trial for burglary relied on circumstantial evidence, it was proper to show the condition of the doors and windows of the building burglarized immediately before and immediately after the alleged burglary, and the testimony of witnesses descriptive of the condition of the windows was admissible to show that accused could not have entered through them.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 90; Dec. Dig. § 36.*]

4. CRIMINAL LAW (§ 388*)—BREAKING—EVIDENCE—ADMISSIBILITY.

Where, on a trial for burglary, a witness testified that a third person experimented by pushing in a door and passing into the building through the opening, and that such experiment occurred immediately after the arrest of accused, arrested as he was escaping from the building, while the third person testified that the experiment was made on the evening of the following day, the evidence of the experiment was properly admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 854; Dec. Dig. § 388.*]

5. CRIMINAL LAW (§ 413*)—EVIDENCE—SELF-SERVING DECLARATIONS.

Where accused on a trial for burglary did not testify in his own behalf, the testimony of a witness that, shortly before 10 o'clock on the night of the burglary, accused told the witness that he was going down to the building burglarized to see the manager, was incompetent as self-serving.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928-935; Dec. Dig. § 413.*]

6. CRIMINAL LAW (§ 412*)—EVIDENCE—DECLARATIONS—ADMISSIBILITY.

Proof that one charged with burglary stated some time before the offense that he was going down to the building burglarized to see the manager did not show his innocence, since

accused, on going to the building and discovering the absence of the manager, could then form the intent to commit the crime, and commit it by breaking and entering and stealing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 894-972; Dec. Dig. § 412.*]

7. BURGLARY (§ 9*)—"BREAKING"—ACTS CONSTITUTING.

Where a door of a building is so nearly closed that one may not enter through the opening into the building without pushing the door further open, such pushing constitutes a breaking within the law of burglary.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 6-12; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 1, pp. 862-866.]

8. CRIMINAL LAW (§ 351*)—EVIDENCE OF FLIGHT—ADMISSIBILITY.

The flight of accused is a circumstance indicative of guilt only where he has actual knowledge of the accusation against him as distinguished from constructive knowledge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778-785; Dec. Dig. § 851.*]

9. CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Where accused's flight was so closely connected in point of time with the commission of the crime charged that proof of flight was admissible, regardless of proof of actual knowledge of accused that he was accused of crime, an instruction that the jury could consider flight as a circumstance *prima facie* indicative of guilt if accused knew or had reason to know that the person from whom he ran was an officer was not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.*]

10. CRIMINAL LAW (§ 1153*)—ORDER OF PROOF—DISCRETION OF COURT.

The discretion of the trial court in permitting on rebuttal evidence which should have been introduced as a part of the main case is not often interfered with on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. § 1153.*]

Evans and Weaver, JJ., dissenting in part.

Appeal from District Court, Polk County; Charles S. Bradshaw, Judge.

The defendant was indicted for burglary. He entered a plea of not guilty. A trial was had to a jury. A verdict of guilty was rendered, and judgment entered thereon. Defendant appeals. Affirmed.

E. C. Mills and E. D. Perry, both of Des Moines, for appellant. George Cosson, Atty. Gen., and John Fletcher, Asst. Atty. Gen., for the State.

EVANS, J. The defendant was charged with burglariously breaking and entering a certain building or storehouse of the Maryland Packing Company, wherein goods and merchandise were kept for sale and deposit, with the felonious intent then and there to commit the crime of larceny. The alleged crime was committed about 10:30 p. m. on November 22, 1910. The storehouse contained a large amount of dressed poultry which

were in course of preparation for the Thanksgiving trade. The employes of the Packing Company were at work in the building until about 10 p. m., and left at that time. The building in question was situated at the northwest corner of West Second street and Court avenue, in the city of Des Moines. It ran northward on the west side of Second street to an alley. At the north end of this building, and facing east and opening on the sidewalk on West Second street, was a large sliding door about 12 feet by 12 feet in dimensions. This sliding door was hung from, and rolled upon, an iron track on the inside of the building. When closed, the door fitted into a crevice or groove at the north end, and fastened by means of a hook, which attached the door to a staple in the jamb at the north end. On the south end of the door on the inside attached to the ceiling and running thence perpendicular to the floor was a large 4 by 4 post. This 4 by 4 post held the south end of the door in position, and the door slid between the wall and the 4 by 4 post. About 2½ feet from the floor was a 2 by 4 firmly attached to the 4 by 4 post, and running thence parallel to the wall and floor southward along the inside of the east wall of the building, the south end of which 2 by 4 was fastened to a partition wall. In opening or closing this door, the door was rolled upon the track through a narrow space, bounded on the east by the inside of the east wall of the building, and on the west by the vertical 4 by 4 post, and the horizontal 2 by 4. The door was of two thicknesses of boards, and was three inches thick. The building also contained an office door opening on the same street, and near the southwest corner of the building. At the north end was a window opening on the alley. On the east side there were two or more windows opening toward the street. Within the building and in the north part thereof was a wire partition or coop for chickens. There were also a considerable number of dressed turkeys packed in barrels and covered. A small gaslight about "two-thirds lit" was burning in this part of the storehouse. We are unable to learn from this record whether this light was left burning by the employes of the Packing Company, or whether it was only discovered in connection with events relating to the defendant which will hereafter appear. One Miller, a "merchant police," observed the light in the storehouse. He went to the sliding door, and undertook to open it, but found that it was fastened from the inside. He stepped from the door to the alley, four or five feet distant, and while standing there the defendant suddenly opened the sliding door from the inside, and rushed out. Miller ordered him to "halt." But the defendant ran down the alley with Miller in pursuit. After shooting once over his head, Miller accomplished the arrest. Some dress-

ed turkeys had been brought by the defendant as far as the door, and were left there when the race began. The manager of the Packing Company, who with the other employes had left the building shortly before, came to the building upon call of the police. Careful examination was thereupon made of all the windows and doors of the building in order to ascertain where and how the defendant had entered. No visible marks were discovered anywhere from which such fact could be directly ascertained. One window was partly open, but the opening was covered with a wire lattice work which was undisturbed. On the trial the theory of the prosecution was that the defendant entered in some way through the sliding door. It was shown by testimony on the part of the state that such sliding door was fastened on the inside by a hook and staple. It was also shown that on the night of the arrest and immediately thereafter it was discovered that the bottom of the 4 by 4 post against which the sliding door rested at its south end was loose, and that it "wiggled," that because of that it was possible to push the south end of the sliding door in to such an extent as to enable a person to crowd in through the opening thus made. Other evidence in the case will be noted in appropriate connection in the later discussion of the various features of the case.

[1, 2] 1. At the close of the evidence, the defendant moved for a directed verdict on various grounds. The substance of them all was that there was not sufficient evidence of a breaking to warrant a submission to the jury. It is the argument that, because the state is unable to point out except by inference and conjecture the place where and the manner how the defendant entered the building, there is a total failure of proof of the corpus delicti. It must be conceded that the mere entry by the defendant is not of itself proof of a felonious breaking. Nevertheless, it is a very important circumstance as bearing upon that question. The crime of burglary, like any other, may be proved by circumstantial evidence. The circumstances relied upon by the state in this case are that the defendant was wrongfully in the building; that he was there for the purpose of committing larceny and that he did commit it; that all the windows were closed, and that both doors were fastened and locked; and that there was no opening left through which the defendant could have entered the building. If these circumstances were proved to the satisfaction of the jury, they were sufficient to warrant deduction therefrom by the jury that the entry must have been effected by a breaking. If it was proved that the defendant was in the building for a felonious purpose, and that there was no opening through which he could have entered, it was a fair inference of fact that he must have entered by breaking. It is not essential

in a legal sense that there be found visible marks of a burglary in the form of broken locks or broken glass or uplifted windows. We find nothing contrary to this view in any of the many authorities cited by appellant's counsel at this point. Defendant's motion to direct a verdict was therefore properly overruled.

[3] 2. Objection was made by the defendant to the testimony of certain witnesses descriptive of the condition of the windows; the argument being that there is no evidence tending to show that the defendant entered through any of the windows. The very purpose of the evidence was to show that the condition of the windows was such that he could not have entered through them. The case of the state resting at this point wholly upon circumstantial evidence, it was clearly proper for it to show the condition of all doors and windows both immediately before and immediately after the alleged crime.

[4] 3. One Vail was a witness for the state. He was the manager of the Packing Company. He, as well as Miller, testified to the discovery of the loosened condition of the 4 by 4 post at its lower end immediately following the alleged burglary. He also testified that on the afternoon or evening of the following day he experimented by pushing in the south end of the sliding door, and passing through the opening thus made. Objection was made to this evidence on the ground that it was too remote in time, and that there was no showing that the conditions remained the same as they were in the preceding night. It is also claimed affirmatively that the conditions were not the same in that the barrels and coops were piled up the night before against the horizontal 2 by 4. It appeared, however, from the testimony of the witness Miller that this same experiment was made the night before, immediately after the arrest, and that it was so made by Vail. There is a conflict between the evidence of Miller and Vail at this point, in that Vail testified that it was in the evening of the next day that he passed through the opening. The conflict in the evidence at this point did not render the testimony of either witness inadmissible. It appearing from the testimony of Miller that the experiment was made immediately after the arrest, we can see no objection to further testimony that it was made, even though it contradicted the first witness as to the time it was made. The testimony of Miller, therefore, furnishes sufficient reason for the admissibility of that of Vail, and we need not consider the question whether the testimony of Vail upon that point would have been otherwise objectionable.

[5] 4. The defendant offered to prove by the witness De Vinne that shortly before 10 o'clock the defendant told De Vinne that he was going down to the warehouse of the

Maryland Packing Company to see Vail, the manager. This testimony was excluded on the objection of the state as being incompetent and self-serving, and defendant complains of such ruling. We think the ruling was proper. Appellant cites to us *State v. Driscoll*, 44 Iowa, 85. In that case statements made by the defendant were introduced in evidence against him by the state. In this case the defendant offered to prove his own previous statements in his own behalf. A state of the evidence might arise in a given case, where such evidence could properly be received as corroborative evidence only. It is not offered as such here. The defendant did not testify to any circumstance which made such a statement pertinent. Neither did he testify that he went to the storehouse for such purpose. He was not a witness in his own behalf. The only purpose of the offered testimony, therefore, was that it should be deemed as independent testimony of the intent of the defendant at the time of making such statement. This was "shortly before 10 o'clock."

[6] If it had been admitted for that purpose, it could only prove that the defendant was not guilty of any crime or felonious intent up to that point of time. It was not claimed by the state that he was. Even if he had come to the building, with the intent only to see the manager, he was none the less guilty, if, after discovering the absence of the manager, he then formed the intent to break, enter, and steal. There was no error in this ruling of the trial court.

[7] 5. The defendant asked the court to give the following instruction: "The burden of proof is upon the state to prove beyond a reasonable doubt that on the night in question the north door of the building occupied by the Maryland Packing Company was closed. Unless you find beyond a reasonable doubt that at the time the defendant attempted to enter said building said north door was closed, your verdict will be for the defendant." This instruction was refused. The only instruction given by the trial court covering the point was instruction No. 6, as follows: "In order to constitute the crime charged, it is necessary that there be a breaking and entering of the building. You are instructed that, to constitute such breaking and entering, it is not necessary that any actual injury be done to said building. An actual breaking may be by lifting, removing, or displacing a latch, or turning a door knob in a door, or removing any part or portion of said building which is an obstruction to the entering of said building." There was some evidence introduced on behalf of the defendant and some elicited by cross-examination of the state's witnesses which might have caused the jury to entertain a reasonable doubt as to whether the sliding door had been fully closed when the employees left

that night. The importance of this evidence was emphasized somewhat by the fact that it was conceded by the witness Vail, who was acquainted with the defendant, that he had had a conversation with the defendant at this building earlier in the day wherein he told him that he wanted to see him before he (defendant) left town, and that he would be at work at this plant in the evening until 10 or 11 o'clock. Other instructions were asked by the defendant to the effect that, if the door were "partly open," a pushing of the same further open could not constitute a breaking. These were refused.

There is a conflict in the authorities on this question. The numerical majority of the cases favor the contention of the defendant to the effect, that, if a door be partly open, it is not a "breaking" to push the same further open. Indeed, the older cases were practically unanimous to this effect. *Commonwealth v. Steward*, 7 Dane, Abr. 136; *Commonwealth v. Stephenson*, 8 Pick. (Mass.) 354; *Commonwealth v. Strupney*, 105 Mass. 588, 7 Am. Rep. 556; *Rex v. Smith*, 1 Moody (Eng.) 178; *State v. Long*, 5 Ohio Dec. 617; *Timmons v. State*, 34 Ohio St. 426, 32 Am. Rep. 376; *May v. State*, 40 Fla. 426, 24 South. 498; *Smith v. Commonwealth* (Ky.) 128 S. W. 68, 27 L. R. A. (N. S.) 1023. See, also, cases collated in 6 Cyc. 174. In the later cases some of the courts have repudiated this rule as being unreasonable and illogical. The first of these cases appears to be *Murmurt v. State* (Tex. Cr. App.) 67 S. W. 508. This has been followed by *Claiborne v. State*, 113 Tenn. 261, 83 S. W. 352, 68 L. R. A. 859, 106 Am. St. Rep. 833; *People v. White*, 153 Mich. 617, 117 N. W. 161, 17 L. R. A. (N. S.) 1102, 15 Ann. Cas. 927. The majority of this court are disposed to follow the lead of the last-cited cases, and to hold that, if a door be so nearly closed that the accused could not enter through the opening without pushing the door further open, then such pushing will constitute a "breaking" within the meaning of the law. The minority, including Justice WEAVER and the writer hereof, are disposed to concede the force of logic in the majority view. In view, however, of the great weight of previous authority to the contrary, they think that the present holding savors somewhat of the *ex post facto*. It has always been in the power of the Legislature to adopt a definition of "breaking" in accord with the present holding, but it has not done so. In section 4791 it did provide that an entry without breaking should be punishable where such entry was in the nighttime, and the building a dwelling house. In all other respects the definition of burglary is left to judicial decision. In view of the uniform judicial definition, so long followed by the courts and acquiesced in by Legislatures, it is the minority view that an innovation ought not to be lightly adopted. On the other hand, it must be said that no previous case is over-

ruled by the present holding, and that some of the previous utterances of this court are somewhat suggestive of the direction now taken by the majority holding. *State v. O'Brien*, 81 Iowa, 93, 46 N. W. 861; *State v. Coonors*, 95 Iowa, 485, 64 N. W. 295.

[8] 6. In the tenth instruction the trial court dealt with the attempted escape of the defendant from the "merchant police" at the time of his arrest. The instruction advised the jury that they were justified in considering such flight as a circumstance *prima facie* indicative of guilt, if the "defendant *knew or had reason to know* that the person from whom he ran was an officer of the law." The defendant complains particularly of that part of the above instruction above italicized. The evident intent of the trial court was to state the rule which has heretofore been announced in some of our previous cases. *State v. Seymour*, 94 Iowa, 699, 63 N. W. 661; *State v. Poe*, 123 Iowa, 118, 98 N. W. 587, 101 Am. St. Rep. 307; *State v. Hetland*, 141 Iowa, 524, 119 N. W. 961, 18 Ann. Cas. 899. The statement of such rule has usually been predicated upon at least two propositions: (1) That the defendant knew that he was accused or suspected of crime. (2) That he fled to avoid arrest therefor. So far as the statement of such rule is concerned, we think that actual knowledge on the part of the defendant of the suspicion or accusation against him is essential as distinguished from mere constructive knowledge. In civil cases persons are often held, as a matter of law, to know that which they "had reason to know"; but such a rule has little application in a criminal case where the guilty mind is the gist of the offense. True it is that, if the facts were such as to give the defendant "reason to know" that Miller was an officer, a jury would be warranted in drawing the inference of actual knowledge. But, if the circumstances were not such that a jury could find actual knowledge therefrom, then it was not sufficient simply to show that he had "reason to know." Defendant's objection to this qualification is therefore well taken.

[9] The error, however, is wholly technical, and without prejudice under the undisputed facts in the case. The alleged flight involved here was so closely connected in point of time with the commission of the alleged offense that it was clearly admissible in evidence regardless of the application of the rule to which we have referred. In other words, it was not necessary for the state to bring such circumstance within the rule indicated in order to render it admissible. If admissible, it had some tendency indicative of guilt. The weight of it was to be determined by the jury like that of any other circumstance and in the light of all the evidence in the case.

[10] Some complaint is made of certain evidence which was permitted upon rebuttal, whereas it should have been introduced as a

part of the main case. It is sufficient to say that the discretion of the trial court on such a question is not often interfered with here.

Other minor questions are argued. We discover no error in the record.

The judgment below must be affirmed.

POLLOCK v. BOARD OF SUP'RS OF STORY COUNTY et al.

(Supreme Court of Iowa. Nov. 16, 1912.)

1. DRAINS (§ 82*)—DRAINAGE ASSESSMENTS—REVIEW.

While the Supreme Court, in reviewing a drainage district assessment, will not lightly interfere with the finding of the board of supervisors making the assessment, the district court on appeal and the Supreme Court on further appeal must review questions as to the propriety of the particular assessment.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 81, 83-87; Dec. Dig. § 82.*]

2. DRAINS (§ 82*)—DRAINAGE DISTRICT—ASSESSMENTS—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a finding that a drainage district assessment was properly reduced in order to be equitable.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 81, 83-87; Dec. Dig. § 82.*]

Appeal from District Court, Story County; Charles E. Albroom, Judge.

This is an appeal from an assessment of benefits in a drainage proceeding. From the order of the board of supervisors assessing benefits to the amount of \$875 against him the plaintiff appealed to the district court of Story county. Upon trial had the trial court reduced the assessment to \$575. From such order of the trial court, the defendants appeal. Affirmed.

E. H. Addison, of Nevada, Iowa, for appellants. B. B. Welty, of Nevada, Iowa, for appellee.

EVANS, J. [1, 2] The drainage district involved is located in Nevada Township, Story county. The water course involved has its head a short distance north of the northwest corner of section 5, and extends in a southeasterly course to its outlet some distance southeast of the southeast corner of section 8. The plaintiff is the owner of the south 31.5 acres of the southeast of the southwest of section 5. An 18-inch tile drain is laid through his land entering the same on his south line about 27 rods west of his southeast corner, and passing up diagonally to his northwest corner and on to other lands, lying north and west. Between plaintiff's land and the outlet, considerable very large tile was used ranging from 18 inches to 36 inches; much of the land being low and flat. The "base 40" was assessed at \$1,400. Only about six sections were included in the district, and the cost of the drain was necessarily large.

1. It is urged upon us by appellant's brief that there are so many considerations that

enter into the apportionment of the benefits of such a project that we ought not lightly to interfere with the finding of the board of supervisors. We are in thorough sympathy with the suggestion, and have so expressed ourselves in the recent case of Rystad v. Drainage District, 137 N. W. 1030 (present term). These cases present peculiar difficulties to the courts, and satisfactory conclusions thereon are hard to reach. Nevertheless, the district court cannot avoid the responsibility of trying the questions involved when presented by proper appeal. Nor can we avoid the responsibility of reviewing the action of the district court upon proper appeal here.

In our consideration of the case we are necessarily confined to the record as made in the district court, so far as the evidence is concerned. In the record before us we are impressed that there are some considerations which stand out quite prominently in favor of the plaintiff's contention. Whether these were overlooked by the appraisers and the board of supervisors, or whether they were otherwise met, is not made to appear in this record. None of such persons were used as witnesses by either party, and we are left wholly in the dark as to the method adopted by the original assessing tribunal to reach the amount fixed. Plaintiff's land was one of the tracts which was heavily assessed. Doubtless one good reason for this was that the tile passes through his land. It does appear, however, that the elevation of plaintiff's land is not only higher than that to the south and east of it along the water course, but that it is also higher by about three feet along the line of the water course than the land immediately north along such water course. The result of this elevation was to dam up the water to the north of this land and up the water course. From one-third to one-half of plaintiff's land was sufficiently elevated to make tillable ground. The remainder was good pasture land, growing blue grass and timothy. The water course passed through his land in an open ditch. His dry land was in the northeast one-half, and his wetter land was in the southwest one-half. Some comparisons were instituted by the witnesses as to the relative benefits to plaintiff's land and to other land along the course tiled. From a careful reading of the evidence as a whole, we are impressed that the assessment against plaintiff was higher in proportion to benefits than much of the other land, and that the district court was justified in making some reduction. How much reduction should be made is a more difficult question.

It is urged by appellant that the plaintiff failed to institute a comparison with all of the tracts in the district, and that he confined his comparison to a comparatively few tracts. But a comparison was instituted

with the tracts similarly situated as being located upon the tile drain, and they bore the heaviest assessments. Just how wide a range such comparison should take must be a matter of judgment in each given case. And the complaining plaintiff must exercise such judgment at his peril before he rests his case. We think that the range of the inquiry in this case was sufficient for the purpose of the investigation at hand. It is impracticable for us to enter into a detailed discussion of the evidence; nor can we serve any public purpose thereby. It is proper, however, that we take note of some considerations that are pressed upon our attention by appellant's argument. It is urged that an 18-inch tile was laid across plaintiff's land at a depth of 9 feet, and at a cost of \$1,136. It is also urged that this was an average cost of construction through his land of \$31.87 per acre; whereas, the average cost of construction of 18-inch tile for the district as a whole was only \$14.20. It is argued, therefore, that because the tax assessed was less than \$28 per acre, whereas the cost of construction across plaintiff's land was \$31.87 per acre, he has received a greater benefit than the tax. Further reflection must convince counsel that such argument is not sound. The cost of construction of the drain across particular land is by no means the measure of benefit to such land. Granting, however, that it is a proper subject for consideration, it turns a sharp edge toward the appellants in this case. Manifestly the cost of construction across this land was greatly increased by the great depth of 9 feet. This depth was rendered necessary because of its high elevation and to furnish outlet to the lower elevations of the land further north and up the course.

It will not be claimed that any man would lay a tile 9 feet deep for the mere benefit of the land thus penetrated. And this great depth manifestly accounts for the increased cost per acre of laying the 18-inch tile across plaintiff's land as compared with the average cost of \$14.20 per acre of the rest of the course of the 18-inch tile. No lands in the district appear to have been assessed for the full cost of construction across such land. The larger assessments which were brought forward for comparison amounted to only about one-third or one-half of such cost of construction. We must hold, therefore, that there is nothing in this phase of the argument that would justify complaint over the reduction made by the district court. The foregoing discussion should not be taken as an indication that we regard cost of construction through particular land as fixing either a maximum or minimum basis for assessment. On the one hand, the cost of such construction may have been greatly increased for the benefit of the lands above, and, on the other hand, regardless of the cost of construction, whether much or little, the plaintiff has received a direct benefit of outlet from the drain below him. And he would be assessable with such benefits, even though he had incurred little or no cost of construction across his own land.

As to the amount of assessment fixed by the district court, it amounts to an average of about \$18 per acre for the entire tract. No definite rule is available to us whereby we can say that it should be a little more or a little less. Approximation is the best that we are enabled to do.

It is our conclusion that the amount thus fixed was approximately right, and the order of the trial court is accordingly affirmed.

WALLINDER v. WEISS et al.

(Supreme Court of Minnesota. Nov. 22, 1912.)

*(Syllabus by the Court.)***MECHANICS' LIENS (§ 78*)—IMPROVEMENTS BY TENANT—NOTICE BY LANDLORD—LIABILITY—"AUTHORIZED."**

A lessor may, by posting or giving notice, as required by section 3509, R. L. 1905, prevent mechanics' liens from attaching to his interest, although in the lease he has given the tenant permission to make the alterations for which the lien is claimed; the tenant having agreed to pay for the alterations and to restore the building to its former condition at the end of the term.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 111; Dec. Dig. § 78.*]

Appeal from District Court, St. Louis County; Homer B. Dibell, Judge.

Action by E. G. Wallinder against Harry Weiss and others. Judgment for defendants, and plaintiff appeals. Affirmed.

John Jenswold, Jr., of Duluth, for appellant. John Brown, of Duluth, for respondents.

HOLT, J. The defendants Breen and Shea, owners of a building in West Duluth, made a lease thereof to defendant Weiss for three years, to be used as a theater. In the lease, privilege was given the tenant, at his own risk and expense, to remove and safely store the plate glass and other windows in the front of the building and the front doors, and to change and remodel the front of the building in such manner as may be reasonably necessary and desirable for theater purposes. There was also a stipulation that the tenant was to restore the front to its original condition at the end of the lease, that he should pay all bills for labor or material used in the building, and keep it free from liens. The court found that before the beginning of the term of the lease Weiss entered upon the leased premises and commenced to make the changes, wherein plaintiff sold and furnished the required material. Within five days after knowledge that the work was being done, the owners posted, and kept posted, in a conspicuous place on the premises, a notice to the effect that the improvement was not being made at their instance. Plaintiff, not being paid, filed a lien, and in this action to foreclose the same the court held that he acquired no lien upon the estate of the owners, Breen and Shea, in the building.

Plaintiff's position is that, since the owners in the lease permitted the alteration to be made by the tenant, they authorized the improvement under the provision of section 3509, R. L. 1905, and hence cannot, by notice, prevent liens from attaching to their interest. Upon an examination of our mechanic's lien law, it will be found that the right to a lien is based on the proposition that the improvement was made pursuant to a contract

with or at the instance of the one whose interest is to be charged with the lien. Prior to the passage of chapter 200, G. L. 1889, it was necessary to prove that the one whose interest was sought to be affected by a lien had contracted for the improvement. *O'Neill v. St. Olaf's School*, 26 Minn. 329, 4 N. W. 47. In the last-named act we find the remedy extended, so that a lien may be had where the improvement was made "at the instance of the owner," or his agent, etc. *Althen v. Larbox*, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. Rep. 616. And it was provided that the presumption should prevail that the improvement was made at the instance of the owner, unless he kept posted or gave written notice to those furnishing material or performing labor that the work was not done at his instance, essentially in the same manner as now found.

In construing this section 3509 of the Revised Laws, it is to be remembered that the main purpose in preparing and adopting the Code was to embody the then existing statutes into more compact and orderly form and clearer language. Said section 3509 covers sections 4 and 5 of said chapter 200, Laws 1889. The first part of the section relates to the vendor's interest in an executory contract to convey, and it is entirely clear that such interest may be protected by posting or serving the written notice mentioned, unless the vendor has required the improvement to be made. Then follows the provision that every improvement shall be deemed authorized by the owner or parties interested, and that one who has not authorized the same may prevent a lien from attaching to his interest by posting a notice on the premises within five days after knowledge of the improvement that the same is not done at his instance. The act of 1889 clearly indicated that a lessor, who did not contract for or direct the improvement to be made, could, by giving or posting the notice, prevent his interest from being subjected to lien. *Congdon v. Cook*, 55 Minn. 1, 53 N. W. 253. *Jefferson v. Leithausser*, 60 Minn. 251, 62 N. W. 277.

But plaintiff insists that an intention is manifest in the Revised Laws to extend the scope of the mechanic's lien right, so as to subject thereto the interest of the one who has merely given permission to the making of the improvement. It is said one who has given permission to make an improvement has authorized it under said section 3509. We consider this proposition unsound. The basis for the right to a mechanic's lien found in section 1 of chapter 200, Laws of 1889, is restated in the Revised Laws in section 3505, and it is plain therefrom that it is made to rest upon the ground, already herein indicated, that the one whose interest is to be charged therewith has either contracted for the improvement or else that it has been done at his instance. The only noticeable

difference in the language is that in section 1 of the Laws of 1839 giving the lien right occurs the phrase, "by virtue of a contract with, or at the instance of, the owner thereof, or his agent" etc., while in the Revised Laws the reading is, "whether under a contract with the owner of such real estate, or at the instance of any agent," etc., of such owner. There is here certainly no indication of an intent to broaden or extend the right to a lien. And in fact there is no change in meaning, for, if something may be done at the instance of the principal's agent, it may also be done at the instance of the principal.

The foundation of this right, as there indicated, must be kept in mind in giving the proper meaning to the word "authorized" as found in said section 3509: "When improvements are made by one person upon the land of another, all persons interested therein * * * shall be deemed to have authorized such improvements insofar as to subject their interests to liens therefor. But any person who has not authorized the same may protect his interest from such liens" by the notice mentioned "that the improvement is not being made at his instance." We may assume, for the purpose of this decision, that if the respondents authorized the alteration, notice that the same was not made at their instance will not prevent liens from attaching. But the word "authorized," as used in the section mentioned, is not synonymous with a permission or consent to an improvement made by a lessee or vendee for the latter's convenience. We think this appears when the purpose of the law as found in section 3505, and the whole mechanic's lien law as it existed before the revision and is now found, is considered. A vendor may protect his interest by notice, unless he has *required* the improvement to be made. The notice which serves to protect must state that the improvement is not made at the *instance* of the one who gives it. We take it that "authorized" here means authorized by contract with, or by direction or at the instance of, the owner or person interested, and not merely by his permission or consent at the instance of a tenant or vendee.

Any other holding would work disastrous results to lessors or vendors, who in many instances lease or sell with the understanding, express or implied, that the tenant or vendee, to enjoy the interest acquired, must necessarily make improvements or alterations. Such mere consent ought not to irrevocably subject the interest of the owner to mechanics' liens for work or material performed or furnished at the instance of a lessee or vendee. And we are of the opinion that the revision of the statutes made no radical change or departure in the mechanic's lien law as it existed prior thereto. Therefore we hold that the defendant lessors

herein, who merely consented to a temporary alteration by the tenant of the front of the building, by keeping the notice posted, as provided by law, that such alteration was not made at their instance, prevented plaintiff's lien from attaching to their interest.

The judgment is affirmed.

WILKINS v. HANSON et al.

(Supreme Court of Minnesota. Nov. 22, 1912.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY (§ 89*) — DISCHARGE—GROUNDS.

If a creditor informs a surety that the debt is paid or settled, and thereby lulls the latter into security, inducing him to take no steps to protect himself, and the surety thus suffers damage, the creditor is estopped from thereafter proceeding against the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 133, 133½, 136-139; Dec. Dig. § 89.*]

2. PRINCIPAL AND SURETY (§ 162*)—REMEDIES OF CREDITOR—QUESTION FOR JURY.

Evidence considered, and held to make a case for the jury on the questions whether the creditor stated to the surety that the debt was settled, whether the surety was thereby induced to take no steps to protect himself, and whether he thereby suffered damage.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 442-445; Dec. Dig. § 162.*]

Appeal from District Court, Clay County; C. A. Nye, Judge.

Action by N. W. Wilkins against Betty Hanson and others. From an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Christian G. Dosland, of Moorhead, for appellant. W. B. Douglas, of St. Paul, and Chas. S. Marden, of Moorhead, for respondents.

BUNN, J. This action was to recover on a promissory note executed by the defendants Betty Hanson and A. Hanson, as principals, and by defendants Bayer and Beck, as sureties. The Hansons did not appear at the trial, and a verdict was directed in plaintiff's favor as against them. As between plaintiff and defendants Bayer and Beck, the case was submitted to the jury, and a verdict returned in favor of said defendants. Plaintiff appeals from an order denying his motion for a new trial.

The assignments of error raise but one question: Was plaintiff entitled on the evidence to a directed verdict against defendants Bayer and Beck? The defense was that after the maturity of the note, and at a time when the Hansons were preparing to move to Canada, the sureties, on requesting A. Hanson to pay the note, were informed by him that it had been paid, and that, upon inquiring of plaintiff if the note had been paid, they were informed by him that it had been settled; that, had they not been "lulled"

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to security" by this statement of plaintiffs, defendants could and would have protected themselves by collecting the note from the Hansons.

[1] The law is well settled that if a creditor informs a surety that the debt is paid or settled, and thereby lulls the surety into security, inducing him to take no steps to protect himself, the creditor is estopped from thereafter proceeding against the surety, if there is evidence tending to show that the surety was damaged; that is, that he might have protected himself, had he not been induced to take no steps to that end. 32 Cyc. 214; Childs, Suretyship and Guaranty, 265; Carpenter v. King, 9 Metc. (Mass.) 511, 43 Am. Dec. 405; Sioux Valley State Bank v. Kellog, 81 Iowa, 124, 46 N. W. 859; Auchampagh v. Schmidt, 80 Iowa, 186, 45 N. W. 567.

[2] The evidence was ample to justify the submission to the jury of the question whether plaintiff stated to defendants that the note had been settled, and the question whether defendants relied on this statement, and were thereby induced to allow the Hansons to depart for Canada without taking any steps to protect themselves. The only doubt is whether defendants suffered any loss; that is, whether there is any showing that would warrant the jury in finding that they could have protected themselves had they made the effort. We have examined the record with care, and reach the conclusion that this question was for the jury. There was evidence tending to show that A. Hanson had recently received \$800 on a life insurance policy, that he had a car loaded in part with personal property ready to transport to Canada, and that his wife, defendant Betty Hanson, owned a building, which had just been sold for some \$700 more than the incumbrances thereon. While this evidence does not make a strong showing of actual damage to the sureties, we are satisfied that it is sufficient to warrant the submission of the question to the jury. We hold that the trial court was correct in denying plaintiff's motion for a directed verdict.

Order affirmed.

NELSON v. NORTHERN PAC. RY. CO.
et al.

(Supreme Court of Minnesota. Nov. 15, 1912.)

(Syllabus by the Court.)

1. DEATH (§ 58*)—PRESUMPTIONS.

The presumption that a person who was killed by a train while crossing a railroad track at a street intersection exercised due care for his safety contains no elements differentiating it from the ordinary presumption of right conduct, and is not conclusive. It may be overcome by direct evidence, or by facts and circumstances clearly showing a failure to exercise due care.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 75-78; Dec. Dig. § 58.*]

2. DEATH (§ 75*)—OPERATION—ACCIDENT AT CROSSING—PRESUMPTIONS.

Force and effect will be given the evidence tending to overcome the presumption, whether it appears from the plaintiff's case in chief or from that offered by defendant.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 93, 95; Dec. Dig. § 75.*]

3. RAILROADS (§ 348*)—OPERATION—ACCIDENT AT CROSSING—SUFFICIENCY OF EVIDENCE.

In this case the evidence is held to justify a verdict of negligence against defendant, and exonerating decedent from contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.*]

Appeal from District Court, St. Louis County; Homer B. Dibell, Judge.

Action by Sarah J. Nelson, administratrix, against the Northern Pacific Railway Company and others. From an order denying an alternative motion for judgment or a new trial, the defendant railway company appeals. Affirmed.

Washburn, Bailey & Mitchell, of Duluth, for appellant. John Jenswold, Jr., C. R. Magney, and H. W. Lanners, all of Duluth, for respondent.

BROWN, J. Action for damages for the alleged wrongful death of plaintiff's intestate, in which plaintiff had a verdict, and defendant appealed from an order denying its alternative motion for judgment or a new trial.

The facts are as follows: Defendant operates a line of railroad at grade over and across Fifty-Seventh avenue in the city of Duluth. Two main tracks and one side track extend over the avenue, at an angle of about 45 degrees. Trains from Duluth pass over the north main track, and those going into Duluth over the south track. The side track is about 9 feet from the south main track, and runs parallel with it across the avenue. The crossing is in a well-settled part of the city, and is much frequented and made use of for public traffic and travel. On December 23, 1910, at about 6:30 o'clock in the evening, decedent was struck by a train passing over the south-bound track into Duluth and killed. This action followed.

The complaint charged three distinct grounds of negligence, namely: (1) The failure of defendant to give any warning of the approach of the train, by ringing the bell or sounding the whistle of the engine; (2) excessive and unlawful speed of the train; and (3) the failure to provide either gates or a watchman at the crossing, contrary to the municipal regulations of the city. There was some evidence tending to show a failure to give the usual signals; but that ground of negligence was abandoned on the trial, and the question was withdrawn from the jury. The verdict rendered in favor of the engineer, a party to the action, negatived negligence in respect to the speed of the

train, and, so far as the alleged negligence of the railroad company is concerned, the verdict was based entirely upon its failure to provide gates or a watchman at the crossing as required by the city regulations.

It is contended by defendant on this appeal (1) that the evidence is insufficient to establish the negligence of defendant, in the respect just stated; and (2) that decedent was guilty of contributory negligence as a matter of law.

[3] 1. The evidence tends to show that this particular avenue is in a well-settled part of the city, and that it was much used by both pedestrians and teams. Buildings for residence and other purposes are situated upon either side of the avenue, and the avenue was used at the point where the railroad crosses the same by the people living in that vicinity. The crossing was considered by the city council as sufficiently dangerous to require a watchman or gates for the protection of those making use of the same, and a resolution requiring the company to maintain gates or a watchman was formally passed and served upon defendant several months before the accident here in question. The defendant failed to comply with the requirements of the resolution, and at the time of the death of the decedent there were neither gates nor watchman at the crossing. We are of opinion, and so hold, that the question whether defendant was negligent in not providing a watchman or gates was one of fact, and properly submitted to the jury; and, whether the municipality lawfully could require the presence of a watchman or gate tender at all hours of the night, the fact remains that the presence thereof at the time in question, an early hour in the evening, might have prevented the death of decedent—at least a compliance with the municipal regulations would have been a timely warning to decedent, and relieved defendant from the charge of negligence. It might be unreasonable to require a watchman at such a crossing at all hours of the night; but the fact is well known that travel on such streets in our large cities is more congested at the close of the business day than at other hours, and greater precautions are necessary for the protection of pedestrians. This question was properly submitted to the jury.

[1] 2. Was decedent guilty of contributory negligence as a matter of law? We think, within previous decisions of the court in similar cases, the question must be answered in the negative. Decedent resided within a block and a half of, and was familiar with, the crossing and the operation of trains by the railroad company. He owned a barn on the opposite side of the railroad from his residence, and was on his way to the barn when killed. It was a dark, cold night, and the wind was blowing from the northwest, and decedent was facing the wind. A view

of the railroad was obstructed for a considerable distance along the route necessarily taken by decedent. There were buildings along the street, and immediately adjacent to the side track were lumber sheds, piles of lumber, and poles, and the evidence tends to show that a box car stood upon the side track nearly up to the footwalk leading across the right of way. With these obstructions, decedent could not see an approaching train until he had passed the box car, and he was then within one or two steps from the track upon which the train was approaching. He was evidently struck by the engine of the train just as he was clearing the track. Decedent's course led him away from the approaching train at an angle of 45 degrees, and, as stated by the trial court, there was evidence suggesting that the place was a difficult one from which to hear, and that the sounds of the train were deceptive and misleading. He may have looked and seen the approaching train as he passed from behind the box car, and misjudged its distance away. It is a well-understood fact that a person cannot with any degree of accuracy judge of the distance of an approaching train when the only guide is the headlight of an engine. And if, as the evidence tends to show, decedent was aware of the approaching train just as he passed the car upon the side track, his first opportunity to observe its approach, and when he was substantially onto the track, the question whether it was prudent for him to go forward was one of fact for the jury. *Bodin v. Railway Co.*, 117 Minn. 513, 136 N. W. 302. The presumption is that he exercised his best judgment in the situation confronting him, and adopted what to him seemed a safe course to pursue. *Knudson v. Railway Co.*, 114 Minn. 244, 130 N. W. 994; *Simonson v. Railway Co.*, 117 Minn. 243, 135 N. W. 745. The fact that decedent was familiar with the crossing is not conclusive against him. *Struck v. Railway Co.*, 58 Minn. 298, 59 N. W. 1022. In that case decedent had formerly been a section hand on the part of the road including the crossing where he was killed, and was well acquainted with the situation. There was in that case, as in the case at bar, no living witness to the accident, and there was no evidence that decedent looked or listened for a train before attempting to cross the track. The court held the question of contributory negligence one of fact. We are unable to distinguish the case at bar from those cited, and we follow the rule there laid down.

[2] The presumption of due care on the part of the decedent in cases of this kind is not a new doctrine. It has been applied in varied forms of expression for many years in substantially similar cases. It embodies, however, no particular elements differentiating it from other presumptions of right conduct, and is not conclusive. It may be over-

come by direct proof, or by facts and circumstances which lead to the conclusion that due care was not exercised. It matters not whether the evidence overcoming the presumption appears from plaintiff's case in chief or from the evidence offered by defendant. It is sufficient in either case to fully destroy and take away the effect of the presumption. It sometimes appears so conclusively that due care was not exercised that the trial court is justified in dismissing the action or directing a verdict for defendant. In the case at bar the evidence made the question one of fact.

Order affirmed.

WHITE v. HEWITT et al.

(Supreme Court of Minnesota. Nov. 15, 1912.)

(*Syllabus by the Court.*)

1. JUDGMENT (§ 682*)—CONCLUSIVENESS—MATTERS CONCLUDED—TITLE TO LAND.

In this action of partition, the issue was as to whether or not plaintiff had any title to an undivided one-third interest in the land. It is held that a judgment in a former action between plaintiff's grantor and others, as plaintiffs, and certain of the defendants in this case, as defendants, estopped plaintiff's grantor and those in privity with him from asserting title to the interest claimed by plaintiff in the case at bar.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1203-1206; Dec. Dig. § 682.*]

2. VENDOR AND PURCHASER (§ 244*)—CONCLUSIVENESS—PERSONS CONCLUDED.

An unrecorded quitclaim deed from plaintiff's grantor to plaintiff, construed together with a contract entered into between them at the same time, constituted plaintiff the agent or attorney of the grantor to conduct litigation, sell the property described in the deed, and divide the proceeds, and did not make plaintiff a bona fide purchaser, or give him a title that can prevail as against the subsequent estoppel of his grantor by the judgment and decision in the former suit.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 609-611; Dec. Dig. § 244.*]

Appeal from District Court, Ramsey County; Hascall R. Brill, Judge.

Action by William G. White against James Byrd Hewitt and others. From an order denying a new trial, plaintiff appeals. Affirmed.

William G. White, of St. Paul, pro se.
John E. Stryker, of St. Paul, for respondents.

BUNN, J. This action is for the partition of certain land which formerly was a part of Bernheimer avenue, in St. Paul. Plaintiff claimed to own an undivided one-third interest in the land, and each of defendants Hewitt an undivided third. The trial court decided that neither plaintiff nor the Hewitts had any interest in the land, but that the same was owned by defendant Jefferson, subject to a contract with the defendant railway company. Plaintiff moved for a

new trial, and appealed from the order denying such motion.

The ultimate question here is whether plaintiff had any interest in the land. His claim of title rests upon the following facts:

In 1889 a portion of Bernheimer avenue, one of the public streets of St. Paul, was vacated. At that time Allie Hewitt, James Byrd Hewitt, and Walter Hewitt owned as tenants in common lot 60 of Hewitt's outlots, First division, which adjoined the vacated street. Through conveyances and a mortgage foreclosure, all after the vacation of the street, defendant Jefferson became the owner of lot 60. Allie Hewitt died in 1898. By her will she devised to her son, Augustus Kirby Barnum, among other property, all her interest in Hewitt's outlots, "all in trust, however, to receive, rent, have, hold, mortgage, sell and convey and otherwise dispose of the same or any portion thereof, when and on whatever terms he shall see fit, as fully as though he were seized in fee simple thereof in his own right, and the proceeds thereof to invest and reinvest when and as he shall see fit, and out of the net income thereof and of the investments arising therefrom to use for the support of himself and his children whatever he shall deem necessary. And should it be necessary in any case for his comfort to use more than the interest or income, I wish him to do so without restraint or control from any one else, but having in mind, however, my preference that he should keep the principal intact if he well can. And all the said property and the investments and reinvestments of the proceeds thereof remaining at the death of my said son shall be disposed of as he, my said son, shall provide in his will. But should my said son die intestate, then that portion of the said property remaining at his death shall, one-half thereof, pass to and become the property of then living children of my said son and the issue of any deceased child in equal shares, so that all the issue, if any, of each deceased child shall altogether receive the same portion as a living child, and the other one-half of such remaining property shall become the property of and pass to my sister, Rebecca E. Miller, if she shall be then living but if she be dead, then to whomsoever she shall have designated in her will to receive the same."

December 15, 1906, Augustus Kirby Barnum executed and delivered to plaintiff a deed, by which "in his capacity of trustee under the last will and testament of Allie Hewitt, deceased," he conveyed to plaintiff all those portions of Bernheimer avenue and other named streets embraced within the limits of Hewitt's outlots. The deed recited the trusts in the will, and the power of sale therein given Barnum, and purported to be executed by virtue of the power given Barnum in the will. At the same time, and as a part of the same transaction, plaintiff,

Barnum, and one Soucheray entered into a contract, reciting the conveyance by Barnum to plaintiff, and providing that plaintiff and Soucheray should convert into cash the real estate so conveyed by Barnum, and to that end institute and carry forward all necessary suits, pay all costs and expenses thereof, and divide the proceeds of the property, when sold, one-half to Barnum, and one-half to plaintiff and Soucheray. In March, 1910, Barnum, "in his individual capacity and also in his capacity as trustee," gave another deed of the same property to plaintiff. Neither of these deeds was ever recorded, nor was the contract.

[1] Under the doctrine of *White v. Jefferson*, 110 Minn. 276, 124 N. W. 373, 125 N. W. 262, 32 L. R. A. (N. S.) 778, 784, *Allie Hewitt*, at the time of her death, owned a one-third interest in the land in question. The writer is firmly convinced that the doctrine of that case is unsound, but it must be adhered to in the present case between the same parties. If, therefore, plaintiff now has *Allie Hewitt's* interest, through her will and the deeds from Barnum, he is the owner of a one-third interest in the property involved, each of the *Hewitts* the owner of one-third, and defendant *Jefferson* has no title. The claim of defendant *Jefferson* is that Barnum was estopped to claim title to the land in question by virtue of the decision and judgment in an action brought by Barnum and the *Hewitts* against *Jefferson* and others, and that plaintiff took no title from Barnum under either deed.

We find little difficulty in agreeing with the conclusions of the trial court that the judgment in the *Barnum* Case constituted an estoppel. In the complaint in that case plaintiffs alleged that the legal title to the tract in question, and other property, was in defendants *Jefferson* and *Hoard*, but that plaintiffs were the owners of the equitable title. The answer admitted that defendants had the legal title, and denied that plaintiffs had any right, title, or interest. The complaint referred to an exhibit for the description of the real estate involved in the action, and in this exhibit the part of *Bernheimer* avenue claimed in the case at bar was explicitly described. After a trial, the court rendered a decision in favor of defendants, finding that the title was in *Jefferson & Hoard*, and that plaintiffs had no right, title, or interest to or in the premises. Pursuant to this decision, judgment was entered in the district court, by the terms of which it was adjudged "that plaintiffs herein take nothing by this action, and that defendants herein have and recover" costs. This judgment was affirmed by this court. *Barnum v. Jefferson*, 109 Minn. 1, 122 N. W. 453.

It is true that the question of Barnum and the *Hewitts'* title to the strip of vacated street, as distinct from their claimed ownership of the property of which *Jefferson &*

Hoard had the legal title, was not litigated. Indeed, the case hinged upon the existence of the agreement claimed by plaintiff to have been made. But this is in no way controlling. The issue involved in the case at bar, the title to the vacated street, was presented by the pleadings in the former case, and might have been litigated. As said by Chief Justice *Start* in *Veline v. Dahlquist*, 64 Minn. 119, 66 N. W. 141: "A judgment on the merits constitutes an absolute bar to a second suit for the same cause of action, and is conclusive between parties and privies, not only as to every matter which was actually litigated, but also as to every matter which might have been litigated therein." In *Prendergast v. Searle*, 81 Minn. 291, 84 N. W. 107, Mr. Justice *Brown* said: "It is elementary that a judgment in an action is final and conclusive between the same parties as to all questions or issues presented by the pleadings." The rule is a familiar one, and we apply it here.

We do not consider that the cases of *Dixon v. Merritt*, 21 Minn. 197, *McClung v. Condit*, 27 Minn. 45, 6 N. W. 399, or *Augir v. Ryan*, 63 Minn. 373, 65 N. W. 640, announce any different rule that is applicable to the facts in this case. The distinction between estoppel by judgment and estoppel by verdict is not important in this case. The issue as to the ownership of this vacated street was expressly made by the pleadings in the former suit. That it was not actually litigated may have been because the legal title was admitted. In any event, it is not a case that calls for a decision that, because there is no finding or no evidence that the point was actually litigated and determined in the former suit, there can be no estoppel. The fact of ownership, the vital fact in the case, was litigated and determined. The most that can be said is that the legal point upon which plaintiff now claims title was not presented in the former case, and not decided. This is no reason why the former adjudication is not a bar.

It is urged that, because the judgment itself did not adjudge title in defendants, there could be no estoppel. But we look to the findings to see what was decided, to interpret the judgment. It there appears clearly that it was determined that plaintiffs had no title, and that defendants were the owners. Plaintiff contends that the judgment did not give title to defendants, was not a link in their chain of title, under the rule in *Minnesota Debenture Co. v. Johnson*, 94 Minn. 150, 102 N. W. 381, 110 Am. St. Rep. 354. This may be conceded, but it does not help plaintiff. Though the judgment was not a link in defendant's title, though it did not operate to transfer the *Barnum* and *Hewitt* title to *Jefferson* as against all the world, it does not follow that it might not operate as an estoppel by verdict to prevent the assertion of title by *Barnum* and the *Hewitts*, or

their privies. Plaintiff must show that he has an interest in the land that he seeks to have partitioned in this action. He can prevail only if he shows a title in himself, not merely by showing that another has no title. We think it clear that there was an estoppel as against Barnum and the Hewitts.

[2] It remains to be considered whether plaintiff took any title from Barnum that gives him an interest in the land that is not cut out by the estoppel of his grantor. The trial court decided that the first deed from Barnum "in his capacity as trustee" under the will of Allie Hewitt conveyed no title, because the trust was an invalid one, and the question of the validity of this trust was argued in this court. But, conceding its invalidity, we are not prepared to hold that, were it not for the contract entered into as a part of the transaction, plaintiff did not acquire thereby all the interest which Barnum had, either as trustee or as the owner of the legal title. We must, however, consider the transaction as a whole, and look to the terms of the contract, to determine whether plaintiff should be considered a bona fide purchaser of Barnum's interest, or merely his agent and attorney to conduct necessary litigation, sell the property, and turn over the proceeds to Barnum, less compensation for his services and those of Southeray. The contract seems to leave no reasonable doubt on this point. It was certainly not intended that plaintiff should become the owner of Barnum's interest. He was obligated to conduct litigation, if necessary, as it undoubtedly would be and was, to establish Barnum's title to a one-third interest in the vacated street. And he was bound to account to Barnum for the proceeds of such litigation and the sale. His interest was really in the fruit of the litigation, not in the real estate itself. His position was not far different from that of any lawyer who takes a case on a contract for a contingent fee. Looking broadly at the entire situation, as disclosed by the deed, contract, and evidence, we must hold that plaintiff was only the attorney, agent, or trustee of Barnum, and that he cannot be considered an innocent purchaser, or even a purchaser of Barnum's interest in the land.

All that is said above applies to the second deed from Barnum to plaintiff, and, in addition, there is the fact that this deed was given after Barnum had become estopped by the judgment or decision in the case of Barnum against Jefferson. As we have said, neither of the deeds to plaintiff was ever recorded. It is impossible to hold that he has any title that can prevail in this action of partition.

We have carefully considered the other points presented by plaintiff, and reach the conclusion that there was no error in the findings, or in the omission to make certain

findings, and that the decision of the trial court that plaintiff had no interest in the land sought to be partitioned was correct.

Order affirmed.

WEISS v. GREAT NORTHERN RY. CO.
(Supreme Court of Minnesota. Nov. 15, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 350*)—OPERATION—ACCIDENTS AT CROSSINGS—QUESTION FOR JURY.

In an action for injuries received by a pedestrian, who was struck at night by one of the defendant's engines at a grade crossing, evidence considered, and *held* sufficient to take the case to the jury upon the question as to whether the headlight of the engine was lighted, and also upon the ultimate issues as to negligence on the part of the defendant and contributory negligence on the part of the plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

2. RAILROADS (§ 320*)—OPERATION—ACCIDENTS AT CROSSINGS—INSTRUCTIONS.

Instruction as to the duty of the engineer to give warning, upon discovering the plaintiff in a position of peril, considered and *held* not reversible error.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1014-1016, 1019; Dec. Dig. § 320.*]

3. DAMAGES (§ 130*)—EXCESSIVE DAMAGES—PERSONAL INJURIES.

Damages *held* excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370; Dec. Dig. § 130.*]

Appeal from District Court, Meeker County; Gorham Powers, Judge.

Action by Laura Weiss against the Great Northern Railway Company. From an order denying a motion for judgment or for a new trial, defendant appeals. New trial granted on condition.

W. L. Clift, of St. Paul, J. D. Sullivan, of St. Cloud, and N. D. March, of Litchfield, for appellant. Ernest W. Campbell, of Litchfield, and F. E. Latham and C. A. Pidgeon, both of Minneapolis, for respondent.

PHILIP E. BROWN, J. Action to recover damages for personal injuries sustained by the plaintiff, in colliding with one of the defendant's trains on October 28, 1910, at a street crossing in the city of Litchfield, and in which she obtained a verdict for the sum of \$7,500. This is an appeal by the defendant from an order denying its alternative motion for judgment in its favor or for a new trial.

The defendant's railway traverses Litchfield in an easterly and westerly direction, crossing Sibley and other avenues west thereof. The business and the larger portion of the residence section is located north of the defendant's right of way and tracks, while to the south thereof is situate the smaller part of the city. Sibley avenue, the main thoroughfare, runs north and south,

has a sidewalk on each side of its roadway, and crosses the defendant's right of way and tracks about 50 feet east of the defendant's depot. The plaintiff, a young lady about 23 years of age, had resided for many years on this avenue, some $2\frac{1}{2}$ or 3 blocks south of the said station, and was thoroughly familiar with the railway crossing, tracks, depot, buildings, and grounds of the defendant, and also with its custom of signaling by whistling one or more times upon the approach of its trains to the various streets which its tracks crossed, including Sibley avenue. About 7:30 o'clock in the evening of the day of the accident, the plaintiff walked from her home, proceeding north, along the sidewalk on the east side of Sibley avenue, and, on arriving at a point about $1\frac{1}{4}$ blocks south of the defendant's tracks, heard a rumbling sound, but was not then certain that it was produced by a train. She became certain, however, that the noise referred to was made by a train approaching from the west, when she was about a block from the crossing. Nevertheless, she continued her journey, and just prior to stepping upon the tracks at the crossing she observed several persons on the opposite side of the street crossing over the tracks from the north to the south side, and when she was almost over the tracks she was struck by some portion of an engine approaching from the west, whereby she suffered the injuries complained of.

[1] The matters stated above are uncontroverted. The plaintiff alleges several acts of negligence in her complaint, including the running of the train through the city at excessive speed, the failure to give either the customary or statutory signals of approach to the crossing, by bell, whistle, or otherwise, and also that the headlight on the engine was unlighted. Furthermore, she claims that the evidence establishes each claim of negligence charged. All of these allegations and claims the defendant denies. The defendant, however, concedes that, if the headlight of the engine was unlighted at the time of the accident, such fact would constitute negligence on its part, and we deem such is, in any event, the law. A consideration of the testimony, especially those portions detailing the physical facts, taken in connection with the instructions given—which must be taken to be the law of the case so far as the plaintiff is concerned—leads to the conclusion that the verdict rendered can in no event be sustained, unless the evidence adduced concerning the question of the headlight being unlighted at the time of the accident was sufficient to carry the case to the jury on this point. We adopt this view, because we deem it clear that, in the event of a determination that the evidence on this question was insufficient to sustain a finding in accordance with the plaintiff's contention, then the plaintiff must be held to have

been guilty of contributory negligence, as a matter of law, in crossing the track under the circumstances disclosed. Was, then, the evidence sufficient to sustain a finding that the headlight of the locomotive was unlighted when the plaintiff was injured? This question is so connected with the defendant's contention that the plaintiff was guilty of contributory negligence, under the circumstances above indicated, that for convenience we will consider them together. And in this connection it should be remembered that the burden rested on the plaintiff fairly to satisfy the minds of the jurors as to the correctness of her contention in this regard, and that the same burden rested upon the defendant to establish contributory negligence on the part of the plaintiff, and, furthermore, that the elementary rule must be applied that, before the court can declare either the existence or nonexistence of negligence as a matter of law, the proof must be such that reasonable minds could not draw different conclusions concerning the presence or absence of due care therefrom.

It is neither practicable nor advisable to state all of the evidence bearing upon these questions. Nor are we required to discuss the evidence for the purpose of demonstrating the correctness of the trial court's action. *Demaris v. Rodgers*, 110 Minn. 49, 124 N. W. 457; *Prahl v. Brown County*, 104 Minn. 227, 116 N. W. 483. The following is, we think, a fair summary of the evidence pertinent to the present inquiry, when coupled with the facts already stated:

The center of the defendant's station is about 225 feet from the east side of Sibley avenue, where the accident occurred, and before passing onto the track near the point where she was struck the plaintiff could have seen the headlight of the approaching engine, had it been lighted, for a long distance, and it appears in this connection that her eyesight and hearing were normal. The night was very dark, and a high wind was blowing from the northwest. There was evidence sufficient to show that neither the street near where the accident occurred nor the defendant's right of way was lighted, and that there were no lights in the defendant's depot or grounds. The plaintiff, an intelligent young woman, testified that she saw no headlight or train approaching, though she was mindful of the fact that one was coming from the west, and continued to look therefore up to the time she was struck, and that she heard no bell or whistle, except one sharp blast immediately before she was struck. Other witnesses traversing the same sidewalk a short distance behind her heard no bell or whistle, except a whistle for the station and three sharp blasts simultaneously with the accident, and did not see the accident; the latter fact apparently due to no other reason than the absence of light, though they did see the train pass the cross-

ing and noticed that a dead engine was a part of the load. The engineer testified that he first saw the plaintiff when his engine was about the middle of the depot, and when she was from 20 to 30 feet south of the track, towards which she was walking, according to his estimate, "medium," with her head somewhat down, and that he last saw her when she stepped into the light of the headlight—which, according to his testimony, shone over the track and sidewalk to a considerable extent—and attempted to cross the track; but he did not see the engine strike her. The engine messenger, who was in the cab of the engine, testified that he saw the accident, but could not see whether it was a man or a woman that was struck, or what part of the engine struck the plaintiff. The fireman testified that he lit the headlight of the engine at the station west of Litchfield, and that when the train stopped after the accident, about 2,000 feet east of the crossing, he went to the front of the engine to ascertain the condition of the headlight, and found it still burning, and other employes of the defendant testified to the effect that the headlight was lighted. Its employes also testified that the train made a great deal of noise in approaching the station—which evidence was corroborated by other witnesses—and that the usual and statutory signals, by whistle and bell, were given on approaching and passing through the city, including three sharp blasts just prior to the accident. The employes estimated the speed of the train at from 10 to 15 miles an hour, while the plaintiff's witnesses estimated it at 20. It also appears that two small "classification" lights were burning on the front of the engine.

Each case of this kind must be determined upon its own facts, and after a careful consideration of all the evidence in this case, in connection with the argument made and the authorities cited by the defendant, we cannot hold that the jury were not justified in believing the plaintiff's version of the accident. Nor can we say that, because other witnesses having a side view of the train saw it pass the crossing, the plaintiff, from her viewpoint, must have seen it as it approached. True it is that this approaching train must have made considerable noise; but it should be remembered that a high wind was blowing, which might easily have interfered with the plaintiff's hearing it, and that it is difficult, if not impossible, to determine how far a train is distant from its noise alone. We are asked to hold that the plaintiff, being aware that a train was approaching from the west, should not have attempted to cross the track, even if she heard no signals and saw no lights, because, it is argued, the use of signals and lights are principally to warn persons of approaching trains, and hence their absence cannot be taken into account by one who knows that a train is

coming. Of course, the knowledge that a train is approaching is an important circumstance to be considered, together with other circumstances, on the question of contributory negligence; but we cannot hold that under the evidence in this case the plaintiff must be deemed to have been guilty of such negligence simply because of such knowledge. The main conflict in the evidence concerns the headlight. To determine the question adversely to the plaintiff's claim, we would have to hold that the plaintiff was either entirely faulty in her recollection of the occurrence or that she testified falsely. This, we think, would invade the province of the jury. The circumstance of the engineer's seeing the plaintiff so short a period before her injury, the testimony of the engine messenger that he could not determine what part of the engine struck the plaintiff, or even whether it was a man or a woman that was struck, taken in connection with the testimony of the witnesses who were walking behind the plaintiff on Sibley avenue, to the effect that they did not see the accident, though in the darkness the headlight, if lighted, would naturally have created considerable light at the place of the accident, constitutes strong corroboration of the plaintiff's version, and makes the question one for the jury.

In reaching this conclusion, we have not overlooked the written statement, made by the plaintiff on the day after the accident, at the instance of an employe of the defendant. In several respects this case is similar in its facts to *Knudson v. Great Northern Ry. Co.*, 114 Minn. 244, 130 N. W. 994, which, generally speaking, is controlling here.

[2] The court instructed the jury among other things, as follows: "If you should find from the testimony that the engineer did discover the plaintiff when the train or engine was some 100 or 150 feet west of the crossing, and that he discovered that the plaintiff at the same time was not observing the train, and apparently did not see or notice the train, but was approaching the railway track and crossing as if unconscious of the approach of the train, then it would be the duty of the engineer to immediately give signals or warning that he might make known to her, if possible, the near approach of the train. And if you find that condition of things, and he did not do so immediately, it would be negligence on the part of the engineer and the defendant, as the engineer was its servant." The defendant complains of this instruction, but we find no reversible error therein.

[3] The defendant contends that the amount of the verdict is excessive, that it was not justified by the evidence, and was the result of passion and prejudice on the part of the jury. The plaintiff was earning \$35 per month at the time of the accident, and it

appears that up to the date of the trial, June 14, 1911, she was unable to perform any services, and that the probabilities were that such condition would continue for a considerable period. The fact that she was severely injured by the accident, and was subjected to much physical and mental suffering, cannot be gainsaid. But we have examined the record with care on this question, and, while realizing that it is a delicate matter to interfere with the determination of the jury in this regard, we hold that the evidence tending to show the likelihood of the plaintiff's complete recovery is so convincing that, under the instructions given, the verdict rendered cannot stand.

Ordered, therefore, that a new trial of this action be granted, unless the plaintiff, within 20 days next after the filing of the remittitur in the district court, files therein her consent to a reduction of the verdict to \$5,500, in which case judgment will be entered therein for the amount of the verdict, as thus reduced, together with interest thereon from the date of the verdict.

In re RIVERSIDE PARK.

EVERINGTON et al. v. BOARD OF PARK COM'RS.

(Supreme Court of Minnesota. Nov. 15, 1912.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§ 290*)—PUBLIC IMPROVEMENT—ASSESSMENT—HEARING—"DUE PROCESS OF LAW."

In proceedings to assess the cost of lands acquired for park purposes in Minneapolis, it is held that the owners of land to be assessed were at some stage of the proceedings entitled to a hearing de novo upon all objections they might have, in order to constitute "due process of law."

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871-875; Dec. Dig. § 290.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2227-2256; vol. 8, p. 7644.]

2. CONSTITUTIONAL LAW (§ 290*)—DUE PROCESS OF LAW—PUBLIC IMPROVEMENT—ASSESSMENT—HEARING.

The trial in the district court on the application to confirm the assessment of the park assessors is not such a hearing.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871-875; Dec. Dig. § 290.*]

3. CONSTITUTIONAL LAW (§ 290*)—PUBLIC IMPROVEMENT—ASSESSMENT—HEARING.

The order or judgment confirming such assessment is a final order or judgment, and precludes the objectors from having such a hearing thereafter.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871-875; Dec. Dig. § 290.*]

4. CONSTITUTIONAL LAW (§ 290*)—DUE PROCESS OF LAW—ASSESSMENT FOR PUBLIC IMPROVEMENT.

The hearing provided by the law to be held before the park assessors is such a hearing. Notice of the time and place thereof,

served by publication, describing the location of the proposed park, but not describing the property to be assessed therefor, or the boundaries of the assessment district, is a sufficient notice to constitute due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871-875; Dec. Dig. § 290.*]

5. MUNICIPAL CORPORATIONS (§ 502*)—PUBLIC IMPROVEMENT—ASSESSMENT—VALIDITY.

The decision of the trial court, to the effect that the assessors did not act on illegal or erroneous principles in assessing the property of objectors as specially benefited by the park, is sustained by the evidence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1174; Dec. Dig. § 502.*]

6. MUNICIPAL CORPORATIONS (§ 502*)—PUBLIC IMPROVEMENT—ASSESSMENT—HEARING.

It was not prejudicial error to try the case on affidavits, with permission to objectors to apply to be permitted to offer oral testimony in addition.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1174; Dec. Dig. § 502.*]

Brown, J., dissenting.

(Additional Syllabus by Editorial Staff.)

7. MUNICIPAL CORPORATIONS (§ 508*)—IMPROVEMENTS—ASSESSMENTS—DECISIONS REVIEWABLE.

An order denying a motion of objectors to an assessment for park improvement to vacate a prior order confirming the assessment and grant a new trial is appealable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1181, 1182; Dec. Dig. § 508.*]

Appeal from District Court, Hennepin County; E. F. Waite, Judge.

Proceedings to assess the cost of land acquired as an enlargement of Riverside Park, Minneapolis. From an order confirming the assessment by the Board of Park Commissioners, and from an order denying a motion of James Everington and others, objectors, to vacate the prior order and grant a new trial, the objectors appeal. Affirmed.

George H. Selover, of Minneapolis, for appellants. O. J. Rockwood, of Minneapolis, for respondent.

BUNN, J. Proceedings under section 4, chapter 30, Special Laws of 1889, to assess the cost of lands acquired for park purposes in Minneapolis upon lands specially benefited thereby. Objections were filed and the matter heard before the district court for Hennepin county on the application to confirm the assessment. The trial court granted the application. Objectors appealed from the order confirming the assessment, and also from a subsequent order denying the motion of objectors to vacate the prior order and grant a new trial.

[7] The first question is whether either order is appealable. We hold that the second order should be construed as one denying a new trial, and that it is appealable.

The case on the merits presents serious

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and difficult questions, to the proper understanding and decision of which a rather full statement of facts is necessary. The land acquired for park purposes was a tract in the Sixth and Eleventh wards of Minneapolis, bounded on the northeast by the Mississippi river. The board of park commissioners determined that 70 per cent. of the amount required for the purchase of this tract, which was \$49,400, should be assessed upon and collected from the land specially benefited by the establishment of the park. The board then petitioned the district court for the appointment of park assessors. Notice of this application was published as required by the law. No appearance was made in opposition to the petition, and the court appointed three assessors to determine the assessment district and make the assessment. The assessors so appointed qualified, made and caused to be published notice of the time and place when they would meet for the purpose of making such assessment, and that "all parties interested may appear before said assessors and be heard touching any matter connected with the assessment." This notice was not personally served upon any of the interested property owners, and did not contain any description of the assessment district, its location or extent, but did contain a description of the property taken for the park. It does not appear that appellants or any interested persons appeared before the assessors at their meeting. The assessors fixed the boundaries of the assessment district, made the assessment, and filed their report to the district court. This report described the limits of the assessment district, named the amount assessed against each lot or parcel of land included in the district, and the owner thereof. Notice of the application to confirm the assessment was given as required by the law. In fact, it is conceded that each step in the proceedings up to this time was strictly in accordance with the provisions of the statute under which the assessment was made.

The objectors appeared and opposed the confirmation. The objections filed by them, as far as they are material here, may be summarized thus: The assessment of any property on the east side of the Mississippi for the acquisition of a park on the west side of the river is "unjust" and "unfair and inequitable." No special benefits have accrued or will accrue to said property that would not have accrued to the whole city. In brief, the objections fairly raised the question whether the assessors proceeded upon "erroneous principles" in assessing any property on the east side of the river. The order recites that, after granting leave to the several objectors to file their objections (the time fixed by law having expired), "Mr. Selover applied for leave to introduce oral testimony in support of the objections, which application the court denied (the objectors duly excepting), and directed that the

hearing be upon affidavits, with leave to the objectors, however, to orally cross-examine the assessors, and to make further application for leave to orally examine other witnesses, if this should be deemed necessary after the submission of affidavits." The court then ordered that objectors serve their affidavits upon the attorney for petitioner on or before September 25, 1911, and that further hearing be had on the objections September 26th, upon such affidavits and such further affidavits as petitioners might then desire to submit. The matter was heard on the date fixed upon these affidavits, no oral evidence being taken. It is not shown that objectors applied again for permission to "orally examine other witnesses."

[1] 1. The question of greatest importance and difficulty is as to whether the park assessment procedure provided by the law, as followed in this case, constituted due process of law. It cannot be doubted that at some stage of the proceedings the objectors were entitled to a hearing de novo, upon due notice.

[2] 2. We think it reasonably clear that the trial below was not such a hearing. In fact, it could not be, if the terms of the law were observed. The objectors could not question the amount of the assessment, unless fraud, mistake, or erroneous principles were shown. The report of the assessors had a prima facie value that entirely prevented a trial de novo on the application to confirm the assessment. The court was acting really as a court of appeal; the report of the assessors having much the effect of the verdict of a jury or the decision of a trial judge. *State v. District Court*, 33 Minn. 235, 22 N. W. 625.

[3] 3. It is urged that the objectors still have this opportunity to be heard in the tax proceedings which must follow before judgment can be entered against their land for the assessment. But we cannot concur in this. The order confirming the assessment is a final order or judgment, and concludes all parties as to all questions concerning the amount of the assessment, whether the property received a special benefit, and mistakes made or illegal principles adopted by the assessors. *State v. District Court*, 33 Minn. 235, 22 N. W. 625.

[4] 4. We therefore think that whether there was due process of law depends upon whether the owners of property affected by the assessment had an opportunity, after due notice, to be heard before the assessors. The law gives this right to a hearing, and the only question here is as to whether "due notice" to the property owners whose lands were to be affected is given by a published notice that is not directed to any one, does not describe any property, except that taken for park purposes, and in no other way indicates upon what property or district the assessment may be spread.

That the notice was not personally served

is immaterial. Constructive service by publication was sufficient. Neither is it important, we think, that the notice was not directed to property owners by name. It may fairly be construed as being directed to all "interested parties." The difficulty is that it does not describe the property to be assessed, or indicate its location, save by the description of the proposed park. The notice does say that the lots to be assessed are in the city of Minneapolis, and are such as the assessors "shall deem specially benefited by the park" described in the notice. It is perhaps a fair inference that the property to be assessed lies in the vicinity of the proposed park—not so far away that it cannot receive a special benefit, as distinguished from a general benefit. There is one case holding such a notice insufficient. *Boorman v. Santa Barbara*, 65 Cal. 313, 4 Pac. 31. But we are not prepared to agree with the conclusion reached in the California case. The notice given by the assessors was to give interested property owners an opportunity to be heard on the question of the extent and boundaries of the assessment district, as well as on the question of the amount their respective lots should bear. It was, of course, impossible to describe the district before it had been determined. Had the district been fixed, a notice sufficient to apprise parties interested that their property is included within the district would have been good, though it was not directed to any particular persons, and though it did not describe any particular property.

The only vice, then, in the notice given, was the failure to notify property owners that their property was liable to be assessed for the park. But it may fairly be said, we think, that the notice given was sufficient to apprise each owner of property in Minneapolis that land had been purchased for a public park, and that an assessment was to be levied upon the property specially benefited thereby. Owners of property near the park might well realize that prudence required them to appear before the assessors with their evidence and arguments against the proposed assessment. We regard the question as doubtful, but conclude that the notice was sufficient. This conclusion seems to be in accord with that reached by the Wisconsin Supreme Court in *Hennessy v. Douglas County*, 99 Wis. 129, 74 N. W. 983. It is not easy to see much difference between a published notice that defines the boundaries of the proposed assessment district and one which merely describes the location of the public improvement for which the assessment is made.

There is no fixed rule as to what kind of a notice is necessary in order to make due process of law. It is not correct to say there must be the same degree of certainty in a description as is required in a deed. An

assessment for a local improvement is a public matter, a species of tax, and the due process clause of the Constitution is satisfied easier in such cases. The Minneapolis park law has been in force many years, and many assessments have been made under it. This fact, while not controlling, is not without weight in the solution of a question so doubtful. In *State v. District Court*, 33 Minn. 235, 22 N. W. 625, the point was made that the notice did not designate the property to be assessed, nor the district within which assessments would be made. The court decided that this did not invalidate the assessment, though the constitutionality of the law providing for such a notice was not expressly declared. A reference to the briefs of counsel in that case discloses that the point was made and elaborately argued, and, had it been upheld, the decision must have been otherwise.

[5] 5. We are unable to hold that the decision of the trial court to the effect that the assessors did not proceed upon an illegal or erroneous principle in assessing property on the opposite side of the river from the proposed park is not sustained by the evidence. We do not feel justified in saying that, as a matter of law, there can be no special benefit to such property.

[6] 6. The action of the trial court in trying the proceeding on affidavits is claimed as error. It does not appear that objectors renewed their application to be allowed to offer oral evidence, or that they were prejudiced by this method of trying the case. We do not feel warranted in granting a new trial on this ground.

Order affirmed.

BROWN, J. I am unable to concur in the view that, in assessing property upon the opposite side of the river, the assessors did not proceed upon an erroneous principle. It seems demonstrable to me, as a matter of law, that property so far removed from the proposed improvement should not be included in the assessment district.

In re STROMBERG'S ESTATE.
STROMBERG v. STROMBERG et al.
(Supreme Court of Minnesota. Nov. 15, 1912.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 177*)—RIGHTS OF SURVIVING SPOUSE—ALLOWANCE TO WIDOW.

Under section 3653, R. L. 1905, the allowance to the widow of the personal wearing apparel and a limited amount of the household goods from the husband's estate is confined to the articles specified, and she has no right to select money or other property in lieu thereof.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 870; Dec. Dig. § 177.*]

2. EXECUTORS AND ADMINISTRATORS (§ 181*)
—RIGHTS OF SURVIVING SPOUSE—ALLOWANCE TO WIDOW.

The widow of a nonresident decedent is entitled to the statutory allowance out of the property of her husband found in this state, where it appears that her husband left no other property whatever.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 681-685; Dec. Dig. § 181.*]

Appeal from District Court, Goodhue County; Albert Johnson, Judge.

In the matter of the estate of Peter J. Stromberg, deceased. Claim by Carrie Stromberg, now known as Carrie Amundsen, against Louis C. Stromberg, as administrator, and others. From a judgment denying the claim, plaintiff appeals. Reversed and remanded, with directions.

George Frantzen, of Chicago, Ill., and Charles J. Tryon and Lew C. Church, both of Minneapolis, for appellant. F. M. Wilson, of Red Wing, for respondents.

HOLT, J. Peter J. Stromberg died in Chicago, Ill., while a resident therein, leaving him surviving his widow, the appellant, but no issue. He left no estate whatever in the state of his domicile, either in the way of household furniture or other personal property, except that he carried \$2,000 life insurance payable to his estate. His brother was appointed administrator of the estate by the probate court of Goodhue county, Minn. He, having possession of the insurance policy, collected the full amount thereof. Resident creditors of the deceased presented claims against the estate, which were duly allowed by said probate court, aggregating more than \$2,000. Appellant, as widow, presented her petition for the statutory allowance of the equivalent for household goods in money, and also for the sum of \$500 out of other personal property. Her petition was denied in toto by the probate court, and also by the district court on appeal. She appeals to this court from the judgment entered on the findings and order of the district court.

[1] We are clear that the trial court was right in holding that, where a decedent left no household goods, the widow is not entitled to have any allowance in lieu thereof. If there be household goods, she is entitled to select and keep such to the value of \$500; but the statute (section 3653, R. L. 1905) does not allow her to select an equivalent in other property. Her right to the selection of certain specified articles of her deceased husband's property is clearly confined to those articles, the household goods, not to exceed a fixed value. In regard to the additional allowance of \$500, it is equally clear that she may select money or any other form of personal property of her deceased husband.

[2] Therefore the only doubtful question in the case relates to the court's ruling that

a widow of a nonresident decedent is not entitled to claim the statutory allowance from his estate, the whole thereof being in this state. It is true that, for the purposes of distribution of the estate of a nonresident decedent, all his personal property is regarded as being situate at the place of his domicile, subject to the right of his creditors in the state where the property is actually found to lay hold thereof through ancillary administration in the probate court to the extent of satisfying their claims. And the respondent confidently asserts that under section 3687, R. L. 1905, the whole estate of a nonresident decedent, as far as it may be laid hold of here, is subservient to the rights of the creditors here residing. But this section must be construed in connection with section 3653, above cited, and also sections 3714 and 3715 of the Code. By the last two sections it is provided that after the inventory has been filed, and before any claims are presented or allowed, the surviving spouse may petition the court to set aside the homestead and assign to her the personal property allowed by law. Thereupon the court shall make an order setting aside such homestead and assigning such property to her. The last part of section 3715 reads: "The property so set aside shall be delivered by the executor or administrator, and shall not be treated as assets in his hands."

The part the widow is entitled to is not to be included in the estate to be administered upon, and is not subject to the expenses of administration or the payment of proved claims, and is no part of the residue to be distributed. All that the probate court is called upon to do with relation to such property is to segregate it from the rest of the estate and order the executor or administrator to deliver it to the widow. Section 3653, supra, reads: "When any person dies owning personal property or any interest therein, the same shall be disposed of and distributed as follows." Then comes, first, the allowance to the widow; secondly, the funeral expenses and expenses of administration; and, thirdly, the distribution of the residue. The statute is not limited to residents, either as to the decedent or the surviving spouse. The instant case is not one of ancillary administration, strictly speaking; for it appears from the findings "that said life insurance policy was all the property or estate of any kind owned by said Peter J. Stromberg at the time of his death, and that said life insurance policy constituted his entire estate." There can, therefore, be no other place or opportunity for this widow than here in this proceeding to claim her allowance. A humane and beneficent purpose to make some provision immediately available to one bereft of support is manifest in this statute, and we think the widow of a nonresident ought not

to be deprived of this benefit provided by our law, where it clearly appears that the only property belonging to the estate of her deceased husband is here. Justice Mitchell, in the concurring opinion in *Benjamin v. Laroche*, 89 Minn. 334, 40 N. W. 156, in apt and terse language, expresses the true status of the personal property which the surviving spouse takes under our law: "I concur, but would place the decision upon the ground that the right of a widow to the property allowed her by subdivision 1, § 1, c. 51 (section 3653, R. L. 1906), is as absolutely vested the instant of the death of her husband as that to her distributive share of the balance of the estate; the only difference being that in the one case the property is subject to administration, and in the other not." That this is now the law appears clearly from the opinion in *Sammons v. Higbie's Estate*, 103 Minn. 448, 115 N. W. 265, where Mr. Justice Brown says with reference to a widow's right under this statute: "The clear intention of the Legislature was to vest an absolute right to the property mentioned in the widow; the only act remaining to be done after the husband's death being the designation of the particular property selected by her. * * * It was clearly not the intention that the property so 'allowed' should enter into the administration of the estate at all."

The fiction of law that the situs of the personal property of a nonresident decedent is in the state or country of his domicile is only for the purpose of distributing the residue of the estate, subject to the expenses of administration and the rights of creditors in the state where the property is actually found. Property not subject to administration or distribution need have no situs by fiction of law to come into the possession of the true owner. No legislative intent to restrict the scope of the beneficiaries named in the first subdivision of said section 3653 to resident widows or widows of nonresident decedents is found in the language itself. It is all-comprehensive. In view of the fact that enactments of similar import to said section are found so generally upon the statutes of sister states, it would seem that by comity we should extend to a widow who comes into the state where the only property of her deceased husband is found the same right she would have had if both she and her deceased husband were domiciled here. In the case note to *Jones v. Layne*, 11 L. R. A. (N. S.) 361, it is said: "That a state within whose borders personal assets of a decedent are found has the power to grant an exemption or allowance to the widow out of those assets, irrespective of the domicile of her husband at the time of his death. * * * Generally, however, the local statutes on the subject are not explicit with respect to the effect of the residence or domicile of the deceased in an-

other state at the time of his death; and in such a situation the well-established principle of private international law, that the distribution of the personal estate of a decedent is governed by the law of his domicile, is allowed to control." Even when such statutes are not explicit, a restricted construction has not been given. *Jones v. Layne*, supra, and *In re Gill*, 79 Iowa, 296, 44 N. W. 553, 9 L. R. A. 126. In *Kapp v. Public Adm'r*, 2 Bradf. Sur. (N. Y.) 258, upon facts similar to those here involved and under a statute much like our own, the rights of the widow to certain personal property of her deceased husband were not limited by the fact of decedent's domicile in another state.

The judgment must therefore be reversed, and the case remanded, with direction to the court below to modify the conclusion of law, so that judgment conforming to the views herein expressed may be entered.

Reversed and remanded.

STATE ex rel. LABOVICH et al. v. REDINGTON, City Clerk.

(Supreme Court of Minnesota. Nov. 22, 1912.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 591*)—POLICE POWERS—DELEGATION.

Under the charter of the city of St. Paul, the power to license and regulate the exhibition of shows of all kinds, including theaters and moving picture shows, is with the common council, is a legislative power, and cannot be delegated to the city clerk.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1310; Dec. Dig. § 591.*]

2. LICENSES (§ 5½*)—MUNICIPAL CORPORATIONS—REGULATION OF OCCUPATIONS.

Certain ordinances passed by the common council considered, and held not to be an exercise of its legislative or discretionary power to license and regulate all shows and theaters, and that the council still retained the power to license and regulate such shows and theaters, including the power to grant or refuse a license in a particular case.

[Ed. Note.—For other cases, see *Licenses*, Dec. Dig. § 5½.*]

Appeal from District Court, Ramsey County; Oscar Hallam, Judge.

Action by the State, on the relation of Esidor Labovich and others, for mandamus to George T. Redington, as City Clerk of St. Paul. From a judgment for respondent, relators appeal. Affirmed.

James E. Markham and Benjamin Calmenson, both of St. Paul, for appellants. O. H. O'Neill and J. P. Kyle, both of St. Paul, for respondent.

BUNN, J. Relators petitioned the district court for Ramsey county to grant a writ of mandamus requiring respondent, as city clerk of the city of St. Paul, to issue to them a license authorizing them to use a building

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

which they owned as a theater for the conduct of moving picture shows. An alternative writ was issued on the petition, and respondent answered. On the petition, writ, and answer, relators moved for a peremptory writ, and respondent moved to quash the alternative writ. The trial court denied the relators' motion, and granted the motion to quash. Relators appealed from this order.

The facts, as disclosed by the petition and answer, are as follows:

Relators are the owners of a lot on Selby avenue, in St. Paul, on which they erected a brick building and equipped the same with the necessary seats and other furniture for use as a place of public entertainment, intending to present therein a series of moving pictures, "descriptive of interesting events and scenes, pictures that are instructive, educational, and interesting," and to charge an admission fee to such entertainments. The plans and specifications for the building were submitted to the building inspector of St. Paul before its construction, and he approved the same, and issued to relators a building permit. Relators expended more than \$7,000 in the construction and furnishing of the building.

An ordinance of the city of St. Paul provides that it shall be unlawful for any person or persons to exhibit any show or shows or to perform any theatrical or other performances or exhibitions whatever, for which pay is required, demanded or received, without having been previously licensed so to do by authority of the common council of the city: "Provided however, that the common council may by resolution, adopted by a two-thirds vote, from time to time authorize such sum as they may deem proper to be received as an annual license from the opera house or any other hall devoted exclusively to public exhibitions." It is made the duty of every person desirous of exhibiting shows for pay to "make application to the mayor or common council of the city of St. Paul, or to the clerk, for a license, and the said license may be granted by the mayor, common council, or by the city clerk, for any concert or theatrical exhibition." It is further provided by this ordinance that the city authorities may grant a license in the manner above provided to "exhibit any show or shows, caravan, or circus, to wit: Provided, whenever any person or persons are desirous of exhibiting any show or performance aforesaid before the meeting of the common council, the mayor or city clerk may grant such license until the next meeting of the common council."

Another ordinance fixes the amount of the license fee for circuses, traveling menageries, merry-go-rounds, shooting galleries, and theaters. It provides that "all theaters shall pay a license fee of one hundred dollars."

In March, 1912, relators applied to the common council for a license to operate a moving picture show in their building. A

resolution was introduced in the assembly fixing the license fee at \$50, and directing the city clerk to issue the license to relators. This resolution was defeated. The building was located within a block of a public school, and opposition to the granting of a license came from parents of school children, teachers, and the school board. In June, 1912, relators made a second application for a license to the common council, and a resolution was introduced granting the application, on condition that no moving pictures should be displayed during school hours, or while children are on their way to or from school. This resolution met opposition from the same sources and was voted down. Thereafter relators applied to respondent, as city clerk, to issue the license, and tendered to the city treasurer the sum of \$100, the amount fixed by the ordinance before referred to as the license fee for theaters. The city clerk refused to issue the license. The petition charges that such refusal was arbitrary and without cause, but the answer alleged that the city clerk knew of the two previous applications to the council, the proceedings in relation thereto, and of the opposition which there was to the granting of such license. The answer also alleged that relators, before constructing the building, were well aware of the opposition, and that at the time of the first refusal of a license by the council, not much more than the foundation of the building had been completed.

Were the relators, on the above facts, entitled to a peremptory writ of mandamus requiring the city clerk to issue the license? It is the position of the relators, in brief, that by the ordinances referred to the common council had directed the issuance of a license to any theater including moving picture shows, on payment of an annual fee of \$100, and that the city clerk, or the council itself, had no discretion to refuse a license to any such theater or show, no matter what its character or where located. In other words, the claim is that the council had directed the issuance of a license to relators, had exhausted its discretionary powers, and that nothing remained for the clerk except the ministerial or clerical duty of making out, executing, and delivering the document constituting the license.

[1] Relators are forced to take this position, because it is conceded, as it must be, that the council could not delegate to the city clerk the legislative duty or discretion to determine whether in a particular case a license should be issued. The city charter gives the council the power "to license and regulate the exhibition of common showmen and shows of all kinds, and the exhibition of caravans, concerts and theatrical performances." There is no authority to license or regulate such shows in any other person or body. And clearly the council could not delegate such authority to the city clerk. *Darling v. St.*

Paul, 19 Minn. 389 (Gil. 336). Therefore, if the ordinances may be construed as delegating to the clerk or mayor any power to determine whether in a particular case a license should be issued, they are to that extent void.

[2] The whole question, then, is this: Did the council, by the ordinances quoted, direct the clerk to issue a license to each and every theater and show upon payment of the license fee of \$100, no matter what might be its character or location? Had the council, in other words, exercised its legislative or discretionary power in the matter, so that such power was exhausted? If it had not, if it still possessed the power to control and regulate such shows, and to grant or refuse a license in a particular case, clearly this writ was properly quashed.

A careful reading of the ordinances referred to, in connection with the charter provision giving the common council power to license and regulate shows of all kinds, leads to the conclusion that the council had never passed an ordinance which can be fairly construed into the grant of a license to theaters or shows in general, no matter what their character, or in what part of the city they might be located. The proviso that the common council may from time to time "authorize such sum as they may deem proper to be received as an annual license from the opera house, or any other hall devoted exclusively to public exhibition," followed by the ordinance fixing the license fee for theaters at \$100, can be construed only as fixing the amount of the license fee, and not as granting authority to every person desiring to maintain such a hall for public exhibition to do so upon payment of such fee. There is much more in the power to "license and regulate" than the mere fixing of the amount of the license fee. It is not to be doubted that under this power the council could prohibit improper exhibitions, or exhibitions in portions of the city in which for reasons of the public welfare it was undesirable to have such exhibitions. The power given by the charter is to regulate, as well as to license. This clearly includes the power to prohibit. *State ex rel. v. District Court*, 114 Minn. 287, 131 N. W. 327.

Nor can we hold that the ordinance providing that licenses may be granted by the "mayor, common council, or the city clerk" is an exercise by the council of its power to license and regulate. If this is to be construed as a delegation to the mayor or clerk of the legislative and discretionary power of the council to license and regulate, the provision is clearly void, as before stated. But the fair construction of this ordinance, construed as a whole, is that the mayor or clerk may grant a license until the next meeting of the council. It should not be construed either as delegating legislative authority to the mayor or clerk, or as determining that all

"shows or theatrical exhibitions" were authorized to be given, upon payment of the license fee, and the ministerial act of issuing the license. The council might, perhaps, by a general ordinance defining the character of the shows permitted to be given, fixing the limits within which they might be exhibited, and other conditions, fully exercise its power and discretion, and leave the mere issuance of the license a purely ministerial duty intrusted to the clerk. But we think it has not attempted to do this. It has still retained the power to refuse a license in a particular case, where by reason of the character of the exhibition, or the proposed location, it is deemed contrary to public welfare to grant it. We are not concerned here with the question of the wisdom of the council's action in giving heed to the protests against moving picture shows in the vicinity of a public school, or with the question of the influence of such exhibitions upon children. Relators are not complaining of the action of the council. Their claim is that the council had no power to act, because such power had been exhausted by the passage of the ordinances we have considered. We do not sustain this claim.

Order affirmed.

STATE ex rel. MCGILL v. COOK et al.
(Supreme Court of Minnesota. Nov. 22, 1912.)

(Syllabus by the Court.)

1. MANDAMUS (§ 163*)—PROCEEDINGS—DEMURREE.

The respondent may demur to the petition and alternative writ in a mandamus case. [Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 341-343; Dec. Dig. § 163.*]

2. MANDAMUS (§ 122*)—SUBJECTS OF RELIEF—ACTS OF UNINCORPORATED ASSOCIATIONS.

A writ of mandamus will issue only to compel the performance by an inferior tribunal corporation, board, or person of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. Private domestic corporations and their officers are within this rule by virtue of the visitatorial power of the state over them; but the writ does not lie to regulate the affairs of unincorporated societies or associations.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 256; Dec. Dig. § 122.*]

Appeal from District Court, Hennepin County; Charles S. Jelley, Judge.

Petition by the State, on the relation of E. W. McGill, for mandamus to Arthur E. Cook and others. From an order overruling a demurrer to the amended petition, the respondents appeal. Reversed.

Elijah Barton and Harry A. Lund, both of Minneapolis, for appellants. Spooner, Laybourn & Lucas, of Minneapolis, for respondents.

START, O. J. This is an appeal from an order of the district court of the county of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Hennepin overruling the demurrer of the appellants herein to the amended petition in a mandamus case. The relator urges that the order is not appealable.

[1] If respondent in mandamus proceedings may raise the question of the legal sufficiency of the facts stated in the petition and the alternative writ by a demurrer, it follows that an order sustaining or overruling a demurrer is appealable. The statute does not expressly provide that a demurrer may be interposed in such cases to the petition, or alternative writ, which must concisely state the facts showing the defendant's duty in the premises, but it expressly provides that a demurrer may be interposed to the answer. The statute also provides that: "No pleading or written allegation, other than the writ, answer and demurrer shall be allowed. They shall be construed and amended, and the issues tried, and further proceedings had, in the same manner as in a civil action." Sections 4558, 4561, 4562, 4563, R. L. 1905. These statutory provisions assimilate in many respects the practice in mandamus to that in ordinary civil actions. *State v. County of Chisago*, 115 Minn. 6, 131 N. W. 792.

The petition and alternative writ in mandamus cases constitute, in legal effect, the complaint. It is difficult to suggest any good reason why the respondent in such cases should not have the right to raise by demurrer, as well as by motion to quash, the question of the sufficiency of the facts alleged to require him to perform the duty directed to be done in the alternative writ, as the relator has to raise the question of the sufficiency of the answer by demurrer. The fact that the interposition of a demurrer to the petition and writ tends to delay the cause, which should be brought to a speedy conclusion, does not suggest a sufficient reason why demurrer should not be allowed to the petition and alternative writ, for such reason applies with equal force to a demurrer to the answer. The objection, however, to allowing an appeal from an order sustaining or overruling a demurrer in any case, which was not permissible prior to the enactment of Gen. Laws 1867, c. 63, apply with special force to mandamus cases, but the difference is one of degree only. The rule announced in many adjudged cases in other jurisdictions is to the effect that the petition and alternative writ take the place of a complaint in an ordinary civil action, and if the facts alleged therein are not in substance legally sufficient the respondent may demur thereto. 13 Enc. Pleadings and Practice, 702.

In the case of *State ex rel. v. McKellar*, 92 Minn. 242, 99 N. W. 807, many of the decisions of this court were reviewed, and the correct practice to bring before this court for review the decisions of the district court was indicated; but the question here in controversy was not directly decided. In the case

of *State ex rel. v. Peltier*, 86 Minn. 181, 90 N. W. 375, the respondent demurred to the petition and alternative writ, the demurrer was overruled, and the respondent appealed from the order. The appeal was heard and determined on its merits; neither court nor counsel raising any question as to the right so to demur, or as to the appealability of the order. In the case of *Gleason v. University of Minnesota*, 104 Minn. 359, 116 N. W. 650, the respondent demurred to the petition and alternative writ, and appealed from the order overruling it, and the appeal was determined on its merits; court and counsel assuming that the practice adopted was correct.

While we adhere to the view expressed in *State v. McKellar*, supra, that the approved and correct procedure to bring before the court for review the decision of the district court in mandamus cases is to appeal from the judgment or an order denying a motion for a new trial, yet we are not prepared to hold that it is exclusive of any other. We accordingly hold, following the cases cited, that the respondent may demur to the petition and alternative writ in mandamus cases.

[2] The demurrer in this case was technically incorrect, in that it was to the amended petition, coupled with a motion to quash the writ. The demurrer, liberally construed, challenged the sufficiency of the facts stated in the petition and writ to entitle the relator to the relief demanded. The only question on the merits of the appeal is whether mandamus is sustainable on the facts alleged, which are, so far as here material, briefly these:

The Modern Woodmen of America is a fraternal beneficiary association organized under the laws of the state of Illinois, and is authorized to do business in this state. It has local lodges called "camps," of which Hiawatha Camp No. 1,931 is one, which is located in Minneapolis. It is not incorporated, and is composed of members of Modern Woodmen of America. The appellants Cook and Guffin are, respectively, consul and clerk of this local camp. In January, 1912, the supreme legislative or governing body of Modern Woodmen of America passed a resolution requiring members to pay higher insurance rates than they had theretofore been paying. The new rates are inequitable, unjust, and higher than necessary. They were arbitrarily fixed, upon an unjust, unequal, and prohibitive basis, and place burdens upon the older members of the society, and, if enforced, will preclude them from keeping their benefit certificates in force, which will result in their forfeiture. Many members of the Modern Woodmen of America, many of whom are members of Hiawatha Camp No. 1,931, being dissatisfied with the new rates, organized an association under the name of the "National Modern Woodmen Assembly," for the purpose of carrying

on a campaign of education and taking such legal steps as might be advisable to secure an annulment of the new and increased rates. On February 27, 1912, Hiawatha Camp No. 1,931, at a regular meeting thereof, by a majority vote of the members present, adopted a resolution authorizing and directing the appropriation and payment from the general fund of Hiawatha Camp of the sum of 50 cents per capita on its 470 members to be used in support of such Assembly in its work. The resolution also provided that there should be immediately paid out of the general fund of Hiawatha Camp, which it exclusively owned and controlled, the sum of \$235 to the relator herein, who then was and now is the treasurer of such Assembly. The by-laws prescribed for the government of the local camps of the Modern Woodmen of America, of which Hiawatha Camp No. 1,931 is one, provide that the banker thereof shall receive all of its funds and disburse the same, when properly allowed, and by the camp ordered paid by virtue of orders which should be drawn by its clerk and signed by him and its consul. They further provided that the clerk and consul should sign all orders to be drawn on the banker. Prior to the institution of this proceeding the relator duly demanded of the appellant Guffin, as such clerk, that he draw and sign an order in favor of the relator for the sum so appropriated, and at the same time he also made due demand upon the appellant Cook, as consul, that he sign such order. Each of them wholly refused, and still refuses, to make out or sign or to deliver to this relator any order whatever.

Do these facts show that the relator has a clear legal right to have the duty, which he seeks to enforce by this proceeding, performed? The law of this state applicable to the question is that a writ of mandamus will issue only to compel the performance by an inferior tribunal, corporation, board, or person of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. Private domestic corporations and their officers are within this rule by virtue of the visitatorial power of the state over them; but the writ does not lie to regulate the affairs of unincorporated societies or associations. R. L. 1905, § 4556; State v. Railway Co., 18 Minn. 40 (Gil. 21); State v. Ames, 31 Minn. 440, 18 N. W. 277; State v. Krahmer, 92 Minn. 397, 100 N. W. 105; State v. De Groat, 109 Minn. 168, 123 N. W. 417, 134 Am. St. Rep. 764; 26 Cyc. 139.

A careful consideration of the facts alleged in the petition and alternative writ has satisfied us that they do not bring the case within the rule stated, for they clearly show that the duty, sought to be enforced by the writ, is not one which the law specifically enjoins, but one enjoined only by the

by-laws of an unincorporated association. The fact that the Modern Woodmen of America is a foreign corporation, authorized to do business in this state, is not of any controlling force, for the fund upon which it is sought to have an order drawn in favor of the relator is exclusively owned and controlled by the unincorporated association. If the writ would lie to regulate the affairs of such an association, it could with equal reason be invoked to regulate the affairs of a copartnership.

The case of Bassett v. Atwater, 65 Conn. 355, 32 Atl. 937, 32 L. R. A. 575, cited by the relator, does not support his contention; for in that case the respondents were officers of a domestic corporation, and the duty sought to be enforced was one prescribed by a public statute.

We hold, upon the facts of this case, that mandamus will not lie, and that the trial court erred in overruling the demurrer.

Order reversed.

McLAUGHLIN v. CLOQUET TIE & POST CO.

(Supreme Court of Minnesota. Nov. 29, 1912.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 332*)—NEGLIGENCE OF SERVANT—SCOPE OF EMPLOYMENT—LIABILITY OF MASTER.

The defendant intrusted to its employes the work of driving lumber products down a stream and through the land of the plaintiff. The work during its progress was interfered with by a stump in the stream at a point near the plaintiff's house. The foreman and a driver, another employé, then went into the stream and sawed out the obstruction, and in doing so both were wet. The driver, upon reaching the shore, built a fire on the bank of the stream on plaintiff's land for the purpose of drying his clothes. He negligently failed to put the fire out, whereby the plaintiff sustained damages.

Held, upon a consideration of the whole evidence, that the question whether the act of the driver in setting the fire was in the course of and within the scope of his employment was one of fact for the jury, and that the court did not err in refusing to direct a verdict for the defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274-1277; Dec. Dig. § 332.*]

Appeal from District Court, St. Louis County; Wm. A. Cant, Judge.

Action by John McLaughlin against the Cloquet Tie & Post Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. B. Phelps, of Duluth, for appellant. John F. Wilkie, of Hibbing, and Alexander Marshall, of Duluth, for respondent.

START, C. J. This action was brought in the district court of the county of St. Louis to recover damages in the sum of \$1,000 alleged to have been sustained by the plaintiff by the negligence of the defendant, by its

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

employé, in negligently starting and leaving a fire which burnt and destroyed certain pulpwood, poles, and standing timber on the plaintiff's land. The defense was in effect a denial of the allegations of the complaint. A verdict was returned for the plaintiff for \$740. The defendant made an alternative motion for judgment in its favor notwithstanding the verdict or a new trial in case the motion for judgment should be denied, and assigned four separate errors in support of the motion for a new trial. The court made its order denying the motion for judgment and granting the motion for a new trial unless the plaintiff consented to a reduction of the verdict to \$500. He consented, and judgment was entered upon the verdict as reduced, from which the defendant appealed, and here assigns that the court erred as follows:

"(1) In refusing to direct a verdict in favor of the defendant.

"(2) In refusing to give the fifth instruction requested by defendant.

"(3) In refusing to order judgment in favor of defendant notwithstanding the verdict.

"(4) In refusing to grant defendant a new trial of this action."

The last assignment of error is too general to present any questions for our consideration, as the motion for a new trial was made on more than one ground. *Dunnell's Digest*, § 363.

The other assignments of error raise the question whether, upon the whole record, the trial court erred in not instructing the jury to return a verdict for the defendant and in not ordering judgment in its favor notwithstanding the verdict. In making this statement we have not overlooked the second assignment of error, which is based on the refusal of the court to instruct the jury that: "If you find that the driver, who started this fire, as claimed by the plaintiff, built the fire to dry his clothing, your verdict will be for the defendant." It was not error to refuse this request, unless the defendant was entitled to an instructed verdict, for the jury was specifically instructed that, to entitle the plaintiff to recover, it was not sufficient that the fire was set by defendant's employé, but that they must be satisfied that the fire was set by the employé in the line of his employment and in the scope of his agency, and not for a purpose personal to himself.

This leaves for our consideration the question: Was the defendant, upon the whole evidence, entitled to a directed verdict in its favor? The evidence relevant to this question tends to prove the following facts:

The plaintiff is the owner of the land described in his complaint, through which runs a natural stream. He was in possession of the land in 1909, upon which there was then standing timber and several piles of pulpwood and poles, some of them near the bank of the stream. The defendant, during the summer of 1909, was engaged in driving lum-

ber products down the stream and through the land of the plaintiff. It intrusted the execution of this work to its employes. The driving operations incident to such work were interfered with by a stump in the stream at a point near the plaintiff's house. The plaintiff at this time was absent from his land, but it was in charge of his nephew, Ray McLaughlin, of whom the defendant's foreman, in charge of the work, borrowed a saw with which to cut out the obstruction in the stream. The foreman and another employé of the defendant, a driver, then waded into the stream and sawed out the obstruction, and in doing so both were more or less wet. They then went ashore, and the foreman started downstream; but the driver said to McLaughlin, "I will have to build a fire to dry my clothes," to which McLaughlin made no reply, and started towards the house, when the driver called to him that he had forgotten the saw. He then turned around to get the saw, and noticed that the driver had started a fire, but said nothing about it, as he thought the driver would put it out. He then went to the house, and some 20 minutes thereafter he heard a roar, and discovered that the fire had not been put out, but had spread and was beyond control. The fire so started by the driver and negligently left burning destroyed the plaintiff's pulpwood and fence poles, and injured to some extent his standing timber.

The controlling question upon the record is whether the trial court erred in not directing a verdict for the defendant, on the ground that as a matter of fact the setting of the fire by the driver was not done in the course of and within the scope of his employment, or, in other words, whether as a matter of law there was no evidence fairly tending to show that his act was so done. The settled rule of this court, stated abstractly, is to the effect that a master is only liable for the wrongful act of his servant when it is done in the course of and within the scope of his employment. The application of the rule is shown in the cases following: *Morlier v. Railway Co.*, 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793; *Mulvehill v. Bates*, 31 Minn. 364, 17 N. W. 959, 47 Am. Rep. 796; *Smith v. Munch*, 65 Minn. 256, 68 N. W. 19; *Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133; *Barrett v. Railway Co.*, 106 Minn. 51, 117 N. W. 1047, 18 L. R. A. (N. S.) 416, 130 Am. St. Rep. 585; *Kwiechen v. Holmes & Hollowell Co.*, 106 Minn. 148-156, 118 N. W. 668, 19 L. R. A. (N. S.) 255; *Penas v. Railway Co.*, 112 Minn. 203, 127 N. W. 926, 30 L. R. A. (N. S.) 627, 140 Am. St. Rep. 470.

While the abstract rule is well settled, some confusion has arisen in applying it concretely, especially with reference to the meaning of the term "the course of and within the scope of his employment." No hard and fast definition of the term, applica-

ble to all cases, can be given. Some of the earlier cases in this court seemingly applied the rule with literal exactness; but the tendency of the later cases is to give the rule a more liberal and practicable application, especially in cases where the business of the master intrusted to his servants involved a duty owed by him to the public or third persons. See, in this connection, the exhaustive opinion of Justice Jaggard in *Penas v. Railway Co.*, supra.

The defendant relies upon the *Morier Case* as conclusively controlling the instant case. The facts in the *Morier Case* were that the employes of the defendant were engaged in repairing its railroad track and were charged with no duty outside of it. They usually went to their boarding house for their dinners, but on the day in question they brought their dinners with them, and at noon left their work, went upon the right of way, and built the fire, which destroyed plaintiff's property, for the purpose of warming their coffee. These special facts distinguish that case from the one at bar. In this case the execution of the work intrusted by the defendant to its employes required them to pass over the plaintiff's land along the banks of the stream, and the defendant owed to the plaintiff the duty of exercising due care to prevent injury to the plaintiff's land in the course of the work assigned to its employes. The building of the fire by the driver to dry his clothes was not, as a matter of law, a departure from the course of his employment, for it was incidentally connected therewith, and was made necessary by his going into the stream to remove the obstruction, which was a part of the work assigned to him.

Upon a consideration of the entire record, we have reached the conclusion that the question whether the driver set the fire in the course of and within the scope of his authority was one of fact, to be decided by the jury under proper instructions. We accordingly hold that the trial court did not err in denying defendant's motion for an instructed verdict in its favor or its motion for judgment. The evidence does not leave the question of the defendant's liability a mere matter of speculation, nor does it show that the plaintiff is estopped from asserting any claim against the defendant by reason of anything that his agent in charge of the premises said or failed to say or do.

Judgment affirmed.

CANTRIL TELEPHONE CO. et al. v. FISH-ER et al.

(Supreme Court of Iowa. Nov. 15, 1912.)

ASSOCIATIONS (§ 7*)—MEMBERSHIP—TRANSFER.

Under articles of an unincorporated rural telephone association providing a membership fee entitling the member to one phone, prohibit-

ing sale of a share without first offering it to the association, except that a purchaser of a farm should have the first right to purchase the vendor's share, etc., mere conveyance of a farm by warranty deed did not confer the vendor's membership on the purchaser, and the association is entitled to enjoin the purchaser from connecting with and using the line.

[Ed. Note.—For other cases, see *Associations*, Cent. Dig. § 7; Dec. Dig. § 7.*]

Appeal from District Court, Van Buren County; Frank W. Eichelberger, Judge.

Suit in equity to enjoin the defendants from connecting with and using the telephone line of plaintiffs, appellees. A temporary writ was issued and served. The defendants filed an answer and cross-bill. They also prayed in their cross-bill for an injunction to enjoin the plaintiff from disconnecting them with the telephone line. Later the defendants filed a motion to dissolve the temporary writ of injunction issued upon the prayer of the plaintiffs, and a further motion asking for the issuance of a writ of temporary injunction in their own behalf. These motions came on for hearing in vacation. Both motions were denied, and the defendants appeal from such order. Affirmed.

Joseph C. Mitchell, of Ottumwa, and Robert & H. B. Sloan, of Keosauqua, for appellants. Walker & McBeth, of Keosauqua, for appellees.

EVANS, J. We avail ourselves of the following statement of the case contained in appellant's brief:

"The plaintiff, the appellee, Cantril Telephone Company, is an unincorporated and acting association, claiming to be organized and acting under written articles of association, inaccurately called 'by-laws.' Those articles, signed by 16 persons, are not only crude and inartistic, but in and of themselves alone fail to show the real purposes and objects of the organization, and are especially silent as to the means and procedure by which the objects and purposes, whatever they may be, are to be effected. But, when the articles are supplemented by the acts and operations under them by the association, it quite fairly appears that the objects and purposes of the association are not pecuniary profit, but the supplying of telephone conveniences in the homes of members of the association at a price not exceeding actual cost. The terms 'stock of said company,' 'stock,' 'stockholders,' and 'share of stock' are frequently used in the articles, but evidently inaccurately. Manifestly, by the term 'stockholders,' is meant the members of the association, and by the term 'stock,' the privileges appertaining to membership. One becoming a member had to pay \$12 (afterwards seemingly raised to \$40), which should properly be styled a membership fee, and the money so raised was doubtless used in constructing the line, and any surplus applied on operating and other in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cidental expenses. A member had the right to connect one phone with the association's wires, and thus have the use of the association's lines and connections for such use, having from time to time to pay such assessments as the association should make to meet the expenses of maintenance and operation.

"The articles contain these provisions:

"Art. 2. The number of shares shall be limited to the number of phones said line will carry and do good service.

"Art. 3. Each stockholder shall have the right to put in but one 'phone and shall have the use of said line for such phone under such regulations as may be adopted by the board of managers.'" Abs. 19, line 25.

"Art. 14. No member shall be allowed to own more than one share of stock nor shall he be allowed to sell his share of stock until after he has offered it for sale to the company (except in case such stockholder should sell his farm, in which case the purchaser of the farm shall have the first chance to purchase such stock), at a price not to exceed the original cost of the share. Any share of stock so purchased by the company shall be held as common stock of the company, but can be sold or rented by the company to any person who is not a stockholder at the time of purchase."

"In the case at bar, at the time the line in question was constructed, one H. H. Barnett owned the W. ½ of N. E. ¼, section 7, township 67, range 10, in Van Buren county, and said line was constructed along the south end and east side of said land; and he, being a member of the association, by virtue of such membership, connected a phone in the dwelling house on said lands with said line, and while he owned said lands continued to use said phone and line. On October 28, 1909, said Barnett entered into a written agreement with the defendant B. T. Fisher, whereby he sold said lands, 'together with all appurtenances thereto belonging' to the defendant, and pursuant to said contract on November 5, 1909, deeded, by warranty deed and without any reservations, said lands to defendant Fisher, who under said deed went into possession and has ever since been in possession by a tenant."

We are asked by the appellants not to pre-judge the final merits of the case on the ground that the record is not sufficient for such purpose. It is the contention of the defendants that the plaintiff company knowingly brought a lawsuit, and that it undertook to make itself the judge of a controversy between Fisher and Burnett. The following excerpt from appellants' brief concisely presents their point of view:

"It, or its smart Alects, thought the company could, by use of a pressure that Barnett could not bring to bear, bring Fisher to an unconditional surrender—that is, Barnett could not disconnect the phone, the com-

pany could, and, doubtless as the smart Alects thought, Fisher would surrender before suffering disconnection. But they didn't know Ben Fisher. We now broadly assert that the granting of and the refusal to dissolve the injunction issued on the part of the plaintiff was an abuse of injunctive procedure, regardless of whether Fisher's good faith claim of ownership may or may not be finally determined in his favor. And it was, we assert, an abusive refusal to exercise a wholesome power, when the court refused to grant the temporary injunction prayed for by Fisher and Struble. Fisher and Struble have an unqualified right to a full final hearing without being forced to a choice of either renouncing their claimed right or of suffering irreparable injury. The company cannot be allowed to become the judge between Fisher and Barnett, and then decide in Barnett's favor, put itself in Barnett's place, and by a kind of duress force Fisher to yield—enforce against Fisher a pressure Barnett could not enforce."

Careful examination of the record satisfies us that the defendants' view of the case as thus expressed is somewhat distorted. Burnett was a member of the plaintiff company. He sold his farm to the defendant Fisher, and executed a warranty deed therefor in the latter part of November, 1909. The theory of appellants is that the warranty deed as a matter of law carried to the grantee the membership in the plaintiff company as an appurtenance to the land. This claim is based to some extent, also, upon the provisions of section 14 of the articles of the company. It is clear that, in the absence of section 14 of the articles, the mere conveyance of the land by warranty deed could not of itself confer membership upon the grantee in the plaintiff company. It is conceded by appellees that the sale of the land to Fisher carried to him a right or option to purchase the "share" of Burnett, and to become a member of the plaintiff company. The trial judge was justified in finding from the affidavits before him that in the negotiations for the sale of the land Burnett had solicited Fisher to buy his "share" in the plaintiff company, and that Fisher declined to do so. For the first year after the purchase, Fisher's tenant paid to Burnett the rental provided for in section 14. In the spring of 1910 the company refused to buy from Burnett because it desired that Fisher should buy the same and become a member. One year later it bought the share from Burnett under the provisions of section 14 for \$24. It knew at this time that Fisher claimed that his warranty deed carried all of Burnett's rights to membership in the plaintiff company, and that he refused to purchase it in any other way, and refused to pay rent therefor. The plaintiff company has always been ready and willing to admit Fisher to membership upon payment for the "share," and otherwise will-

ing also to permit him and his tenant, Struble, to use the phone upon payment of the usual rent. The defendants refuse to do either. The sum of \$24 therefore measures the full substance of this controversy. If the plaintiff company made itself a judge of the controversy between Burnett and Fisher, it did no more than the defendants forced it to do in protection of its own rights. Under the provisions of section 14, an option was reserved to the company to purchase such share. A failure to exercise such option would amount, under such section, to an implied permission to Burnett to sell to whomsoever he could. The company had a right under such section to refuse such permission by exercising such option itself, and there is nothing in the record to impeach its good faith in such course. Such course on the part of the company did not settle or pre-judge any controversy as between Burnett and Fisher. The plaintiff company was justified in refusing to become involved in such controversy, and to require the parties to it to settle it between themselves. If Fisher's contention is sound that he purchased the share from Burnett by force of his warranty deed, he had an abundant remedy as for breach of warranty after the sale by Burnett to the company and he could have safely paid the company the \$24 which it paid Burnett in exercising its option. By this manner he could have saved himself the complaint that the company made itself a judge of the controversy. On the other hand, if the company had assumed to accept his contention and to receive him into membership on the strength thereof, it could not escape a part in the controversy. In such case it must apparently decide to whom the share belonged. The company did not arbitrarily refuse membership to Fisher. It recognized his right under section 14 to purchase Burnett's share. But it insisted upon an uncontroverted purchase, and not a controverted one, before accepting Fisher into membership in lieu of Burnett. It was a bona fide and reasonable exercise of its power over its own membership. Presumptively it could not accept Fisher into membership in lieu of Burnett without Burnett's consent. It never had Burnett's consent. Section 8 of the articles provides for a record of stockholders, and that no stockholder shall be released from the liabilities of the company "until the change be indorsed on the records by the secretary." Whatever rights Fisher may have acquired under his warranty deed, it is clear that he did not thereby become a de facto member of this association. Further action was necessary on his part for that purpose. He could not be deemed a member against his will by mere force of his warranty deed. And in like manner some action was necessary on the part of the plaintiff company indicating its assent to the change of membership. We had occasion to consider this ques-

tion to some extent in *Staples v. Hobbs*, 145 Iowa, 114, 123 N. W. 935. We there held that the alleged purchaser had not established his membership in the company. Applying to the case before us our holding in the *Staples* Case, it is quite clear that Fisher has never become a member of the plaintiff company. His right to connect with the telephone line is dependent upon his membership. The plaintiff company has been guilty of no arbitrary act or bad faith to prevent his acquiring membership in a proper way. The only relief he prays for in his cross-bill is that the plaintiff company be enjoined from interfering in any way with his connections with the telephone line. Upon the record before us, he is not entitled to such relief and the trial judge properly so found.

2. It is strongly urged that the granting of a temporary writ of injunction was an abuse of power, regardless of the final merits of the case, and that such writ should be dissolved. It will be noted that both parties prayed for such writ. From a bird's-eye view of the case it is quite apparent that one party or the other was entitled to the writ. If the defendants were entitled to it, the plaintiffs were not. And, if the defendants were not entitled to it, there cannot be much substance to the claim that plaintiffs were not. The plaintiffs brought their suit in equity for an injunction as an independent remedy under the provisions of Code, § 4354. They prayed a temporary writ, and this was issued under the provisions of sections 4355 and 4356. Our discussion in the preceding paragraph is a sufficient statement of the record to show that the trial judge was justified in granting the temporary writ of injunction. On this question we need add nothing to what has been said in our previous cases. *Ladd v. Osborne*, 79 Iowa, 93, 44 N. W. 235; *Tantlinger v. Sullivan*, 80 Iowa, 218, 45 N. W. 765; *Price v. Baldauf*, 82 Iowa, 677, 46 N. W. 983, 47 N. W. 1079; *Troe v. Larson*, 84 Iowa, 652, 51 N. W. 179, 35 Am. St. Rep. 336; *Halpin v. McCune*, 107 Iowa, 494, 78 N. W. 210; *Keil v. Wright*, 135 Iowa, 383, 112 N. W. 633, 13 L. R. A. (N. S.) 184, 124 Am. St. Rep. 282, 14 Ann. Cas. 549.

No other question is presented for our consideration.

The order of the trial court is therefore affirmed.

PARMENTER v. PARMENTER et al.

(Supreme Court of Iowa. Nov. 15, 1912.)

1. DEEDS (§ 211*)—FRAUD IN PROCUREMENT—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show that a deed from plaintiff to her son was procured through fraud and collusion practiced upon her by him and another son.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 637-647; Dec. Dig. § 211.*]

2. WORK AND LABOR (§ 7*)—SERVICES BY PARENT—RIGHT TO RECOVER.

On an accounting between mother and an adult son, she was not entitled to credit for household services rendered him while they lived together.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 11½-22; Dec. Dig. § 7.*]

3. TRUSTS (§ 44*)—EXISTENCE—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show that a son held personality left by his father in trust for his mother.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. § 44.*]

Appeal from District Court, Polk County; Lawrence De Graff, Judge.

The facts are stated in the opinion. Affirmed.

L. A. Smyres and Dale & Harvison, all of Des Moines, for appellant. Parker & Riley and Bowen & Alberson, all of Des Moines, for appellees.

SHERWIN, J. The plaintiff is the widow of Edward Parmenter, who died intestate in Polk county in 1897, leaving surviving him seven children. The defendant Sabert E. Parmenter is the oldest son, and Walter E. Parmenter the youngest. Edith Witmer is the youngest daughter. Walter and Edith were living at the parental home when their father died, and were of the respective ages of 22 and 18 years. The action was brought against Sabert E. Parmenter to set aside and cancel a certain deed, dated and recorded May 25, 1906, whereby the plaintiff conveyed to him 90 acres of land situated in Polk county, on the ground that the same was made without consideration, without independent advice, and because of fraud and collusion practiced upon the plaintiff by her two sons, Sabert and Walter. As incident to the main relief sought, plaintiff seeks an accounting against Sabert for the rents and profits of said land for the years 1901 to 1910, both inclusive. She also asks to recover against Sabert for labor and services rendered him during the same period. The plaintiff seeks to recover against Walter E. Parmenter for the wrongful conversion to his own use of the plaintiff's share of the personal property belonging to his father's estate, and for the rents and profits of the same land for the years 1898, 1899, and 1900. Sabert E. Parmenter denied the grounds upon which his mother asks the cancellation of said deed, and, further answering, he alleges that he has made improvements on said land, relying upon said deed, and his mother is thereby estopped to maintain this action. As to the claim for an accounting for the rents and profits of said land, he says that action for the same for the years 1901 to 1905 is barred by the statute of limitations. As to the period from 1906 to 1910, both inclusive, he pleads that he occupied said premises with his

mother, under verbal agreement with her made prior to the beginning of such occupancy, whereby he was to have the rents and profits of the land in return for the payment of taxes, insurance, repairs, and upkeep of the same, and the personal expenses of his mother, and avers compliance therewith on his part. He denies her claim for services. Walter E. Parmenter, for answer to the claim against him, denied generally, and further pleaded that the action was barred by the statute. He further pleads the same arrangement with his mother for the use of the land that is pleaded by his brother Sabert, and alleges compliance therewith. The district court refused to cancel the deed, and found against the plaintiff's claim for services. As to an accounting for rents and profits by Sabert, the court found the same barred for the years 1901 to 1905. An accounting for the years 1906 to 1910 was granted, and it was found that Sabert was indebted to his mother in the sum of \$300. The court found adversely to the plaintiff on her claim against Walter E. Parmenter. The plaintiff alone appeals.

A statement of the conditions existing at the time of the death of the husband and father, and of the subsequent financial transactions between the mother and the two sons, Sabert and Walter, and the daughter Edith, prior to the execution of the deed in question, will throw much light on the present controversy. As we have heretofore said, Edward Parmenter, the father, left surviving him his widow, the plaintiff, and seven children. Prior to his death, the five oldest children, including the defendant Sabert, had received advancements of their share of the father's estate. This is conceded by all parties, and at the time of his death Mr. Parmenter owned 270 acres of land in Polk county and certain personal property, and the son Sabert was appointed administrator of his estate. Very soon after the death of the father the family had a conference at which it was mutually agreed that the oldest five children had already received more than their proportionate share of their father's property, and that the estate left at the time of his death should be divided equally between plaintiff, Walter, and Edith. It was thereupon divided so that each of the three received what was considered to be one-third in value of the entire estate left by the father. Conveyances were duly executed, whereby Edith took title to 100 acres of the land, Walter received 80 acres thereof, and the plaintiff the remaining one-third, being the 90 acres in controversy, upon which the homestead was located. Walter and Edith continued to live with their mother in the old homestead until late in 1900, under conditions which will be more fully disclosed further along. Some two months after this division had been made,

the plaintiff made a will, by the terms of which Edith and Walter were to receive the 90 acres in controversy upon the death of plaintiff. In November, 1897, a public sale was had of a part of the personal property belonging to the estate, and from the proceeds of such sale Edith was paid \$1,000 in full settlement of her interest therein. The remainder of the money received from the sale of such property was kept and used by Walter as if the entire amount thereof belonged to him, and this was without any objection from the plaintiff. The remainder of the personal property was kept on the farm and was sold, or otherwise disposed of, by Walter, without objection on the part of the plaintiff. Walter remained with his mother, and worked the farm until in November, 1900, when he was married and left. Edith remained with her mother until in December of the same year, when she also married and left the old home. A few months before these marriages, and in anticipation thereof, as the record fairly shows, Sabert arranged to go back to the old homestead and take care of his mother. Sabert had, before this time, separated from his wife, and was then living some distance from his mother. He owned 160 acres of land, which about August, 1900, he traded to Walter for the 80 acres that Walter had received in the division of the 270 acres left by the father, and for Walter's interest under the will of his mother in the 90 acres in controversy. Sabert also purchased from Edith the 100 acres that had been deeded to her in the family settlement, and also bought from her and paid her \$1,000 for her interest, under her mother's will, in the 90 acres in controversy. These transactions were fully understood and acquiesced in by the plaintiff, except that she thought, and so expressed herself, that Sabert was not making an advantageous trade with Walter. Shortly after Sabert had purchased the respective interests, under the plaintiff's will, of Edith and Walter in the land in controversy, and to carry out the new arrangement, the plaintiff agreed to and did make a new will in which she devised the 90 acres in controversy to Sabert. Near the close of 1900 Sabert went back to the old home and to his mother, where they lived together until the fall of 1910. Plaintiff was not satisfied that the will in favor of Sabert would accomplish her intention to give him the land in controversy, and, after several talks about the matter, she executed the deed of May 25, 1906, which gave Sabert the title in fee to the 90 acres in controversy, subject to a life estate reserved to herself. Both before and after the execution of this deed, Sabert farmed the 90 acres, and took all the proceeds therefrom, using the same for the support of himself and mother, for taxes and improvements on the land, and for purposes of his own. During the years that Sabert and the plaintiff thus lived together, the

plaintiff, though well along in years, was able to do, and did, a great deal of hard work. The mutual love of these two was great, and each was deeply concerned for the welfare of the other, but in the fall of 1910 differences between them, arising in part, at least, out of Sabert's second marriage, caused the plaintiff to leave him, and she thereupon went to the home of her daughter Edith.

[1] 1. Appellant contends that because of the confidential relation existing between the defendant Sabert E. Parmenter, and his mother, the plaintiff, and because of her trust and confidence in him, as shown by the record, the burden of proof is upon him to show the bona fides of the transaction. We have held in many cases that where there is such fiduciary relation between parent and child, and the conveyance is gratuitous, the burden rests upon the beneficiary to prove the bona fides of the transaction. And without determining whether the record before us shows that such relation existed here, or that such trust and confidence was reposed in the son as to invoke the application of the rule, we may concede that it should be applied to the transactions under consideration. But, giving the plaintiff the full benefit of such rule, we are still of the opinion that she is not entitled to have the conveyance set aside and canceled. The undisputed history of the transactions between the plaintiff and these defendant sons and daughter from the time of the death of the father until the unfortunate separation of the mother and Sabert in the fall of 1910 in itself almost conclusively refutes the present claim of the plaintiff. The five oldest children had received, at least, all that they were entitled to from their parents before the death of Mr. Parmenter, and, after his death, Edith and Walter were the only children about whose financial welfare the mother was concerned. The other children were married and had homes of their own, and it was upon Edith and Walter, one or both, that the mother must depend, if she continued to live in the home that had been hers and her husband's for over 40 years. That she did not then or thereafter want to break up her home is conclusively shown. Edith and Walter were both young, and as the plaintiff thought would both remain with her for many years. But the plaintiff thought that, in any event, these two were justly entitled to the 90 acres when she was through with it, and hence she made her first will giving it to them. This arrangement continued with the approval of all, until Edith and Walter were planning their marriages and the consequent departure from the parental roof, and it became apparent that other arrangements would have to be made for the care of the mother. Sabert had always been, and was then, plaintiff's favorite son. He and his wife were separated, and there was no ob-

stacle in the way of his going to his mother's home and helping her keep it for the rest of her life. To enable him to do this, he acquired by purchase the tracts of 100 acres and 80 acres that Edith and Walter had received in the division of the home farm, and also purchased of them the interest which they were supposed to have in the land, in controversy under the will of the plaintiff, and there can be no question but what this arrangement was made with the full knowledge and approval of the plaintiff. After Sabert had bought and paid for this expectancy of Edith and Walter, under the circumstances disclosed, about the only natural and right thing for the plaintiff to do was to make some arrangement that would protect him, and, following out the plan that she had adopted with Edith and Walter, she made a new will, devising the land to Sabert. Up to this point of time there could have been no fraud or collusion practiced upon the plaintiff without a participation therein by the daughter Edith, and this the plaintiff does not claim. The subsequent execution of the deed to Sabert simply made a present conveyance of an interest that the grantor originally intended should be postponed until her death. All of these transactions appear to us to have been very natural and proper, and we are united in the view that there was no fraud, collusion, or conspiracy connected with any of them.

2. Appellant cannot justly complain because she was not allowed a greater sum on the accounting between her and Sabert. The decided preponderance of the evidence shows that Sabert took possession of the farm, and continued such possession under an express agreement with the plaintiff that he was to have what he could make from it in return for taking care of plaintiff, paying the taxes and insurance, and for improvements and repairs, all of which he did. This agreement remained in force during all of the years involved in this controversy, and plaintiff was not in reality entitled to the sum found due her on the accounting, but, as the defendant Sabert does not appeal, we need not further discuss the matter.

[2] 3. Appellant does not press her appeal on the proposition that she should have been given recovery for her services while she and Sabert lived together. That she is clearly not entitled to anything on that account, see the following decisions: *In re Estate of Bishop*, 180 Iowa, 252, 106 N. W. 637; *Donovan v. Driscoll*, 116 Iowa, 339, 90 N. W. 60.

[3] 4. It is appellant's contention that Walter E. Parmenter wrongfully converted her share of the personal property that was left by her husband, and that he thereby became a trustee, holding it for her benefit.

It is sufficient answer to this claim to say that the evidence wholly falls to prove a trusteeship. On the other hand, it is shown without serious question that Walter was to use and handle this property as his own, and that he was not to account to the plaintiff for it. Moreover, at the time he left the farm in 1900, the said personal property had all been either used or disposed of by him, and no claim was made therefor until this suit was brought more than ten years thereafter. Had any of this property ever been held in trust for the plaintiff, her action therefor would now be barred, because of Walter's denial of the trust and claim to the property before and at the time he left the farm. *Wilson v. Green*, 49 Iowa, 251; *Murphy v. Murphy*, 80 Iowa, 740, 45 N. W. 914; *Peters v. Jones*, 35 Iowa, 512.

5. Walter's possession of the land in controversy from 1897 to 1900, and his use of the income therefrom, was under an agreement with his mother that he was to take care of her and pay other expenses connected with the land, and have what he could make over and above that amount. The judgment of the district court is, in all respects, affirmed.

Affirmed.

STALEY v. FOREST.

(Supreme Court of Iowa. Nov. 15, 1912.)

1. MUNICIPAL CORPORATIONS (§ 705*)—INJURIES TO TRAVELERS ON STREET—NEGLIGENT OPERATION OF AUTOMOBILES.

Where one operated an automobile at a dangerous speed in view of the curve in the street at the approach of a bridge, and ran his machine directly toward a driver of a horse in a manner calculated to frighten a reasonably safe and well-trained horse, and as a result thereof the horse became frightened and jumped aside to avoid a collision, upsetting the vehicle, and causing injury to the driver, the operator was guilty of actionable negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.*]

2. INTEREST (§ 39*)—LIABILITY FOR INTEREST—UNLIQUIDATED DAMAGES.

An instruction in an action for personal injuries which directs interest to be computed from the time of the injury on the amount allowed for future pain and suffering is erroneous.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. §§ 97-108, 142, 143; Dec. Dig. § 39.*]

3. NEW TRIAL (§ 162*)—GROUNDS—ERRONEOUS INSTRUCTIONS—RELIEF AWARDED.

The court on motion for new trial in an action for personal injuries on the ground that it erred in directing interest to be computed from the time of the injury on the amount allowed for future pain and suffering may exclude the amount which it must be presumed the jury included as interest on account of the erroneous instruction, and enter judgment for the balance.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 324-329; Dec. Dig. § 162.*]

4. NEW TRIAL (§ 164*)—VACATING ORIGINAL JUDGMENT—FINDINGS.

Where, by agreement of the parties, the court was authorized in vacation to make entry of proper judgment on motion for new trial on the ground of errors in the instructions, and the court made findings and entered a correct judgment in place of the erroneous judgment as of its date, the original judgment was set aside, and the corrected judgment was effectual.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 333; Dec. Dig. § 164.*]

Appeal from District Court, Hardin County; C. G. Lee, Judge.

Action to recover damages for injuries received by plaintiff as a result of alleged negligence on the part of defendant in operating an automobile. There was judgment for plaintiff, from which defendant appeals. Affirmed.

Lundy, Wood & Baskerville, of Eldora, for appellant. Bryson & Bryson, of Iowa Falls, for appellee.

McCLAIN, C. J. The material allegation of negligence on the part of defendant which was submitted to the jury was that defendant operated his automobile at an unreasonable and dangerous rate of speed on a street of the city of Iowa Falls, approaching plaintiff who was driving a horse and buggy from the opposite direction on such street, causing the horse of the plaintiff to become frightened, upsetting the buggy, and throwing the plaintiff out, with the result that her arm was broken.

[1] 1. The contention that the verdict for the plaintiff is without the support of any evidence in the record tending to show negligence of the defendant need not be considered at any great length. Although the plaintiff's own testimony as to what she observed in the excitement of the moment as she came around a curve onto the street and was met by the defendant in his automobile does not tend very strongly to establish negligent conduct on the part of the defendant, nevertheless, there was testimony of a witness who was in a position to observe the circumstances from which the jury might well have believed that at a rate of speed which was dangerous and negligent, in view of the curve in the street at the approach of a bridge, defendant ran his machine directly toward the plaintiff in a manner calculated to frighten even a reasonably safe and well-trained horse, and that as a result of this conduct of defendant, which might well have been anticipated, plaintiff's horse was frightened, and jumped aside to avoid an imminent collision, upsetting plaintiff's buggy, causing the injury complained of.

In this connection we may notice an assignment of error relating to the admission of the evidence of a witness who was allowed to testify as to the speed at which the defendant's automobile was being operat-

ed at the time of the accident; the claim made being that the witness did not show himself competent to give an opinion as to the rate of speed. The point is not pressed in argument, and an examination of the testimony of the witness shows that it is not well taken. The witness clearly showed such competency as to justify the court in receiving the evidence.

2. As to the amount of damages which might be allowed, the jury was instructed to take into account pain and suffering already endured by the plaintiff, if any, and such pain and suffering as it was reasonably certain from the evidence would be endured by her in the future, if any. And the jury was then directed that on determining the amount allowed as damages interest should be computed on that amount from the time of the injury and be added to the amount of the damages, and that the sum thus ascertained would be the amount of the verdict.

[2] It is conceded that this instruction was erroneous, for the reason that it directed interest to be computed from the time of the injury on the amount allowed for future pain and suffering. *Jacobson v. United States Gypsum Co.*, 150 Iowa, 330, 336, 130 N. W. 122.

[3, 4] The jury, in fact, returned a verdict for \$1,236.60, and judgment was immediately entered for the plaintiff in that sum. On a motion for a new trial, this error was called to the attention of the court; and the judge, in ruling upon such motion which covered also other grounds for new trial, filed a finding in which the error of the instructions as to the allowance of interest was attempted to be corrected by the reduction of the verdict so as to eliminate the item of interest which it was presumed the jury had included in its verdict covering the period from the date of the injury to the date on which the verdict was rendered. It is proper to say in explanation of the action of the judge that the decision of this court in the case above cited was announced between the time of the giving of the instruction and the time of ruling on the motion. In connection with the filing of this written finding by the judge ruling on the motion for a new trial, a judgment entry was made reciting that: "By agreement of parties entered of record in term time, the motion for new trial in this cause was to be submitted in vacation and ruling and entry made as of the date of said agreement. The motion for new trial having been submitted, and the court having considered the same and having filed its finding, it is now ordered that the said motion be overruled and that the plaintiff have and recover judgment for the sum of \$1,200.00 with interest at the rate of 6 per cent from the date the verdict was returned into court, viz., the 26th day of January, 1911. To the overruling of defendant's mo-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion and to all entries herein the defendant excepts."

The contention for appellant is that the judgment for \$1,236.00 entered on the verdict at the time it was returned was erroneous on account of the error in the instruction relating to interest, and that the court had no authority to subsequently enter a corrected judgment, and that, as the first judgment was not set aside, a second judgment on the same verdict is necessarily erroneous. It is not contended, however, that the second judgment, if properly entered, does not eliminate the prejudicial error in regard to the allowance of interest. The sole question presented in this respect is as to whether the second judgment is valid; for, of course, it is of no validity if there remains on the record a prior judgment entered on the same verdict. It is clear that the court had authority in ruling on the motion for new trial to determine that the verdict included an item of damage for which allowance should not have been made, and, as the court had directed the jury to include interest which should not have been included, the court might properly enter judgment for the amount of damages found by the jury, excluding the amount which it must be presumed the jury has included on account of the erroneous instruction as to interest. By agreement of the parties, the judge had authority in vacation to make such entry as the court might have made at the term, and that authority included the entry of judgment on the verdict for the proper amount. There was no occasion, therefore, to award a new trial on condition that plaintiff should not accept a judgment for a reduced amount. The erroneous allowance on account of interest was ascertainable, and the court might eliminate the amount of such erroneous allowance and render final judgment for the balance.

Thus it appears that the only grievance of the appellant is in this respect that a judgment had already been entered on the verdict which remained a valid and binding adjudication notwithstanding the attempt to enter a subsequent correct judgment. Construing together the original judgment, the written finding of the judge in ruling on the motion for a new trial, and the final judgment entry, it is plain that the effect of the action of the court was to set aside the first judgment, and to enter a new and correct judgment in its place as of the same date. It could hardly be contended that, if the ruling on the motion for a new trial had expressly recited the setting aside and vacation of the first judgment, the second and correct judgment would not have been effectual. The intention of the trial judge in his ruling to set aside and cancel the judgment already entered is perfectly clear; and it is perfectly clear that the second and

correct judgment is a substitute for the judgment first entered.

We reach the conclusion that the final judgment is for a correct amount, and such judgment is therefore affirmed.

FARDAL DRAINAGE DIST. NO. 72, IN HAMILTON COUNTY, et al. v. BOARD OF SUP'RS OF HAMILTON COUNTY et al.

(Supreme Court of Iowa. Nov. 16, 1912.)

1. DRAINS (§ 79*)—TAXATION—ASSESSMENTS—EQUALITY.

Drainage Law, § 12 (Code Supp. 1907, § 1989a12), relating to drainage improvements, requires equality in assessments so far as possible, and that lands receiving the most benefit shall bear the greater burden, but leaves the determination of what is an equitable apportionment of the costs, expenses, and damages to the commissioners, so that they may charge certain lands with a certain part of the costs of the improvement, in addition to a just proportion of the general costs.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 76; Dec. Dig. § 79.*]

2. DRAINS (§ 73*)—ASSESSMENT—PLAN—CONSTRUCTION.

Where the original plan of a drainage improvement was slightly changed in two or three places in its construction, but such changes were unimportant and the additional expense was paid wholly by those for whose benefit such change was made, another owner has no ground for complaint thereof.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 73.*]

Appeal from District Court, Hamilton County; Robert M. Wright, Judge.

The facts are stated in the opinion. Affirmed.

Wesley Martin, of Webster City, for appellants. J. M. Blake, of Webster City, for appellees.

SHERWIN, J. The Fardal drainage district No. 72 is located in Freedom township, Hamilton county. The water is carried away by an open ditch, which extends north about $4\frac{1}{2}$ miles from its outlet, and by three lines of tile extending north from the head of the open ditch. The plaintiff is the owner of the S. W. $\frac{1}{4}$ of section 8, township 88, range 26, which land is within the drainage district. One Welch owns the S. $\frac{1}{2}$ of section 5, W. A. Jones owns the S. E. $\frac{1}{4}$ of section 6, and J. W. Smith owns the E. $\frac{1}{2}$ of section 7, and in the same township and range. One line of tile runs north from the upper end of the open ditch and enters the plaintiff's land near the southwest corner thereof, and extends north across his quarter section some two or three rods east of the west line thereof, and then north into the Welch land in section 5. The benefits assessed to the plaintiff's land were as follows: The N. E. $\frac{1}{4}$ of his 160, containing 24 acres, was assessed \$81.88; the S. E. $\frac{1}{4}$, 38 acres, \$70.84; the S. W. $\frac{1}{4}$, 38 acres, \$436.08; and the N. W. $\frac{1}{4}$, containing 39 acres,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was assessed \$599.88. Plaintiff filed objections to the assessment on the grounds that there was an improper and illegal classification of his land, and because the assessment was excessive, inequitable, and greater than assessments made against other land within the district. The board of supervisors confirmed the assessments, as we understand the record, and the plaintiff appealed to the district court, where the assessment on each of the west forties was reduced \$50, and the action of the board was otherwise confirmed. Each party was ordered to pay one-half of the costs, and the plaintiff appeals.

[1] 1. The record shows that the cost of the main tile, in what is termed the "tile area," was taxed wholly to that area, and not spread over the whole district, and that the entire district was then taxed for the general benefit. The appellant contends, first, that the tile area should not have been alone taxed for the cost of tiling, but that it should have been spread over the whole district; and, second, that if the cost of the tile should be paid by the tile area alone, then there should have been two assessments, one for the cost of the general improvement, and the other for the cost of the tile. The Drainage Law requires equality in these assessments, so far as the same may be attained by human endeavor. Section 1989a12, Code Supp. But it does not undertake to specify just how such equality shall be determined. It provides only that the commissioners appointed for the purpose shall make an equitable apportionment of the "costs, expenses, costs of construction, fees and damages assessed for the construction of any such improvement." The main purpose of the law is to secure an equitable apportionment of the entire cost of the improvement, after considering the location of the several tracts of land, their condition and needs, and the relative benefit that each tract will receive from the improvement as a whole. As we have said, the method of reaching this result is not specifically pointed out in detail by the statute. All that is required is that the lands receiving the most benefit from the improvement shall bear the greater burden. Under this statute, we believe it to be entirely within the power of the commissioners to make any classification, in addition to that specifically required by the statute, which will aid them in finally accomplishing the end sought, to wit, an equitable apportionment. If they find that such an apportionment requires them to tax certain lands a certain part of the cost of the improvement in addition to a just proportion of the general cost, we see nothing in the law to prevent such action. Indeed, we think the statute requires that very thing to be done where an equitable apportionment demands it.

The whole controversy, then, hinges on the question whether there had been, in fact, an

equitable apportionment. Practically all of the evidence in the case touching the question of taxing the cost of the tile to the tile area alone agrees that it should be done. Even the engineers used as witnesses by the plaintiff, with one exception, agree that such a method is right, and, in fact, the only right method to secure an equitable apportionment. The reasons they and the defendants and other witnesses give for this conclusion appear to us to be sound, and we are not disposed to hold that they are all wrong on the question. The question then remains whether the plaintiff has, in fact, been charged more than his just proportion of the cost of this improvement. The testimony is in sharp conflict on this branch of the case. The matter was investigated by the board of supervisors, at least some of the members having visited the district in person, and determined adversely to the plaintiff. The district court gave the case careful attention, and made but a slight reduction in the amount assessed to the plaintiff. We have gone over the evidence with care, and reach the conclusion that the decree of the district court does not require the plaintiff to pay more than his equitable proportion of the cost of the improvement. It is an utter impossibility to determine to a nicety what any particular assessment should be. The most that can be done is to arrive at a result that will fairly meet the requirements of the statute, and such, we think, is the case here.

2. What we have already said is sufficient answer to the appellant's contention that a subdistrict should have been established under the provisions of section 1989a23.

[2] 3. It is claimed that there was such a variation from the route of the main open ditch, as originally established, as to render a part, at least, of the assessment void. The original plan provided for an angular and crooked open ditch, and it was slightly changed in two or three places in its construction, but such changes are shown to have been unimportant, and that the additional expense occasioned thereby was paid wholly by those for whose benefit such changes were made. The plaintiff has no just ground for complaining of this.

4. The court had authority to make a division of the costs, and the division made was favorable to the plaintiff. The judgment is affirmed.

Affirmed.

FARDAL DRAINAGE DIST. NO. 72, IN HAMILTON COUNTY, et al. v. BOARD OF SUP'RS OF HAMILTON COUNTY et al. (Supreme Court of Iowa. Nov. 16, 1912.)

Appeal from District Court, Hamilton County; R. M. Wright, Judge.

Wesley Martin, of Webster City, for appellants. J. M. Blake, of Webster City, for appellees.

SHERWIN, J. This case was tried in the district court with the case of Varick Crosley v. Board of Supervisors on practically the same evidence, and was submitted with the Crosley Case to us. See Fardal Drainage District No. 72 v. Board of Supervisors (No. 28,448), 138 N. W. 443, decided at this period. The plaintiff is the owner of land in sections 7 and 18, township 88, range 26, situated near the Crosley land, and assessed for the same improvement and in substantially the same way. The same propositions are relied upon for a reversal here that were urged in the Crosley Case. Following the Crosley Case, we hold, without further discussion, that the appellant has not been assessed more than an equitable proportion of the cost of the improvement, and that his other complaints are without merit. The judgment is therefore affirmed.

Affirmed.

HOLLY v. HOLLY.

(Supreme Court of Iowa. Nov. 14, 1912.)

1. INSANE PERSONS (§ 35*)—DRUNKARDS (§ 3*)—TEMPORARY GUARDIAN—APPOINTMENT.

Under Code, § 3219, providing for the appointment of a permanent guardian of the property of a person of unsound mind or an habitual drunkard incapable of managing his affairs, the judge of the court in which the proceeding is instituted may appoint a temporary guardian.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 52, 53; Dec. Dig. § 35;* Drunkards, Cent. Dig. §§ 5, 6; Dec. Dig. § 3.*]

2. DRUNKARDS (§ 3*)—TEMPORARY GUARDIAN—APPOINTMENT—VACATION.

Where a temporary guardian of an habitual drunkard was appointed in a proceeding for permanent guardianship, it was proper for the judge making the appointment to treat a subsequent application to annul the same, addressed to the court, as an application to him as judge for an order authorized by Code, §§ 3831, 3846, to be determined in vacation.

[Ed. Note.—For other cases, see Drunkards, Cent. Dig. §§ 5, 6; Dec. Dig. § 3.*]

3. DRUNKARDS (§ 3*)—TEMPORARY GUARDIAN—VACATION OF APPOINTMENT.

A judge, having appointed a temporary guardian for an alleged habitual drunkard, has authority to vacate such appointment on a preliminary ex parte showing in vacation.

[Ed. Note.—For other cases, see Drunkards, Cent. Dig. §§ 5, 6; Dec. Dig. § 3.*]

4. JURY (§ 19*)—TEMPORARY GUARDIAN—APPOINTMENT—DISSOLUTION—STATUTES.

Code, § 3219, providing that either party to a proceeding for the appointment of a guardian for a person of unsound mind or an habitual drunkard may have a trial by jury, has no reference to the appointment of a temporary guardian by the judge of the court or to his action in dissolving such appointment.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 91, 104-133; Dec. Dig. § 19.*]

5. INSANE PERSONS (§ 37*)—DRUNKARDS (§ 3*)—APPOINTMENT OF TEMPORARY GUARDIAN—DISSOLUTION—STATUTES.

Code, § 3222, provides that at any time not less than six months after the appointment of a guardian for a person of unsound mind or an habitual drunkard the person under guardianship may apply to the court or any judge thereof for an order terminating the guardianship. Held, that such section refers to a permanent and not to a temporary guardian, and does not prevent an application for vacation of the appointment of a temporary guardian before the

expiration of six months, since neither the appointment nor the discharge of a temporary guardian has any bearing on the trial of the question whether a permanent guardian should be appointed.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 56; Dec. Dig. § 37;* Drunkards, Cent. Dig. §§ 5, 6; Dec. Dig. § 3.*]

6. DRUNKARDS (§ 3*)—RESIDENCE.

Where an alleged habitual drunkard for whom a guardian was sought had formerly been a resident of C. county, but for 10 years had been an inmate of a home for the aged in D. county, where he had lived under an arrangement to pay a small amount for his board, and had voted in D. county and continuously remained there except for temporary visits to C. county, without any indications of an intention to return to C. county for residence, he was properly found to be a resident of D. county.

[Ed. Note.—For other cases, see Drunkards, Cent. Dig. §§ 5, 6; Dec. Dig. § 3.*]

7. DRUNKARDS (§ 3*)—APPOINTMENT OF GUARDIAN—JURISDICTION.

Where an alleged habitual drunkard for whom a guardian was sought was a resident of D. county, and, though it was alleged that he had property in C. county consisting of money which he was incompetent to manage, there was no proof that there were any sums of money belonging to him in C. county or in the custody of any person living in that county, and no effort was made to bring any money or other property of the alleged incompetent within the jurisdiction of the court in C. county, such court had no jurisdiction to appoint either a temporary or permanent guardian, since, the proceeding being in personam, the mere fact that persons in C. county held money of the alleged incompetent would not of itself give that court jurisdiction to appoint a guardian of his property.

[Ed. Note.—For other cases, see Drunkards, Cent. Dig. §§ 5, 6; Dec. Dig. § 3.*]

8. VENUE (§ 36*)—APPOINTMENT OF GUARDIAN—JURISDICTION—VENUE.

Code, § 3504, providing for a change of the place of trial where an action is brought in the wrong county, does not apply to special proceedings, such as an application for the appointment of a guardian; and hence, where such proceeding is instituted in the wrong county, it cannot be transferred to the proper county, but must be dismissed.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 54, 55; Dec. Dig. § 36.*]

Appeal from District Court, Cherokee County; John F. Oliver, Judge.

In a proceeding instituted in the district court of Cherokee county by a petition filed by the plaintiff, asking the appointment of a guardian for the defendant alleged to be incompetent to manage his affairs and addicted to the excessive use of intoxicating liquors, the judge of said court appointed Wm. Mulvaney temporary guardian for the defendant. On an application to set aside this appointment and cancel the letters issued on the ground that the defendant was, and for many years had been, an actual inhabitant and resident of Dubuque county, and not an inhabitant or resident of the county in which the proceeding was instituted, the judge, having considered affidavits in support of the application and in resistance

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thereto, found that the defendant was an inhabitant and resident of Dubuque county, and that in making the appointment the judge was without jurisdiction to do so and thereupon ordered that the appointment of Mulvaney, as temporary guardian, be canceled and annulled. The plaintiff appeals from this order. Affirmed.

Wm. Mulvaney, of Cherokee, for appellant. Walter P. McCulla, of Cherokee, and Kenline & Roedell, of Dubuque, for appellee.

McCLAIN, C. J. The appointment of the temporary guardian for the defendant was made on plaintiff's application without any trial or final determination of the question whether, in fact, the defendant was a resident of the county of Cherokee in such sense as to authorize the appointment by the judge of a permanent guardian for him. The ruling of the judge which is now complained of simply terminated the temporary guardianship, and presented no obstacle to the trial by the court of the question whether the defendant was, in fact, a resident of the county, and was, in fact, so far competent as to justify the appointment of a permanent guardian for him. No issue, either of law or fact, was raised in the lower court on plaintiff's petition, so far as the appointment of a permanent guardian was applied for. It is true that the judge, in sustaining the application for the discharge of the temporary guardianship, announced his reason for doing so to be that the defendant was a resident of Dubuque county, and not of Cherokee county; but that conclusion was predicated wholly upon affidavits, and was not a finding in the final determination of the case. The plaintiff could have secured an adjudication on the allegations of his petition relating to the necessity for a permanent guardian, involving, of course, the question as to the residence of the defendant; but he did not see fit to do so. He has appealed only from the order, discharging the temporary guardianship.

[1] 1. Under the provisions of Code, § 3219, relating to an application for the appointment of a permanent guardian of the property of a person who is of unsound mind or an habitual drunkard incapable of managing his affairs, the judge of the court in which the proceeding was instituted may appoint a temporary guardian, and the appointment of Wm. Mulvaney as temporary guardian of the estate of the defendant was made by the judge of the court in pursuance of this authority. Thereupon the defendant asked the court to annul and set aside such appointment, presenting affidavits tending to show that the defendant was a resident of Dubuque county. This application was presented, however, in vacation to the judge of the court who had made the preliminary order, and said judge directed a hearing before him on affidavits of such application.

[2] Although the application was addressed to the court, we have no doubt that the judge to whom it was presented was justified in construing it to be an application to him for an order such as is authorized by Code, §§ 3831, 3846, to be determined in vacation. However this may be, no objection was made to him, nor is any objection now made, that he improperly placed such construction upon the application. The plaintiff appeared at the time designated, and presented counter affidavits as he was authorized to do by the court's order, and submitted to the determination of the judge the question whether the appointment of a temporary guardian should be set aside. It is plain that there was no attempt to secure a trial on the merits of the application for a permanent guardian and that no such determination was made.

[3] It is not contended for appellant that the judge has not the authority in vacation to entertain an application to set aside the appointment of a temporary guardian made by him on a preliminary ex parte showing.

[4] Such a determination is not a trial of the case on the merits of the plaintiff's petition for the appointment of a permanent guardian and the provisions of Code, § 3219, that either party may have a trial by jury in such a case has evidently no reference to the appointment by the judge of a temporary guardian or his action in dissolving such temporary guardianship.

[5] 2. The provision of Code, § 3222, that "at any time, not less than six months after the appointment of such guardian, the person under guardianship may apply to the court, or any judge thereof," for an order terminating the guardianship, evidently has reference to a permanent guardianship, and not to one which is temporary in its nature only to continue until the propriety of granting a permanent guardian can be decided in the method provided by law. There is nothing in the statutory provisions to warrant the inference that a temporary guardianship granted on an ex parte application cannot be set aside until after the expiration of six months. Neither the appointment nor the discharge of a temporary guardian has any bearing upon the trial of the question whether the permanent guardian should be appointed.

[6] 3. Counsel for appellant assails the order of the judge discharging the temporary guardianship on the ground that the finding in the order from which they appeal that defendant was a resident of Dubuque county, and that the court to which application for the appointment of the guardian for the defendant was made was without jurisdiction, was erroneous; and, inasmuch as this question is discussed in argument on both sides, it may, we think, be properly considered.

Treating the finding of the judge as an adjudication by the court on the question of its jurisdiction, it is sufficient to say that

on affidavits presented on each side the judge may very well have found as a conclusion of fact that the defendant was at the time the proceeding was instituted not an inhabitant or resident of Cherokee county, but, on the other hand, that he was and had been for at least 10 years an inhabitant and resident of Dubuque county. It appears without substantial controversy that about 10 years before this proceeding was instituted the defendant, a man without family, left Cherokee county, and went to Dubuque county, where he voluntarily became an inmate of St. Antony's Home for the Aged under an arrangement by which he was to remain at said Home for life, paying \$3 per week for his board. His competency to effect a change of residence and enter into such an arrangement is not questioned in this proceeding, and, so far as appears from the record, has never been questioned. Since becoming an inmate of the Home defendant has voted in Dubuque county and remained in that county, save for temporary visits to Cherokee county; one of those visits being on the occasion of the funeral of his sister. It does not appear that on this or any other occasion of his visiting Cherokee county after becoming an inmate of the Home, he assumed or pretended to be a resident of that county, or that he did anything to indicate an intention to return to that county for residence. Under the showing, the trial judge could not very well have found otherwise than, as he did, that the defendant was not an inhabitant nor a resident of Cherokee county. In a law case the finding of the trial court or judge is as conclusive on us with reference to the facts as would be the verdict of a jury.

[7] If the defendant was not an inhabitant nor a resident of Cherokee county, but, on the other hand, was an inhabitant and resident of Dubuque county, then the court had no jurisdiction to entertain the proceeding for the appointment of a permanent guardian for him. The proceeding is not in rem, but it is in personam. *Brown v. Lambe*, 119 Iowa, 404, 93 N. W. 486. In the case before us there is no pretence that there was property of the defendant within the jurisdiction of the court as to the management or disposition of which it was essential that a guardian be appointed. It was alleged that defendant had property in Cherokee county, consisting of money which he was incompetent to manage; but even this allegation was not supported by any showing that there was any sum of money belonging to the defendant in Cherokee county or in the custody of any person living in said county, and no effort whatever was made to bring any money or other property of the defendant's within the jurisdiction of the court. The mere fact that some persons in Cherokee county held money of the defendant's would not in

itself give the court of that county jurisdiction to appoint a permanent guardian for his property.

[8] It is suggested that the lower court acquired jurisdiction, and that the remedy of the defendant, if the proceeding was instituted in the wrong county, was to move for its transfer to the county of his residence. It is plain, however, that the provisions of Code, § 3504, relating to change of place of trial in case an action is brought in the wrong county, are applicable only to actions and not to special proceedings, such as those for the appointment of a guardian. If such a proceeding is instituted in a court having no authority to entertain it, no jurisdiction is conferred, and the court must necessarily dismiss it.

The order discharging the temporary guardian is therefore affirmed.

WHITE et al. v. BOARD OF SUP'RS OF STORY COUNTY et al.

(Supreme Court of Iowa. Nov. 20, 1912.)

DRAINS (§ 67*)—ASSESSMENTS—PURPOSE OF STATUTE.

The purpose of the law authorizing assessments to be made for drainage improvements is to impose on each landowner an equitable part of the cost of the improvement, and the result can best be attained by a personal inspection and examination of the location, with a consideration of the conditions as they actually exist.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 73, 76, 91; Dec. Dig. § 67.*]

Appeal from District Court, Story County; C. G. Lee, Judge.

"Not to be officially reported."

The facts are stated in the opinion. Affirmed.

Geo. C. White, Chas. Hall; and Bert B. Welty, all of Nevada, Iowa, for appellants. E. H. Addison, of Nevada, Iowa, for appellees.

SHERWIN, J. The appellant Cook is the owner of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 28, and of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 21, all in township 84, range 22. The forty in 28 was assessed \$478.80 by the board of supervisors, and the forty in 21 was assessed by the board \$518.70. The district court reduced the assessment on the forty in 21 to \$275, and refused Cook further relief. The appellant White is the owner of six 40's in section 28, township 84, range 22, upon which he was assessed. The assessments complained of, however, were on two 40's only; that on one 40 being \$210, and on the other \$696.15. The district court reduced the \$210 assessment to \$140, and in other respects confirmed the assessment of the board of supervisors. Cook and White both appeal.

No question is made as to the validity of the proceedings. As stated by appellants:

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"The only question to be determined is: Are appellants' lands assessed too high as compared with other similar tracts in this district, or are these assessments greater than the benefits received?" The question thus presented is purely one of fact. The record shows that this improvement consists almost entirely of two lines of tile extending on both sides of a low divide or ridge, and that it is of great value to the lands in the district. It is also shown that the owners of land in the district have been awake to the advantage of drainage, and that much tiling had been done before this improvement was made. The purpose of the law is to impose on each landowner an equitable part of the cost of the improvement, and this result can best be attained by personal inspection and examination of location and a consideration of the conditions as they actually exist. We shall not attempt to set out or review the testimony of the several witnesses, because it would be of no benefit to any one. We have given all of the evidence careful consideration, however, and reach the conclusion that substantial equality was reached by the district court.

The judgment is, therefore, affirmed.
Affirmed.

STATE v. FISHER.

(Supreme Court of Iowa. Nov. 20, 1912.)

CRIMINAL LAW (§ 1182*)—APPEAL—AFFIRMANCE.

Where no error appears on an appeal presented only by a short transcript, showing the indictment, the verdict of guilty, and the judgment, the judgment will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203-3214; Dec. Dig. § 1182.*]

Appeal from District Court, Pottawattamie County.

The defendant was indicted, convicted, and sentenced for the crime of assault with intent to commit murder, and from the judgment he now appeals. Affirmed.

S. B. Wadsworth and Thos. Harrison, both of Council Bluffs, for appellant. Geo. Cosson, Atty. Gen., and John Fletcher, Asst. Atty. Gen., for the State.

PER CURIAM. In this case, presented only by a short transcript, showing indictment, the verdict of guilty, and the judgment, no error appears, and the judgment is therefore affirmed.

TOMLINSON v. GOLDEN et ux.

(Supreme Court of Iowa. Nov. 16, 1912.)

1. BOUNDARIES (§ 3*)—MONUMENTS—FIELD NOTES—CONFLICTS.

Where there is a conflict between monuments erected on the ground as a part of the

original survey and the field notes and plat as recorded, the survey on the ground as ascertained by the monuments marks the boundaries, and is controlling.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

2. BOUNDARIES (§ 3*)—"MONUMENTS"—FIELD NOTES—CONFLICTS.

The engineer making an original survey of a tract into lots, blocks, and streets set stakes on the ground to indicate boundaries of lots. He made a resurvey from his original notes, and discovered a discrepancy between the stakes and the field notes. In placing the stakes originally, he intended to place them in accordance with the notes and plat. One of the earliest purchasers found the stakes, and relied thereon. Others accepted the stakes as marking the boundaries. An abutting street was improved with paving, gutters, curb, and parking in accordance with the boundaries of the lots established by the stakes. Held, that the stakes constituted monuments on the ground controlling the field notes, and established the boundaries between property owners and were controlling on the city.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

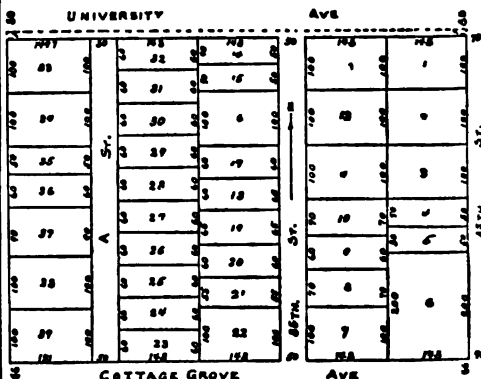
For other definitions, see Words and Phrases, vol. 5, p. 4576.]

Appeal from District Court, Polk County; J. A. Howe, Judge.

This is a controversy between adjoining lot owners over the location of their dividing line. The plaintiff brought this action to enjoin interference with his fence. There was a decree for the plaintiff establishing the line as claimed by him. The defendants appeal. Affirmed.

Ryan & Ryan, of Des Moines, for appellants. S. G. Van Auken and Bowen & Albersson, all of Des Moines, for appellee.

EVANS, J. Reference to the following plat will aid to an understanding of the case:



The foregoing is a plat of an addition to Des Moines known as "Kauffman place." The plaintiff is the owner of the north half of lot 22, and the defendants are the owners of the south half thereof. This lot faces east on Thirty-Sixth street. Thirty-Sixth street runs north and south. What appears as "A" street in the plat is referred to as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Thirty-Seventh street in this record. From the southeast corner of lot 22 to the northeast corner of lot 14 is a distance of 600 feet according to the plat, and according to the ground. This dimension also measures the distance between University avenue and Cottage Grove avenue as laid by the recorded plat. It is undisputed that lot 22, as platted, has a dimension of 100 feet fronting east on Thirty-Sixth street, and that the parties hereto are entitled each to 50 feet thereof. The controversy is over the true location upon the ground of the north and south lines of such lot. Practically all the lots shown on the plat as fronting east on Thirty-Sixth street and numbered from 14 to 22, inclusive, are improved and occupied as residence properties. In locating and taking possession of their lots, the respective owners were guided by the presence of certain stakes which were supposed to represent the respective corners as fixed upon the ground by the original survey. These stakes were all consistent with each other; and the respective owners successively took possession in accord therewith, and each owner is in possession of his appropriate dimensions indicated upon the plat. The improvement and occupancy of these lots began about 1905. At that time neither Cottage Grove avenue nor University avenue nor Thirty-Sixth street had been improved. The original survey of that ground was made in 1902 by one Dickenson. This survey, however, laid open only six lots on this ground, giving to each a frontage of 100 feet east on Thirty-Sixth street, and stakes were then set by the engineer 100 feet apart, to indicate the boundaries of each of such lots. Such plat was not recorded in such form. Just when the plat was made in the above form does not appear. This plat was filed and recorded in 1906, and after sales had been made therefrom. In April, 1907, the plaintiff purchased the north half of lot 22. He took possession in accordance with the stakes appearing upon the ground, and such possession was consistent with the claims of his neighbor on the north. The defendants also purchased in 1907 a few days prior to the purchase of the plaintiff. They also took possession of 50 feet south of plaintiff's assumed line. In the spring of 1909, after all the improvements above referred to had been made, except those of the defendants, a resurvey or measurement was had in pursuance of the call of the field notes of the original survey, and stakes were set in pursuance of this survey. The result of this survey was to disclose a discrepancy of approximately four feet between the call of the field notes and the stakes and lines which had been assumed and adopted by the respective owners. Under the call of the field notes every occupant was encroaching upon his neighbor to the south to the extent of approximately four feet, and was himself encroached upon in like manner by his neighbor on the north.

138 N.W.—29

In pursuance of this survey, the defendants claimed a four-foot strip of the ground occupied by the plaintiff. It will be seen, therefore, that the controversy involves a possible readjustment of all the partition lines in the block.

[1] The stakes which have been referred to were pointed out to plaintiff as the monuments fixing the boundaries of his proposed purchase, and he accepted them as such. If these stakes, or either of them, represented the monuments erected as a part of the original survey, then we have a case of conflict and discrepancy between the monuments upon the ground, on the one hand, and the field notes and plat as recorded, on the other. In such a case the law seems to be well settled that the survey upon the ground as ascertained by monuments then made to mark the boundaries of the lots is controlling, and the paper plat and field notes must give way thereto. *Root v. Town of Cincinnati*, 87 Iowa, 204, 54 N. W. 206; *Bradstreet v. Dunn*, 65 Iowa, 248, 21 N. W. 592; *Ufford v. Wilkins*, 33 Iowa, 110; *McDaniels v. Mace*, 47 Iowa, 510. To the same effect, see *Olson v. City of Seattle*, 30 Wash. 687, 71 Pac. 201; *O'Farrel v. Harney*, 51 Cal. 125; *Holst v. Streitz*, 16 Neb. 249, 20 N. W. 308; *Flynn v. Glenny*, 51 Mich. 580, 17 N. W. '65; *Marsh v. Mitchell*, 25 Wis. 706; *Turnbull v. Schroeder*, 29 Minn. 49, 11 N. W. 147; *Burke v. McCowen*, 115 Cal. 481, 47 Pac. 367; *Morrow v. Whitney*, 95 U. S. 551, 24 L. Ed. 456.

[2] The defendants do not controvert the legal propositions here involved. Their main contention is that the evidence fails to identify the stakes in question as being the monuments made upon the ground at the original survey. The case here is therefore made to turn upon this question of fact. The trial court held the evidence sufficient in that regard. From a careful reading of the evidence we also reach the conclusion that the identity was sufficiently proved. It is true that there is no specific identification by any witness who saw the stakes at the time of the original survey. But it is not legally necessary that the proof of identity should be in that form. It is undisputed that the engineer Dickenson made the original survey upon the ground by setting stakes 100 feet apart to indicate the boundaries of six 100-foot lots. In each case, the dividing line was to run due west from such indicated point, and parallel with the avenues. Dickenson also made the resurvey in 1909 from his original field notes, and thereby disclosed the discrepancy if discrepancy there was. He then saw the stakes upon which plaintiff and others relied. As a witness he would neither affirm nor deny whether such stakes were those that were set by him in 1902. If they were, they were not located where he intended to place them. In other words, they were not located in accordance with his field notes. In placing the stakes

originally he intended to place them in accord with the notes and paper plat. If, in fact, he placed them otherwise, it was a mistake on his part. Of necessity he could not know that he made this mistake; otherwise he would not have made it. The fact, therefore, that the plaintiff failed to show the identity of the stakes, or the occurrence of a mistake by the testimony of this witness, is not very significant. This remark is not intended to reflect upon the witness. On the contrary, his testimony impresses us as entirely candid. One of the earliest persons to buy and improve in this locality was the witness Townsend. This was in 1905, and before the improvement of Thirty-Sixth street or either avenue. He then intended to buy upon the west side of Thirty-Sixth street. He looked at every lot on that side of the street, and ascertained its supposed boundaries. At the supposed southeast corner of lot 22 he found a stake, and a succession of stakes 100 feet apart from there to University avenue. Due east from each one of these stakes on the east side of Thirty-Sixth street was a corresponding stake marking boundaries on that side. He later bought a lot on the east side of the street, and has occupied it ever since. He has been familiar ever since with the location of the stakes which he discovered in 1905. From 1905 down to the present time, the evidence of identity is abundant. The stakes and locations relied upon by plaintiff and others are the same as those ascertained by Townsend. They are located due west of similar stakes 100 feet apart on the east side of Thirty-Sixth street. The fact that other stakes are found also which indicate smaller subdivisions of the original lots does not affect the question. Their location was determined by mere measurement from the original 100-foot points. These stakes were universally accepted by all parties in interest as representing the original survey until the survey of 1909. The record discloses no apparent advantage to be gained by any one by a shifting of the location of these stakes. So far as appears, every owner is in possession of the appropriate dimensions indicated by the plat, and this includes the defendants who are in possession of a little more than 50 feet. Their contention at this point, however, is that their possession is an encroachment of 4 feet upon Cottage Grove avenue, and that they hold such possession by sufferance, and not by right. The evidence shows that the south stake ascertained by Townsend purporting to be the southeast corner of lot 22 was actually located at the southeast corner of defendant's present possession. It does appear that Cottage Grove avenue at this point

is only approximately 62 feet wide, whereas it is supposed to be, according to the plat 66 feet wide. The defendants' sidewalk apparently encroaches upon the platted street, approximately four feet beyond the ordinance provision. But such sidewalk as actually laid is nevertheless in a straight line with its extensions east and west. It is a somewhat inexplicable peculiarity of the situation that the sidewalk between Thirty-Fifth and Thirty-Seventh streets encroaches upon the width of Cottage Grove avenue, and that such encroachment is the result of keeping such sidewalk in a straight line with its extensions east and west. In other words, east of Thirty-Fifth street and west of Thirty-Seventh street Cottage Grove avenue is 66 feet wide. The sidewalk is laid at such points one foot south of the lot line according to ordinance. Beginning, however, at any point in the sidewalk east of Thirty-Fifth street and extending the same west in a straight line, it encroaches upon the avenues as platted between Thirty-Fifth and Thirty-Seventh streets. The sidewalk as actually laid between Thirty-Sixth and Thirty-Seventh streets is laid in such straight line, and yet is five feet south of the lot line of 22 as claimed by defendants, or one foot south of such line as claimed by plaintiff. If the sidewalk were removed to its proper location as contended for by defendants, it would be four feet out of line with the sidewalk which is properly located east of Thirty-Fifth street and west of Thirty-Seventh. Such a change of location would give to Cottage Grove avenue its full width of 66 feet, but it would also throw its north boundary out of line for the two blocks mentioned. Cottage Grove avenue has been fully improved with paving, gutters, curb, and parking and these improvements have been adapted to the encroachment, if such it is. If the monuments upon the ground are controlling as to the property owners, there is nothing in this record to indicate that they are not likewise controlling upon the city. In this view, the mistake or discrepancy, if any, has operated equitably upon all. It does not appear that any property owner has been deprived of any dimension or suffered in location. The sum of the whole trouble seems to be that there is a loss of width to Cottage Grove avenue, and a gain to University avenue.

We think the monuments or stakes upon the ground are sufficiently proved to have been a part of the original survey, and that they must accordingly control.

We reach the conclusion upon the whole case, therefore, that the decree of the trial court was right, and it is accordingly affirmed.

FIRST NAT. BANK OF RED OAK v. CITY OF EMMETSBURG.

(Supreme Court of Iowa. Nov. 14, 1912.)

1. MUNICIPAL CORPORATIONS (§ 232*)—GOVERNMENTAL POWERS—DUAL CHARACTER OF POWERS—CONTRACTS—BINDING SUCCESSORS IN OFFICE.

A city has two classes of power—the one legislative, public, governmental, in the exercise of which it is the sovereignty and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purposes of government, but for the private advantage of the inhabitants of the city itself as a legal personality—and in its exercise of the former power it is bound to transmit such powers of government to its successive officers unimpaired. A contract under Code, §§ 695, 791, 794, 796, 810, 817, and 819, authorizing cities to contract for the construction of sewers where the cost thereof is to be paid from a general fund and not from special assessments, relates to the business powers of the city as distinguished from its governmental powers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 605; Dec. Dig. § 232.*]

2. MUNICIPAL CORPORATIONS (§ 350*)—PUBLIC IMPROVEMENTS—PAYMENT BY SPECIAL ASSESSMENTS—LIABILITY.

Where a city has the power as a part of its proprietary or business powers, as distinguished from its public or governmental powers, to construct sewers and contract therefor, irregularities in the exercise of such powers will not relieve it from liability for benefits received thereunder.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 879, 880, 882; Dec. Dig. § 350.*]

3. MUNICIPAL CORPORATIONS (§ 350*) — PUBLIC IMPROVEMENTS — CONTRACTS OF ULTRA VIRES—CONSTRUCTION AND OPERATION.

A municipality having power as a part of its proprietary or business powers, as distinguished from its public or governmental powers, to construct sewers and contract therefor, cannot escape liability on a plea of ultra vires where the contract has been fully performed, and it has received the benefits thereof, but under such circumstances it is estopped, on the same ground as any other corporation or as an individual, from retaining such benefits without liability.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 879, 880, 882; Dec. Dig. § 350.*]

4. MUNICIPAL CORPORATIONS (§ 350*) — CONTRACTS — RATIFICATION OF UNAUTHORIZED CONTRACTS.

A city, attempting to comply with the statutory requirements preliminary to the execution of a sewer contract, failed to call for the yeas and nays on the resolution of necessity passed for a main sewer, passed no resolution of necessity, and gave no notice as to other work, and issued a defective notice to bidders, and by an oversight omitted one block from the description in such notice. On discovery of this, the council, by resolution, authorized the sewer committee to have the contractors construct this block at the same price as the rest, and afterwards passed a resolution authorizing the execution of a compromise agreement, and accepted the work done recording the yeas and nays thereon, and upon its claim that a part of the work was not done according to contract made an arrangement for its continuance and issued certificates reciting that all acts, conditions, and things required to be done precedent to the issue thereof had been done, and after-

wards accepted that work, and, in an action by other parties to which it was defendant, controverted the contention of plaintiff therein as to the invalidity of the contracts. *Held*, that there had been a ratification of the contracts, and waiver of any right to object thereto.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 881; Dec. Dig. § 350.*]

5. MUNICIPAL CORPORATIONS (§ 1010*)—CONTRACTS—ACCORD AND SATISFACTION.

An accord and satisfaction entered into by a city and the holder of certificates issued by it in payment of work done under contracts for the construction of sewers is as binding on it as would have been the case, had the holders been dealing with a private corporation or individual.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2181, 2182; Dec. Dig. § 1010.*]

6. JUDGMENT (§ 704*) — CONCLUSIVENESS — PARTIES CONCLUDED.

An adjudication in an action to enjoin sewer contracts and to restrain the enforcement of special assessments, in which the city had joined with the contractors and the holders of assessment certificates as a party defendant, that the cost of the sewer could not be taxed against the property of the plaintiffs in that case, and enjoining a further levy therefor, without raising or determining any question between the city and its codefendants, is not conclusive against the assignees of such holders in a subsequent action to enforce such certificates.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1229; Dec. Dig. § 704.*]

7. JUDGMENT (§ 707*) — CONCLUSIVENESS — PARTIES CONCLUDED.

Such judgment is not conclusive in favor of other property owners as against the enforcement of special assessments, unless the facts are substantially alike; and even then the judgment for the property owner against the validity of the assessment is not in rem, and therefore not conclusive in another action against the city in which the validity of the same assessment is invoked.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. § 707.*]

Appeal from District Court, Palo Alto County; D. F. Coyle, Judge.

Reversed and remanded.

The facts are stated in the opinion.

Carr, Carr & Evans and O. M. Brockett, all of Des Moines, and John Menzies, of Emmetsburg, for appellant. E. A. and W. H. Morling, of Emmetsburg, for appellee.

SHERWIN, J. This is a suit at law to recover the amount of the unpaid balance due on municipal contracts for the construction of sewers, represented by special assessment certificates for redemption, and payment of which defendant negligently failed to make provision. The petition, as summarized by counsel for appellant, alleges as follows:

"The issuance by defendant of the certificates to the contractors as pretended payment of and compliance with the contracts therefor.

"That the special assessment to create a fund for the payment of such of them as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

were involved in the suit had been vacated, and further levy therefor enjoined in *Bennett et al. v. Emmetsburg*.

"That plaintiff is the present owner and holder of all said unpaid certificates, and of all rights of the contractors to any remedy for collection of the amount thereof, with interest.

"That B. O. Hanger had become liable to the plaintiff as surety for the contractors prior to September 30, 1904, for a large sum of money advanced to enable them to construct the sewers contracted for, and the certificates to be issued therefor, and all rights of the contractors were also pledged as security therefor, both to him and plaintiff, and plaintiff's assignor, Century Savings Bank.

"That while so liable, and while a controversy was pending between said contractors and the defendant as to whether said sewer construction had been performed and completed in accordance with the contracts therefor, and under threats then made by the defendant to proceed against said contractors to enforce its remedies for such alleged breach, and on said 30th day of September, said Hanger, acting for himself and said contractors, entered into a compromise contract in writing set out in the petition, in which, in consideration of certain repairs and changes he had made under such demand, and of the further deposit by him of \$688 to be paid to defendant upon its delivery of the special assessment certificates and otherwise performing its covenants in the sewer contracts, all controversy was fully settled.

"That thereafter a dispute arose as to the right of the defendant to take down said deposit, because of its failure to levy the special assessment and issue the certificates within the time stipulated in said compromise agreement.

"That at the September term, 1908, of said court, the Valley National Bank, holding the rights of said Hanger to said deposit by assignment set out, brought suit therefor against this defendant, and against the depositor, the Farmers' Savings Bank of Emmetsburg.

"That the defendant answered therein that it had fully performed said compromise agreement, having therein made said sewer construction comply in all respects with the requirements of the plans and specifications, and had on account thereof become liable on all its covenants in the sewer contracts, and had, as required thereby, made the special assessment and issued the certificates in all respects as in said contracts agreed. All this, it declared in said answer, had been done in reliance upon said compromise agreement, and pleaded certain alleged facts as an excuse for failure on its part to perform said compromise agreement within the time limited therein, and denied the right of plaintiff to complain of such delay because of alleged laches of Hanger.

"That while said suit was pending, and on or about May 13, 1909, the Valley National Bank, plaintiff herein, sold and assigned its chose in action to this plaintiff by a written instrument set out in the petition, which was concurred in by B. O. Hanger by indorsement thereon.

"That on or about August 17, 1909, said suit was compromised by the terms whereof the defendant received \$600 of said fund; this plaintiff receiving the remainder after paying the costs of the suit.

"That prior to September 20, 1904, Hanger had appeared before the city council of the defendant, and notified them fully of the facts of the relation which created his interest in having the sewer construction made satisfactory and paid for by the defendant as agreed.

"That on or about the 19th day of September, 1904, said city council passed a resolution detailing what it claimed were the particular respects in which the work differed from the requirements of the contracts, and directed notice thereof to be served on Hanger and on the contractors, including demand that the same be remedied within 10 days thereafter, failing which the defendant would do so and collect the cost thereof from the contractors.

"That on the next day such notice was issued and served accordingly. Whereupon Hanger, for himself and said contractors, within said 10 days entered upon the work of making the changes thus demanded, and, after having incurred something over \$112 expense therein, substituted for the completion thereof said compromise agreement of September 30th, in the doing of all which he and the contractors relied upon the good faith of the defendant, and believed it thereby became bound to pay for said sewers in accordance with the contracts therefor.

"That the sewer certificates all recited among other things that 'it is hereby certified and recited that all the acts, conditions, and things required to be done precedent to and in the issuing of this certificate have been done, happened, and performed in regular and due form as required by law. And the city of Emmetsburg hereby transfers to the said Shepherd and Hanrahan or assigns all right and interest of the said city of Emmetsburg in the assessment herein described, and the holder hereof is authorized to receive and collect said assessment by or through any of the methods provided by law for its collection as the same matures.'

"That the defendant has accepted said sewers, possesses, uses, and controls the same, and enjoys all the benefits of its recognition of the validity of the contracts under which they were constructed.

"That certain persons named against whose property the special assessment was levied, this defendant, the county treasurer, the contractors, engineer, Hanger, the Cen-

tury Savings Bank, and assignors of plaintiff, were parties to the Bennett Case.

"That plaintiff and its several assignors in extending the credit and entering into the several transactions recited, relied upon the representations, covenants, and conduct of defendant recited, and would not have done so but for such reliance, and were, at the times thereof, ignorant of the fact, if it was a fact, that they were not in accord with the truth.

"That this defendant had answered in said Bennett Case denying generally and specifically the allegations of the petition therein, and declared the facts as to the controversy with the contractors, and the compromise thereof by the transaction of September 30th, and the performance of it with knowledge of the plaintiffs, estopped them from complaining; further, that they had waived the right, either by failure to object to the assessment upon due notice of proceedings for, or by failure to appeal from, adverse findings of the council on such objections as were then made, and because plaintiffs had petitioned for the sewers and they have been constructed and accepted and the citizens of defendant were then using the same and enjoying the benefits thereof; that they were concluded by the action of the council as a special tribunal, and had waived their right of complaint by failure to pursue such remedy; that such right, if it had existed, had been lost by laches and delay, and because, if the assessment were vacated, 'the defendant would be in danger of an action in behalf of said contractor to recover personal judgment against this defendant for the construction of the said sewer, and thereby jeopardize and imperil the interests of the general taxpayers of the defendant and those who, in good faith, paid their said assessments.'

"That in the trial of said Bennett Case in the district court, and afterward in the appeal thereof to the Supreme Court, the defendant had united with this plaintiff's assignors in controverting the contentions of the plaintiffs therein as to the invalidity of the sewer contracts, the special assessment, and the certificates, contending therein, among other things, that the success of the plaintiffs therein would subject the defendant to the liability claimed by the plaintiff in the present suit; that its liability had become fixed by the compromise of September 30th if not otherwise; and generally claiming, as does now this plaintiff, that defendant is bound by its covenants in said contracts in view of the premises, and plaintiffs therein should not have the relief sought. And plaintiff herein averred that its assignors relied upon such conduct by the defendant and was led thereby to forego other remedy if any they had.

"That defendant had refused, since the entry of final decree in the Bennett Case, and

still refuses, to take any action to make provision for payment of the balance due on the contracts.

"That plaintiff's assignor, the Century Savings Bank, had extended its credit in part upon an order drawn in its favor by Shepherd & Hanrahan October 31, 1903, on the city of Emmetsburg, and accepted by the latter about November 18, 1903, by which the defendant agreed to pay the money and to issue the certificates provided for in the sewer contracts to said bank. That therein it relied on the same together with said contracts, as creating binding obligations according to their terms, and thereupon made the loan to the contractors, afterwards assigned to plaintiff as shown by 'Exhibit H' to the petition, by reason of which defendant ratified said sewer contracts, waived any right to dispute the validity thereof, and estopped itself from doing so.

"That there were many persons and parcels of property affected by said special assessment, not, however, involved in said Bennett Case, and that, as to such, nothing therein had and done was an adjudication.

"That defendant should be held liable for the balance due on the contracts, as for a money demand, because of the making of the contracts and the failure to perform them, because it is estopped to deny their validity, because it bound itself thereto by new contracts of compromise, accord, and satisfaction as charged, because it is bound by its action in the Valley National Bank Case, in taking the portion of the deposit there in suit on the claims made, based upon the claimed binding effect of the sewer contracts on which the compromise contract rested, as an election of remedies, and because of its ratification of said contracts and waiver of claim of alleged irregularities or illegality thereof."

Different exhibits were attached to the petition, which need not be set out in detail, but some of which will be hereinafter again referred to. The answer admitted "that the two sewer contracts and the several certificates of assessment as set out in the petition 'were executed by the persons named therein,' and denied the other averments." It was averred: "That the sewer contracts were invalid because the officers who executed the same had obtained no authority to execute the same, and such invalidity had been adjudicated in the Bennett Case. The defendant had not undertaken in said contracts 'to pay for said sewer in any other or different form than as therein specified and that the said Shepherd & Hanrahan, who were the plaintiff's assignors, therein, agreed to accept said certificates of assessment in full payment of the balance due them under said contracts.' That as obligations to pay from general revenues the contracts were void, 'for the reason that the same exceeds the amount of indebtedness which the defendant was authorized by law to incur.'

That the resolution by the city council required by section 810 of the Code had not been adopted before making said contracts, nor did the record of its proceedings so show, and no sufficient notice of the passage of such resolution had been given. That the large part of the certificates in question had been issued as part payment for lateral sewers provided for in the contract of July 3, 1903, as to which lateral sewers the council had not adopted a resolution as required by said section 810, and undertook to give the numbers of such certificates. That the contract of November 6th was for two lateral sewers, as to the proceedings for which there was the same defect."

Count 8 is a plea of abatement as to amount of certain certificates set out, paid under protest to the county treasurer, and involved in suit pending against him by this plaintiff therefor.

Count 9: "That the officers of defendant had no jurisdiction to enter into any covenant of warranty contained in the certificates."

Count 10: "That plaintiff's assignors had knowledge of all the alleged defects and irregularities in the proceedings of the council affecting said contracts."

The cause was tried to the court, and findings of fact adverse to the plaintiff were, in substance, as follows: That the yeas and nays were not called and entered of record on the resolution of necessity passed for the main sewer. That no resolution of necessity was passed, or notice given, as to the three lateral sewers ordered at the meeting of June 15th. The notice to bidders was defective as stated in the opinion in *Bennett v. City of Emmetsburg*, 138 Iowa, 87, 115 N. W. 582. That by oversight one block of the proposed main sewer was omitted from the description in the notice to bidders. On discovery of this, the council, by resolution, authorized the sewer committee to have the contractors construct this block at the same price as the rest of the "submains." Notice to bidders for construction of additional laterals ordered October 15, 1903, was defective as shown in the opinion in the *Bennett Case*. And that the construction of the sewers had not been done in accordance with the contracts at the time Hanger made changes, and at the time of the compromise contract of September 30th.

The facts found in the plaintiff's favor are as follows:

"(1) That attempt was made by defendant to comply with the statutory requirements preliminary to the execution of the sewer contracts, and afterward to perform the contracts.

"(2) The execution of the compromise agreement by Hanger and the attempt by the city in consideration thereof to complete the sewers according to the contracts.

"(3) That the council of defendant city passed the resolution authorizing the execu-

tion of the compromise agreement of September 30th, and accepting the sewers, recording the yeas and nays thereon.

"(4) That said council on July 23, 1904, passed the resolution reciting the objections made to the sewers and directing notice thereof, and of demand on the contractors, 'that unless they appeared upon said work with all necessary material and help within ten days from date of service of notice on them and began the work of completing said sewer * * * making said sewer in all respects fully comply with the said plans and specifications on the present grade as now laid, and push the work to completion with all reasonable speed, and with due diligence, said city of Emmetsburg will consider said contract abandoned by said contractors, and will enter upon said work and complete in all respects in accordance with said plans and specifications and said contract at the expense of said Shepherd & Hanrahan, and recover the costs and expense of the work from Shepherd & Hanrahan or from those who are responsible for the performance of the contract.' That the yeas and nays were taken on this resolution.

"(5) That such notice was issued as directed in the resolution and served on Shepherd & Hanrahan and B. O. Hanger.

"(6) That said council passed the resolution accepting said sewers and directing the issuance of the special assessment certificates September 30, 1904.

"(7) That the certificates for the amount of which recovery is sought in this action were issued and delivered in pursuance of the resolution.

"(8) That the defendant herein filed an answer in the suit of the Valley National Bank for the money deposited by Hanger under the compromise contract of September 30th as alleged in the petition herein.

"(9) That suit was compromised as alleged, the defendant therein receiving and appropriating \$600 of said sum.

"(10) The defendant never offered to place the parties affected in statu quo, or to surrender any benefit received.

"(11) The city attempted to perform the contracts on its part as alleged.

"(12) The defendant never undertook in its corporate capacity to repudiate or rescind the contracts with Shepherd & Hanrahan, under which the sewers were constructed."

The trial court's conclusions of law may be thus summarized:

(1) The contracts are void for the irregularities found as facts, except as to proceedings since June 15, 1903, as to which latter there can be no recovery, because of failure to show separate amount thereof.

(2) That there is no liability as for tort, because there was no duty which could have been violated.

(3) The facts do not constitute an estoppel,

or afford a basis upon which to predicate liability.

There was judgment for the defendant on the merits, and plaintiff appeals. There is no real controversy over the facts stated in the petition. Many of them are admitted in the answer, and those not admitted were proved. The questions for our determination are therefore legal only, and these we will discuss, so far as we consider discussion necessary, in the order of presentation by appellant's counsel.

Appellant contends that the contracts were not originally void; that, as to the additional laterals, the court found that a resolution of necessity was adopted October 15, 1903, and notice given to contractors, inviting bids, and thereafter the letting of the contract for these laterals for \$1,833.80; that as to the main sewer it was found that an attempt was made by the city council to pass a resolution of necessity June 15, 1903, but there was a failure to call and record the yeas and nays; that at the same meeting three lateral sewers were ordered for which no resolution of necessity was ever passed, or notice of intention to pass one given; that subsequently notice to bidders for the construction of such main and lateral sewers was published, but was defective as found in the opinion of the Bennett Case, *supra*; and that the contract for the main and lateral sewers first ordered was let to Shepherd & Hanrahan for the gross sum of \$18,192.66. And, based on the above facts, appellant says that the preliminary proceedings by the city council were sufficient to confer jurisdiction to execute the contract under the special assessment statute. Appellant says that any holding to the contrary in *Bennett v. City of Emmetsburg*, *supra*, has been overruled in later decisions by this court, and that, in any event, the decision in the Bennett Case is not controlling here. Appellant further contends that the facts create an estoppel against the right of the city to dispute the validity of the contract; that they were not *ultra vires*, but were within the powers granted to the city, and in their execution the city was exercising its business powers as distinguished from governmental power, and that in respect to its business power a municipality is subject to the same application of the doctrine of estoppel as an individual or corporation; that by reason of the facts the city conclusively ratified the contracts for sewer construction, and waived the right to object thereto; that the facts show a clear case of compromise, accord, and satisfaction as binding upon the city as would have been the case if it were an individual or private corporation, and appellant also says there was an election of remedies on the part of the city, which now concludes it.

[1] At the threshold of the several propo-

sitions lies the question of the power of the city to enter into contracts of this kind. If it had the power to construct sewers and to contract therefor, irregularities in the exercise of such power will not in this case relieve the city from liability. Had the city such power? Section 695 of the Code makes cities and towns bodies corporate, and gives them general power to contract and be contracted with, and to sue and be sued, and to exercise the inherent and implied powers of such corporations. This is a general grant of power, and our attention has not been called to, nor have we been able to find, any statute with reference to the letting of contracts for public improvements to be paid for by special assessment of the cost thereof to property benefited, which in terms or by necessary implication limits the power conferred in the general grant prior to the enactment of the special assessment statute. Sections 791, 794, 796, 810, 817, and 819 of the Code give cities the power to construct sewers and to assess the cost thereof upon the property benefited, or to pay such cost from a sewer district or from the general fund, as the city may elect. It is apparent, therefore, that cities are authorized by the statute itself to make contracts for the construction of sewers, where the cost thereof is to be paid from a general fund and not from special assessments, and the contracts thus authorized must, we think, relate to the business powers of the city as distinguished from its governmental powers. It seems to be correctly held generally that a city has two classes of powers, which have been stated as follows: "A city has two classes of power—the one legislative, public, governmental, in the exercise of which it is the sovereignty and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city itself as a legal personality. In the exercise of the powers of the former class, it is governed by the rule here invoked. In their exercise it is ruling its people, and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class, it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation." *Illinois Trust & Savings Bank v. City of Arkansas*, 76 Fed. 721, 22 C. C. A. 171, 34 L. R. A. 518; *Southern Bell Telephone Company v. City of Mobile* (C. C.) 162 Fed. 523; *City of Winona v. Botzet*, 169 Fed. 322, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204. The dual character of municipal corporations has already been dis-

tinctly recognized by this court, and we have in effect, at least, directly adopted the rule stated in the quotation from the Illinois Savings Bank Case. *State v. Barker*, 116 Iowa, 96, 89 N. W. 204, 57 L. R. A. 244, 93 Am. St. Rep. 222, and cases there cited. But the last-cited case does not stand alone among our decisions as a recognition of the rule.

[2] In *Marion Waterworks Co. v. City of Marion*, 121 Iowa, 321, 96 N. W. 883, the action was to recover for hydrant rentals in accordance with the terms of a contract, which, before being fully performed, was wholly void, because the question as to whether or not it should be entered into was not submitted to the vote of the people as required by law. We held there, as we do here, that the city had the power to make the contract, and held that, having such power, though it was defectively exercised, the city was liable for benefits received.

[3] And in many other cases we have recognized and enforced the rule by holding that corporations of this kind cannot escape liability on a plea of ultra vires, where the contract has been fully performed, and the defendant corporation has received the benefit thereof. *Kagy v. Ind. Dist.*, 117 Iowa, 694, 89 N. W. 972; *City of Ida Grove v. Ida Grove Armory Company*, 146 Iowa, 690, 125 N. W. 867; *Thompson v. Lambert*, 44 Iowa, 248; *McPherson v. Foster*, 43 Iowa, 48, 22 Am. Rep. 215. Whatever may have been the rights of property owners who were specially assessed for this improvement, we think it clear that the city should be held to the same business integrity that the law requires of any other corporation, or of an individual, and that the rules of estoppel and waiver should be applied to their business dealings as completely and as effectively as to other business transactions. There is, in our opinion, no legal reason, and there certainly is no moral one, whereby a municipal corporation should be permitted to reap the benefit of a fully completed contract and escape liability therefor under the plea of ultra vires, where the power exists to contract, but the same has been exercised in a negligent manner and even so irregularly as to release noncontracting parties from liability. That a city may be estopped under such circumstances is well-settled by our own decisions. See cases cited above and *Turner v. Cruzen*, 70 Iowa, 320, 30 N. W. 483; *Spencer v. Andrews*, 82 Iowa, 14, 47 N. W. 1007, 12 L. R. A. 115; *Duetzmann v. Kuntze*, 147 Iowa, 158, 125 N. W. 1007; *Bellows v. Dist. Twp.*, 70 Iowa, 320, 30 N. W. 582; *Scotfield & Cavin v. Council Bluffs*, 68 Iowa, 695, 28 N. W. 20.

[4] Under the facts and the authorities already cited, there was a complete ratification of the contracts for sewer construction, and a waiver of the right to object thereto.

[5] Furthermore, it is conclusively shown that there was a compromise and an accord

and satisfaction, and this was as binding on the defendant city as would have been the case had plaintiff been dealing with a private corporation or individual. *Collins v. Welsh*, 58 Iowa, 72, 12 N. W. 121, 43 Am. Rep. 111; *Allen v. Cerro Gordo County*, 34 Iowa, 54; *Grimes v. Hamilton*, 37 Iowa, 290; *Mills County v. B. & M. R. R. Co.*, 47 Iowa, 66. The city having become bound by the sewer contracts, as herein indicated, the plaintiff was entitled to judgment for the unpaid balance due on the contracts being the amount of the unpaid and unwaived certificates of special assessment in plaintiff's hands. *Scotfield & Cavin v. City of Council Bluffs*, supra; *Ft. Dodge E. L. & P. Co. v. City of Ft. Dodge*, 115 Iowa, 573, 89 N. W. 7.

[6, 7] Appellee's contention that there was an adjudication in the *Bennett Case* that binds the plaintiff in this case cannot be sustained. No question between the city and its codefendants was raised or determined in that case. The holding there was simply that the cost of the sewer could not be taxed against the property of the plaintiffs in that case. It is doubtful even if such determination would be an adjudication in favor of other property owners against the enforcement of the special assessments. It certainly could not be conclusive in their favor, unless the facts were substantially alike, and even then it has been held that a judgment for the property owner against the validity of an assessment is not in rem, and therefore not conclusive in another action against the city in which the validity of the same assessment roll is involved. *Trimmer v. City of Rochester*, 130 N. Y. 401, 29 N. E. 746; *Tift v. City of Buffalo*, 164 N. Y. 605, 58 N. E. 1098. As we have already said, the fact that property may not be liable to a special assessment does not necessarily determine the liability of the city for a completed and retained improvement. The very fact that the property is not so liable creates liability on the part of the city; and, if the city is estopped by its acts to plead ultra vires as to an executed contract, it is clear that it cannot claim that a judgment in favor of the property owner is also a judgment in its favor. The authorities relied upon by the appellee do not announce such a doctrine and are not determinative of the question. Here, the city joined with the other defendants in the *Bennett Case* in resisting the plaintiff's claim, and pleaded, among other things, that a judgment sustaining *Bennett's* claim would render it liable; hence there was no issue between the city and its codefendants in that case that adjudicated the present controversy.

Some other points are argued by both the appellant and the appellee, but, as the propositions already discussed reach and dispose of the substantial merits of the case, we need go no further.

For the reasons pointed out, the judgment of the district court is reversed, and the cause is remanded for a judgment in harmony with this opinion.

Reversed and remanded.

JEWELL v. NUHN et al.

(Supreme Court of Iowa. Nov. 16, 1912.)

1. BUILDING AND LOAN ASSOCIATIONS (§ 15*) —LIEN ON STOCK.

In the absence of any statutory provision therefor, a building and loan association had no other lien or claim on a shareholder's stock than that given by its articles of incorporation.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 20; Dec. Dig. § 15.*]

2. BUILDING AND LOAN ASSOCIATIONS (§ 15*) —“OTHER INDEBTEDNESS FROM SHAREHOLDER”—LIEN ON STOCK—DEFALCATION OF OFFICER.

A provision of the articles of incorporation that a building and loan association shall have a lien upon the shares of each shareholder for any sum due it for subscription, money loaned, or any “other indebtedness due from the shareholder” did not give a lien for the amount of defalcation upon stock held by a defaulting officer; the phrase quoted having reference only to indebtedness as a shareholder.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 20; Dec. Dig. § 15.*]

3. BUILDING AND LOAN ASSOCIATIONS (§ 15*) —ARTICLES OF INCORPORATION—TRANSFER OF STOCK—PRIORITY OF CLAIM—“DEBTS.”

Under a provision of the articles of incorporation of a building and loan association that “no stock shall be transferred unless all debts due the association are first paid,” the association did not, as against a transferee of stock from a shareholder, have a prior claim for unliquidated damages arising from such shareholder's defalcation while an officer of the association; the term “debts” in this connection not including unliquidated claims by way of damages for a tort.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 20; Dec. Dig. § 15.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1884-1886; vol. 8, p. 7628.]

Appeal from District Court, Black Hawk County; F. C. Platt, Judge.

Action in equity to establish and foreclose a lien on 20 shares of the capital stock of the defendant Building, Loan & Savings Association transferred by G. H. Boehmler, now deceased, to the plaintiff as security for indebtedness evidenced by a promissory note. The Building, Loan & Savings Association, by cross-petition, interposed a claim on the stock in the nature of a lien under provisions of its articles of incorporation for indebtedness of decedent to it. There was a decree for the plaintiff, establishing his lien as prior to any lien or claim of the defendant association, and the association appeals. Affirmed.

William H. Merner, of Cedar Falls, and Mullan & Pickett, of Waterloo, for appellant. Alfred Grundy, of Los Angeles, Cal., and H. B. Boies, of Waterloo, for appellee.

McCLAIN, C. J. In July, 1905, one G. H. Boehmler was the owner of 20 shares of the stock of the defendant association which would be of the par value of \$100 each when fully matured, and on that date he borrowed of the plaintiff \$2,000, for which he gave his promissory note and pledged as collateral security for the payment thereof his certificate representing the said shares. For many years Boehmler had been the secretary of the association, and had been unlawfully appropriating and converting to his own use the moneys of the association paid in by its members, and at the date of pledging his certificate of stock he was indebted for money thus misappropriated to the extent of more than \$4,000. His misappropriation of money continued until his death in 1907, when he was indebted to the association on that account to the extent of nearly \$8,000, and he was then still indebted to the plaintiff on his promissory note for the \$2,000 borrowed by him in 1905, as above stated. At the time of Boehmler's death, all dues and assessments necessary to mature the 20 shares of stock and make them of the paid-up value of \$2,000 had been paid except the sum of \$40 which was tendered by the plaintiff to the defendant association. Soon after the death of Boehmler, plaintiff notified the association of the assignment of the stock to him, and requested its transfer on the association's books, which request was refused on the ground that it had been discovered after the death of Boehmler that he was indebted to the association in a larger amount on account of misappropriations of its funds. During his term of office Boehmler had from time to time, as required by the articles of the association, given bonds, all of which had been satisfied and released by the officers of the association on settlements with the sureties under which about \$2,700 had been recovered on Boehmler's total indebtedness. The paragraph of the defendant's article of incorporation under which it now claims a lien on the shares of stock for Boehmler's indebtedness to it for moneys misappropriated is as follows: “Art. XV. Liens. This association shall have a lien upon the shares of each shareholder, for any sum due it from said shareholders, either on account of the subscription to its stocks, or for money loaned by the association to said shareholder or for any other indebtedness due from the shareholder and no stock shall be transferred unless all debts due the association are first paid, except that in the sale of property upon which the association has a mortgage, the stock may be transferred to a purchaser, provided that there are no other claims due the association.” The trial court ruled that, as against plaintiff's holding Boehmler's shares of stock as security, the defendant association had no lien for the sum of money owed to it by Boehmler on

account of his defalcation as an officer, and, if this holding is sustained, we shall have no occasion to consider questions of estoppel and laches which are argued by counsel on either side.

[1] 1. In the absence of any statutory provision on the subject, the defendant association had no other lien or claim on the shares of stock assigned by Boehmler to plaintiff beyond that given by the paragraph of its articles above quoted. *Farmers' & Merchants' Bank of Lineville v. Wasson*, 48 Iowa, 336, 30 Am. Rep. 398.

[2] And the claim of the association must be predicated either upon the provision giving it a lien upon the shares of the stockholder for indebtedness due from such stockholder or the provision that no stock shall be transferred unless all debts due the association are first paid. In the connection in which the words "other indebtedness due from the shareholder" are used, it is plain that such words refer to indebtedness of the shareholder to the association on account of his relations to the association as such shareholder. These general words follow others which plainly refer to obligations of the shareholder on account of his stock, either by way of subscription thereto or for money loaned on the security thereof, and we would not be justified under the language employed in holding that it was intended to create a lien in favor of the association against the stock of a shareholder for obligations having no relation to his connection with the association as such shareholder. It would hardly be contended that if, as an independent transaction, the association had sold a piece of property owned by it to Boehmler, the indebtedness of Boehmler to the association for a portion of the purchase price would entitle the association to a lien against Boehmler's stock in the hands of plaintiff. The relation of Boehmler to the association, as an officer, was wholly independent of his relations to it as a shareholder. The articles provided specifically for bonds to be given by the officers of the association, and it is not to be inferred, as against the express language employed with reference to liens, that the association was attempting in the article above quoted to preserve a lien on the shares belonging to officers or obligations of such officers to it.

The cases relied upon for appellant in this connection seem not to be in point. In *Sprout v. Standard Plate Glass Co.*, 201 Pa. 103, 50 Atl. 1003, and *National Bank v. Rochester Tumbler Co.*, 172 Pa. 614, 33 Atl. 748, it was held that the transferee for security of shares of stock in a corporation took subject to indebtedness of the shareholder to the corporation for embezzlement of funds; but that holding was predicated on a statute providing that "no certificate of stock shall be transferred so long as the holder

thereof is indebted to the company." Plainly this statutory provision covered every kind and character of indebtedness, and is broader in its terms than the provision of the defendant's articles of incorporation which gives a lien for other indebtedness due from the shareholder; the term "shareholder" evidently being used to describe a member of the association who holds shares of stock therein as a basis of such membership.

[3] 2. The other provision of the article above quoted that "no stocks shall be transferred unless the debts due the association are first paid" evidently relates to and provides for the satisfaction of debts as distinct from unliquidated claims by way of damages for a tort. It is true that an obligation to pay damages for a tort may in some cases be sued upon in an action *ex contractu*, but it does not constitute a debt within the proper meaning of that term. "A debt in a legal sense looks to contract relations, expressed or implied." *White v. Green*, 105 Iowa, 176, 74 N. W. 928. In construing the term "debt" used in statutory provisions relating to the liability of stockholders for debts of the corporation, it seems to have been usually held that an unliquidated claim for damages for a tort is not covered. *Doolittle v. Marsh*, 11 Neb. 243, 9 N. W. 54; *Cable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214; *Esmond v. Bullard*, 16 Hun, 65. In general the term "debt" is applied to a sum of money due under certain and express agreement, while "liability" may include obligations arising under a contract or in consequence of a tort. *Detroit Post & Tribune Co. v. Rellly*, 46 Mich. 459, 9 N. W. 492; *Hill v. Bowman*, 35 Mich. 191; 8 *American & English Enc.* (2d Ed.) 986.

We reach the conclusion that the liability of Boehmler for misappropriation of funds was not a debt due by him to the association as to which the association had priority of claim over the rights of plaintiff, as transferee of this stock. Notice of transfer and of plaintiff's rights under it were given to the defendant association before the association had in any manner converted its claim into a demand for liquidated damage for any specific sum of money.

The judgment of the trial court is therefore affirmed.

STATE v. JOHNSON et al.

(Supreme Court of Iowa. Nov. 19, 1912.)

INTOXICATING LIQUORS (§ 250*)—CONDEMNATION OF LIQUOR—JURY QUESTION.

Where the evidence in a proceeding to condemn and destroy a barrel of beer tended to show that defendants ran a restaurant and grocery, residing in the building, and that the liquor seized belonged to them and was kept in the grocery store, it made out a *prima facie* case, under Code, §§ 2413-2416, 2427; and the question whether the evidence showed the liquor was owned and kept for defendants' personal

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

use was for the jury, and it was error to take the case from the jury and discharge defendants.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 386-388; Dec. Dig. § 250.*]

Appeal from District Court, Polk County; W. H. McHenry, Judge.

In proceedings instituted before a justice of the peace of Polk county for the condemnation and destruction of a barrel of beer, alleged to have been kept by defendants for sale in violation of law, the justice ordered that said property be condemned and destroyed. On appeal to the district court, the case was taken from the jury after the introduction of the evidence, and the defendants were discharged; the sheriff being ordered to return the liquor seized to the defendants. From this order, the plaintiff appeals. Reversed.

George Cosson, Atty. Gen., and John Fletcher, Asst. Atty. Gen., for the State.

PER CURIAM. The evidence received for the state tended to show that defendants were running a restaurant and grocery store, residing in the same building, and that the liquor seized was the property of defendants and kept in the grocery store. By Code, § 2427, it is provided that "the finding of intoxicating liquors in the possession of one not legally authorized to sell or use the same, except in a private dwelling house which does not include or is not used in connection with a tavern, public eating house, restaurant, grocery or other place of public resort, or the finding of the same in unusual quantities in a private dwelling house or its dependencies of any person keeping a tavern, public eating house, grocery or other place of public resort, shall be presumptive evidence that such liquors are kept for illegal sale." By Code, §§ 2413-2416, it is provided that intoxicating liquor kept for illegal sale may, in a proper proceeding, be seized, condemned, and destroyed.

The evidence, therefore, made out a prima facie case for the condemnation of the liquor seized, and the question of fact, as to whether the evidence tending to show that the liquor was owned and kept for the personal use of defendants was sufficient to overcome the prima facie case made out for the prosecution, was for the jury. The ruling of the court, taking the case from the jury, was therefore erroneous as a matter of law, in denying to the evidence for the prosecution the presumptive force given to it by the statute. Although we find that the court erred, as a matter of law, in its ruling taking the case from the jury, we have no authority to reverse the judgment on that ground. Having pointed out the error committed by the lower court, we have performed the function delegated to us on appeal

by the state in a criminal case. See Code, § 5463.

The decision of the lower court, discharging the defendants and exonerating their bond, and directing the return of the liquor seized to the defendants, is affirmed; but the ruling of the court directing a verdict for the defendants is reversed.

UNTERHARNSCHEIDT v. MISSOURI STATE LIFE INS. CO.

(Supreme Court of Iowa. Nov. 18, 1912.)

1. INSURANCE (§ 137*)—PREMIUM—PAYMENT BY NOTE.

The delivery of a promissory note to an insurance company by an applicant for insurance was not insufficient as payment of the first premium merely because it was made payable to the maker's order and not indorsed, since such a note, although not negotiable under Code Supp. 1907, § 3060—a184, providing that a note drawn to the maker's order is not complete until indorsed by him, is enforceable by a purchaser or assignee.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 231-245; Dec. Dig. § 137.*]

2. INSURANCE (§ 137*)—PREMIUM—PAYMENT BY NOTE.

Under an insurance application which provided that the policy should not take effect unless the premium was paid, payment of the premium in cash could be waived and a promissory note or other evidence of indebtedness accepted in lieu thereof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 231-245; Dec. Dig. § 137.*]

3. INSURANCE (§ 668*)—ACTIONS ON POLICIES—QUESTIONS FOR JURY.

In an action on an insurance policy it was a question for the jury whether promissory notes for the amount of the first premium were given and accepted in payment of such premium.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.*]

4. INSURANCE (§ 665*)—ACTIONS ON POLICIES—EVIDENCE—WEIGHT AND SUFFICIENCY.

In an action on an insurance policy, where it was claimed that promissory notes were given and received as payment of the first premium, evidence held to support a finding that the premium was paid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.*]

5. INSURANCE (§ 137*)—APPLICATION—CONSTRUCTION—PAYMENT OF PREMIUM.

In an application for insurance, the question whether the premium for the first year had been paid in advance was answered, "No; cash \$5. Note or notes \$30.70 due July 17, 1910." Held, that this did not show conclusively that the premium had not been paid, but was open to the construction that, while not fully paid in cash, it had been paid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 231-245; Dec. Dig. § 137.*]

6. INSURANCE (§ 186*)—CONTRACT—WHEN COMPLETE.

Plaintiff's husband applied for life insurance, the application providing that the policy should not take effect unless the premium was paid and the policy delivered to the insured during his lifetime and good health, and that

the company might fix the date when the first policy year should end and on the same date paid the premium for one year. The application was accepted, the policy executed, registered with the state insurance department, and mailed to the company's agent, accompanied by a "form letter" instructing him not to make delivery unless settlement had been received and the applicant was in good health. The policy fixed July 8th as the date from which premiums were to be computed, and was received at the agent's office not later than July 20th, but was not delivered because the agent was absent from his office and did not return until August 7th, prior to which date plaintiff's husband died of a sickness dating from July 23d. Held that, when the policy was executed and mailed to the agent, there being nothing further for the parties to do, it became a binding and enforceable contract, notwithstanding the instructions contained in the form letter, since it could not have been understood that they were to be observed where the conditions referred to had been complied with in advance, and hence the company was liable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.*]

7. INSURANCE (§ 373*)—ACTIONS—DEFENSES—CONDITION OF HEALTH OF INSURED WHEN POLICY WAS ISSUED.

Where, by reason of payment of the premium in advance, a policy of insurance was issued and delivered when mailed by the company to its agent, and insured had previously submitted to a satisfactory medical examination, the condition of insured's health at that time was not open to consideration in an action on the policy where fraud was not pleaded or proved, in view of Code, § 1812, providing that, where an applicant for insurance submits to a medical examination by the company's physician and is pronounced a fit subject of insurance, the company, in the absence of fraud, shall be estopped to plead that the insured person was not in the condition of health required by the policy at the time of the issuance or delivery thereof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 947; Dec. Dig. § 373.*]

8. APPEAL AND ERROR (§ 1058*) — ERROR — CURE.

The exclusion of testimony is not error where it is afterwards admitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. § 1058.*]

9. WITNESSES (§ 211*)—PRIVILEGED COMMUNICATIONS—TESTIMONY OF PHYSICIAN.

In an action on an insurance policy, it was not error to exclude the testimony of insured's attending physician as to his last sickness upon the statutory objection being made thereto.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 768, 773; Dec. Dig. § 211.*]

Appeal from District Court, Woodbury County; David Mould, Judge.

Action at law upon a policy of life insurance. Trial to jury, verdict and judgment for plaintiff, and defendant appeals. Affirmed.

C. R. Jones, of Sioux City, for appellant.
F. E. Gill, of Sioux City, and Robert B. Pike, of Whiting, for appellee.

WEAVER, J. The policy in suit is alleged to have been issued by the defendant upon the life of plaintiff's husband, who, it is claimed, died while the insurance so pro-

vided was still in force and effect. The defenses relied upon as stated in appellant's brief are: (1) That the premium on said policy was never paid, and therefore the contract of insurance never became of any binding force or effect; and (2) that there was never any sufficient delivery of the policy. The testimony in the case is quite brief and to a considerable extent undisputed. Of the facts admitted or of which there is some support in the record, the following are most material: On June 17, 1910, Louis Unterharnscheidt, residing at Sioux City, Iowa, made and delivered to W. C. Kinzer, resident agent for the defendant at that place, an application for insurance in that company to the amount of \$1,000, which application was soon thereafter forwarded to the defendant at its home office. It was also accompanied by a physician's report of the medical examination of the applicant showing him then to be in good health. This application, as executed by the applicant, shows his agreement to pay a yearly premium of \$68.63 in semiannual installments. Among the questions answered in the application was the following: "(15) Has the premium for the first policy year been paid in advance? A. No; (a) cash \$5; (b) note or notes \$30.70 due July 17, 1910." Certain agreements were also embodied in the application, among which was the following: "(7) That the insurance hereby applied for shall not take effect unless the premium is paid and the policy delivered to and accepted by me during my lifetime and good health, and that then the first policy year shall end on such date as may be fixed by the company in the policy." At the time of making the application, the applicant paid the agent \$5 in money and made and delivered to him two notes as follows: "\$33.68. Sioux City, Ia., June 17, 1910. Ninety days after date, for value received, I promise to pay to the order of myself thirty-three & 68/100 dollars, at Sioux City, Iowa, with interest at the rate of 6 per cent. per annum from date. Louis Unterharnscheidt." "\$30.00. Sioux City, Ia., June 17, 1910. Thirty days after date, for value received, I promise to pay to the order of myself thirty & no/100 dollars, at Sioux City, Iowa, with interest at the rate of six per cent. per annum from date. Louis Unterharnscheidt." For the payment thus made or provided for, the agent then and there gave to the applicant a receipt in these words: "Missouri State Life Insurance Company of St. Louis. Amount received in cash, \$5.00. Dated at Sioux City, Iowa, this 17th day of June, 1910. Received of Louis Unterharnscheidt, the sum of \$5.00 cash, dollars, and 2 notes for \$30.00 & \$33.00, dollars for (insert one, two, or three) the first annual premium required on an application for \$1,000.00 insurance on the life of Louis Unterharnscheidt,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

herein named the applicant, in the Missouri State Life Insurance Company of St. Louis, subject to the terms and conditions of said application. In case the application is not approved by the home office, the amount first named herein, together with notes, if any, shall be promptly returned. [Signed] W. C. Kinzer, Gen. Agent."

The application was approved by the company. A policy such as was contemplated in the application was issued July 8, 1910, and registered on the following day in the insurance department of the state of Missouri. It was then mailed to the agent, Kinzer, for delivery to the insured. Accompanying this policy was a letter or form of instructions to the agent not to make the delivery "unless settlement has been received and applicant in good health." The letter bears date July 19, 1910, but it was not registered. Kinzer appears to have left Sioux City on July 15, 1910, and did not return until August 7, 1910. He left no one in charge of his business while absent from the city, and the letter inclosing the policy, which in due course of mail would reach there not later than July 20, 1910, was delivered at his office remaining there unopened until his return as above indicated. The insured died August 2, 1910. Concerning the date when he was attacked by the fatal illness, there was no medical or expert testimony. The evidence was such, however, as to indicate that, while he was not feeling entirely well on July 16th and some days thereafter, he exhibited no indications of serious ailment or disease until July 23d, prior to which time he was about his home assisting in some degree with the work of the family. Concerning what occurred between the applicant and the agent at the time the application was made and the money and notes delivered to the agent, there is a dispute between the agent and the plaintiff who was present on that occasion. According to plaintiff's story, the agent, on receiving the money and notes, told her husband that he was insured from that time forward, and that, if he died that night, the insurance would be paid. The agent swears, however, that he did not make the statement, but on the contrary told the husband that the policy would not be delivered until the note was paid. On this point the court instructed the jury that, if they found defendant's claim in this respect to be true that the policy was to be withheld and not delivered until the first note was paid, then there was no sufficient delivery of the policy, and plaintiff could not recover; but on the other hand that, if the notes and cash were received and accepted as payment of the first year's premium, such payment would be sufficient to satisfy the requirement of the policy in that respect. The defendant pleaded a tender and offer to return the money and notes taken for the premium, but the

record contains no evidence of the alleged fact unless it is to be found in a letter written by the defendant company to plaintiff's counsel denying liability on the policy and saying: "The money and notes are held by the company and will be turned over to the executor or administrator of Louis Unterharnscheidt." The foregoing sufficiently states the case for a consideration of the legal propositions argued by counsel.

[1] 1. The first point made in the brief is that the notes given by Unterharnscheidt to his own order and not being indorsed by him were of no legal force or validity and could not therefore operate as payment. It is true that these notes until indorsed are not negotiable under our statute (Code Supp. § 3060—a184) but it does not follow that such notes, payable to the maker's own order and transferred by him to another for a valuable consideration, are void or unenforceable. It is not an infrequent practice for a person to execute a promissory note or bill of exchange payable to his own order (Daniels on Negotiable Inst. § 27; Culbertson v. Nelson, 93 Iowa, 187, 61 N. W. 854, 27 L. R. A. 222, 57 Am. St. Rep. 266), and in the absence of statutory restrictions such instruments are enforceable in the hands of a purchaser or assignee (Miller v. Weeks, 22 Pa. 89). It has also been held that a holder to whom a promissory note payable to order has been transferred by delivery obtains title thereto and may compel the necessary indorsement by the transferor (Swenson v. Stoltz, 36 Wash. 318, 78 Pac. 999, 2 Ann. Cas. 504), and we can see no reason why this rule does not apply as well to the case where the maker undertakes to pay to his own order. The objection of the appellant to the sufficiency of the notes must be overruled.

2. It is next argued that the delivery of the policy to the company's agent is not a delivery to the insured person. It is quite obvious that this may or may not be true according to the circumstances under which the policy is placed in the agent's hands. If the premium is paid when the application is presented, and such application is approved and policy executed as of that date, and nothing remains but to deliver the paper to the insured, it may well be held that the sending of it to the agent to be by him given over to such insured person constitutes a sufficient delivery in law. To say the least, the neglect or omission of the agent under such circumstances to perform the manual act of placing the policy in the hands of the insured will not serve to suspend or postpone the obligation of the company upon its contract. In other words, delivery in law is not necessarily manual delivery. Davenport v. Insurance Co., 17 Iowa, 282; Lightbody v. Insurance Co., 23 Wend. (N. Y.) 18; Blanchard v. Waite, 28 Me. 51, 48 Am. Dec. 474; Warren v. Insurance Co., 16 Me. 439, 33

Am. Dec. 674; *Cooper v. Life Ins. Co.*, 7 Nev. 116, 8 Am. Rep. 705; *Stephenson v. Allison*, 165 Ala. 238, 51 South. 622, 138 Am. St. Rep. 26; *Kimbrow v. Insurance Co.*, 134 Iowa, 84, 108 N. W. 1025, 12 L. R. A. (N. S.) 421; *Kilborn v. Insurance Co.*, 99 Minn. 176, 108 N. W. 861; *Yonge v. Insurance Co. (C. C.)* 30 Fed. 902; *N. Y. Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134; *Fried v. Ins. Co.*, 50 N. Y. 243; *N. Y. Life Ins. Co. v. Pike*, 51 Colo. 238, 117 Pac. 899; *Francis v. Insurance Co.*, 55 Or. 280, 106 Pac. 323. These and many other cases emphasize the proposition that legal delivery is very frequently accomplished without an actual transfer of manual possession.

[2-4] 3. It is further said that, under the conditions of the application, the insurance was not to take effect until the first installment of premium should have been paid and the policy delivered while the insured was in good health, and that this fact is negatived by the record. Whether payment was made is a question of fact upon which the jury has found against the defendant, and the finding is not without support in the evidence. That payment in cash may be waived and a promissory note or other evidence of indebtedness may be accepted in lieu thereof without violating the contract of insurance has been held so frequently that it would be an unnecessary waste of time to array the authorities, but many of the precedents already cited, as well as of those hereinafter referred to, are directly in point. There is no claim that the agent exceeded his authority in taking the notes. The blank forms of application, notes, and receipt were prepared and furnished by the company, and filled out and prepared for signature by the company's agent. The receipt is the receipt of the company which acknowledges having received \$5 cash and \$63 in notes for the first annual premium. The evidence of the wife of the insured, who was present when the notes were made, supports the theory that they were given and received in payment of the premium.

[5] Nor is the jury's finding in this respect conclusively negatived by the answer found in the application to the question whether the premium had been paid in advance. On the face of it the answer is somewhat ambiguous but not inexplicable. Following the printed question is the word "No," immediately followed by the words, "(a) Cash \$5; (b) notes \$30.70," etc. This statement, taken as a whole, may fairly be considered as a somewhat awkward statement or representation to the company that the payment had not been made wholly in cash but partly in cash and partly in notes as there indicated. The company was in no way deceived or misled by the statement for it received the notes and retained them.

[6] We have therefore the following conceded or established facts which must be

borne in mind in dealing with the remaining points made by the appellant: First. On June 17, 1910, the deceased made his application to the appellant's duly authorized agent for insurance. Second. On the same day he paid the premium on such insurance for one year. Third. On July 8, 1910, the appellant accepted the application and executed the policy, and on the same day sent it to the state insurance department for registration as one of its risks to be protected by the deposit of securities. Fourth. Not later than July 19, 1910, the policy was forwarded to the agent who procured the risk for delivery to the insured and arrived at Sioux City not later than July 20, 1910. Fifth. The agent had left his office on July 15, 1910, with no person in charge of his business, and did not return until August 7, 1910, and because thereof the policy remained sealed in its envelope until the date last named. Sixth. At the time of the return of the agent, the insured person was dead, having died August 2, 1910, of a sickness dating from July 23, 1910.

It is true that appellant disputes some of the statements here recited, and especially the date given for the inception of the fatal illness of the insured, but we think the record does not bear out their contention. There was no medical or expert testimony whatever as to the nature of the illness or of its origin or duration. The wife expresses the opinion or conclusion that he died of pneumonia or typhoid pneumonia. She says he was not feeling well for several days after about July 16, 1910. According to her story, however, he first manifested illness requiring attention on the 23d day of that month, or at any rate not earlier than the 21st. It is a further material consideration that the insurance which the company undertook to provide was to be treated as term insurance for the first year, and to be thereafter continued as endowment insurance maturing in 20 years, and, as will be seen by the provision hereinbefore quoted from the application, the company reserved the right to fix the date "on which the first policy year shall end." Acting upon this application, defendant made its policy to bear date July 8, 1910, and provided for premiums in semiannual installments computed from the same date. The endowment period was also fixed or designated as terminating on the corresponding day of the month of the year of maturity.

We come, then, to the inquiry whether, under such a record, a finding that the policy was delivered to the insured in his lifetime can be sustained. As already noted, delivery does not always mean change of manual possession. This rule has been frequently applied in cases like the one now at bar. For instance, in *N. Y. Life v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134, a party applied for life insurance and, as in this case, paid the pre-

mium in advance, receiving a receipt therefor. By the terms of the application and receipt, it was provided that no liability should be incurred by the company until the premium was paid and the policy delivered to the insured while living and in good health. The application was approved, the policy issued and mailed to the company's local agent, who held it three days without attempting to deliver it. On the third day the insured person was killed, and a friend of the family, by trick or misrepresentation, got possession of the policy and gave it to the widow who brought suit thereon. The court, conceding that plaintiff could obtain no advantage through the act of her friend in getting possession of the policy, held, nevertheless, that, independent of such act, a sufficient delivery had been shown. It says: "The controlling question, then, on the subject of delivery is not who has the actual possession but who has the right of possession. Applying these principles to the facts before us, we think the delivery of the policy in question to the applicant had, in contemplation of law, been effected before his death. When his application was accepted at the home office in New York, and a policy issued thereon was placed in the mails for the sole purpose of ultimately reaching his hands, the company parted with its possession and control of the paper. The intention to deliver was complete. The premium money which it had held up to that time upon a conditional trust then became its absolute property. It would have been guilty of no breach of trust in appropriating the fund to its own use. For this privilege thus acquired there must have been a corresponding benefit accruing to the original owner of the fund, and what he acquired in lieu of his money was an insurance upon his life and a right to the policy which evidenced a consummation of the contract. If the delivery was not complete when the policy was mailed, it certainly became so when it reached the hands of the local agent during the lifetime of the applicant and while he was in good health. Construing the act of the company in transmitting the policy to the agent in the light of the contract, it necessarily follows, in the absence of proof to the contrary, that the agent received the policy charged with no other duty except to hand it unconditionally to the applicant. If this be true, the possession of the agent was the possession of the applicant, and while in the hands of the agent it was simply held by him on deposit or in trust for its real owner. This owner had a right to demand possession of it. Upon refusal he could have recovered it in an action in trover. Conceding this right, we do not see how death can rob the beneficiary of her rights under the contract."

In *May on Insurance* (3d Ed.) § 55, the author says that, while the act of the company in sending a policy to its agent to be

given to the insured upon payment of the premium does not amount to a delivery until such payment is made, yet, where the applicant has done everything that is required of him under his contract, the policy is held merely as a deposit for his benefit. It is said on behalf of appellant that the policy was not sent to the agent in this case to be delivered unconditionally, but to be delivered only upon condition of payment of the premium and the good health of the applicant and the giving by him of a prescribed receipt for the policy. The letter accompanying the policy is apparently a "form letter" prepared for use in sending out policies to agents for delivery to applicants, and contains general cautionary instructions. It must, we think, be taken, as understood by both company and agent, that such instructions were to be observed and the policy withheld from delivery only where the conditions referred to had not been complied with in advance. But the company could not by such instructions add anything to the obligation of the applicant or to the conditions of the contract. It had already received payment of the premium in cash and notes. The giving of a written receipt for the policy was no part of the contract. The applicant having submitted to a medical examination by the company's examiner whose report it approved, his good health at that time is to be assumed. There is nothing to rebut the presumption that such state of health continued at the time the policy was executed and at the date it was sent to the agent. See *Insurance Co. v. Altschuler*, 55 Neb. 341, 75 N. W. 862. In other words, the applicant had complied with all the requirements of the contract on his part and was entitled to receive the policy. He was not responsible for the voluntary absence of the agent, and his rights cannot be abridged or lost by the failure of the agent to perform his duty in the premises.

In *Fried v. Insurance Co.*, 50 N. Y. 243, a person applied to the agent of a London company for insurance upon his life and paid the premium with the understanding that his insurance began at once, but subject to rejection by the company. The policy was issued and sent to the agent, whose instructions were not to deliver any policy if any unfavorable change had taken place in the health of the insured. The agent, claiming that such change had taken place, refused to deliver the policy, and the insured soon thereafter died. The court, holding it immaterial whether the action be treated as being brought upon the policy or upon the contract independent of the policy, say of the effect claimed by the company or its instructions given its agent: "The alleged instructions could have no such effect upon the contract. They could not alter or qualify the terms of the contract to the prejudice of the plaintiff."

In *Kilborn v. Insurance Co.*, 99 Minn. 176,

108 N. W. 861, the applicant, as in this case, gave his note for the first premium. The application was accepted and the policy issued and mailed to the agents on December 23, 1904. On the following day, while the policy was still in the course of transmission through the mails, the applicant was killed. The policy reached the hands of the agents two days later, and they, having learned of the applicant's death, returned the paper to the company. The notes given by the deceased were marked "void" and returned to the widow who refused to receive them. The company's defense to an action brought to recover the insurance was that the premium had not been paid and the policy had never been delivered. Overruling both propositions, the court holds that the giving of the notes under the circumstances, which are not in this respect materially unlike those in the present case, operated as a payment of the premium, and of the alleged want of delivery it adds: "It is very well settled that, where nothing remains to be done by the insured, the mailing of the policy duly executed to the insured or to the agent of the company for delivery constitutes a delivery. * * * The contract is complete when the application is accepted and the acceptance signified by mailing the policy."

The case of *Francis v. Insurance Co.*, 55 Or. 280, 106 Pac. 323, involves circumstances somewhat like those in the *Kilborn Case*, with the additional fact that the application contained a provision whereby the insurance was not to take effect until the premium had been paid in the lifetime and good health of the applicant. A policy was issued and forwarded to the agents, but before it was delivered into the possession of the applicant he died, and the policy was returned to the home office. The trial court having found for the defendant, the judgment was reversed on appeal; the court approving and applying the rule of the *Kilborn Case* and other similar precedents. The opinion restates the rule as follows: "Where a company receives an application for insurance, acts upon it, signs and seals a policy complete in form, and forwards it to its agent for delivery, the policy is deemed to have been issued from the date of its deposit in the mails." Upon the same general subject the Indiana court has said: "When the company executed and issued a policy in conformity with the application, the contract of insurance was then complete, as it thereby accepted the offer or application of the insured." *N. Y. Ins. Co. v. Greenlee*, 42 Ind. App. 82, 84 N. E. 1101.

In *Insurance Co. v. Pike*, 51 Colo. 238, 117 Pac. 899, the Colorado court deals with a case having significant likeness to the one at bar in several respects. There the application provided that the insurance should not take effect unless the policy was delivered to the insured in his lifetime and in

good health, and a note was given for the first premium. The application was approved and the policy executed, but, owing to some disagreement between the company and its agent, it was not at once sent out. It was finally sent to the company's Denver agency, which sent it to a bank at the residence of the insured to be delivered when the premium note was paid. Shortly after, and with the matter of the policy still in this position, the insured died. Action was brought to recover the insurance, and defense was made on the ground that no contract was ever in fact consummated, that the premium had never been paid, nor the policy delivered. The plea was held to be unavailing. The court says, among other things, that the mailing of the policy from the home office "constituted a delivery thereof," and that the instructions to the bank not to deliver to the insured until the note was paid "could not affect the contract already made." Many other precedents might be here quoted to the same general effect, but we think it unnecessary to prolong this opinion for that purpose. As bearing upon this, as well as upon other points in this case, see *Mulligan v. Insurance Co.*, 149 Ill. App. 516; *Insurance Co. v. Davis*, 141 Ky. 358, 132 S. W. 410; *Mutual v. Farmer*, 65 Ark. 581, 47 S. W. 850; *Insurance Co. v. Altschuler*, 55 Neb. 341, 75 N. W. 862; *Life Ins. Co. v. Moore*, 117 Ky. 651, 79 S. W. 219.

The rules of law thus affirmed may be applied to the case before us without the slightest injustice to the insurer. Acting upon its reserved right to fix the date of the risk which it undertook to assume, it named July 8, 1910. It demanded and received premium for the initial year beginning upon that date, and computed future accruing premiums therefrom. When the policy had been executed in conformity with the offer of the applicant, the minds of the parties had met; and the premium being paid, and nothing remaining for the applicant to do to perfect the contract, the execution by the company of the written evidence of that agreement and sending it, either direct to the applicant or to the local agent for his use according to the usual course of business, was all that the law or the terms stipulated in the application require to make a binding and enforceable contract. Each party had furnished the agreed consideration for the undertaking of the other, and each is entitled to its promised benefits.

Appellant cites the case of *Hawley v. Insurance Co.*, 92 Iowa, 593, 61 N. W. 201, as controlling the present issue in its favor, but we think it is not in point. In that case the application was made for the benefit of or at the request of a third person who held a personal claim against the agent of the insurance company; the plan being to pay the premium by an indorsement or credit upon the agent's said personal debt. The policy

was issued and put into the hands of the agent during the lifetime of the applicant. The agent sent it to a third person with instructions not to deliver it until the promised indorsement was made on his note. Before that was brought about, the applicant died, and it was held by this court that there had been no delivery of the policy or payment of the premium, and the company was not liable. The simple statement of the case and the questions there considered is a sufficient demonstration that their decision in no manner controls the controversy we are now considering.

[7] 4. Our statute relating to life insurance provides that, where an applicant submits to medical examination by the company's physician and is pronounced a fit subject of insurance, such company, in the absence of fraud, shall be estopped from pleading that the insured person "was not in the condition of health required by the policy at the time of the issuance or delivery thereof." Code, § 1812. No fraud is pleaded, and none is shown in testimony. It follows of necessity that, if we are right in the conclusion heretofore expressed that, under the circumstances of this case, the issuance or the delivery of the policy dates from its execution and mailing, the applicant's condition of health at that time is not open to question or consideration in this action.

5. The appellant complains of the court's refusal to give certain requested instructions to the jury. The requests were mostly predicated upon the theory that the defendant was entitled to a verdict as a matter of law. The points so made are all governed by the conclusions we have already announced and require no further discussion. There was no error in the ruling.

[8] Error is also assigned on the exclusion of testimony as to the agreement or understanding upon which the notes given by the insured were delivered. It is enough upon the point so made to say that the testimony so excluded was afterward admitted and both parties gave to the jury their version of the transaction.

[9] The defendant also offered to examine the attending physician as to the last sickness of the insured. This testimony was excluded upon the statutory objection thereto. In this there was no error.

There is nothing in the record to justify us in ordering a new trial, and the judgment of the district court is affirmed.

BRINSMAID v. ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA.

(Supreme Court of Iowa. Nov. 19, 1912.)

1. INSURANCE (§ 819*)—ACCIDENT INSURANCE—SUFFICIENCY OF EVIDENCE.

Evidence, in an action on an accident insurance policy, held to raise a fair conflict on

the question of whether insured came to his death by drowning or from an aneurism and a rupture of an artery, and to require the submission of the case to the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.*]

2. APPEAL AND ERROR (§ 1003*)—SCOPE OF REVIEW.

The question of the weight or preponderance of evidence cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.*]

Appeal from District Court, Polk County; Hugh Brennan, Judge.

This is an action at law upon a certificate of membership in the defendant association. The defendant is a mutual association and purports to issue accident insurance to its members. Thomas F. Brinsmaid was one of its members in good standing. It is averred that he lost his life on November 27, 1907, by drowning at Long Beach, Cal. The circumstances of his death are made to appear by the evidence in the record. The defendant denies that the insured met his death by drowning, and avers that such death was caused by rupture of the large artery near the heart, known as the aorta. The question was submitted by the trial court to the jury, which found for the plaintiff. Judgment was entered upon the verdict, and the defendant appeals. Affirmed.

Sullivan & Sullivan, of Des Moines, and Vorys, Sater, Seymour & Pease, of Columbus, Ohio, for appellant. Clinton L. Nourse, of Des Moines, for appellee.

EVANS, J. [1] There is no controversy in this case over the fact of death. The sole dispute is as to the cause of it. It is undisputed that on November 27, 1907, the insured went bathing in the ocean at Long Beach, Cal.; that he was apparently well and strong when he entered the water; that he in some manner became helpless to save himself, and that he was later taken from the water either actually dead or so nearly so that all efforts at resuscitation failed. The insured was 44 years of age, 6 feet 1 inch tall, weighed from 190 to 200 pounds, in apparently fine physical condition, all "muscle and bone," without surplus tissue. Eyewitnesses testified to the circumstances of the alleged drowning. The testimony on behalf of the plaintiff tends to show that the tide was running unusually high and the breakers and the undertow were unusually strong. One of the witnesses who first saw the peril of the insured and went to his assistance was Mrs. Pitcher, who testified as follows: "The breakers were running high that afternoon. At the farthest point Mr. Brinsmaid went out, I should say it was about six or seven feet deep. I noticed him when he first went out. The breakers went over him. When I reached him, the water was six or seven feet deep. The

breakers would have gone over me if I had not jumped. I had to jump to get over them. I was a strong and good swimmer at that time, accustomed to the surf. I was three or four days getting over it. The tide was very high that afternoon." Cross-examination: "I saw Mr. Brinsmaid when he first went into the water, and my eye followed him out. He went out through the breakers. I watched him for five minutes or more until I first noticed him acting queerly. At the time he was being knocked down by the breakers; he was not under water, of course, for more than a second at a time. I should say that, if a person gets knocked down once by the breakers, it would be quite hard to get their feet again, and a breaker coming in would knock him down again. It is very liable to happen to any good swimmer. After being struck by the first breaker, Mr. Brinsmaid was knocked down into the water. He then came up to the surface and was knocked down again. Then I did not watch him for a few seconds, and then I saw him floating on his back. When I got to him I seemed to feel a shock go through his body, and thought I heard him groan." Also: "Mr. Brinsmaid went out 400 or 500 feet through the breakers. The breakers were high that afternoon. He went out a couple hundred feet farther than I did, and I think it would be about six or seven feet deep there. I noticed him, and it seemed like he was trying to help himself along and motioning with his hands. I stood there and watched him. Until he turned over I was not certain he needed help." Other testimony along the same line we need not repeat. Doctors were called and efforts at resuscitation continued for the space of two hours. When the body was taken from the water the heart was beating, and so continued for some time. During the efforts at resuscitation, other signs of life appeared, but the final result was failure. On the face of it, this evidence would seem ample warrant to support the finding of the jury that the insured came to his death by drowning. If drowned, there is no controversy made but that such drowning was accidental and within the terms of the insurance certificate.

On behalf of defendant it was made to appear that an autopsy was held by Dr. Campbell, assistant to the coroner. Dr. Campbell testified that he found an aneurism in a branch of the aorta, and a rupture of the artery at such point. An aneurism is said to be a tumor and is the result of disease in the coats of the artery. This rupture was alleged to be about one-half inch by three-eighths. It is undisputed that if such rupture had occurred during the life of the insured it would cause instantaneous death. No one assisted Dr. Campbell in the autopsy, nor was any one present except the undertaker. That a jury would have been justified in finding such rupture to have been

the cause of death, there can be no doubt. But the contention of the defendant is that there was no fair conflict in the evidence as to the cause of death, and that the trial court should have directed a verdict for the defendant. And this is the only question before us. It is enough to say that there are many facts testified to by witnesses for the plaintiff which are wholly inconsistent with the theory of instantaneous death as a result of the alleged rupture. The truth of the testimony to establish such facts was, of course, for the jury. The doctors who worked over the body in efforts at resuscitation testified on behalf of the plaintiff. Their opinion was that drowning was the cause of death, and the facts upon which such opinions were based were fully stated in their testimony. The expert testimony to the contrary, except that of Dr. Campbell, was wholly hypothetical.

[2] We cannot assume to weigh the evidence in this review, or to determine where its preponderance lies. What is clear to us is that there was a fair conflict of evidence on the pivotal question, and the trial court could not properly have directed a verdict. All the assignments of error and argument are directed to this one proposition.

The judgment of the trial court must therefore be affirmed.

BABBITT v. CORRIGAN.

(Supreme Court of Iowa. Nov. 19, 1912.)

1. ABATEMENT AND REVIVAL (§ 69*)—DEATH OF PARTY.

An action to enjoin a liquor nuisance, from the very nature of the case, abates on the death of the sole defendant, even after an appeal is perfected.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 349-354; Dec. Dig. § 69.*]

2. ABATEMENT AND REVIVAL (§ 69*)—APPEAL—NOTICE.

In an action to enjoin a liquor nuisance, where plaintiff's notice of appeal was served only on the defendant, the Supreme Court cannot save the action as against the owner of the premises, on its abatement pending the appeal by the death of the defendant.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 349-354; Dec. Dig. § 69.*]

3. INTOXICATING LIQUORS (§ 263*)—NUISANCE—ABATEMENT.

Where the defendant in an action to enjoin a liquor nuisance dies pending appeal, the action abates, and the liquor on defendant's premises cannot be adjudged a nuisance, since there can be no intent by defendant to keep and sell liquors in violation of law, which is a necessary element.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 263.*]

Appeal from District Court, Scott County; William Theophilus, Judge.

Suit in equity to enjoin Hugh Corrigan from maintaining a liquor nuisance. Corrigan interposed a demurrer in the court be-

low, which was sustained. From such ruling the plaintiff has appealed. Appeal dismissed.

George Cosson, Atty. Gen., and Betty & Betty, of Davenport, for appellant. Isaac Petersberger, Thuenen & Shorey, and Henry Vollmer, all of Davenport, for appellee. C. M. Waterman, amicus curiæ.

EVANS, J. It is charged in the petition that Corrigan is unlawfully operating a saloon in the city of Davenport and that he there sells and keeps for sale intoxicating liquors in violation of law. The prayer of the petition asks for an injunction, temporary and permanent, and for the abatement of the nuisance.

[1] It is now made to appear that after the appeal was perfected, and on September 12, 1912, Corrigan died. For this reason the attorneys of record for appellee ask that the action be abated as against Corrigan and that the appeal be dismissed. A civil action does not ordinarily abate by reason of the death of the defendant. Code, § 4150. On the other hand, a criminal action does so abate, from the very nature of the case. Punishment cannot be imposed upon a dead man, nor can penalties be imposed as against his estate. In the case before us, the only relief prayed is injunctive and penal. Death has enjoined Corrigan, and neither this court nor the lower court can add anything to such decree. From the very nature of the case, the court has no further power over the defendant, either to impose punishment or to adjudge his guilt or innocence.

[2] It is urged by appellant that the case should be saved as against the real estate and the owner thereof. But such question is not before us. The title of the case in this court names Corrigan as sole defendant. It does appear, however, from the body of the petition, that Elizabeth Koch is the owner of the premises, and relief is prayed against her as such owner, on the ground that she had knowledge of the violation of law by Corrigan. It is not made to appear whether she was ever served with notice, or whether she appeared in the action, or whether she was named as a defendant in the lower court. In prosecuting his appeal to this court, the appellant served notice on Corrigan alone. Manifestly, therefore, there is no other party defendant before us. If the plaintiff is entitled to proceed as against Elizabeth Koch, notwithstanding the death of Corrigan, such right cannot be affected by an abatement of the action or a dismissal of the appeal as against Corrigan.

[3] It is also urged by appellant that, notwithstanding the death of Corrigan, he is entitled to an order for the destruction of the intoxicating liquors kept by Corrigan on said premises, on the ground that they constitute

a nuisance and should be abated as such. Leaving out of view for the moment that such an order would be penal in its nature, it yet remains that such intoxicating liquors could be adjudged a nuisance only in the sense that they were kept by Corrigan with intent to sell in violation of law. So far as the past is concerned, the guilt of Corrigan is an essential element of such past nuisance. If we are precluded by his death from adjudging his guilt, we are likewise precluded from adjudging the nuisance, which is a mere incident to his guilt. So far as concerns the present and the future of such alleged nuisance, there can be none, without an intent on the part of Corrigan to keep and sell in violation of law. Such intent is an essential element of the nuisance, and his death has eliminated it. We reach the unavoidable conclusion, therefore, that so far as Corrigan is concerned, and to that extent, his death abates the prosecution, and that the courts have no further power of punishment over him. Our process cannot reach him. See *Williams v. Williams*, 115 Iowa, 520, 88 N. W. 1057; *Doubet v. Riggs*, 112 N. W. 242; *Davis v. Boyer*, 122 Iowa, 132, 97 N. W. 1002.

For the reasons indicated, it is clear to us that the appeal should be dismissed; and it is so ordered.

Dismissed.

KENNIS v. OGDEN COAL CO.

(Supreme Court of Iowa. Nov. 16, 1912.)

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—QUESTION FOR JURY.

In an action for injuries to a miner caused by a fall of slate in the mine, the question of the master's negligence *held* one for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 296*)—INJURIES TO SERVANT—INSTRUCTIONS.

In an action for injuries to a miner caused by a fall of slate while he was eating his dinner in a "crosscut," it was proper to refuse an instruction that, if plaintiff was charged with knowledge of the rules of the company excluding miners from crosscuts, repeated violations would not justify him in the assumption of the risk involved in such use, where there was evidence tending to show a custom acquiesced in by defendant to use the crosscut, and that there was no rule of the company brought to the servant's attention forbidding such use.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.*]

3. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANTS—INSTRUCTIONS.

In an action for injuries to a miner caused by a fall of slate, the court instructed that, if it was customary for the miners to use "crosscuts" as a place to sit while eating their dinner, which custom was acquiesced in by defendant, it was its duty to keep the walls of the crosscut in which plaintiff was injured while eating his dinner in a reasonably safe condition. *Held* that, there having been evi-

dence tending to show acquiescence, such an instruction was proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1161; Dec. Dig. § 293.*]

4. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INJURIES TO SERVANT—INSTRUCTIONS.

In an action for injuries to a miner caused by a fall of slate, the court instructed that an employe assumes the risks and dangers of the employment which he knows and appreciates, and assumes those which an ordinarily prudent person of his capacity and intelligence would have known and appreciated in his situation. *Held*, that the instruction could not have prejudiced defendant because of the limitation of the assumption of risks to those which an ordinarily prudent person of his capacity and intelligence would have known and appreciated; there being no issue as to plaintiff's capacity and intelligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4527-4530; Dec. Dig. § 1066.*]

Appeal from District Court, Boone County; Robert M. Wright, Judge.

Action to recover damages for personal injuries received by plaintiff while employed in the defendant's mine, alleged to have been due to the negligence of defendant. There was a verdict and judgment for plaintiff and defendant appeals. Affirmed.

Dyer & Dyer and John A. Hull, all of Boone, for appellant. D. G. Baker, of Boone, for appellee.

McCLAIN, C. J. [1] The plaintiff, an experienced coal miner, while eating his dinner in the mine sitting on a loose tie at the intersection of an entry and a "crosscut," so called, was injured by a fall of slate from the roof. The alleged negligence of the defendant, rendering it liable to plaintiff for damages on account of the injuries received, consisted in the failure to properly investigate the roof of the mine at the place where the plaintiff was injured so as to discover the dangerous condition of the same and in failing to timber the roof at that place. In addition to a general denial, the defendant pleaded contributory negligence of plaintiff and an assumption by him of the risk incident to the conditions which surrounded him at the time of the alleged injury.

1. The general contention for appellant that, on its motion at the close of the evidence, the court should have directed a verdict for the defendant, and that the verdict as rendered should have been set aside as unsupported by the evidence, is predicated upon various grounds which can be understood only by a brief statement of the uncontroverted facts.

In defendant's mine the coal is taken out in accordance with what is called the "panel" system, involving the extension into the vein of two parallel entries from 30 to 40 feet apart connected by a "crosscut" or "break-through" intended primarily to cause a cir-

culatation of air at the working face of the vein. As the entries are carried forward in the process of mining and rooms are turned off from them, a new "cut-through" is made about every 60 feet, and the one previously constructed is closed up with "gobb" so as to force the air to pass through the last one. Plaintiff was at work mining at the end of entry "G," which was being extended in a westerly direction parallel to entry "H" and about 37 feet beyond the last "crosscut," which is designated as No. 3. But during the forenoon of the day of the accident he had suspended his work about 9 o'clock in order to interview the pit boss in regard to the supply of air, being one of the miners' committee charged in their interest with looking after the relations between the miners and the mine management. Before returning to his work, he and another miner, named Anderson, had seated themselves at the intersection of "crosscut" No. 3 and entry "G" to eat their dinners, and while so engaged the fall of slate occurred, which injured the plaintiff.

With reference to this state of facts, the general contention of appellant is: That the "crosscut" was constructed and used for the circulation of air only; that it was not the custom in the defendant's mine or in the mining district in which the same was located to timber such "crosscuts"; that plaintiff knew of the custom in this respect and the conditions under which he was working in the mine, and continued in the employment without protest or complaint; that the roof of entry "G" and of "crosscut" No. 3 was in good condition, and, if inspected, would have appeared to be without defect on the morning preceding the accident; and that the fall of slate which caused the injury to plaintiff was in the "crosscut" or "cut-through," and not in the entry, so that, had plaintiff been sitting fully within the limits of the entry, he would not have been injured. In short, the contention is that plaintiff was injured by reason of placing himself fully or partly in the "cut-through" where he had no right to be, and where defendant was under no obligation to protect him from the danger of a falling of slate from the roof, and that plaintiff was charged with knowledge of this fact by reason of his experience, and placed himself in this position of danger for his personal convenience, and not in pursuance of any duty or requirement of his employment.

Without setting out the evidence in detail, it is sufficient to say, in answer to this general contention for the appellant, that there was evidence tending to show that it was the custom of miners, known to defendant, to eat their dinners in the mine at such places as they might select; that the "cut-throughs" were generally used by the miners as proper places in which to put their din-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ner palls and leave their tools and as proper ways through which to pass from one entry to another if there was any occasion to do so, either in the ordinary prosecution of their work or in cases of emergency; and that the defendant had assumed, with reference to the entries and "cut-throughs," the duty of maintaining them in a safe condition and preventing the falling of the roof therein by props when necessary. There was also evidence tending to show that the portion of the roof about the intersections of "cut-through" No. 3 with entry "G," which injured plaintiff, was not wholly in the "cut-through," but extended into the entry so that, although plaintiff might have been wholly within the limits of the entry, he would have been injured by the falling of that portion of the roof which was within such limits. If, therefore, the jury was properly instructed, there was no error of which appellant can complain in refusing to direct a verdict for the defendant or in refusing to set aside the verdict as rendered.

2. With reference to the instructions, there are many assignments of error in refusing to give those asked for the appellant and in the giving of those which were submitted by the court to the jury. Many of these can be sufficiently disposed of by reference to the general theory on which the case was submitted.

[2, 3] Complaint is made of the refusal of an instruction that, if plaintiff was charged with knowledge of the rules of the company excluding miners from the use of the "crosscuts" by them, repeated violations of such rules would not justify him in the assumption of the risk involved in such use; and the giving of an instruction to the effect that, if it was customary for the miners to use such "crosscuts" for storage of tools and as a place to sit while eating their dinners, or for other convenient uses, and that this custom was acquiesced in by defendant, it was the duty of the defendant to keep the walls and roof of "crosscut" No. 3 in a reasonably safe condition and make reasonably frequent and proper inspection thereof, and that failure or neglect of defendant in this respect would render it liable. It has already been indicated that there was evidence tending to show that a custom of miners, acquiesced in by defendant, was to use "crosscuts" for the purposes stated, and that there was no rule of the company brought to their attention forbidding such use. The instruction given properly submitted to the jury the considerations which they should take into account under the evidence in determining whether the use of the "crosscuts" by the miners was proper, and there was no error in refusing to give the instruction asked upon that subject.

[4] In one instruction given the jury was told that an employé assumes the risks and dangers of the employment which he knows

and appreciates, and also assumes those which an ordinarily prudent person of his capacity and intelligence would have known and appreciated in his situation. Error is assigned in limiting the assumption of the risks of the employment to those which an ordinarily prudent person "of his capacity and intelligence would have known and appreciated in his situation." If there had been an issue under the pleadings or evidence with reference to the capacity and intelligence of the plaintiff, there might have been some force in this criticism, for, of course, the employé is bound to exercise the prudence of a reasonably careful person; at any rate, he is bound to do so unless the employer is charged with some knowledge of his lack of ordinary capacity and intelligence. But there was no such question in the case. The plaintiff is presumed to have had ordinary capacity and intelligence, and there is not the slightest suggestion in the record to the contrary. The expression criticised, if it could be construed to have had reference to the peculiar capacity and intelligence of the plaintiff, was wholly without prejudice, for the jury could not be presumed to have based their verdict upon any lack of such capacity and intelligence on plaintiff's part. But in the connection in which the expression is used, it clearly had reference to the general capacity and intelligence which must be presumed to have been possessed by an employé in the general employment in which plaintiff was engaged, and, under this construction of the language, it was not prejudicial as a matter of law. Taking the instruction as a whole, we are satisfied that it contains no erroneous statement of the law as applied to the evidence, and that, if read with the other instructions on the subject, it correctly informed the jury as to the considerations which they should take into account in determining the assumption of risk. The other objections made to the instructions are so evidently without merit, under the facts and circumstances with reference to which they were given, that a discussion of them would be superfluous.

We find nothing in the instructions of which appellant can reasonably complain, and the instructions asked and refused, so far as they suggest the proper rules of law applicable to the case, are fully covered by those given.

3. It is earnestly contended for the appellant that the record presents an aggravated case of misconduct by counsel for the appellee in his opening argument to the jury, and that on account of such misconduct the verdict should have been set aside. In brief, the complaint is that counsel for appellee urged the jury to put the amount of their verdict up to what the jurors should think it ought to be within the prayer of the petition—leaving to him the responsibility of settling afterwards with the court the question

whether it was excessive—and in leading the jury to infer that he had some personal interest by way of a contingent fee, and further that there might be some party other than the defendant, such for instance as an insurance company, which might have to pay the judgment rendered. We would hardly be justified in setting out in full the portions of the argument of counsel which are presented in the record in order to show the connection and significance of the particular portions of which complaint is made. The portions of the argument presented in the record would not serve as a model for the use of other counsel in similar cases. But it appears that in the course of the argument, and in response to objections made by counsel for appellant, the court warned counsel for appellee to confine himself in argument to the evidence and the questions properly before the jury for consideration, and that these admonitions were, as given, heeded by counsel to whom they were addressed. In its instructions, the court cautioned the jurors against accepting the interpretations which might be put by counsel in their zeal upon the evidence of the witnesses, and expressly told them that they had nothing to do with the interest of the attorney for plaintiff in the case.

After reading with care the argument for plaintiff, so far as it is presented in the record, we are satisfied that, in view of the cautions suggested during the argument and in the instructions, there was nothing so calculated to prejudice or unduly influence the jury as to require the trial court to set aside the verdict. We are reluctant always to interfere with the action of the trial court in its conclusion, based upon the entire trial of the case as it has proceeded before it, that no improper prejudice or influence has affected the verdict as rendered, and in this case we see no occasion for such interference.

The judgment of the trial court is therefore affirmed.

WACKERBARTH & BLAMER CO. v. INDEPENDENT SCHOOL DIST. OF INDEPENDENCE et al.

(Supreme Court of Iowa. Nov. 18, 1912.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 112*)—CONTRACTOR'S CLAIMS—FILING.

Under Code, § 3102, relating to claims for labor and material furnished on public improvements for public corporations, and providing that such claims "shall be made by filing with the public officer through whom the payment is to be made an itemized statement," etc., it is sufficient, when filing a claim against a school district, to file it with the treasurer and give notice to the secretary and president of such filing; the intent of the statute being to bring the claim definitely and formally to the attention of the governing officers.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 269, 270; Dec. Dig. § 112.*]

2. MUNICIPAL CORPORATIONS (§ 373*)—PUBLIC IMPROVEMENTS—CLAIMS OF SUBCONTRACTOR—ASSIGNMENT BY CONTRACTOR FOR BENEFIT OF CREDITORS.

Under Code, § 3102, providing that subcontractors shall have a claim against a public corporation making improvements, though it does not give the subcontractor a lien, it offers him an equitable right to unpaid funds in the hands of the corporation at the time of the filing of his claim, which cannot be defeated by an assignment by the principal contractor, through bankruptcy or otherwise, and a personal liability is created against the public corporation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 913; Dec. Dig. § 373.*]

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 180*)—TITLE OF ASSIGNEE.

A contractor for public work, who, before he finished, made a general assignment for benefit of creditors, had nothing more than a cause of action against the municipality, and the assignees took no title to the funds in its hands, but only the cause of action, and had subject to the equities given subcontractors by Code, § 3102, giving them a claim against public corporations for work and material furnished on improvements.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. §§ 532-539; Dec. Dig. § 180.*]

4. MUNICIPAL CORPORATIONS (§ 373*)—PUBLIC IMPROVEMENTS—SUBCONTRACTOR'S CLAIM—PRIORITY.

Although the distribution of the estate of an insolvent contractor for public work under an assignment for benefit of creditors would be more equitable, Code, § 3102, giving subcontractors a claim against public corporations for unpaid funds, expressly provides for preference, and cannot be ignored.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 913; Dec. Dig. § 373.*]

Appeal from District Court, Buchanan County; F. C. Platt, Judge.

The defendant Netcott is a principal contractor, who entered into contract with the defendant school district for the erection of a schoolhouse. The plaintiff is a subcontractor, who furnished Netcott over \$6,000 worth of lumber and material for the construction of such public building. As such subcontractor the plaintiff brought this action against the school district under the provisions of section 3102 of the Code; the defendant Netcott being insolvent and having failed to finish the contract. Upon trial in the district court, the plaintiff's petition was dismissed, and it appeals. Reversed and remanded.

Cook & Cook, of Independence, for appellant. Hasner & Hasner, of Independence, for school district and its treasurer. Chappell & Todd, of Independence, for W. E. Bain, assignee.

EVANS, J. The case was submitted upon an agreed statement of facts. Only questions of law, therefore, are submitted for our consideration. These questions are two in number: (1) Did the plaintiff comply with the preliminary requirements of sec-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion 3102, or did he fail to file his statement of account with the proper officer of the school district? (2) Were the provisions of section 3102 available to the plaintiff after the principal contractor had made a general assignment for the benefit of his creditors?

[1] Section 3102 is as follows: "Public Buildings or Bridges—Claim of Subcontractor. Every mechanic, laborer or other person who, as subcontractor, shall perform labor upon or furnish materials for the construction of any public building, bridge or other improvement not belonging to the state, shall have a claim against the public corporation constructing such building, bridge, or improvement for the value of such services and material, not in excess of the contract price to be paid for such building, bridge or improvement, nor shall such corporation be required to pay any such claim before or in any different manner from that provided in the principal contract. Such claim shall be made by filing with the public officer through whom the payment is to be made an itemized and sworn statement of the demand, within thirty days after the performance of the last labor or the furnishing of the last of the material, and such claims shall have priority in the order which they are filed."

In attempted compliance with the requirements of this section the plaintiff filed an itemized and sworn statement of his account with the treasurer of the school district; and within a few minutes thereafter, and approximately at the same time, he served a written notice of such filing upon the president and secretary of such school district. It is urged by appellee that the treasurer was not the proper officer with whom such statement should have been filed, but that it should have been filed with the secretary as being the officer contemplated by the provisions of the quoted section. This contention is based in part upon the case of *Green Bay Lumber Co. v. Thomas*, 106 Iowa, 420, 78 N. W. 740. That was an action against the county. The statement was filed or left with one member of the board of supervisors. We held in that case that it should have been filed with the county auditor. This section of the statute was not at that time identical with its present form. Its requirement then was that the statement should be filed "With the officer through whose order the payment is to be made." It will be noted that the statute in its present form requires a filing with the "public officer through whom the payment is to be made." It was this provision which led the appellant to make the formal filing with the treasurer on the theory that he was the officer through whom payment would be made. It is argued that the change in the statute was intended only to improve its form, and not to change its real meaning, and that its meaning and intent are not

thereby changed. The argument is that the treasurer as a disbursing officer can exercise no responsibility except to pay the warrants drawn upon him, that the warrants must be drawn by the president and secretary, and that such warrants when drawn and delivered constitute payment within the meaning of the statute. The argument is not without its force. A warrant being once issued and delivered is practically beyond recall or defense; but the fact remains that the treasurer is the officer through whom the payment is made in the literal sense. It is evident, also, that, if the plaintiff had filed its statement with the secretary in lieu of the treasurer or with the president in lieu of either, he could not have escaped the menace of plausible argument against the course adopted. As against the secretary, it could be said that he is not the officer through whom "payment" should be made, and, further, that he is not the officer "through whose order" the payment is to be made. His duties are clerical and are performed under the direction of the board of directors in pursuance only of their official action. The order or warrant, when issued upon the direction of the board, must be signed by the president and the secretary. If it would have been sufficient to file with the secretary under the terms of the statute, by the same reasoning it would be sufficient to file the same with the president. As urged by appellees, the real purpose of the statute is very plain. It is intended to bring the claim definitely and formally to the attention of the governing officers of the corporation before its liability thereon can attach. We have already noted the fact that the plaintiff not only filed the sworn statement with the treasurer, but he immediately served written notice to that effect upon the president and the secretary. We think that such a course fully met the requirements of the statute and amounted to a filing of the statement with the president, secretary, and treasurer. To hold otherwise would be unduly technical, and would ignore, not only the spirit of the statute, but its literal letter as well, in that the treasurer is an officer through whom "payment" is made.

[2] 2. We turn now to the second question. A few hours prior to the filing of the sworn statement by plaintiff and on the same day, the principal contractor, Netcott, made a general assignment for the benefit of his creditors. The plaintiff filed its claim within the 30-day period, and complied in all respects with every requirement of the statute. It is agreed that there was in the hands of the school district, due under the contract, at the time of such filing, the net sum of \$6,168.57 over and above one prior claim of \$97. The question is, Can the plaintiff be deprived of the benefits of section 3102 by the mere act of the principal con-

tractor in transferring his claim against the school district to some other person? Does the mere fact that the principal contractor made a general assignment for his creditors prevent the plaintiff from availing himself of this statute thereafter, even though within the statutory period? Our first impressions on the oral argument inclined to the affirmative on this question. Upon further consideration we are convinced that the position is not sound. We have held heretofore that the statute creates no lien in favor of the subcontractor, although it does offer him a certain equitable right. *Whitehouse v. Surety Co.*, 117 Iowa, 328, 90 N. W. 727; *Green Bay Lumber Co. v. Independent School District of Odebolt*, 125 Iowa, 227, 101 N. W. 84; *Swearingen v. School District*, 125 Iowa, 283, 99 N. W. 730; *Steel Co. v. Van Buren County*, 128 Iowa, 619, 102 N. W. 536.

In the *Swearingen Case*, supra, we held that where the school district was garnished, and answered showing its indebtedness, and was adjudged to pay the claim of the garnishee, it was entitled to credit for the amount so paid, and was liable to the subcontractor only for the amount remaining in its hands. And this was held notwithstanding that the subcontractor filed his claim therewith within 30 days. He had not filed his claim when the school district answered. It was made to appear, also, in that case that the subcontractor intervened in the garnishment action, and that the question of his priority was there litigated. It is contended for appellee that such case is authority to support the ruling of the trial court. We think it falls far short. The statute purports to create a personal liability against the public corporation. It is limited, however, to the amount due under the contract at the time such liability is created. The corporation is not bound to assume that the subcontractor will avail himself of the provisions of this statute. It is not bound to suspend operations while waiting for the expiration of 30 days in favor of any subcontractor. But, when the subcontractor does avail himself of the provisions of this section and does comply with its formal requirements, then a personal liability is created against the public corporation, to the extent of the amount of money then in its hands, preference being given to subcontractors in the order of their filing in pursuance of this statute. If we say that the principal contractor can of his own volition deprive the plaintiff of the benefits of this section by merely making a general assignment for the benefit of his creditors, then we contradict the statute, and we deny to the subcontractor the very preference which the statute offers him. If the principal contractor may thus defeat the subcontractor by making a general assignment for his creditors, by the same logic he may do so by making any bona fide assignment to any

proper person for a proper consideration. This would be adding an exception to the statute and taking somewhat of substance away from it.

[3] It is argued that by force of the general assignment the fund in the hands of the school district passed immediately into the possession or custody of the assignee. But this contention is not quite accurate. No title to a fund is involved. The school district was debtor to Netcott under the contract. The general assignment carried to the assignee the possession of no fund. The principal contractor had a cause of action against his debtor and nothing more. This cause of action was acquired by the assignee by the general assignment. The right and interest of the school district as debtor was not affected. If the school district had paid to Netcott the full amount due under the contract before the subcontractor had availed himself of the provisions of section 3102, it would have been protected against a second liability under the holding in the *Swearingen Case*, supra. If it had made such payment to the assignee under the same circumstances, it might perhaps have been protected in like manner. The provisions of the statute guard the public corporation against double liability. But there is no valid reason why it needs any protection to the extent of the amount due from it, and while such amount remains unpaid. If this is so, as between it and the principal contractor, we can see no fair reason why it should not be so as between it and the assignee of the contractor. True, the amount due from the school district after the assignment is no longer due to the principal contractor, but to the assignee. But this change does not, under the terms of the statute, operate as a limitation upon the right of the subcontractor. The limitation of the liability imposed by the statute is "not in excess of the contract price to be paid for such building." The contract price and the payments thereon and the balance due form the criterion under the statute, and this regardless of whether the principal contractor has transferred his interest therein or not. The assignee took the cause of action as it was. While it was held by the contractor, it was subject to the contingency that subcontractors had a right to avail themselves of the provisions of the statute at any time before settlement had. The assignee necessarily took the cause of action subject to the same contingency.

[4] It is urged that distribution of this insolvent estate under the assignment would be more equitable than to permit this creditor to obtain the claimed preference. The argument appeals to us, but the statute under consideration expressly provides for preference. Of necessity a statute of preference can never operate equally in a particular case. If there ought to be no preference in

such a case, the statute should be repealed. While it continues, it cannot be ignored. Without this statute the principal contractor could by a general assignment divert the contract price in large part to the benefit of antecedent creditors. The statute could be rendered more equitable, perhaps, if it provided for a pro rata distribution of the unpaid price among the labor and materialmen. But it is not so written. The conclusion is unavoidable in this case that the plaintiff has brought itself within the provisions of the statute and is entitled to the preference.

Some other points are argued by appellant. Objection is made to certain credits claimed and taken by the school district; one being for \$30 for insurance and the other being for about \$200 for an old building that was taken by Netcott at such agreed price. It is sufficient to say that the points here urged were not made in the court below. A stipulation of facts was entered into, and the case was tried thereon. From this the amount of the indebtedness appears as above stated.

The judgment of the trial court must be reversed and remanded.

Reversed and remanded.

STATE v. SAMPSON.

(Supreme Court of Iowa. Nov. 19, 1912.)

1. CRIMINAL LAW (§ 200*)—FORMER JEOPARDY—SEPARATE OFFENSES.

Where accused at the same time stole a watch from one of his roommates, and a pocketbook from another, he is guilty of only one offense, even though the takings were separated by a small fraction of time; hence a conviction of simple larceny of the watch is a bar to a prosecution for larceny from the dwelling house, based on the theft of the pocketbook.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 347, 386-409; Dec. Dig. § 200.*]

2. CRIMINAL LAW (§ 167*)—FORMER JEOPARDY—SEPARATE OFFENSES—JURISDICTION.

If, on a trial of the major offense, there can be a conviction of the minor, then a former conviction or acquittal of the minor will bar the major, and hence, where accused at one theft stole a watch and a pocketbook, a conviction of simple larceny for the theft of the watch is a bar to a prosecution for larceny from the building, though the conviction was had before a justice of the peace, who did not have jurisdiction of the offense of larceny from the building.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 304-308, 310, 311; Dec. Dig. § 167.*]

3. CRIMINAL LAW (§ 167*)—FORMER JEOPARDY—SEPARATE OFFENSES—JURISDICTION.

Accused at one time stole both a watch and a pocketbook; the theft being made from a dwelling. He was then convicted in justice court of simple larceny; the accusation being based on the theft of the watch. Held that, as the state in prosecuting may disregard or omit in the charge against the prisoner all aggravating circumstances, it cannot in a prosecution against him for larceny from a dwelling set up that the justice was without jurisdiction in the prosecution for simple larceny; the theft hav-

ing been made in a dwelling, and hence the conviction is a bar to further prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 304-308, 310, 311; Dec. Dig. § 167.*]

Appeal from District Court, Cerro Gordo County; J. F. Clyde, Judge.

From a judgment convicting him of larceny from a dwelling the defendant appeals. Reversed.

F. A. Ontjes, of Mason City, for appellant. George Cosson, Atty. Gen., and John Fletcher, Asst. Atty. Gen., for the State.

LADD, J. [1] The accused, with Charles Bergman and Hans Olson, occupied the same room at 205 Hoyt street, in Mason City, and had done so for several weeks. In the evening of February 17, 1911, he retired at about 10 o'clock, and the others shortly afterwards, and, after they had fallen asleep, he arose, dressed, and, seizing Olson's watch from the dresser and Bergman's purse containing \$42 from his trunk, departed. He was subsequently arrested and two informations filed with a justice of the peace, the one, sworn to by Olson, charging him with petit larceny of the watch and the other, sworn to by Bergman, alleging the larceny of the money from a dwelling. He pleaded guilty to both informations, and was immediately sentenced to serve a term of 30 days in the county jail on the former charge, and bound over to the grand jury on the latter, and was later indicted for the offense of larceny from a dwelling house. When put on trial, he pleaded his conviction of larceny of the watch by the justice as a bar to his prosecution under the indictment. On this issue, the court instructed that, "if in point of time and circumstances the taking of the watch and money was done on a single act or transaction, then there was but one crime, and your verdict must be for the defendant. But, if you find from the evidence that in point of time and circumstances the taking of the watch and money were done as separate acts and transactions, and not a single act or transaction, then the conviction of the crime of larceny of the watch would not bar a conviction of larceny of the money described in the indictment." Appellant insists that no such issue was raised by the evidence, and in this we concur. The taking was from the same room, and, though the watch was stolen from the dresser and money from the trunk, these were parts of the same transaction perpetrated at the same time. That an instant or several minutes may have intervened between seizing the watch and the purse can make no difference if these were a part of the same transaction wherein the accused carried out his design of stealing these articles. Nor does the circumstance that the property belonged to different persons render the transaction divisible into two offenses. The state may

not split up and prosecute separately distinct parts of the same crime. Undoubtedly, many authorities may be found holding that where a man simultaneously takes two or more articles belonging to different persons, even though at the same time, he may be separately prosecuted for the taking from each owner.

In *State v. Thurston*, 2 McM. (S. C.) 382, the prisoner stole cotton belonging to three different persons, and the conviction of larceny in stealing that of one was held not to be a bar to prosecutions for theft from the others, saying "the stealing of the goods of different persons is always a distinct felony, or may at least be so treated by the solicitor, if in his discretion he thinks proper so to do." See, also, *Commonwealth v. Sullivan*, 104 Mass. 553; *U. S. v. Beerman*, 5 Cranch, 420, Fed. Cas. No. 14,560. But these and like decisions in England have not been followed generally in this country. In *State v. Emery*, 68 Vt. 109, 34 Atl. 432, 54 Am. St. Rep. 878, the court states the rules sustained by the clear weight of authority as follows: "The theft of several articles at one and the same time and place, and by one and the same act, constitutes but one indivisible crime, even though the articles belong to different owners; and the judgment of conviction or acquittal of the theft of one of the articles is a bar to a prosecution for the theft of the others. A prosecution and conviction or acquittal for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime. It is equally well settled that if, on the same expedition, there are several distinct larcenous takings, as taking the goods of one person at one place, and afterward taking the goods of another person at another place, and so on, as many crimes are committed as there are several and distinct takings." In *Lurton v. State*, 7 Mo. 55, 37 Am. Dec. 179, the larceny was of goods belonging to Curle and Gibson, and instructions embodying the above principles were refused, and this was held to be error. See, also, *State v. Morphin*, 37 Mo. 373. In *State v. Hennessey*, 23 Ohio St. 339, 13 Am. Rep. 253, conviction was reversed on the same ground; the court saying: "The particular ownership of the property which is the subject of a larceny does not fall within the definition, and is not of the essence of the crime. The gist of the offense consists in feloniously taking the property of another; and neither the legal nor the moral quality of the act is at all affected by the fact that the property stolen, instead of being owned by one or by two or more jointly, is the several property of different persons. The particular ownership of the property is charged in the indictment, not to give character to the act of taking, but merely by way of description of the particular offense." In *Hudson v. State*, 9 Tex. App. 151, 35 Am. Rep. 732, the prisoner was accused of the theft of a gold

watch of Mrs. Hurndall taken from her room, and pleaded in bar a conviction of the theft of money and goods of her son taken from another room in the same house on the same night. On the trial the prisoner requested the court to instruct that, "when a variety of articles are stolen at the same time and from the same place and from the same or different persons, it is only one offense." The court gave the instruction, with this qualification added: "The proof must show, before the jury can consider a transaction to constitute only one offense, that the articles stolen were in possession of the same party and taken from the same place and at the same time, and, if any reasonable space of time elapses between the taking of one and the taking of the other articles or they are taken from different places, it will be two distinct offenses." The court disapproved of the modification, saying, in conclusion, that: "In order to avoid misapprehension, it may be well to say that, when various articles are stolen at the same time and place, the transaction is not divisible, but is one transaction, and that a prosecution for the theft of a portion of the articles so taken would bar a prosecution for the theft of another portion of the same articles, whether the property belonged to or was in the possession of the same person or different persons. But we must not be understood as holding that the different articles taken from different persons and from different places, as from different rooms of a house occupied by different persons, would necessarily be one transaction; but, on the contrary, that property thus situated would on proper averments and proof support different prosecutions. For example, if a thief should enter the room of one lodger at a hotel, and should there perpetrate a theft, and should then pass to the room of another lodger and there commit another theft, these would be different thefts, and each might be prosecuted separately, and a conviction or an acquittal for the one would be no bar to the prosecution of the other. So in case of one horse being taken from the inclosure of A., and another from the inclosure of B., these would be separate offenses. What the law prohibits is the cutting up of one transaction into different offenses, and holding one accused liable for more than one penalty when there has been but one violation." See, also, *Jackson v. State*, 14 Ind. 327; *Roberts v. State*, 14 Ga. 8, 58 Am. Dec. 528; *State v. Williams*, 10 Hump. (Tenn.) 101; *State v. Clark*, 32 Ark. 231; 2 Bishop's New Crim. Law, § 888. In *State v. Eggesht*, 41 Iowa, 575, 20 Am. Rep. 612, the holding was that, where one at the same time and by the same act passed to a teller of a bank four forged checks, he was guilty of but one offense, and that a conviction for altering one of the checks was a bar to a conviction upon the others. After referring to many of the authorities now cited, the court remarked:

"It seems impossible to maintain the doctrine of the former cases upon principle. If the stealing of various articles owned by different individuals constitutes as many distinct offenses as there are owners, then they cannot be united as one offense in the indictment. If one should at the same time, and as one act, steal two watches, each of the value of \$15, and owned by different persons, and another person should steal in the same manner two articles of like value owned by one person, it would be difficult to give a reason satisfactory to the legal mind why one should expiate his offense with a fine of \$200 or imprisonment in the county jail for sixty days, whilst the other should be sent to the penitentiary for the period of five years." See, also, *State v. Larson*, 85 Iowa, 659, 52 N. W. 539.

There is no logical escape from this conclusion that the theft of articles belonging to different persons at the same place and time constitutes a single offense. The matter of ownership does not characterize the crime. Neither the legal nor moral phase of the offense is affected by the fact that portions of property taken may have belonged to different persons, and there is no ground, on the one hand, for allowing the state to split up the single act of the accused into subjects for several prosecutions, nor, on the other, for denying it the right to prosecute for the entire transaction as a single offense, aggravated by increased value of all the property stolen. As the watch and purse were stolen at the same place and time, but one offense was committed.

[2] 2. It is argued that, as the accused is now charged with the commission of an offense of which a justice of the peace has no jurisdiction, the former conviction cannot operate as a bar. Simple larceny is an offense included within the compound larceny from a dwelling house (*State v. Nordman*, 101 Iowa, 446, 70 N. W. 621), and if, after having been punished for the simple larceny, he is again punished for compound larceny, in which the simple larceny is included and of which it is a necessary ingredient, he is twice punished for simple larceny—once upon the conviction of simple larceny alone and a second time upon the conviction of the same simple larceny as a part of a compound larceny. There are no degrees in the crime of larceny; the circumstances of the offense being recited in the several statutes by way of aggravation in fixing punishment, and manifestly a conviction thereof in the absence of allegation or proof of these attending circumstances is a conviction of precisely the same offense as when these are included. So it has been held that conviction of petit larceny is a bar to subsequent prosecution for grand larceny on the same facts. *State v. Murray*, 55 Iowa, 530, 8 N. W. 350. In *State v. Mikesell*, 70 Iowa, 176, 30 N. W. 474, an acquittal of a

charge of larceny from a dwelling in the nighttime was adjudged a bar to a prosecution for robbery for that he had been acquitted of larceny, the essential element of both offenses. It is laid down in 1 Wharton, American Crim. Law, that: "If on a trial of the major offense there can be a conviction of the minor, then a former conviction or acquittal of the minor will bar the major." And, as applying the principle to cases like that under consideration, see *State v. Gleason*, 56 Iowa, 203, 9 N. W. 126; *State v. Wiles*, 26 Minn. 381, 4 N. W. 615; *Floyd v. State*, 80 Ark. 94, 96 S. W. 125; *Powell v. State*, 89 Ala. 172, 8 South. 109; *State v. Paul*, 81 Iowa, 597, 47 N. W. 773; *State v. Blodgett*, 143 Iowa, 578, 121 N. W. 685, 21 Ann. Cas. 231. The same offense was charged in the information and the indictment. Though the latter included aggravating circumstances omitted in the former, the criminal intent was the same, and we are of opinion that the conviction of petit larceny under the information in the absence of fraud or collusion was a complete bar to the subsequent prosecution under the indictment for larceny from a dwelling house.

[3] 3. The Attorney General suggests that, inasmuch as the larceny was from a dwelling, the justice of the peace was without jurisdiction in convicting the accused of simple larceny, even though he was charged with the latter offense in the information. The state in prosecuting may disregard or omit in the charge lodged against the prisoner any or all aggravating circumstances, and, having done so, is not in a situation to challenge the validity of a conviction of an offense which as charged was clearly within the jurisdiction of the court.

The plea of former conviction should have been sustained.

Reversed.

HUNTER v. CITIZENS' SAVINGS & TRUST CO.

(Supreme Court of Iowa. Nov. 14, 1912.)

1. JUDGMENT (§ 777*)—JUDGMENT LIEN—EX-TENT—APPLICATION.

Code, § 3801, provides that judgments in courts of record are liens on real estate owned by defendant at the time of rendition of the judgment, and also on all he may subsequently acquire for 10 years from that date. *Held*, that a judgment lien was but a creature of the statute, and that such act was applicable to both legal and equitable interests in lands.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1338; Dec. Dig. § 777.*]

2. JUDGMENT (§ 752*)—LIEN—EFFECT.

A judgment lien on land does not create any property right in the judgment debtor, nor does it attach to the land as distinct from the title held or obtained by the debtor, but merely gives to the creditor a prior right as against a general creditor to enforce his claim by levy and sale of the debtor's legal or equitable interest in the land; the creditor being unable to

seize, sell, or acquire any greater interest than is owned by the judgment debtor.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1811; Dec. Dig. § 752.*]

3. JUDGMENT (§ 785*)—JUDGMENT CREDITOR—LIEN—INTEREST OF DISTRIBUTEE UNDER WILL.

Where testatrix bequeathed an undivided share in the residue of her estate to a judgment debtor, with authority to the executors to sell the real estate in question to pay debts and legacies, the judgment creditor acquired no lien or claim on the land which could be enforced against it in the hands of a purchaser from the executor, under the power contained in the will, and this though the purchaser took with notice of the judgment; the purchaser taking title through the executor, and not through the judgment debtor.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1358-1362; Dec. Dig. § 785.*]

Appeal from District Court, Johnson County; R. P. Howell, Judge.

Action in equity to quiet title to real estate. Decree as prayed, and defendant appeals. Affirmed.

McDonald & Olsen and O. A. Byington, all of Iowa City, for appellant. W. J. Baldwin and S. K. Stevenson, both of Iowa City, for appellee.

WEAVER, J. The conceded facts of the case are as follows: One Rosa Weber, being the owner of a 100-acre tract of land in Johnson county, Iowa, died testate December 25, 1909. Her will, which has been duly probated, first provides for certain legacies, and then proceeds to dispose of the residue of her estate in the following manner:

"I will, devise and bequeath all the rest, residue and remainder of my property after payment of the above legacies, which I may have at the time of my death of whatever kind, nature or description, real, personal or mixed to be equally divided among my eight children now living, each to receive one eighth; to my son, William, one-eighth; to my son, Frank, one-eighth; to my son, George, one-eighth; to my son Eddie, one-eighth; to my daughter Mary Bothell, one-eighth; to my daughter, Annie Frisbie, one-eighth; to my daughter, Lizzie Weber, one-eighth.

"Codicil.

"I name and appoint my son, William Weber and A. B. Frisbie, my son-in-law, to be the sole executors of this will and my estate without bond and authorize and empower them to sell my real estate and sign a deed therefor as fully and completely as I myself could do. And said deed when so signed shall convey all right, title or interest I have in any of my real estate at the time of my death, and no bond shall be required for the sale of said real estate or other purposes."

In the exercise of the power conferred upon them by the foregoing devise the executors on April 8, 1910, entered into a written contract to sell and convey said land to Charles R. Hunter, plaintiff herein, and

thereafter on March 1, 1911, a deed of conveyance in pursuance of said contract was made and delivered. It further appears that the land was incumbered by a past-due mortgage of \$2,500, and that other valid claims to the amount of \$400 were outstanding against the estate. The testatrix left no personal property available for the payment of debts, and said land constituted the only fund from which means could be derived for the proper administration and settlement of the estate. At the time of making the deed to plaintiff he paid the agreed purchase price of the land, except the sum of \$500, which was deposited with the defendant bank to secure the payment of claims which might be established against the estate during the time allowed therefor by law. At the same time the executors entered into a bond to plaintiff to protect him against any adverse claims which might be asserted against the land by judgment creditors of the beneficiaries under the will. It further appears that on May 25, 1906, and in the lifetime of the testatrix, the defendant bank obtained a judgment in the district court of said county against W. A. Weber (who is the William Weber named in the will) for \$307, with interest and costs, and that said judgment has never been paid or otherwise discharged. The defendant, asserting that upon the death of the testatrix its judgment became a lien upon the land or upon such interest therein as was acquired by W. A. Weber, caused execution to be issued and levied upon the property under date of May 18, 1911, whereupon plaintiff served written notice upon the defendant of his claim of ownership free and clear from the alleged lien, and, having tendered to defendant the sum of \$1.25 as provided by statute to cover the expense of making the conveyance, demanded the execution and delivery to him of a quitclaim deed. Said demand being refused, this action was begun to settle the rights of the parties, and quiet the title in plaintiff. The defendant's answer, briefly stated, is a reassertion of the existence of its alleged judgment lien which it asks the court to affirm and establish by its decree. The trial court found for the plaintiff that the judgment was not a lien upon the lands in his hands. To obtain a reversal of that holding, the defendant appeals.

[1] A judgment lien is a creature of the statute, and, except as there provided, none exists. Our statute (Code, § 3801) provides that judgments in courts of record are liens upon real estate owned by the defendant at the time of such rendition, and also upon all he may subsequently acquire for the period of 10 years from that date. This has been held applicable to both legal and equitable interests in lands. *Brehner v. Johnson*, 84 Iowa, 23, 50 N. W. 35.

[2] But a judgment lien has no effect to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

create any property right in the judgment creditor. It does not attach to the land as distinct from the title held or obtained by the debtor. His lien simply gives him a prior right as against a general creditor to enforce his claim by levy upon and sale of the debtor's legal or equitable estate in the land, but he cannot seize, sell, or acquire any greater interest than is owned by the debtor himself. If there be any equities, limitations, or conditions attaching to the debtor's title which would defeat it in the hands of the debtor himself, it would be subject to the same infirmities and liabilities in the hands of the purchaser under such levy. Even if the debtor has some real or apparent interest in land to which the lien has attached, yet if his title has been so qualified in the instrument creating it that it may be defeated or divested by a power intrusted to another, and it is in fact thereafter so defeated or divested, the lien falls with it, and the creditor cannot pursue the property in the hands of a third person who has acquired it through the exercise of that power. This is not only the reasonable rule, but is we think sustained by all the authorities. The thought will perhaps be more clear if we keep in mind the fact that a judgment lien does not attach to the land, but to the judgment debtor's interest in it, and, if that interest be subject to any infirmity or condition by reason of which it is eliminated or ceases to exist, the lien attaching thereto ceases with it. *Beaver v. Ross*, 140 Iowa, 154, 118 N. W. 287, 20 L. R. A. 65, 17 Ann. Cas. 640; *Thomas v. Kennedy*, 24 Iowa, 405, 95 Am. Dec. 740; *Bucknell v. Deering*, 99 Iowa, 548, 68 N. W. 825; *Holden v. Garrett*, 23 Kan. 98; *Shipe v. Repass*, 28 Gratt. (69 Va.) 716; *Sinclair v. Sinclair*, 79 Va. 40; *Snyder v. Martin*, 17 W. Va. 276, 41 Am. Rep. 670; *Scudder v. Voorhiss*, 5 Sandf. (N. Y.) 271. Applying this principle, the New York court in *Moore v. Pitts*, 53 N. Y. 86, where a lien was sought to be enforced against one Hall, says: "It is obvious that the lien of Gilman's judgment could only attach to such estate as Hall had in the premises. If that estate was subject to be divested by the breach of any condition subsequent, any such breach that would divest the estate would of necessity destroy the lien." See, also, *Ackerman v. Gordon*, 67 N. Y. 63; *Rose v. Hatch*, 125 N. Y. 427, 28 N. E. 467; *Leeds v. Wakefield*, 10 Gray (76 Mass.) 514; *Smyth v. Anderson*, 31 Ohio St. 144; *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600; *Wetmore v. Midmer*, 21 N. J. Eq. 242; *Morse v. Bank*, 47 N. J. Eq. 279, 20 Atl. 961, 12 L. R. A. 62; *Mayo v. Merritt*, 107 Mass. 505.

[3] The application of this rule to the case at bar is too clear to require argument. The will did not devise the land to the beneficiaries therein named. It gave them no more than a specified share in the residue of the estate. It may be presumed that

the testatrix knew that she was leaving no personality with which to pay her debts, and the legacies provided for in her will and that a sale of the land would doubtless be necessary for a proper settlement of her estate; but, even if such be not the case, she had the undoubted right to confer upon her executors a power of sale, and so long as the estate remained unsettled, and the executors were still in the active exercise of their trust, no devisee under the will could dispose of any part or share of the land and invest the purchaser with title or estate therein which would not be defeated and rendered ineffectual by a conveyance by the executors under the testamentary power conferred upon them. This is squarely held in the half dozen cases last above cited. It is immaterial whether we adopt the view that, by reason of an application of the doctrine of equitable conversion, the entire property is to be treated as personality, or adopt the other theory that the beneficiaries under the will took an actual legal or equitable estate in the land. In the former case there would be no lien which could affect the land in the hands of a grantee in a conveyance by the executors. In the latter case the estate or interest held by the debtor in the land would be divested by the executor's deed, and his only right in the premises would be his right to his proper share of the proceeds of the sale or rather to his proper share in the distribution of the residue of the estate after paying the legacies and making due settlement of claims and expenses of administration. With the extinguishment of the debtor's interest in the land the creditor's lien was also extinguished.

Without quoting largely from the precedents, it may be said that their general purport is fairly reflected in *Morse v. Bank*, 47 N. J. Eq. 279, 20 Atl. 961, 12 L. R. A. 62, a case in which the facts are much like those shown in the record before us. There the will authorized the executor to sell and convey. A judgment creditor levied an execution upon the fractional interest of a devisee, and obtained a sheriff's deed therefor. Subsequently the executor exercising the power given him by the will sold and conveyed to another purchaser. Upholding the latter conveyance the court says: "By the purchase at the sheriff's sale, complainant acquired only Richard's estate as an heir at law, subject to the trust and power of sale contained in the testator's will. If the power of sale subsisted and was capable of being executed at the time of the sheriff's sale, the purchaser at the executor's sale took a title under the testator's will paramount to any estate derived from or through the heir." The decision in *Wetmore v. Midmer*, 21 N. J. Eq. 242, is also very closely in point upon the question before us. The case of *Atlee v. Bullard*, 123 Iowa, 274, 98 N. W. 889, cited by appellant, is not in

point. There no attempt was made to exercise the testamentary power, but all parties in interest united in treating the property as land owned in common and entered into a partition of the same as such. The question as to the effect of the power upon the rights of the parties was not suggested until controversy arose over the adjustment of liens in distributing the proceeds of the partition sale, and we held that the point was raised too late. The decision in *Williams v. Lobban*, 206 Mo. 399, 104 S. W. 58, also relied upon by the appellant, does not sustain its contention for the opinion expressly recognized the principle that the heir's right and title to the land may be divested by the exercise of the power contained in the will. Counsel seem to argue upon the theory that the executors in exercising the powers given to them were selling and conveying the property of the devisees, and, as the latter could not have avoided the lien had they themselves made the conveyance, the same result must follow a conveyance by the executors. This view wholly ignores or misapprehends the nature of the estate or interest created by the will. As we have already mentioned, the will makes no specific devise or disposition of the land. The gift to W. A. Weber is limited to the right to an equal one-eighth share of the residue of the estate after paying legacies, debts, and expenses of administration, and this gift is made subject to the power of the executors to sell and convey. But the title conveyed under the power is not the title of the devisee. It is the title of the testator which passes to the purchaser directly from the testator through the executors, and not through the heirs. The power and authority of the executors to sell and convey being clearly paramount, its exercise eliminates or defeats the inferior or imperfect title, if any they had, of the devisees, and as a necessary consequence the lien, if any, attaching to such inferior or imperfect title, is extinguished with it. In this connection it is immaterial whether the true theory be that the executors took the title to the land for the purposes of their trust, or whether they be considered as the devisees or depositories of a power only, or whether the effect of the devise was to work an equitable conversion of the realty into personalty. By either route we are inevitably led to the same result. Many of the authorities are reviewed by this court in *Beaver v. Ross*, supra, and the conclusions there announced are in harmony with the views we have here expressed.

The point made by appellant that plaintiff purchased the land with notice of the claim asserted by appellant is not controlling. If the judgment was a lien which would follow the title in the hands of a grantee in an executor's deed, he would be held to have had at least constructive notice of it and could

not be heard to object to its enforcement, but if, as we have said, there was no lien or if there was a lien, and it was such as would be extinguished by a conveyance under the paramount power, there is no rule of law or principle of equity which would forbid his taking such conveyance and insisting upon holding the title free from the claims of the alleged lien holder.

The equities of the case as argued by counsel for appellant growing out of the claimed fact that the sale was made by the executors for the purpose of cheating and defrauding the judgment creditors of the devisees are not very persuasive. We do not hold, nor must anything we have said be so understood, that the property or the property rights which the devisees obtained under the will are not liable to be subjected to the claims of their creditors. Our decision only goes to the proposition that a judgment creditor acquires no lien or claim upon the land left by the testator which can be asserted or enforced against it in the hands of one to whom it has been conveyed by the executors in the exercise of power conferred upon them by the will. Beyond that we need not go. The creditors have neither legal, equitable, nor moral rights to any greater interest or estate in the property than their debtors acquired under the will. It was the undoubted right of the mother in making her will to burden or limit the estate she was giving her children by such lawful conditions and limitations as to her should seem wise. She was under no obligations to provide for the payment of their debts or to protect their creditors, and, if the conditions or limitations imposed by her made the subject of the devise less available or more difficult of subjection to the payment of their claims, it was within her right so to do, and affords them no just ground of complaint. *Meek v. Briggs*, 87 Iowa, 620, 54 N. W. 456, 43 Am. St. Rep. 410.

It is unnecessary to further pursue the discussion. What we have said sufficiently indicates our conclusion that the trial court was not in error in holding that, upon the agreed facts, the appellant's judgment constitutes no lien upon the land in the hands of the plaintiff.

The decree below is therefore affirmed.

WESEMAN v. GRAHAM.

(Supreme Court of Iowa. Nov. 20, 1912.)

1. TRIAL (§ 11*) — DOCKET — TRANSFER TO EQUITY SIDE.

Where, in an action for liquidated damages for breach of contract for the exchange of real estate, plaintiff pleaded the contract, alleged a breach, and demanded liquidated damages, and defendant admitted the execution of the contract, but denied that it became a binding contract because of specified conditions, and filed a cross-petition pleading fraudulent repre-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sentations made by plaintiff, and asking for the cancellation of the contract, the court on motion of defendant properly transferred the cause to the equity side of the docket.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 28-30; Dec. Dig. § 11.*]

2. EXCHANGE OF PROPERTY (§ 8*)—CONTRACTS—RESCISSIION—ESTOPPEL.

Where a party to a contract for the exchange of real estate based his refusal to perform on the ground that he had not made a contract, and that at the time all he knew of the land which the adverse party should convey was what the latter had stated, and subsequently investigated the land and found the adverse party's statements relative thereto false, he was not estopped when sued by the adverse party for liquidated damages for breach of contract to plead the fraud as a ground for rescission.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 14-18; Dec. Dig. § 8.*]

Appeal from District Court, Johnson County; R. P. Howell, Judge.

Suit to recover liquidated damages. Judgment for the defendant from which the plaintiff appeals. Affirmed.

Remley & Remley, of Anamosa, and Milton Remley, of Iowa City, for appellant. Ball & Ball and Wade, Dutcher & Davis, all of Iowa City, for appellee.

SHERWIN, J. The parties to this action signed a writing by the terms of which they were to exchange real estate; the plaintiff's land being in Nebraska and consisting of 605 acres, and the defendant's land being in Missouri and consisting of 1,109 acres. The writing provided for liquidated damages in the sum of \$5,000 should either party fail to comply with its terms.

[1] The plaintiff pleaded the agreement, alleged a breach thereof, and asked to recover the damage provided for therein. The defendant admitted signing the writing, but denied that it ever became a contract between them. He alleged that it was delivered to a third party, to be held until he could learn whether his brother, who was the owner of the Missouri land, had a deal on for the sale or exchange of the land, and, if he had, that the writing was not to be delivered to the plaintiff, and was not to become effective or a contract binding either party. The defendant further pleaded that at the time in question his brother was negotiating the sale or exchange of the Missouri land, and that, upon learning thereof, he immediately notified the plaintiff of such fact, and of the fact that he could not make the contemplated contract with the plaintiff. The defendant in a cross-petition pleaded false and fraudulent representations as to the quality and value of the Nebraska land, and asked that the contract be canceled. After the issues had been thus settled, the defendant moved to transfer the issue on the cancellation of the contract to the equity side of the docket to be first tried.

This motion was sustained, and the issue was so tried; the trial resulting in a judgment for the defendant. We are of the opinion that the court properly sustained the motion to transfer. It is, of course, true that the question whether there had, in fact, been a contract and the question of fraud in its procurement, if there was a contract, could both be determined in a law action. But the plaintiff might have dismissed before trial, in which event the defendant, in the absence of a cross-petition praying a cancellation of the contract, might still be subject to another action on an apparently valid contract. We have held that the cancellation of a contract can only be procured in equity, and under the rule so announced the issue here was properly tried. *Twogood v. Allee*, 125 Iowa, 59, 99 N. W. 288; *Carey v. Gunnison et al.*, 65 Iowa, 702, 22 N. W. 934; *Johnston & Son v. Roebuck*, 104 Iowa, 523, 73 N. W. 1062.

The defendant claims that the writing was not to be delivered or to become effective as a contract, if his brother, who was the owner of the Missouri land, was at that time negotiating a sale or exchange thereof. On the other hand, the plaintiff claims that the only condition on which the completion of the contract depended was that the brother had already made a sale of the Missouri land. We reach the conclusion that the defendant's statement of this oral agreement is the true one, and that the writing never, in fact, represented a contract between the parties, for it is conclusively shown that the brother was then negotiating a sale or exchange of this land and was then in Missouri, or on his way there in furtherance of such negotiation. But, even if the writing became a contract, we are convinced that it was procured by the false and fraudulent representations of the plaintiff as to the quality and value of the Nebraska land. The plaintiff knew the quality of his land and its value, while the defendant had not seen it, nor did he know anything about it aside from what the plaintiff told him.

[2] The appellant says, however, that the defendant did not base his refusal to carry out the terms of the writing on the ground of fraud, and that he could not change his position after the suit was brought. The defendant based his refusal on the proposition that he had never made a contract, and at that time all he knew about the land was what the plaintiff had told him. But, after this suit was begun, he investigated the land, and found that plaintiff's statements relative thereto were false. If he did not know of the fraud that had been attempted when he first refused to complete the contract, he was not estopped from pleading and relying thereon after he knew the facts. The judgment is affirmed.

Affirmed.

WILLIAMS v. WILLIAMS.

(Supreme Court of Iowa. Nov. 18, 1912.)

WILLS (§ 608*)—CONSTRUCTION—LIFE ESTATE—RULE IN SHELLEY'S CASE.

Under a will providing that upon the death of testator's wife, who was given a life estate, his son shall have and become owner in all the real estate of a life estate therein, and, on his death, the said property shall pass and go to the heirs of his body in fee, but, if he died without issue, it should go to his sisters, that he could not mortgage or sell the real estate except that he could mortgage it to pay legacies due his sisters, the son took only a life estate, since the rule in Shelley's Case is not controlling, and effect will be given to the intent of the testator as ascertained from the whole instrument, unless prevented by some positive rule of law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1872-1876; Dec. Dig. § 608.*]

Appeal from District Court, Johnson County; R. P. Howell, Judge.

Action to recover possession of certain real estate and to establish plaintiff's title thereto. Defendant demurred to the petition, and, this demurrer having been sustained, plaintiff elected to stand on his petition, and judgment was rendered for defendant. Plaintiff appeals. Affirmed.

Ney & Bradley, of Iowa City, for appellant. Wade, Dutcher & Davis, of Iowa City, for appellee.

DEEMER, J. Plaintiff claims title to the real estate in controversy under and in virtue of the will of Peter Williams, deceased, from which we quote the following paragraphs:

"Par. 1. I, Peter Williams, of the county of Johnson, state of Iowa, being of sound mind and disposing memory, do hereby make and publish this, my last will and testament, as follows, to-wit: I will and bequeath to my beloved wife, Ellen M. Williams, a life interest in and to all real property of which I may die seized or possessed the same to use to her use and support, she to receive all rents, profits and emoluments, derived therefrom so long as she shall survive me, provided, however, it is my will and wish that my son, Peter Williams, shall be allowed to rent the real estate in which my said beloved wife shall have a life interest as aforesaid, if my said beloved wife shall find and deem him a suitable and careful person to whom to rent the same.

"Par. 2. I will and bequeath that upon the death of my said beloved wife, that my said beloved son, Peter Williams, shall have and become owner in all real estate mentioned in the next preceding paragraph of a life estate therein and upon the death of my said beloved son the said property shall pass and go to the heirs of his body and become vested in them in fee simple

absolute, provided, however, should my said beloved son die without issue then the said real estate shall pass and go to his sisters, Lizzie F., Nellie H., and Jennie A., or to the survivors of them; it being my will that all of my real estate of whatever kind or nature of which I may die seized or possessed shall first be subject to the life estate or interest of my said beloved wife as provided in the first paragraph hereof, and upon her death shall pass to my beloved son, the said Peter, and that the said son shall have a life estate therein and that he shall not be privileged to mortgage or sell the said real estate or any part thereof except that he shall be allowed to mortgage the said real estate for the purpose of obtaining money with which to pay his sisters, Lizzie F., Nellie H., and Jennie A., the several sums bequeathed them as provided in the next succeeding paragraph hereof.

"Par. 3. Upon the death of my beloved wife, Ellen M., I will and bequeath that my son, the said beloved Peter Williams, shall pay to my beloved daughter, Lizzie F., the sum of twenty five hundred dollars, and shall pay my beloved daughter, Nellie H., the sum of two thousand dollars and shall pay to my beloved daughter Jennie A., the sum of one thousand dollars, the said several sums bequeathed in this paragraph to be paid within one year from the death of my beloved wife, and to become a charge and lien upon all real estate left in my estate and passing into the hands of my said beloved son, Peter, as in the next preceding paragraph provided until said several sums are fully paid.

"Par. 4. I will and bequeath that all the personal belongings of which I may die seized or owner or possessed, shall pass and become the property of my beloved daughters, Lizzie F., Nellie H., and Jennie A. in equal shares; it being my will that my said daughters shall take all and every kind of personal property of which I may die owner or possessed in equal shares; provided, however, I will and bequeath unto my said beloved son, Peter all the work horses, harness, buggies, wagons and farming machinery of which I may die owner or possessed; said beloved children to become owners of the said personal property upon my death; and provided further that the piano which I may possess upon my death shall go to my beloved daughter, Jennie A.

"Par. 5. I will and bequeath that my said beloved son, Peter Williams, shall pay all expenses of my last sickness and burial expenses and I will and request that my beloved daughters Lizzie F., Nellie H., and Jennie A., shall erect at their expense a monument at my grave which shall cost not less than six hundred dollars. I will and request that my beloved son, Peter Williams, shall pay the expenses of my last sickness and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

burial expenses of my beloved wife, Ellen M."

The argument is that by the second paragraph of the will either under the rule of Shelley's Case, or by reason of the language of the clause itself, plaintiff took an estate in fee, subject to a life estate in his mother, and that all subsequent clauses are void for repugnance or operated as a restraint upon alienation and should not be considered. For appellee it is contended that the rule of Shelley's Case is not applicable to wills, or, if applicable, it is not a rule of property, but may perhaps be considered in arriving at the testator's intent, and that, in any event, the rule to be applied here is to arrive at testator's intent from the examination of the whole instrument. It is useless to enter into the field of inquiry regarding the law of this state applicable to such wills. The question was fully examined in the late case of *Westcott v. Meeker*, 144 Iowa, 311, 122 N. W. 964, 29 L. R. A. (N. S.) 947, and we there held, following the Massachusetts court, that: "The rule for the construction of wills followed by courts in recent times is to ascertain the intent of the testator from the whole instrument, attributing due weight to all its language, and then give effect to that intent unless prevented by some positive rule of law, rather than to try to make interpretation of particular words or phrases in one instrument square with that before given to somewhat similar words used by some one else under other surroundings to accomplish a more or less different end. *McCurdy v. McCallum*, 186 Mass. 464, 72 N. E. 75. A few combinations of words had become so fixed in their meaning by law and unvarying use as to be rules of property. But ordinary canons for the interpretation of wills, having been established only as aids for determining testamentary intent, are to be followed only so far as they accomplish that purpose, and not when the result would be to defeat it."

Going back now to the will, it will be observed by reason thereof that testator expressly limited plaintiff's estate to one for life, and put it out of his power to sell or dispose of the fee. In at least two clauses of the will testator said that he should have but a life estate, and express limitations were put upon his power of alienation. It is manifest that the devise of the remainder to the heirs of his body and in default of issue to others was not intended simply as a limitation, but the words creating the estate were manifestly intended as words of purchase. The rule in Shelley's Case is not controlling, and no other rule should be recognized which will defeat testator's clearly expressed intent.

The judgment must be, and it is, affirmed.

WORRALL v. DES MOINES RETAIL GROCERS' ASS'N.

(Supreme Court of Iowa. Nov. 19, 1912.)

1. TRIAL (§ 251*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Where defendant, in an action for the wrongful levy of an execution on exempt property, pleaded a former adjudication as to the question of exemption, relying upon a judgment rendered by a justice of the peace, and there was evidence tending to show that the continuance of the case before the justice from September 21st to 24th was by mutual consent, the refusal of defendant's requested instruction that, if such continuance was agreed upon by plaintiff and defendant, and that judgment was on that day rendered against the claim of plaintiff, it would constitute an adjudication of her exemption rights, was error, since the issue of former adjudication was before the court.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

2. JUSTICES OF THE PEACE (§ 130*)—CONCLUSIVENESS—JUDGMENT OF JUSTICE OF THE PEACE.

The judgment of a justice of the peace is as conclusive on the parties as is the judgment of any other court.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 130.*]

3. JUDGMENT (§ 720*) — CONCLUSIVENESS — MATTERS CONCLUDED.

A judgment of a court having jurisdiction is conclusive as to all points and questions adjudicated.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1251; Dec. Dig. § 720.*]

4. JUSTICES OF THE PEACE (§ 125*)—PROCEDURE—CONSENT JUDGMENT.

Although under Code, § 4522, a justice of the peace has no jurisdiction to render a valid judgment after the expiration of the third day after the cause is submitted for final judgment, he has jurisdiction to enter judgment thereafter, if the parties to the action stipulate or consent to a continuance to that time; the statute being intended for the protection of litigants and one which they may waive without loss of the justice's jurisdiction.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 390-392, 395-399; Dec. Dig. § 125.*]

5. EXECUTION (§ 472*) — WRONGFUL LEVY—MEASURE OF DAMAGES.

In an action to recover damages for wrongful levy on exempt furniture, where there was evidence that there was a regular and well-established market and a well-established market price for secondhand furniture at that place, the proper measure of plaintiff's damages was the secondhand retail value of the furniture taken, under the general rule that the value of property is to be established by evidence of what it is worth in the market.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 1403, 1404; Dec. Dig. § 472.*]

6. EVIDENCE (§ 113*)—COMPETENCY—VALUE.

Before actual value of furniture can be shown in an action to recover damages for an alleged wrongful levy thereon, it must appear that there is no market value.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 259-296; Dec. Dig. § 113.*]

Weaver, J., dissenting in part.

Appeal from District Court, Polk County; Hugh Brennan, Judge.

Suit to recover damages for the wrongful levy of an execution on exempt personal

property. There was a verdict and judgment for the plaintiff. The defendant appeals. Reversed.

Graham & Graham, of Des Moines, for appellant. J. L. Witmer, of Des Moines, for appellee.

SHERWIN, J. The defendant had a judgment against the plaintiff and her divorced husband, and caused the issuance of an execution and a levy thereunder on household goods in the possession of the plaintiff. Shortly after the levy made by the defendant, Chase & Co., of Des Moines, caused a second levy on the same goods; process in both of these cases having issued from the same justice court in Des Moines. After both levies had been made, the plaintiff herein, Mrs. Worrall, served notice that she claimed all of said property as exempt to her. This was denied by both the defendant and Chase & Co. Issue was joined on the question of exemption before F. A. Cope, the justice of the peace, before whom the case was pending. A trial was had on the merits, and it was found that the goods levied on were not exempt to Mrs. Worrall. No appeal was ever taken from said judgment. The trial on the question of exemption was completed September 18, 1908, and the justice took the matter under advisement and continued the case until September 21, 1908. On the 21st of September, the case was again continued for a period of three days, and judgment was finally entered by the justice on the 24th day of September. Thereafter the plaintiff herein, Mrs. Worrall, brought an action in equity against Chase & Co., asking that they be restrained from enforcing their judgment against her. The case finally reached this court, and we held therein that the judgment obtained by Chase & Co. against Mrs. Worrall was void for want of jurisdiction in the justice to render it six days after the cause had been submitted to him for final action. *Worrall v. Chase & Co.*, 144 Iowa, 665, 123 N. W. 338.

[1] In the case now before us, the defendant pleaded former adjudication as to the question of exemption, relying upon the judgment rendered by the justice of the peace in the proceedings to which we have already referred. There was evidence tending to show that the continuance of the case before the justice from the 21st to the 24th of September was by mutual consent, and the defendant asked an instruction to the effect that if such continuance was agreed upon by Mrs. Worrall and this defendant, and that judgment was on said day rendered against the claim of Mrs. Worrall, it would constitute an adjudication of the exemption rights of Mrs. Worrall. This instruction was refused, and the court did not instruct on the question of a previous adjudication. This instruction, or a similar one, should have been given. The issue of former ad-

judication was before the court, and there was evidence tending to show that there had been an adjudication, so far as this defendant is concerned, in the trial before the justice.

[2] The judgment of a justice of the peace is as conclusive on the parties as is the judgment of any other court. *Central Iowa Ry. Co. v. Piersol*, 65 Iowa, 498, 22 N. W. 648.

[3] And a judgment of a court of jurisdiction is conclusive as to all points and questions adjudicated. *Beh v. Bay*, 127 Iowa, 246, 103 N. W. 119, 109 Am. St. Rep. 385; *Reynolds v. Lyon County*, 121 Iowa, 733, 96 N. W. 1096.

[4] We entertain no doubt as to the jurisdiction of the justice to render judgment on the 24th day of September, if, as a matter of fact, the parties to the action consented to a continuance to that time. It is only where the decision is delayed beyond the statutory period for judgment, without the consent of the parties, that the justice loses jurisdiction to render a valid judgment. See *Iowa Union Telephone Co. v. Boylan*, 86 Iowa, 90, 52 N. W. 1122. We think it a general rule that parties to an action in a justice court are bound and estopped by their stipulation as effectively as they are in any other court. The statute (Code, § 4522) requiring judgment to be entered within three days after the cause is submitted to the justice for final action is undoubtedly intended for the protection of litigants, and may be waived without the loss of jurisdiction by the justice.

[5] 2. The defendant offered evidence tending to show that there was a regular and well-established market for secondhand furniture in Des Moines, and a well-established market price therefor. On the other hand, the plaintiff was allowed to prove, over defendant's objections, the actual value of said goods. The defendant asked an instruction to the effect that, if it was found that there was in Des Moines at the time of the levy an established secondhand retail market for used furniture, then the proper measure of plaintiff's damages would be the secondhand retail value of the furniture taken. We think the instruction should have been given. It is the general rule that the value of property is to be established by evidence of what it is worth in the market. *Scott v. Security F. Ins. Co.*, 98 Iowa, 67, 66 N. W. 1054; *Read v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. 665, 64 Am. St. Rep. 180.

[6] Before the actual value can be shown, it must appear that there is no market value. *Lundvick v. Ins. Co.*, 128 Iowa, 376, 104 N. W. 429; *Houghtaling v. C. G. W. Ry. Co.*, 117 Iowa, 540, 91 N. W. 811. That there may be as certain a market value for secondhand goods as for new goods is quite possible, and, where such is the case, such value should govern.

Other errors are presented, but they need

not be discussed in view of our reversal on the points indicated. Judgment reversed. Reversed.

WEAVER, J. I concur in the conclusion announced and in the argument of the foregoing opinion except in so far as it is expressed in the second paragraph. I do not agree in its holding upon the measure of damages.

OWENS v. NORWOOD WHITE COAL CO.

(Supreme Court of Iowa. Nov. 19, 1912.)

On Rehearing.

1. MASTER AND SERVANT (§ 278*)—INJURIES—SUFFICIENCY OF EVIDENCE.

In a coal miner's action for personal injuries from a slate fall, evidence *held* not to show negligence by defendant in failing to provide a safe place of work by not properly timbering the entry or in failing to warn plaintiff of the danger, etc., as claimed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954-972, 977; Dec. Dig. § 278.*]

2. MASTER AND SERVANT (§ 280*)—INJURIES—SUFFICIENCY OF EVIDENCE—ASSUMPTION OF RISK.

Evidence in a coal miner's action for personal injuries caused by a slate fall *held* to show that plaintiff assumed the risk of such injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 981-986; Dec. Dig. § 280.*]

3. RELEASE (§ 57*)—SUFFICIENCY OF EVIDENCE.

Evidence in an employe's action for personal injuries, defended on the ground that plaintiff executed a release in full satisfaction of all claims, *held* not to show plaintiff's mental capacity at the time of signing the release, or that such capacity was impaired.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 106-108; Dec. Dig. § 57.*]

4. RELEASE (§ 57*)—SUFFICIENCY OF EVIDENCE—FALSE STATEMENTS.

Evidence *held* not to show any false or fraudulent statement by defendant's agent as to what the attending physician told him as to how long plaintiff would be in bed.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 106-108; Dec. Dig. § 57.*]

5. TRIAL (§ 252*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

In an employe's action for personal injuries, defended on the ground that plaintiff executed a release in full settlement of all claims, the court instructed that, if at the time plaintiff signed the release he was suffering great pain and was mentally unfit to transact business, and the defendant made use of statements that he would be well and at work within six weeks, and that the doctor had so informed him, and plaintiff was induced by such statements to sign the release, and that such statements were not true, but made for the purpose of inducing him to sign the same, the jury should find that the release was void, and that, in considering whether it was obtained by fraud, they should consider plaintiff's condition at the time, and whether he was in such condition that he was incapable of understanding its effect, etc. *Held*, that the instruction authorized the jury to disregard the release if it found that plaintiff did not have sufficient mental ca-

capacity to understand its nature and effect, and hence was erroneous, in absence of evidence tending to show plaintiff's mental capacity at the time.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

6. RELEASE (§ 15*)—VALIDITY.

The law favors adjustment of controversies, and an agreement executed for that purpose will be upheld when fairly made without fraud or false representations.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 30; Dec. Dig. § 15.*]

7. RELEASE (§ 15*)—VALIDITY.

Settlements as for personal injuries, when made with persons who are injured, poor, and without the aid of counsel, should be closely scrutinized.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 30; Dec. Dig. § 15.*]

8. RELEASE (§ 16*)—PERSONAL INJURIES—VALIDITY.

One injured from negligence has the right to settle the damages, and a contract executed by one for that purpose will be sustained, though he was mistaken as to the nature and extent of his injuries.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 32; Dec. Dig. § 16.*]

Appeal from District Court, Polk County; Hugh Brennan, Judge.

Action at law to recover damages for personal injury. There was a verdict and judgment for plaintiff, and defendant appeals. Reversed.

For former opinion, see 133 N. W. 716.

Guernsey, Parker & Miller, of Des Moines, for appellant. J. L. Gillespie and Bannister & Cox, all of Des Moines, for appellee.

DEEMER, J. On August 5, 1908, the defendant was, and for some time had been, operating a coal mine in Polk county, and plaintiff was engaged in its service. He was a miner of experience, and at the time in question was principally engaged in attending the pumps of the mine, but at intervals, when his attention was not thus required, he assisted in other work when called upon so to do, and at the time of the injury of which he complains he had gone to the assistance of one Grange, who was the timberman in charge of a mine entry spoken of by the witness as "17." Plaintiff had some experience as a timberman, and was acquainted with the manner in which mine entries in that neighborhood were constructed and maintained. It was the duty of Grange to inspect this entry every day, and especially those parts of the roof and walls not protected by timbers placed for that purpose. As the entry was driven further into the mine, the timbering, so far as any was thought to be necessary, was advanced accordingly for the purpose of maintaining a passage or roadway between the holsting shaft and the places where coal was being excavated. As the excavation of the entry was pushed forward into the mine, the track on which coal cars were operated was also

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

extended, keeping the end of the track a short distance behind the face of the coal. Between the end of the track and the face of the coal the roof and walls of the entry were left to the inspection and care of the miner or miners working at that point; but, so far as the entry was completed and track laid, it was the duty of the timberman in charge to look after the safety of the passage. Wherever the condition or character of the roof of the entry appeared to demand it, protection against danger from falling rock and slate was usually provided by setting up posts on which cross-timbers and logs were placed. The existence of a defective roof from which a fall is liable to occur may sometimes be discovered upon visual inspection, and, when more obscure, may ordinarily be detected by tapping or sounding with a hammer or pick. This entry was being extended to the east, and from its side at intervals were turned or opened rooms from which miners dug coal which was loaded upon the cars and hauled through the entry to the shaft. Nearest the east or working end of the entry was room known as "No. 7," which was worked by one Murray, and about 30 feet farther westward was room No. 8, worked by one Owens, not the plaintiff. Prior to August 4, 1908, the work of timbering the entry had been carried forward to a point about halfway between the openings into rooms 6 and 7. From this place the roof was left unsupported to a point 30 or 40 feet east of No. 7, from which point Grange, the timberman, having called plaintiff to his assistance, began to set another series of supports. For this purpose they brought in timbers on a coal car, and under the direction of Grange they had begun to unload them immediately east of the switch at the turn of No. 7, when a large mass of slate fell from the junction of the roof with the rib or wall of the entry, and plaintiff was caught in the fall and severely injured. He charges that his injury was occasioned by the negligence of the defendant in failing to provide him a reasonably safe place to work, and in failing to properly timber the entry, and that defendant, though having knowledge of the dangerous condition of the entry at that place, failed to warn the plaintiff thereof. The defendant denies the alleged negligence on its part, alleges that plaintiff himself was guilty of negligence contributing to his own injury, and that he assumed the risk of the conditions of the mine at the place in question, and is therefore not entitled to recover damages. Defendant further pleaded that, after plaintiff's injury and before this action was begun, the parties had an accounting and settlement, the result of which was that defendant undertook to pay, and did pay to, the plaintiff or for his use the sum of \$138, and that he agreed to accept, and did, in fact, accept and receive, the same

in full payment, settlement, satisfaction, and discharge of all his demands and rights of action on account of defendant's alleged negligence, and did then and there, in writing release the defendant from all further liability on account thereof. Replying to said plea of settlement, plaintiff admits the execution and delivery of the written acknowledgment of satisfaction set up by the defendant, but says the same was procured from him by fraud and misrepresentation, and he is therefore not precluded or estopped thereby.

[1, 2] 1. In view of our final conclusion in the matter, we need only say, with reference to the merits of the case, that there are grave doubts about there being any showing of actionable negligence. The majority of the court are inclined to think there was no such showing of negligence on the part of the defendant as to take the case to the jury, and are also inclined to the opinion that the plaintiff assumed the risks and hazards of which he complains. Part of the work which he was employed to do was to assist in timbering the mine, and this he was engaged in when injured. A minority of the court think that these were jury questions and should have been submitted as such. We refer to the matter now for the purpose of showing that in any event there has always been doubt of defendant's liability and of plaintiff's right to a verdict on the testimony, aside from the question upon which the case turns. This much in preparation for the controlling proposition in the case which we shall now consider.

[3, 4] 2. On the 28th day of August, 1908, something more than four weeks after the accident, plaintiff made a settlement with the defendant and executed to it the following receipt and release:

"Form 373, 2 M, 607.

"I, J. R. Owens, hereby admit and acknowledge that there has been paid to me in hand this day by Norwood White Coal Company the sum of one hundred thirty six and 60/100 dollars in full settlement, accord and satisfaction of any and all claims or demands of every description which I now have or may hereafter have against the said Norwood White Coal Co. on account of an accident causing injury to me on or about August 5th, 1908.

"In testimony whereof, I hereunto set my hand and seal this 28th day of August, 1908. J. R. Owens [Seal.]

"Witness: C. Woodbridge. Mrs. J. R. Owens."

Prima facie, at least, this is a bar to his recovery. He pleaded in his reply, however, that defendant's agent and attorney falsely represented to him that he had no cause of action, and by his professed friendship and false pretenses of sympathy he won his (plaintiff's) confidence and induced him to

sign the paper and accept the money, and that said attorney and agent falsely and fraudulently represented and stated to plaintiff that his (plaintiff's) doctor had stated to him (the said agent) that he (plaintiff) would be up and around within six weeks. He further alleged that he had no opportunity to consult counsel with reference to his case, and believing each and all of said statements to be true, and relying thereon, he entered into the contract of settlement which he would not have done had he known the truth. He also pleaded a mutual mistake of the parties as to plaintiff's legal rights, and asked that the settlement be disregarded, and that the amount paid him be credited on whatever allowance the jury should make on his behalf. The testimony introduced on this issue tended to show that defendant's agent and attorney stated to plaintiff that he had no case, and that he would be a lucky man to take the money offered; that this agent, one Woodbridge, visited plaintiff about August 10, 1908, and had him make a statement of his case, and at the time "he asked Mr. Owens if he knew him, and Mr. Owens said, 'I suppose you are sent here by the company,' and he said, 'That is who I am.' He said, 'My name is Woodbridge,' and he said, 'Mr. Owens, I am going to do all I can for you,' and he says, 'I have gone where they will cuss and swear at me,' and he says, 'You have acted the perfect gentleman, and I am going to do all in my power, and I am going to try and get half of your wages while you lay here.' That was after he had talked with Mr. Owens. Mr. Woodbridge said where he goes they cuss and swear at him some places, and he said the company would rather give it to the lawyers than to give it to the man that cussed him."

The witness who gave this testimony (plaintiff's wife) further testified: "On his second visit Mr. Woodbridge came with Dr. Cokenower who had been taking care of my husband. The two drove up together in a buggy. When Dr. Cokenower came in, he brought Mr. Woodbridge to the bed and said, 'Come here, and see that I am not holding this man here any longer than I can possibly help,' and he took care of his back, and put a new drainage in his back, and when Dr. Cokenower said that, Mr. Woodbridge came up and looked at my husband. After the doctor got through dressing the wounds, he picked up his satchel and walked out and sat in his buggy. Mr. Woodbridge then sat on a chair alongside of my husband and told him he had heard from the company that the company had allowed him \$75 all told, but he said, 'Mr. Owens, your hurt is deeper than I thought it was; I will do better than that on my own responsibility. I will give your hospital bill and doctor bill, and give you \$50.' He said, 'Wait a minute and I will go and see the doctor as to how many trips he will have to

make,' and he went out and came back and said, 'The doctor said he would have to make two or three more trips.' When Mr. Woodbridge came back in from the buggy he said, 'Your doctor bill is now close to \$75 and he will have to make two or three more trips, and that will bring it close to \$100. He charges \$5 a trip.' My husband said, 'Well, I will think about it; I will think it over.' My husband was not then able to walk around. He could not move himself at that time. Mr. Woodbridge said, 'All right, you think it over, and if you decide on doing it, I will leave you my phone number, and you can call me up.' My husband asked him if he could not give him half his wages that he was getting, and he said, 'I cannot do that because the doctor says you will be out of here and at work in six weeks.' Mr. Woodbridge said that after he had stepped out of the house and went to Dr. Cokenower's buggy. I could not hear what Dr. Cokenower said to Mr. Woodbridge. On this second visit, Mr. Woodbridge said to my husband that he had no case whatever; that he was an attorney himself, and was going to do all he could for him; that he had got word from the company, and that they had looked it up thoroughly, and he had looked it up thoroughly himself, and he would take it on his own shoulders and give us more than the company allowed, and he said we had no case whatever. He said he was an attorney and claim agent. He said he had had experience as a claim agent for a long time, and had been out where people had been hurt in the mines. On that second trip my husband did not accept Mr. Woodbridge's offer. Mr. Woodbridge picked up his hat off the stand and started out and said, 'If you decide to do it, you can call me up,' and he left his phone number. After Mr. Woodbridge left, my husband and I talked over his offer. My husband has no education. During our married life he has done nothing but mining and timbering in the mines. Mr. Woodbridge came to our house again when I phoned for him. We decided to take the \$50 and have him pay the hospital bill and doctor bill. We thought if my husband got out and at work in six weeks we were doing pretty well, and my husband said, 'All right, you go and phone for him, and we will take it,' and I went and phoned. Mr. Woodbridge came when I phoned him. He was out there before I had time to get over from the home. Mr. Woodbridge came in and said, 'Mr. Owens, you are a lucky man, because you have no case whatever, and you are lucky to take this; you had better take this than to have nothing.' * * * I took care of Mr. Owens from the time he returned from the hospital up to the time Mr. Woodbridge made his third trip. Mr. Owens could not move himself. I had to move and help him. When I went to lift him or take care of him he would scream and holler

with his leg. He could not be moved at all. He was in that condition at the time Mr. Woodbridge made his third visit. Mr. Woodbridge was out the second time on Monday, and it was either Thursday or Friday of the same week that he came out the third time and settled. It was either three or four days after the second trip that he settled up, on the third trip. Dr. Cokenower had not been at the house between those two trips of Mr. Woodbridge. He came the same day right after Mr. Woodbridge left. Up to that time Mr. Owens had not talked with any business man or lawyer about his case. Mr. Owens was in bed all the time. Mr. Woodbridge told us that if we went and got lawyers to see about it their lawyers would beat us out of it anyhow. That was on the second trip. * * * There were 12 days from the time he was hurt that he never moved a limb or shut an eye to sleep, and it was all of six weeks before he could use his limbs at all. He had not done any work since he was hurt."

This witness further testified on cross-examination: "It was during his second visit that Mr. Woodbridge first proposed to pay my husband \$50 and the hospital and doctor bills. It was on that second visit also that he told my husband that he had no case against the company. My husband was in bed, and I was in the same room and heard the conversation. My husband did not accept the offer at that time, but said he would think about it. Q. And then that was on Monday and your husband thought about it until Thursday or Friday? A. Yes, sir. He talked it over with me and decided to accept the proposition. We accepted it on Thursday or Friday, and the money was paid at our home, 854 Boyd street, in East Des Moines. * * * My mother and father live just across the street. My father was at the house when Mr. Woodbridge came over the second time. He was in the room and heard this conversation. One of the neighbors right across the street had a telephone. I used that telephone when I phoned for Mr. Woodbridge on the day he came and paid us. During the days of the week before he paid us I was taking care of Mr. Owens. It took most of my time. I could have gone over to my father's house during that time, had I wanted to. I went to the telephone myself and talked to a lady in Mr. Woodbridge's office. I was not at the telephone before during that week unless I phoned for the doctor. Oh, I did not phone for the doctor that week. He did not come out from the time Mr. Woodbridge was there the second time until Mr. Woodbridge came and paid the money. The doctor came right after Mr. Woodbridge went away. If I had had occasion to telephone, I could have done so any day that week. Neither Mr. Owens nor myself talked with my father about this settlement. We did not talk with any one. Did not call up any lawyer or talk to any lawyer about it. Mr.

Woodbridge told us it would do no good to talk to a lawyer because we had no case whatever, and if we went and hired a lawyer that their lawyers—that is, his company's lawyers—would win the case for the company. That is about all he said about that matter. He tried to give us to understand we had no case, and that therefore we had better settle. We did not call up any business man or talk with any business man about settling. I did not go to the store during that week before the settlement. I could have gone, but I had no occasion to go. I was present when the settlement was made, and saw the receipt signed by my husband. He signed his own name to it. He can read and write. He can and does read the newspapers. He was not delirious or out of his head at all during that week before the settlement that I know of. When he was talking about this matter of this settlement and about other matters he talked rationally as though he understood what he was talking about. He did not get out of his head at all. He was suffering agonies, but when he talked about things he talked sensibly as he ordinarily did."

And on re-examination she gave the following testimony: "I did not have any talk with Dr. Cokenower over the phone during that time between these two visits of Mr. Woodbridge. I did not try to have any talk with him. I never asked the doctor about this statement of Mr. Woodbridge's as to how long my husband would be disabled. I never thought about asking the doctor about what he had told Mr. Woodbridge."

Plaintiff himself gave this version of the matter: "They took me from the mine to my home and from there to Mercy Hospital. I remained in the hospital about four days. Went there on the 5th and left on the 9th, and after that stayed at home. They took me home in the ambulance. I was not able to sit up in a chair and be around when they took me home. I got home on the 9th, and on the 10th Mr. Woodbridge was there early in the morning. He came alone. * * * At the time Mr. Woodbridge came to see me, I was suffering untold pain. I was suffering with my kidneys and back, clean up to the back of my head here—all kinds of pain—and I was suffering in this knee here. It was fractured and swelled all up and gave me all kinds of pain. Most of the time I laid flat on my back. I could not stand sitting up too much. I could move the right limb a little, but the left I could not. I did not sleep well at night. I never slept at all for 12 days and 12 nights after I was hurt for the simple reason I was in all kinds of misery and my nerves were all shattered. When Woodbridge came to see me on the 10th of August he asked me how I felt. I told him very poorly. He said, 'Yes, I guess you do.' He says, 'Who does your doctoring?' I says, 'Dr. Cokenower,' and he said, 'I know him

well; he does our doctoring.' He got to asking me how I got hurt, and I commenced to tell him the best I knew how, and he took out a pencil and paper and commenced writing down. He was sitting down in the chair. As I talked to him he would keep writing it down. I told him everything he asked me. I answered his questions as near as I knew how. After he had finished writing, he did not read the paper to me. He did not hand it to me to let me read it. He just stuck it in his pocket. I do not remember whether he got me to sign it or not. I do not remember whether I signed it or not. Q. Now did he mention anything about a settlement on the first trip? A. Why, he said that I had acted a perfect gentleman with him, and that he was going to do all in his power to help me along. He was going to try to get me half of my wages. In most of the cases people was cursing and swearing around, and if they took the case to a lawyer and took it to court, why their lawyers would generally beat them. He did not advise me to go and consult a lawyer. He said if I went to see a lawyer I would be beat anyhow. He did not say who he was until he got everything wrote down, and then asked me if I knew him, and I said I did not unless he was a man sent there by the company, and he said, 'Yes,' he was sent there by the company. I believed these things he told me because he was a lawyer and I was not. I had confidence in what he told me on that visit. He came again in about two weeks with Dr. Cokenower. I was still in about the same condition. I was suffering pain; suffered all that day because he went and put a drainage in my back while he was standing there looking. Dr. Cokenower and Woodbridge came into the house together. Dr. Cokenower said, 'Step up here and I will show you that I am not holding this man in bed any longer than I possibly can,' and he took the bandage off and started to work on my back, and called Mr. Woodbridge's attention to my back. He was where he could see it. After the doctor got through bandaging my back, he said, 'I will step out, Mr. Woodbridge, to the buggy, and you can go ahead and do your talking, and I will wait for you.' Woodbridge stayed in the room. Woodbridge said he had consulted with the company. They had found out that I had no case whatever, and he himself was an attorney, had been in the business a good many years, and had handled such cases as mine and found out that I had no case whatever. He said he had heard from the company, and they claimed I had no case. He made an offer of settlement at that time. Woodbridge said the company had authorized him to give me \$75 all told, but the condition I was in he would do better. He would make it better. He would take the responsibility on his own shoulders. He would pay my hospital bill and doctor bill and give me \$50. He said he would take

that upon his own shoulders. He mentioned that the doctor's charges so far were \$75, and he said, 'I will step out and see the doctor and see how many more trips he has to make.' He left the room and stepped outside, and after awhile came back. He said, 'The doctor said he would probably make two or three trips yet.' That would bring the doctor bill up to \$90 or \$95. He said that the doctor said I would be up out of bed and at work in six weeks. He asked me if I was going to take the money. I told him 'No,' I would not do it, I would study over the matter. He said I had better take the money because I had no case to fight on whatever. He said if I would take it then, and after I got to studying over the matter he left his telephone number with me on a card and said, 'When you come to decide to take it, phone down to me and I will come right direct up.' * * * After Woodbridge left after the second trip, my wife and I discussed over the amount he wanted to give me. We decided that we had better take that than to get nothing at all. We could live on that \$50 anyway, and by that time probably I would be able to be out and get to work again. I did not know how bad I was hurt. I supposed the doctor knew his business. Three or four days after Woodbridge's second visit, my wife telephoned him to come. He came. That was his third trip. He said, 'Mr. Owens, you are a lucky man that you sent for me to accept this money.' He said, 'You have no case at all.' He said, 'Furthermore, you will be out of bed in six weeks and at work.' I believed what he told me on that third trip, and relied on that in making the settlement and taking the money. He paid me \$50. He said the doctor bill would be \$90 or \$95. I knew what the hospital bill was. It was around \$15.50, or \$16. Q. You never paid the doctor bill or hospital bill? A. No. Q. Do you know whether he did? A. Yes, he did. Up to the time I made the settlement with him and signed the release and took the money, I relied upon all the statements made by Woodbridge to me. I would not have made the settlement and taken the money had he not made those statements. I did not distrust him. I recognize my signature to the paper marked 'Exhibit 3.' That paper also bears my wife's signature. I saw her sign it there. I saw my wife sign it, and I signed it. I can read the paper Exhibit 3, both the written and printed parts of it. I do not have much difficulty in reading it by taking my time to it. The printed part of it is large and clear. Exhibit 3 bears date August 28, 1908. I believe that is the date when I signed it. Mr. Woodbridge did not hand Exhibit 3 to me. When I signed it, it was off of the bed on a chair. I was lying on my back. I do not know whether the written parts were filled in it or not when I signed it. I did not see whether it had my name, J. R. Owens, written at the top, nor the

words 'Norwood White Coal Company.' I could not swear whether those things were written in or not. I suppose the sum \$136.01 was written in there at the time I signed it. I have no reason for thinking that those things were not written in there at the time I signed it. I have no doubt but that the written parts of Exhibit 3 were all in it when I signed it. Q. That is what you were recollecting for? A. I signed it, yes. Q. For the injuries received August 5, 1908? A. For the money I received from him. * * * This settlement was made on the 28th day of August. Mr. Woodbridge did not read over the release, Exhibit 3, to me. I did not ask him to. My wife did not read it to me. I did not ask her to. I got the benefit of the whole \$136.00 in settlement. He did not frog me on that part of it. I did not try to read the receipt myself that day. There were three or four days intervened between the time when Mr. Woodbridge offered to make this settlement and the day it was made. At the time Mr. Woodbridge made the offer and I told him I would think it over, my father-in-law was present. He heard Mr. Woodbridge's offer. I did not talk it over with my father-in-law at any time, but I talked with my wife. My father-in-law was an old coal miner. He was an old hand at it. * * * I never did talk that matter of settlement over with my father-in-law. That was my business. I thought I was treated right and that I had a friend. I thought Mr. Woodbridge was my friend. Yes, I knew he was representing the company and was looking after its interests. I did not know that he was trying to get out of the matter so that it would not cost the company a great deal of money. I guess my common sense did not teach me that. He said he was a friend of mine and he was going to do everything possible for me. I had never seen him before he came out there on the 10th of August. Never had any acquaintance with him before that. On that day he was there probably an hour and a half. That was the time when he got this statement signed up. About all that was done there that time was his writing down this statement and then leaving. He did not make any offer of settlement the first day. He came out there again two weeks afterwards. That time he came with the doctor. He was there probably half or three-quarters of an hour, and about 20 minutes of that time the doctor was not in there. The next time I saw Woodbridge was the time he paid me the money. I suppose he was there about 15 minutes before I signed this receipt. These were the only times I had ever spoken with Mr. Woodbridge. These were the only times that I had ever seen him in all my life. I knew he was a representative of the company, and was representing the company's interests. That was the extent of my friendship and acquaintance with Mr. Woodbridge. Yes, I knew that this was

a receipt in full. I knew that it didn't leave me any right to claim anything against the company. I accepted this at that time as a full settlement on account of the injuries that I had received. That is what I intended to do at that time. He said I had no case. There were three or four days intervening between the time when Woodbridge made me the offer and the time I accepted it and signed the receipt. Those days were along the 24th, 25th, 26th, and 27th of August. Dr. Cokenower was not there to see me during that time. I heard him testify that he was out here during that time, but he was not. I heard him swear that he was. I did not at any time ask Dr. Cokenower what he thought about when I would be able to get up and go to work. I never asked him the question. I was not curious to know what he would say about it. I never got my wife to telephone him about it. Never sent my boy to see him and ask him that question. I never made any effort whatever to inquire of Dr. Cokenower himself as to how long I would probably be disabled. There was nothing to prevent me doing so. At the time of the settlement I had heard of other men being injured and bringing suits to recover damages. I knew that there was such a thing as a court and jury to try that kind of case. I knew that sometimes the verdicts were one way and sometimes the other. Q. And so, when Mr. Woodbridge told you that you had no case, you knew he was simply expressing his opinion about it, didn't you? A. No, he said he had looked it up. Q. You knew the other side might look the other side up? You knew some one might look your side up, didn't you, if you had asked them to do it? A. I believed what he said. I knew I could get a lawyer to look up my side of the case, but I did not do it; did not try to do it. There was nothing to prevent my wife telephoning a lawyer. Nothing to prevent me sending for one. I had all the opportunity in the world between the time Woodbridge made the offer and the time he paid me the money, if I wanted to. There was nothing to prevent my doing so. I had had a physician in my family before this. Some one called Dr. Cokenower this time when I was hurt. He was my family doctor, and he had been before that. I do not know who called him this time. Q. Did you talk with Dr. Cokenower between the second and third trips? A. No, sir. Q. What, if anything, prevented you from consulting a lawyer about your case before you settled? A. Well, Mr. Woodbridge said, if I went and consulted a lawyer and brought it into court, their attorneys would beat me anyhow, so I did not see that there was anything for me to do. I did not think that there was any necessity or use of seeing a lawyer. I was on my back in bed. My wife was there in attendance on me. My mother-in-law would come over sometimes and my sister-in-law would come

in and help take care of the children. We had no nurse."

This is practically all of the testimony as to the inducements offered plaintiff to settle and to prove their falsity. Plaintiff, of course, claims that his testimony made out a case against the defendant, and he introduced testimony showing the nature and extent of his injuries, which were in fact serious and doubtless permanent, and in addition to that he produced Dr. Cokenower as a witness. Dr. Cokenower who, it is conceded, was plaintiff's physician, and in no manner represented the defendant, nor was he employed by it, testified substantially as follows: "I remember Mr. Woodbridge riding out to Mr. Owens' place in the buggy with me one day. After I got through attending Mr. Owens, I went out and got in the buggy. Mr. Woodbridge came out with me, but later went back into the house. Q. Did you, when Mr. Woodbridge came out from the house, tell Mr. Woodbridge that Mr. Owens would be up and at his work in six weeks? A. I did as far as the hematoma was concerned, unless some new complications arose. Q. Tell what you told Mr. Woodbridge when he came out from the house. A. Just as I stated then. Q. Did you ever tell Mr. Woodbridge or any one else that Mr. Owens would be up and at his work in six weeks? A. No, sir. I might qualify that, just as I did before, that so far as the tumor was concerned he ought to be over that in six weeks unless some complications arose or new developments, because this was before the six weeks was up that I stated this, and any one to make a statement that a person would be able to go to work after the injury at a specified hour, he was certainly ignorant or dishonest. That would be all I would say, I do not care who he would be. * * * I could not say positively how many visits I made to Owens' place in company with Mr. Woodbridge. It would be guesswork. I recall the occasion of his asking me as to the probable period of time during which Owens would be disabled, as that was the only occasion when he returned to the house. I have a record of my visits to Mr. Owens. I would say that my statement to Mr. Woodbridge was made more than two weeks prior to the termination of the six weeks from the date of the injury. That would make the statement to Mr. Woodbridge about four weeks after the injury. I made a number of visits after that. Four or five days after that I visited Mr. Owens again. I stated to Mr. Woodbridge at that time what I thought with reference to the prognosis or outlook for his man Owens. Q. What was it you said, just repeat that? A. I said that so far as the tumor was concerned that it ought to be well in six weeks unless complications arise or something else develops. Q. Were you at that time, at the time you made that statement, anticipating any complications? A. I was not although I know that there was some trouble with the

hip, but I did not know just exactly to what extent or how long it would be. I recognize the writing, Exhibit 1, as being in my handwriting. That is the report I made as attending physician in Mr. Owens' case to Mr. Woodbridge. The written words in Exhibit 1, 'disabled about six weeks, mostly from left thigh,' after the printed words, 'future prospects,' are in my handwriting. That was my judgment of the probable future prospects of Mr. Owens' injury at the time I made that report. I do not remember the date when I made out the report Exhibit 1. That report, Exhibit 1, was my professional judgment of Mr. Owens' condition at that time. The fact that the report, Exhibit 1, is not signed by me is the result of oversight. I am ready to stand for the statements the same as though the paper had been actually signed by me. Every statement that is made there was true at that time, but that was before the six weeks had expired. * * * There were no bones broken or fractures in Mr. Owens' case. There was no complete dislocation. There was an injury to the hip, but the swelling was so large that it was not dislocated but simply damaged. I have no record of a visit to Mr. Owens after the 31st of August. I took care of him as long as I deemed it necessary. I then discharged him as a patient, simply because I thought all that he needed was rest and quietude, and that he could get without my presence. * * * This statement, Exhibit 1, was not made before Mr. Woodbridge made his last visit with me to Mr. Owens, nor was it made before he took his first trip with me. The statement was made after he had made his last trip there with me. This journal, from which I have taken the dates of my visits, is in my handwriting."

The exhibit referred to by the doctor was his report as surgeon, which is in the following language:

"Surgeon's Report.

"Case of J. R. Owens, Residence, 854, E. Boyd St. Injury at Norwood mine.

"Date of accident, Aug. 5, 1908; examination, Aug. 5, 1908.

"Physician, James W. Cokenower.

"Diagnosis, lumbar blood tumor, 3 pints, due to injury, bruised left thigh and hip and right knee.

"Prognosis, favorable.

"Age, 39 yrs.; weight, 140 lbs.; height, 5 ft. 7 in.

"Previous history, negative.

"Nature of accident.

"Direct effects.

"Indirect or subsequent results.

"What work since accident.

"Examination.

"Future prospects, disabled about 6 weeks; mostly from left thigh.

"Remarks.

"[Sign here] _____, M. D."

This is practically the entire testimony introduced by plaintiff in support of the issues tendered by his reply in response to the plea of settlement. Some of it is disputed by defendant's witness, Woodbridge, and with reference to one of the issues he said: "On the 21st day of August I told Mr. Owens the doctor told me he would be disabled about six weeks, and Mr. Owens said, 'I do not believe it.' And I said, 'He is sitting out there in the buggy; call him in here, and ask him,' and he said, 'No; I do not mean I do not believe you when you say he said it, but I think he is mistaken,' and I said, 'I do not know anything about that.' The doctor had told me coming over to Mr. Owens' house in the buggy that he would be disabled about six weeks. I went over to the doctor's office, or started over to get him to make out this report showing the man's condition, and when I got over to the door of the building I met Dr. Cokenower coming out and told him what I wanted and that I was going over there, and he said he was just on his way there, and for me to get in and ride along with him; and on the way over there he told me that in his judgment Mr. Owens would be disabled about six weeks, and when we came back from Mr. Owens' house the doctor went up to his office and filled out that blank. That was on August 21st, the date when I first made the offer of settlement to Mr. Owens. The blank which he filled out was Exhibit No. 1. I saw the doctor make it up. He delivered it to me. I have no knowledge or skill in medicine or surgery, and at the time I made this statement to Mr. Owens I had no knowledge or information of any sort that led me to question or doubt the correctness of the statement that the doctor made me. I only knew what he had told me. The doctor had told me, in substance, the same thing that he afterwards wrote in this report. What I told Owens was what the doctor had told me, namely, that the doctor said he would probably be disabled about six weeks. The day I rode over with the doctor, as he went out he said he would be back Tuesday, as I remember it, and the day I settled with him I asked Owens if the doctor had been there since I was there, and Owens said 'Yes,' and I asked Owens, 'Did you ask him about the disability?' and Owens said, 'Yes, and he said just as you said, that I would be laid up about six weeks,' and Mr. Owens added; 'I think yet it will be longer than that.'"

In rebuttal of this plaintiff testified as follows: "I heard Mr. Woodbridge's testimony. I had never talked with Dr. Cokenower prior to the time of this settlement regarding the length of time I would be sick. Q. How long after you received that money was it that you had any talk whatever with Dr. Cokenower about the extent of your injury? A. It was about four months."

It has seemed necessary to either set out

the testimony bearing upon the issues tendered with reference to the settlement in order that the matter may be fully understood or to simply announce our conclusions with reference to the matter, leaving it to the profession to hunt out the testimony in the record in the event it became necessary to know the exact nature of the evidence upon which our conclusion is based. In view of our final conclusion, it is deemed best to adopt the former method in the writing of this opinion. The trial court in its instructions, with reference to the matters here at issue, said: "(10) If you find from the evidence that, at the time the plaintiff signed the release in controversy, he did not read the same, and you further find he was suffering with pain and that he was mentally unfit to transact business, and that the defendant made use of the statements and representations that he would be well and at work within six weeks from that time, and that the doctor had so informed him, and you further find that the plaintiff was induced by such statement to sign said release, and you further find that the statement, if you find it was made, was not true, and that it was made by the defendant through its agent and attorney for the purpose of inducing the plaintiff to sign said release, and that such statement did induce him to sign such release, then and in that event you would be justified in finding that said release or receipt is void; but, unless plaintiff has so established by a preponderance of the evidence, then said receipt would not be void and would be binding upon plaintiff, and you should return your verdict for the defendant. (11) In considering the question as to whether or not the said receipt was obtained by fraud, you will consider the surroundings and conditions of the plaintiff at the time the same was signed, whether he was in that mental condition that he was capable of understanding and realizing the nature and effect of the same, whether defendant made use of any artifice or statements that were untrue and of a nature to deceive and mislead plaintiff, and from these and all other facts and circumstances, that you may find are established by the testimony in the case you are to judge whether or not the release or receipt in controversy is binding upon the plaintiff. And if you find from the evidence that said release was obtained by such fraud, then plaintiff is not bound thereby, and the same is no defense in this case. The statement that plaintiff had no case and could not recover damages from the defendant is merely an expression of an opinion, and would not be the basis of fraud, and you could not so consider it in arriving at the question of whether a fraud was committed. If, under the evidence and the foregoing instructions, you find that said receipt and release is void, then you will proceed to consider whether or not plaintiff is entitled to recover upon the

main branch of the case as set out by him." By this instruction Woodbridge's statements that plaintiff had no case and could not recover were eliminated, and the jury was confined to but two propositions: One plaintiff's mental incapacity, and the other the representations as to the time within which plaintiff would recover.

[5] These instructions are not entirely clear; but it is manifest we think that a jury would be authorized thereby to disregard the settlement in the event it found plaintiff did not have sufficient mental capacity to understand or realize the nature and effect of the same. In this respect we think the court was in error. There was no testimony tending to show plaintiff's mental incapacity at the time the settlement was had and the receipt executed. Had the jury been directed to consider plaintiff's mental condition in arriving at the effect which Woodbridge's statements as to the time when he might expect to recover had upon him, there might be some ground for sustaining it. The trouble here is that the plaintiff himself testified that he fully understood and comprehended the effect of the statements and relied thereon with a full understanding of what they implied. He did not excuse his act by saying he was either in want or in pain, or that his condition of mind was such that he did not fully understand all that took place. In submitting this matter to the jury, we think the trial court was in error.

As to the other proposition, to wit, whether or not Woodbridge made any false or fraudulent statements regarding what the doctor told him as to how long he (plaintiff) would be in bed, the members of the court are not agreed. A majority are of opinion that there was not enough testimony here to take the case to the jury. The doctor was plaintiff's own. He was not in the employ of the defendant, either generally or specifically. It is conceded that Woodbridge inquired of the doctor as to the nature of plaintiff's injuries before making any statement to him (plaintiff) as to the probable nature, extent, and duration thereof, and it appears to the majority that he (Woodbridge) did no more than to repeat the substance of what the doctor said to him. The doctor himself, answering a question categorically, said that he did not make the statement which Woodbridge repeated to plaintiff, but he qualified this statement in such a way that a jury must have found that he did in fact make substantially the same statement which Woodbridge repeated to plaintiff, save such verbal inaccuracies as naturally arise in trying to repeat a statement made by another. In the opinion of the majority there is no testimony whatever that would justify a finding that Woodbridge concealed anything from the plaintiff, or that he intentionally or fraudulently made any misstatements in his attempt to repeat

what plaintiff's own doctor said to him regarding plaintiff's case. True, the doctor was mistaken, but he was plaintiff's own choice, and Woodbridge did no more than attempt to state what the doctor told him. He offered no opinion of his own, and did not profess to have any knowledge of the subject. In addition to this, there is testimony in the record, undenied by plaintiff, to the effect that he (plaintiff) did not rely upon this statement, but said himself that he believed that he would be laid up longer than the time fixed by the doctor. Moreover, according to plaintiff, the statement as to what Woodbridge said the doctor stated to him was made some three or four days prior to the time the settlement was had, and plaintiff did not, as he says, see fit to inquire as to whether or not his doctor had made any such statement. True, he says that he did not see the doctor in the interim, but the doctor says he did see plaintiff. However this may be, it is conceded that plaintiff's wife was in communication with the doctor and could easily have reached him at any time by phone, and that nothing was done in this direction. The settlement was not hastily made. It was under consideration by plaintiff and his wife for many days, and some of the testimony indicates that relatives were also counseled. However this may be, one of the relatives, an experienced miner, was present when Woodbridge made his first proposition of settlement, and, if he did not advise the settlement, he certainly offered no objections thereto.

[6] For all time the law has favored the settlement and adjustment of controversies, and when fairly made and uninfluenced by fraud or false representations, or overreaching, they should be upheld.

[7] Of course, where such settlements are made with injured and necessitous persons who have not had the aid of counsel, they should be closely scrutinized in order that one who is liable may not profit from his own fraud or wrong. But when fairly and intentionally made, especially where, as in this case, the claim is, to say the least, doubtful, they should be upheld. It is entirely competent for persons of sound mind to make such contracts as they will, and the law does not undertake to act as guardian for every one who is injured in the matter of making settlements with the party who is responsible therefor. It will see, however, that no undue advantage is taken of one who may be in a badly injured and necessitous condition, and do everything in its power to avert the consequences of fraud and misrepresentation.

[8] Every one, no matter what his injuries, has a right to settle the damages resulting from the negligence of another, and it is not for the courts to either deprive him of the privilege or to relieve him of the consequences thereof simply because he was mis-

taken as to the nature and extent of his injuries. Our conclusions here find support in the following, among other, cases: *Rauen v. Insurance Co.*, 129 Iowa, 725, 106 N. W. 198; *Kilmartin v. Railroad Co.*, 137 Iowa, 64, 114 N. W. 522; *Nason v. Railroad Co.*, 140 Iowa, 533, 118 N. W. 751; s. c., 149 Iowa, 608, 128 N. W. 854; *Douda v. Railway Co.*, 141 Iowa, 82, 119 N. W. 272; *Blossi v. Railroad Co.*, 144 Iowa, 697, 123 N. W. 360, 26 L. R. A. (N. S.) 255; *Johnson v. Railroad Co.*, 107 Iowa, 1, 77 N. W. 476. In this connection it should be stated, however, that the case differs from some of these relied upon by appellant which hold that an erroneous opinion of an attending physician as to the nature, extent, and probable duration of an injury cannot be made a ground for setting aside a settlement; in this that Woodbridge was not a doctor and was not undertaking to give his own opinion, but was attempting to repeat a statement said to have been made to him by plaintiff's own physician, and if he falsely and fraudulently misrepresented what the doctor said to him, and plaintiff believed his statements to be true and acted thereon, this would amount to such a fraud as would nullify the receipt and settlement. The difficulty in the case is to find any false or fraudulent statement made by Woodbridge, or any reliance upon whatever statements were made. Again, there is nothing, as the majority think, to show any material misstatement of what the doctor said. The difference of opinion between the majority and the minority is not so much as to the law but as to whether or not there was a question here for a jury. On one proposition—that is to say, there being a lack of testimony to show mental incapacity—we are all agreed, however.

It follows that, for the reasons pointed out, the judgment must be, and it is, reversed.

HAHN v. LUMPA.

(Supreme Court of Iowa. Nov. 19, 1912.)

1. TRIAL (§ 253*)—INSTRUCTIONS—ISSUES.

Where, during the trial of an action for slander, the courts dismissed the second count of the petition, it was proper to ignore such count in charging the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

2. LIBEL AND SLANDER (§ 7*)—SLANDEROUS PER SE—INNUENDO.

Defendant in conversation with plaintiff's husband and her son stated to the son, "You are not the son of William Hahn, meaning the husband of plaintiff. You are the son of Matt Cochran. Your mother is a whore. She whored with Matt Cochran. You are a son of a bitch. Your mother is a whore. Pap, meaning plaintiff's husband, has no sons. His children are all girls. You are Matt Cochran's son."

Held, that such words were slanderous per se, without the allegation of an innuendo.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 17-78; Dec. Dig. § 7.*]

3. APPEAL AND ERROR (§ 193*)—OBJECTIONS NOT RAISED AT TRIAL.

Where no objection to the petition was raised in the district court, it could not be objected to on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1238, 1240; Dec. Dig. § 193.*]

4. LIBEL AND SLANDER (§ 95*)—MITIGATION—DAMAGES—PLEADING.

Where matter relied upon in mitigation of damages in an action for slander was not separately pleaded as required by Code, § 3593, it was not available for that purpose.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 227; Dec. Dig. § 95.*]

5. LIBEL AND SLANDER (§ 107*)—EVIDENCE—DEFENDANT'S PECUNIARY CONDITION.

In an action for slander, defendant's pecuniary condition is relevant.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 299-303, 305, 351; Dec. Dig. § 107.*]

6. LIBEL AND SLANDER (§ 121*)—EXCESSIVENESS—PERSONAL INJURIES—SLANDER.

In an action for slander of a chaste woman by calling her a whore and the mother of a bastard, judgment awarding her \$500 damages is not excessive.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 353, 354; Dec. Dig. § 121.*]

Appeal from District Court, Johnson County; R. P. Howell, Judge.

Suit to recover damages for slander. Verdict and judgment for plaintiff. The defendant appeals. Affirmed.

S. K. Stevenson and Ranck & Messer, all of Iowa City, for appellant. Hemley & Calkins, of Iowa City, for appellee.

SHERWIN, J. The plaintiff is the wife of William Hahn and the mother of William J. Hahn. Her petition alleges that the defendant, in the presence and hearing of her husband and son and other persons, said to her son: "You are not the son of William Hahn, meaning the husband of plaintiff. You are the son of Matt Cochran. Your mother is a whore. She whored with Matt Cochran. You are a son of a bitch. Your mother is a whore. Pap, meaning plaintiff's husband, has no sons. His children are all girls. You are Matt Cochran's son." Defendant's answer was a general denial and a specific denial that he uttered the words charged, or any words relating to or concerning her. The answer alleges that at the time the words charged were alleged to have been uttered he had a conversation with William Hahn, plaintiff's husband, and William J. Hahn, her son, in which they applied abusive language to him, and that all the words he spoke on that occasion were uttered in answer to the allegations made against him by the said William and William J. Hahn. When the trial began, there was a second count in the petition, alleging the speaking of other slander-

ous words at another time and place, but the appellee's counsel say that this count was dismissed before the case was submitted to the jury. This statement is not denied, and we conclude that it must be correct, because the court's instructions relate only to the time and words charged in the first count. We shall therefore treat the case as having been submitted on the first count alone.

[1] It is manifest that, if count 2 was dismissed and the issue presented by count 1 was alone submitted to the jury, there is no merit in the appellant's contention that the court ignored the fact that there were two counts, and grouped the two causes of action in his instructions. The issue presented by count 1 was clearly and fairly stated by the court, and that was all that was necessary.

[2] The words alleged to have been spoken concerning the plaintiff were slanderous per se, and an innuendo was not required to explain the meaning intended to be conveyed to the hearers. *Quinn v. Insurance Co.*, 116 Iowa, 522, 90 N. W. 349; *Kinyon v. Palmer*, 18 Iowa, 377. While the term "son of a bitch" is not necessarily slanderous per se, the connection in which it was used in this case clearly made it so here, and no innuendo could have explained its meaning more fully. The count therefore alleged a slander, and not merely the use of malicious and wicked language, as contended by appellant. *Craver v. Norton*, 114 Iowa, 46, 86 N. W. 54, 89 Am. St. Rep. 346.

[3] Moreover, no question as to the sufficiency of the petition was raised in the district court, and hence it cannot now be raised in this court. *Weis v. Morris Bros.*, 102 Iowa, 827, 71 N. W. 208.

[4] In various forms the appellant complains of the court's failure to instruct more specifically on the question of mitigation, which appellant alleges he pleaded. The statute (Code, § 3593) requires the pleading of all matters relied upon in mitigation of damages, and this in a separate and distinct division of the answer. There is no such plea in this case. The defendant denied in his answer and all the way through trial the speaking of the words charged. He nowhere alleged that he spoke in heat of passion, or that he did not intend the fullest meaning that could be given the words spoken. The conversation that took place between the parties at the time in question was fully before the jury, but, as we have said, there was no plea in mitigation, and hence no occasion for the court to present such an issue to the jury. *Halley v. Gregg*, 82 Iowa, 622, 48 N. W. 974; *Ronan v. Williams*, 41 Iowa, 680. There being no plea in mitigation, the court correctly instructed that, if the words were spoken in the defamatory sense charged, anger would be no excuse, nor serve to mitigate the offense. *Craver v. Norton*, supra.

[5] The criticism of instruction 7 is without merit. It was competent to show the defendant's pecuniary condition. *Herzman v. Oberfelder*, 54 Iowa, 83, 6 N. W. 81; *Karney v. Paisley*, 18 Iowa, 89.

[6] Complaint is made of two or three rulings on the introduction of testimony, but we find nothing of a prejudicial character therein, nor are the complaints of sufficient importance to require discussion. There is nothing in the record from which the conclusion might be drawn that the verdict was the result of passion and prejudice, nor is the judgment for \$500, in our opinion, excessive. Parties who accuse a chaste woman of being a whore and the mother of a bastard should expect to respond liberally in damages, if they are unable to prove the truth of the charge. The judgment is affirmed.

Affirmed.

BOEKEMEIER v. BOEKEMEIER et al.

(Supreme Court of Iowa. Nov. 19, 1912.)

1. WILLS (§ 614*)—CONSTRUCTION—LIFE ESTATES.

Where testator in one paragraph of his will gave to his wife all his property of which he might die seised, and declared in subsequent paragraphs that, after her death, designated children should receive legacies, and the residue should be divided equally between his children, the wife acquired only a life estate, with remainder to the children.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1893-1416; Dec. Dig. § 614.*]

2. WILLS (§ 450*)—CONSTRUCTION—INTENTION OF TESTATOR.

The court in construing a will must give effect to every part thereof, and carry out the evident intention of testator.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 966; Dec. Dig. § 450.*]

Appeal from District Court, Floyd County; Joseph J. Clark, Judge.

The facts are stated in the opinion. Affirmed.

Wm. H. Salisbury, of Osage, for appellant.
J. C. Campbell, of Charles City, for appellees.

SHERWIN, J. [1] This action is in equity to quiet the title to certain real estate, and to establish the ownership of certain personal property, all of which belonged to Schristian Boekemeier at the time of his death. The plaintiff is the widow of said deceased Boekemeier and she bases her claim to title to the real estate and to ownership of the personal property on the will of her deceased husband. Omitting the parts of the will not material, the remaining paragraphs are as follows:

"I will, devise and bequeath to my beloved wife, Louise Boekemeier, all my property

of every kind and nature of which I may die seized, personal as well as real estate, and wherever located.

"After the death of my said wife, I will, devise and bequeath to my daughter, Martha Boekemeier, the sum of one thousand dollars (\$1000.00).

"After the death of my said wife, I will, devise and bequeath to my daughter, Maria Achenbach, nee Boekemeier, the sum of three hundred dollars (\$300.00).

"After the death of my said wife, I order that the sum of two hundred dollars (\$200.00) be deposited with the Riverside Cemetery Association of Charles City, Iowa, for the purpose that the annual interest thereon shall be applied to the taking care of our family graves in Charles City, Iowa.

"The rest and residue of all my said property I will, devise and bequeath to my eight children share and share alike.

"I hereby appoint my said wife, Louise Boekemeier, to be the executrix of this my last will and testament, and after my wife's death I appoint my youngest child, Maria Achenbach, nee Boekemeier, to be the executrix of the residue of my property, and I order that both the parties named as executrix herein shall not be obliged to give any bonds as such."

The appellant claims that all of the property, both real and personal, owned by her husband at the time of his death, was bequeathed to her by the second paragraph of the will, the real estate in fee simple and the personal property absolutely. The appellees contend that the subsequent paragraphs of the will are entitled to the same consideration that is given to the second paragraph, and that from the entire instrument it is clear that the deceased intended to give to his widow only a life estate in both the real and personal property with the remainder to them. The pleadings of the respective parties presented this question alone, and it was decided by the district court on such pleadings. While the second paragraph of the will does not, in express terms, give power of disposition, if the paragraph stood alone, it would undoubtedly pass an absolute estate in all of the property left by deceased. But was this the intention of the testator? If it was his intention, as disclosed by the entire instrument, then plaintiff's contention is right. If, on the other hand, it is manifest from a consideration of the instrument as a whole that it was not testator's intention to give his widow an absolute estate, but that it was his intention to give her a life estate only with remainder to his children, the judgment of the district court should be affirmed. The second paragraph of this will is somewhat peculiar in this respect. It gives no express power of disposition, nor does it expressly refer to the use that the devisee may make thereof, and in this respect it is unlike

many wills that we have heretofore considered and given effect to such provisions in determining the real intent of the testator. The failure to refer to these matters in said paragraph may rightly be given weight in connection with the other and subsequent paragraphs in arriving at the testator's intention as to what estate plaintiff should take. Every other paragraph of the will is just as concise, certain, and direct as the second. The third, fourth, and fifth make certain positive bequests of such part of the estate as shall remain after the death of the wife, and the sixth just as positively and certainly gives the "rest and residue of all" of testator's property to his eight children, "share and share alike." Nor do these paragraphs stand alone in pointing to the intention of the testator, for the seventh, which names the persons who shall carry out the various provisions of the will, clearly indicates that the wife's interest in the estate was to cease with her death. Aside from the second paragraph, there cannot be found in the entire instrument any language from which an inference can justly be drawn that the second paragraph was intended to create a fee in the plaintiff. The language used in the subsequent paragraphs is direct and positive, and not a precatory word can be found therein. Nor is there any language in the subsequent paragraphs of the will enlarging or adding to the naked devise in the second, as has been found in many cases. Where none of the foregoing qualifications are present, the later clauses or paragraphs of a will are entitled to at least as much consideration and weight as the paragraphs preceding them, and, where all paragraphs may be given effect without doing violence to the intent of the testator, it is the rule that such must be the construction. In order to sustain the appellant's contention, it would be necessary to entirely disregard and nullify paragraphs 3, 4, 5, and 6, and to partially nullify paragraph 7, where executors are provided for.

[2] By construing the entire will as giving to the plaintiff a life estate only, every part thereof is given effect, and the evident intention of the testator is carried out, and that is what the law demands. A general discussion and review of our cases would be of no benefit to any one, for this has been done time and again. This case is ruled by the following decisions: *Hoefliger v. Hoefliger*, 132 Iowa, 575, 107 N. W. 312; *Jordan v. Hinkle*, 111 Iowa, 43, 82 N. W. 426; *Wheeler v. Long*, 128 Iowa, 643, 105 N. W. 161; *Pool v. Napier*, 145 Iowa, 699, 124 N. W. 755; *Jordon v. Woodin*, 93 Iowa, 453, 61 N. W. 948; *Stivers v. Gardner*, 88 Iowa, 307, 55 N. W. 516; *Iimas v. Neldt*, 101 Iowa, 348, 70 N. W. 203; *Law v. Douglass*, 107 Iowa, 606, 78 N. W. 212.

The judgment of the district court should be, and it is, affirmed.

MENGEL v. MENGEL.

(Supreme Court of Iowa. Nov. 18, 1912.)

1. APPEAL AND ERROR (§ 939*) — RECORD—CONCLUSIVENESS.

Papers and documents included in a transcript which is duly certified must be assumed to be a part of the record below, although not specifically identified.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3804-3806; Dec. Dig. § 939.*]

2. APPEAL AND ERROR (§ 668*)—RECORD—CONCLUSIVENESS.

Recitals in the record on appeal from an order that a party appeared in person on the hearing of the application for such order cannot be contradicted by parol, but must stand as a verity until corrected in the district court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2881; Dec. Dig. § 668.*]

3. APPEAL AND ERROR (§ 911*)—REVIEW—PRESUMPTIONS.

Where the order appealed from appears to have been entered by the district court and is properly of record in the proceedings in that court, it will be assumed that the application therefor was heard before the court and not by a judge thereof as such.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3682-3688; Dec. Dig. § 911.*]

4. DIVORCE (§ 226*)—ALLOWANCE FOR COUNSEL FEES AND EXPENSES—APPLICATION AND PROCEEDINGS THEREON.

Application in a divorce action for suit money, together with the affidavits attached thereto, held to sufficiently show that it was made by reason of a change of situation, since a previous order granting temporary alimony was made to give the court jurisdiction of the application.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 651, 652; Dec. Dig. § 226.*]

5. DIVORCE (§ 226*)—ALLOWANCE FOR COUNSEL FEES AND EXPENSES—APPLICATION AND PROCEEDINGS THEREON—"MOTION."

An application for suit money in a divorce action should be treated as a motion within Code, § 3833, authorizing motions to be supported by affidavit which may be considered as testimony on the hearing.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 651, 652; Dec. Dig. § 226.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4609-4610.]

6. DIVORCE (§ 217*)—TEMPORARY ALIMONY—MODIFICATION OF ORDER.

The court has power in an action for divorce to make subsequent changes in orders for temporary alimony.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 637, 638; Dec. Dig. § 217.*]

7. DIVORCE (§ 227*) — ALLOWANCES FOR COUNSEL FEES AND EXPENSES.

A wife suing for divorce may be allowed suit money with which to resist an appeal taken by the husband from an order allowing temporary alimony.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 653, 654; Dec. Dig. § 227.*]

8. DIVORCE (§ 200*)—TEMPORARY ALIMONY—APPLICATION IN PROCEEDINGS THEREON.

Under Code, § 8177, providing that in divorce actions the court may order either party to pay a sum of money for the separate support and maintenance of the adverse party and the children, temporary alimony can be

allowed only by the court and not by a judge thereof as such.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 587-590; Dec. Dig. § 200.*]

9. DIVORCE (§ 182*) — ALLOWANCES FOR COUNSEL FEES AND EXPENSES.

Suit money on an appeal to the Supreme Court in a divorce action can be allowed only by the Supreme Court and not by the district court.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 568, 587, 588, 625, 638, 641, 657; Dec. Dig. § 182.*]

10. DIVORCE (§ 227*) — ALLOWANCES FOR COUNSEL FEES AND EXPENSES.

In a divorce action, an allowance cannot be made to the wife for attorney's services already performed, which have been paid, which she can pay from her separate property, or which were rendered on her credit; but where they were rendered and not paid for in reliance on the husband's liability to pay, and were necessary to enable her to prosecute or defend the case, the allowance will not be denied merely because the services have already been performed.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 653, 654; Dec. Dig. § 227.*]

11. DIVORCE (§ 227*) — ALLOWANCES FOR COUNSEL FEES AND EXPENSES—AMOUNT.

Affidavits presented on an application in a divorce action for suit money, where there had been a number of collateral cases for the enforcement and to defeat the collection of allowances previously made, held to justify an allowance of \$800.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 653, 654; Dec. Dig. § 227.*]

12. DIVORCE (§ 223*)—ALIMONY AND ALLOWANCES—APPEAL—REVIEW.

An order in a divorce action allowing suit money will be reversed only where the court was without jurisdiction to make it or abused its discretion with reference to the amount of the allowance.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 645; Dec. Dig. § 223.*]

Appeal from District Court, Scott County; A. J. House, Judge.

From an additional allowance to plaintiff of temporary alimony or suit money in a suit for divorce under the title above given, defendant appeals. Affirmed.

B. I. Salinger, of Carroll, and George W. Scott, of Davenport, for appellant. Sharon & Higgins, of Davenport, for appellee.

DEEMER, J. This case has had a checkered career, and the record now before us is incomplete and difficult to understand. We are advised that there is now before us another intermediate order in an original divorce case brought by plaintiff against her husband, George Mengel, which latter case has not as yet been tried, although it has been pending for many years, during which time there has been a prolonged controversy over many intermediate or collateral orders. One branch of the case reached us many years ago and was disposed of, so far as this court is concerned, by an opinion which will be found reported in 145 Iowa, 737, 120 N. W. 72, 122 N. W. 899. We are informed that that branch of the case is now pending

on appeal to the Supreme Court of the United States, and doubtless should take judicial notice of that fact.

The matter now before us was initiated by plaintiff filing in the district court on March 8, 1909, the following application: "Comes now Blanche Mengel by her attorney, E. M. Sharon, and asks the court to order the defendant to pay the clerk of this court the sum of five hundred dollars to be applied as partial payment of the costs and attorney's fees incurred in this cause, and in support of this application says: That this cause was commenced in March, 1907, and that she had retained E. M. Sharon of the firm of Sharon & Donegan as her attorney in the January preceding. That the defendant has contested the case and sought to delay the termination thereof. That there have been 28 different pleadings filed in this case in this court, and the trial of the plaintiff's cause for separate maintenance and defendant's cause to annul the marriage continued five times. That her attorney has been obliged to advance up to the present date \$32.70 for sheriff and clerk's cost in this cause. That the defendant commenced an independent action to enjoin the judgment of the Supreme Court affirming the order of this court ordering the defendant to pay the plaintiff \$50 per month for her support, pending the disposition of the cause. That there have been three applications for an injunction on said allowance in this court, which were successfully contested by her attorney. That three appeals have been taken to the Supreme Court of Iowa; that one of said appeals was dismissed at time required to file abstract. One was affirmed on motion of plaintiff, and one is still pending wherein plaintiff's attorney has filed a brief and argument and an abstract of the record, the printing of which cost \$21.80. That in all of these appeals there have been numerous motions, statements, affidavits, briefs, and arguments not printed, but which required much legal work. That defendant also notified plaintiff's attorney to go to Des Moines at a hearing on the application to Judge Sherwin, of the Supreme Court, for an injunction to restrain the execution of the judgment for \$575 of the allowance for support made by this court, and her said attorney has received no repayment of his expenses, and has filed a motion to dissolve the injunction, with the answer of the plaintiff and affidavits of an officer or employe of the two banks in which it was alleged that plaintiff had funds; that such accounts were the accounts of Felicia Reuter, the daughter of plaintiff. That it is necessary for plaintiff to have funds to apply as part payment for the services of her attorney and the money expended in costs paid and payable before proceeding further in its prosecution and defense. That \$50 is all the money hereto paid said E. M.

Sharon on account of his services and disbursement in this cause, and the plaintiff has no means of her own with which to pay him except as she obtains the same from her husband, who is liable for the same. That the appeal from the order allowing support money is an appeal from an interlocutory order of this court, and this court has jurisdiction to make the allowance herein asked for. Blanche Mengel, by E. M. Sharon, her attorney." This application was duly verified by plaintiff's attorney.

On March 30, 1911, plaintiff also filed the following motion: "Comes now the plaintiff and moves the court for an order compelling the defendant to pay the clerk of this court \$2,000 for attorney's fee and costs for expenses made necessary by litigation caused by the defendant and to enable the plaintiff to prosecute her said action in the court and the Supreme Court of the United States, and submits in aid of this motion affidavit and application filed herein about March 8, 1909, and affidavits submitted herein. Sharon & Higgins, Attorneys for Plaintiff." With this was filed an affidavit by plaintiff's counsel, to which we shall hereinafter refer. Plaintiff also filed her own affidavit, to which reference will hereinafter be made. We shall presently make such reference to the original affidavit as the record will warrant.

On April 5, 1911, defendant was served with the following notice:

"State of Iowa, Scott County.

"Notice of Hearing on Application for Allowance of Suit Money. Blanche Mengel, Plaintiff, v. George Mengel, Defendant. In the District Court of Said County. To the Above-Named Defendant: You are hereby notified that there is filed in the office of the clerk of the district court, in and for said county of Scott, state of Iowa, the application of the above-named plaintiff, asking against you the allowance of \$2,000 for suit money and attorney's fees in the above-entitled cause, and that unless you appear and make defense thereto before Judge House, at the courthouse in Davenport, in said county, on the 17th day of April, 1911, an allowance will be entered against you, and judgment rendered thereon.

"Sharon & Higgins,
"Attorneys for Plaintiff."

On May 3, 1911, a hearing was had on the second of the foregoing applications in point of time at the Scott county courthouse, and we find that the following record was made thereat: Testimony was introduced tending to show an agreement between counsel for the postponement of the hearing from the time fixed in the notice until May 3, 1911. On the part of defendant, one George Scott testified that he was an attorney of record for said defendant, and that he agreed to May 3d as the date for the hearing; but it is claimed that his appearance in the case

was special, and that his agreement was not binding on defendant. As he was an attorney of record for the defendant, we think his agreement was binding. But, however this may be, the transcript to which we have been compelled to resort shows affirmatively that defendant appeared in person on the morning of May 3d, and the court ordered that the matter be taken up at 1 p. m. of said day. At that time plaintiff by her attorney introduced the following from the record in the original case: The appearance docket and fee book showing the filings in the original case of Mengel v. Mengel, and in a case entitled George Mengel v. Blanche Mengel and Louis Eckhardt, the issuance of a writ of attachment and a levy thereunder, and another case of the same title as the last one above mentioned being an action on injunction bond, and, as we understand it, the pages of an appearance docket showing the filings in another case of the same title. The original application for suit money was also introduced, and also the application filed March 8, 1909, which we have heretofore set out in extenso.

In support of the motion for allowance of suit money filed March 30, 1911, plaintiff also introduced the affidavit of her attorney, from which we quote the following: "E. M. Sharon, being duly sworn, deposes and says, as supplemental to his affidavit filed here March 8, 1909, that since March 5, 1909, he has paid out for plaintiff's expenses of suit in the sum of \$61.38, and that he has been obliged to follow the dilatory appeals and reviews and rehearing instituted by defendant's counsel, and states that in addition to the matters set out in his former affidavit he has made an additional motion to dissolve the injunction granted by Judge Sherwin in February, 1908, which the Supreme Court sustained. That he made and had granted a motion for procedendo from the Supreme Court in the case of George Mengel against this plaintiff and the sheriff of this county, and had judgment in this court for the costs in that case. That he has commenced, and there is pending in this court, an action on the injunction bond in the above injunction case; that on March 29, 1910, said George Mengel, defendant herein, obtained from Judge Deemer, Chief Justice, an order allowing a writ of error in this case to the Supreme Court of Iowa for review of said case in the Supreme Court of the United States of America and allowing a supersedeas. The plaintiff herein applied for a modification of said order and for the allowance of attorney's fees for contesting said writ and an additional security on said supersedeas. Judge Deemer held that he did not have jurisdiction to allow attorney's fees, but did order said bond increased from \$2,111 to \$4,000. Said George Mengel failed to file the record in the Supreme Court at Washington, D. C., and in August, 1910, this plaintiff did

have said record certified from the Supreme Court of Iowa on this plaintiff or her attorney filing the same—paying the costs of docketing the case, and employing counsel at Washington for that purpose, said writ of error was dismissed. That afterwards and about the 5th day of September, 1910, said George Mengel or his attorney again applied for writ of error, and again Judge Deemer granted the same and also ordered a supersedeas. Plaintiff's attorney, knowing that under the statutes and procedure in the United States courts a writ of error does not and cannot be made to operate as a supersedeas unless said writ is allowed within 60 days, Sundays excluded, from the rendition of the judgment to be reviewed, applied to Judge Deemer to have said supersedeas vacated, and supported said application with a brief. George Mengel's attorney contesting the matter, plaintiff did furnish at least two additional briefs which involved a study of the statutes and decisions of the United States and its courts. That after several months Judge Deemer refused to declare the supersedeas ineffective, but did in his final order limit its application to the particular judgment entered in the Supreme Court of Iowa January 15, 1908. That plaintiff in error while he has complied with the rules of the United States Supreme Court and filed the records in that court prior to October 5, 1910, has not had such record printed within a reasonable time as required by said rules, and apparently intends to delay the disposition of said writ of error in that court so long as possible, and plaintiff nor her attorney has means with which to defend such suit in that court. That about June, 1910, plaintiff had issued a writ of execution on the amount due in this court on the order of August 1, 1907, for temporary support of plaintiff, which execution the defendant without notice induced Judge Jackson to recall; that such recall was canceled on plaintiff's application, but afterwards defendant in a separate suit obtained an injunction restraining execution of that judgment, and plaintiff has on file an answer and motion to dissolve. That the book charges for his services and disbursements in prosecuting this suit and defending the counter litigation of the defendant are already \$1,916.25, and, while the sum is reasonable and just, plaintiff must abandon her suit and the relief which affiant believes she is entitled to unless she can meet the contentions of the defendant in the matter of the Supreme Court of the United States and in the various suits, injunctions, and supersedeas pending in this court. The plaintiff's attorney, the affiant, has not received any money or property from plaintiff nor from other persons for or on account of this suit or those growing out of it or the matters between plaintiff and defendant except \$9.16 return costs paid clerk of United States Su-

preme Court, and affiant does not believe that plaintiff is able to advance him any money for his services or disbursements herein. E. M. Sharon."

And in the same connection plaintiff's own affidavit bearing date March 24th, but filed with the motion of March 30th, reading as follows: "Blanche Mengel, being duly sworn, deposes and says that she is the plaintiff in the above-entitled cause. That she was obliged to give up her residence in Davenport temporarily in September, 1907, on the refusal of the defendant, her husband, to contribute to her support, and when defendant appealed from the order of Judge Bollinger compelling said George Mengel to pay her \$50 per month. That the only money or property she had or controlled at that time was money in two Davenport banks which was the property and had been given to her daughter Felicia. That since August 1, 1907, she has received no money or property from any source except for her personal service and assistance from members of her own family. That she has kept her daughter in a boarding school in Kentucky. That she has not paid her attorney any money for his services or disbursements since the bringing of this suit except that he retained \$50 of an allowance of \$100 ordered by the court and paid by defendant in May or June, 1907, and that she has been unable to do so and now has no money or property from which she is able to make any such payments. Blanche Mengel."

In addition to this, plaintiff offered an additional affidavit made by her attorney and filed March 31, 1911, reading as follows: "E. M. Sharon, being duly sworn, deposes and says that he is one of the attorneys of the plaintiff and has been since the commencement of this suit. That on the trial of plaintiff's suit for separate maintenance, certified record of her marriage with defendant was put in evidence. That defendant's contention was that plaintiff was incompetent to contract marriage at the time. That the records of this cause show that the prior marriage of the plaintiff with Otto Reuter had been annulled on the ground that said Otto Reuter had a wife living from whom he had not been divorced at the time of his marriage to plaintiff. That at the close of that trial Judge Bollinger announced his finding that the marriage of plaintiff and defendant was legal and valid, and that the evidence showed him to be worth \$50,000; defendant not having contradicted plaintiff's evidence to that effect, and afterwards in open court, after plaintiff had filed her amendment, asking for a divorce. Defendant's attorneys offered to withdraw their cross-petition attacking the validity of the marriage between the parties thereto, and the reason that it was not withdrawn was plaintiff's attorneys refused to consent thereto. That the evidence taken on the trial of this cause has been transcribed, and

the cost thereof, \$300 or thereabouts, has been taxed as costs in this cause, but such transcript is in the possession of defendant or his attorneys. That said transcript of the evidence is referred to in support of this motion to show the legality of plaintiff's marriage and her right to divorce in this action. That affiant further says that this action was commenced and is prosecuted in good faith by him as an attorney at law. E. M. Sharon."

The papers filed in the several cases noticed in the appearance docket were also introduced. And also a decree of the Supreme Court rendered January 23, 1908, which concluded as follows: "Now, therefore, it is adjudged and decreed that the judgment of the said district court be affirmed in all particulars, and that the appellee, Blanche Mengel, have and recover of George Mengel the sum of \$500 and 15 per cent. of said principal sum, with interest and costs, and judgment is hereby entered in favor of Blanche Mengel and against George Mengel and Henry Jaeger for \$575, with interest thereon from date at the rate of 6 per cent. per annum, and \$25 for costs of this appeal and accrued costs, and that general execution issue from this court to the sheriff of Scott county for the collection thereof. [Signed] Scott M. Ladd, Chief Justice."

And a subsequent order entered on March 10, 1908, reading as follows: "The above-entitled cause came on for hearing on the motion of the appellee for judgment in favor of the appellee and against the appellant and the surety on his appeal bond, and the court, having considered the statements and arguments in favor of said motion, filed for the appellee by Sharon & Donegan, her attorneys, and those in resistance by Ruyman & Ruyman and Salinger, Scott & Theophilus for the appellant, and the court, being fully advised in the premises, finds that this court did on the _____ day of January, 1908, affirm the order and judgment of the district court of Scott county, made and entered August 1, 1907, by which the appellant herein was ordered to pay the appellee herein the sum of \$250 on or before August 5, 1907, and \$50 per month on the first day of each month thereafter, until final judgment herein, and that this court did on the 23d day of January, 1908, enter judgment thereunder for the sum of \$500, being the sum at that time due, with penalty and costs; and further find that there is now due on said order the sum of \$100, being the payments due on February 1 and March 1, 1908, and that no remand of this appeal has been made or asked for by the appellee, and all the record pertaining to said matters having been certified to and filed in this court, now it is adjudged and decreed that the appellee, Blanche Mengel, have and recover of George Mengel, the appellant, and Henry Jaeger, surety on the appeal bond of appel-

lant, the sum of \$100, and judgment is hereby entered against said George Mengel and Henry Jaeger in the sum of \$100 with interest thereon at the rate of 6 per cent. per annum and costs and accrued costs taxed at \$——, and that the clerk of this court issue under the seal thereof execution to the sheriff of Scott county, Iowa, for the collection thereof, and that this matter be continued until further order of this court."

The original order for temporary alimony is in the record, and it is as follows: "It is ordered that defendant pay to plaintiff for her support the sum of \$50 per month from April 1, 1907; \$250 of said money to be paid within five days from this day, and \$50 on September 1, 1907, and \$50 on the first day of each month thereafter until final judgment in this case or until otherwise ordered by the court. Defendant excepts. Jas. W. Bollinger, Judge."

This was entered on August 1, 1907. The record also shows an order of date February 12, 1908, overruling defendant's motion to vacate the order of August 1st. There is also a showing of an appeal from an order denying defendant a temporary writ of injunction against the enforcement of the original order for temporary alimony. Also a copy of a resistance filed for defendant to a motion for a judgment in this court pursuant to the order of affirmance entered in January of the year 1908, and also a like resistance to a motion said to have been filed in September of the same year. A showing is also made of defendant's dismissal of the appeal taken by him from the order of the district court denying him a temporary writ of injunction against the enforcement of the order for temporary alimony. Included in the record is a supplemental opinion filed by this court in response to defendant's petition for rehearing on the appeal from the allowance of temporary alimony; also a copy of the original opinion filed March 12, 1909. The record also shows the allowance of an appeal from the decree of this court to the Supreme Court of the United States, and a dismissal of that appeal by the United States Supreme Court for failure to file and docket the case; this dismissal having been entered August 19, 1910. The record also contains a motion by plaintiff to vacate a supersedeas order entered by one of the justices of this court, with an argument thereon in print or type-writing; also a motion to modify the supersedeas order for additional security and for an allowance of additional attorney's fees. This motion was also addressed to the then chief justice of this court. The record of the proceedings in the district court in the original case is also presented by the record before us, and this shows the overruling of a demurrer filed by defendant and his insistence upon a trial of the main case, orders fixing a day therefor, and the release of some of the attached property. The record also shows the allowance of a second writ of er-

ror to the Supreme Court of the United States, of date September 3, 1910, together with an order for a supersedeas upon defendant's filing a bond in the sum of \$4,000. This is the entire record in the case, and it is needless to say it is in an extremely confused condition. On account of the nature of the abstracts we have been compelled to resort to the transcript, and from that we have made the necessary excerpts and quotations. It is hard to extract a clear or satisfactory statement as to the nature of the controversy, but the trial court on this showing, and none other, made the following order: "This matter came on to be heard on the application of the plaintiff for the allowance of \$2,000 suit money to pay in part costs and attorney fees incurred, and to defend and prosecute pending litigation. The plaintiff appeared by Sharon & Higgins, her attorneys, and the defendant appeared in person. And the court finds that jurisdiction of the parties and subject-matter is complete, and the plaintiff has introduced in evidence affidavits and records in cases pending; and, the court, being fully advised in the premises, it is ordered and adjudged that defendant pay to the clerk of this court for the use of the plaintiff and her attorneys the sum of \$800 as suit money to enable her to prosecute and defend the litigation involving her rights to a divorce from the defendant and the support money hereto granted her by this court, and on failure of defendant to so pay said sum forthwith that execution issue for the collection thereof. This allowance shall be in addition to, and shall not affect, the allowance made by this court August 1, 1907; and this allowance is made without prejudice of the rights of the plaintiff or her attorneys to recover from the defendant costs and attorney fees heretofore disbursed and accrued, as determined by the court on final determination of this cause, or sooner if the conditions and circumstances justify the same. The defendant excepts. A. J. House, Judge." The appeal is from this last order, and many errors are assigned and reasons advanced why the order so made should be reversed.

[1] While it is true that many of the papers and documents to which we have referred are not specifically identified, they are included in the transcript, which is duly certified, and we must assume that they are a part of the record in the case below, as they are certified to by both the judge and the reporter.

[2, 3] It is contended that the court or judge making this order had no jurisdiction, because if made by a judge he had no jurisdiction, and if made by the court defendant had no sufficient notice of the time set for hearing and did not appear. As to this it appears that defendant did have notice of the hearing, but this seems to have been postponed by consent of one of his counsel of record. Aside from this, the record recites

in at least two places, and once in the final order, that the defendant did appear in person. These recitations cannot be contradicted by parol, and until corrected in the district court must stand as a verity. Again the final order seems to have been entered by the district court and is properly of record in the proceedings in that court. We must assume, therefore, that the matter was heard before the district court.

[4] 2. It is argued that the court had no jurisdiction of this last application for the reason that it shows no change in the situation or circumstances of the parties since the original order for temporary alimony was made, and the application calls for nothing more than a review of the original order. The present application is very informal in character; but, taking all the papers together, we think it sufficiently appears that plaintiff's application was for additional suit money due to change of situation since the original order was made. The recitals in the applications themselves, together with the affidavits attached thereto, sufficiently show the character thereof, and doubtless gave the court jurisdiction.

[5] The application should be treated as a motion, and it is expressly provided by section 3833 of the Code that motions may be supported by affidavit, and such affidavits may be considered as testimony upon the hearing. That such an application should be by motion is expressly held in *Simpson v. Simpson*, 91 Iowa, 235, 59 N. W. 22; *Finn v. Finn*, 62 Iowa, 482, 17 N. W. 739.

[6] Aside from this, however, the court has power to make subsequent charges in an order for temporary alimony. In *Clyde v. Peavy*, 74 Iowa, 47, 36 N. W. 883, we said: "Orders made for temporary alimony for the support of the wife and for attorney's fees, or suit money, as it is sometimes called, are not like ordinary money judgments. They cannot, in the very nature of things, be regarded as final adjudications as to the rights of the parties. These orders are usually made to continue from term to term, for the reason that it is impossible to determine at the beginning what the necessities of the litigation may require. It may continue for years, and the court cannot determine in advance that any named sum of money ought to be a full allowance for all purposes. This being the nature of the proceeding, no mere temporary order can be said to be a final adjudication. Additional allowances may be made from time to time."

3. Again it is argued, as on the former appeal, that the trial court, by reason of defects in the petition in the original divorce action, had no jurisdiction to make any order whatever. This point was ruled adversely to appellant on the former appeal, and in addition to this it is admitted that, before the last application was submitted, plaintiff amended her petition so as to cure

the defect therein. There is nothing in this last proposition.

[7] 4. Next it is argued that the allowance here made was unauthorized because of the fact that it was for the protection of an order previously made for suit money, and that, if such an allowance should be made, there would be no end to the matter. In other words, that each order is appealable, and if suit money were allowed to resist each appeal there would be an endless chain. We have no doubt of the inherent power in some court to make an allowance to a wife of suit money for the purpose of resisting an appeal taken by her husband from an award of temporary alimony. Such an appeal is authorized and a supersedeas may be given; and, if the wife can have no allowance of suit money to resist the appeal, she may be deprived of the very thing which was necessary to the prosecution of her suit. There ordinarily is an end to all things, even a lawsuit, although no one yet has been able to see the end of this controversy which has proceeded no farther than an allowance to plaintiff to temporary alimony and suit money with which to prosecute her main action. True there have been a large number of other suits, but these have grown out of the original order for suit money which has not yet been complied with. *Nelson*, in his work on Divorce and Separation, at section 862, states the law on this subject as follows: "The weight of authority is that such order may be stayed by the execution of a suitable undertaking, and the case may be reviewed without awaiting a final decree in the action for divorce. The undertaking must conform to the provisions of the Code, and should be in double the amount of the order for a reasonable time within which the appeal can be determined, and for costs. After the filing of such undertaking, the court may make another order compelling the husband to pay costs and attorney fees to enable the wife to resist the appeal." Although no cases are cited to the last proposition, we think it sound doctrine, and adopt it as the rule for this state.

[8] 5. Before passing to the next point in order, it should be stated in this connection that we agree with counsel in saying that a judge, as such, has no power to allow temporary alimony. The statute in express terms limits this power to the court itself. Code, § 3177. But we have already found that the hearing was before the court, and the final order was entered by it. *Prosser v. Prosser*, 64 Iowa, 378, 20 N. W. 480; *Shaw v. McHenry*, 52 Iowa, 186, 2 N. W. 1096.

[9] 6. The next question in order is the power of the district court to allow suit money on an appeal to this court. According to our more recent holding, the appellate tribunal is the only one to make such an allowance. *Shors v. Shors*, 133 Iowa, 22, 110 N. W. 16; *Lewis v. Lewis*, 138 Iowa,

593, 116 N. W. 698. This seems to be the rule in other jurisdictions. *Cralle v. Cralle*, 81 Va. 773; *Jenkins v. Jenkins*, 91 Ill. 167; *State v. Phillips*, 32 Fla. 403, 13 South. 920; *Goldsmith v. Goldsmith*, 6 Mich. 285; *Pleyte v. Pleyte*, 15 Colo. 125, 25 Pac. 25; *Coad v. Coad*, 40 Wis. 392. In so far as the order included anything for attorney's fees for the prosecution of an appeal here, it was erroneous under the authorities cited.

[10] 7. Again it is said that no allowance should be made for attorney's services already rendered. If these had been paid or plaintiff had any separate property with which to meet them, or if the services had been rendered on the strength of plaintiff's credit, there would be no doubt of appellant's position. *Bohnert v. Bohnert*, 91 Cal. 428, 27 P&C. 732; *Beadleston v. Beadleston*, 103 N. Y. 402, 8 N. E. 735; *McCarthy v. McCarthy*, 137 N. Y. 500, 33 N. E. 550. But where the services are rendered and not paid for in reliance upon the husband's liability to pay, and were necessary to enable the wife to further prosecute or defend her case, it is no defense that they have already been performed. See *Bohnert v. Bohnert*, *supra*.

[11] 8. Finally it is argued that there is no proper showing upon which to base an allowance of additional attorney's fees. If the affidavits filed by plaintiff and her attorney are to be considered, as we think they should be, for reasons already stated, they show enough, in our opinion, to justify the allowance made by the trial court. That court had jurisdiction of the main case and power to make necessary allowances of suit money, save as by appeal some other court may be vested with exclusive jurisdiction in such matters. In connection with the original order for temporary alimony, the record shows a number of cases to enforce and to defeat the collection of the allowance made. These cases were in the district court of Scott county, and were proper to be taken into account in making the allowance of additional attorney's fees. Again it seems that orders made by judges of this court in some of these collateral cases had to be met and set aside, and enough other work which the district court might properly consider was shown to relieve the district court from the charge of an abuse of discretion in making the allowance.

[12] To justify the reversal of such an order it must be shown that the trial court had no power or authority to grant it; in other words, that it was without jurisdiction, or that it abused its discretion in the amount of the allowance. *Campbell v. Campbell*, 73 Iowa, 483, 35 N. W. 522. Neither of these facts is shown.

This opinion is inexcusably long, and it may be that the case does not demand it. But the record is such that we felt driven to a long opinion fully covering the matter,

or else to a memorandum opinion affirming the order without more.

In view of the arguments presented, we adopted the former course, with the result that the order must be, and it is, affirmed.

EDWARDS v. HASEL

(Supreme Court of Iowa. Nov. 20, 1912.)

1. MUNICIPAL CORPORATIONS (§ 819*) — STREETS—ACQUIESCENCE AND OBSTRUCTION.

Evidence that a property owner maintained a raised cover over a grating in the sidewalk for more than 35 years will warrant a finding that the municipality acquiesced in the maintenance of the obstruction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1739-1743; Dec. Dig. § 819.*]

2. MUNICIPAL CORPORATIONS (§ 809*)—SIDEWALK—NEGLIGENCE.

A property owner may be held liable for negligence in the maintenance of an obstruction on the sidewalk, though permitted by the municipality to maintain it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1688-1694; Dec. Dig. § 809.*]

3. MUNICIPAL CORPORATIONS (§ 821*) — STREETS—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action against an abutting property owner for injuries caused by the maintenance of an obstruction in the sidewalk, evidence held sufficient to take the case to the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

4. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY OF EVIDENCE.

In an action against the owner of abutting property for personal injuries caused by the maintenance by the lessee of a cover over a grating in the sidewalk, where the owner testified that she had used such cover in like manner during her occupancy, and that she rented the premises in December, and there was evidence that it was in use all winter, an instruction that the owner was not liable unless such cover was furnished for use by her lessee was not improper as unsupported by the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 506, 596-612; Dec. Dig. § 252.*]

Appeal from District Court, Scott County; A. J. House, Judge.

Action for damages for a personal injury caused by an obstruction upon the sidewalk, placed thereon by the defendant. There was a verdict for plaintiff, and defendant appeals. Affirmed.

Thunen & Shorey, of Davenport, for appellant. Cook & Balluff, of Davenport, for appellee.

EVANS, J. We quote from appellant's brief the following statement of facts, which the evidence fairly tends to support: "The defendant is the owner of certain premises in the city of Davenport, Iowa. Said premises were leased by defendant to one Traeger in December, 1908, for a period of five years, and were occupied by a subtenant at the

time the injury occurred. The building on said premises extends up to the sidewalk. A cellar window is cut into the sidewalk, and extends about 18 inches out from the building, and is about 2½ feet wide, running alongside of the building. The cellar window has an iron grating over it to prevent persons from stepping into the opening, and during the winter months, and for more than 35 years, has had a wooden covering. This wooden covering is 2 inches thick, and consequently stands 2 inches higher than the surface of the sidewalk. Just east of the cellar window is a door leading into a storeroom, which storeroom was occupied by a subtenant, and was used as a saloon at the time of the accident. On or about March 9, 1909, the plaintiff coming out of the saloon, stepped onto the platform in front of the door, made a short turn to the west, and when he stepped off the platform in front of the door bumped his toe against the covering and fell, injuring himself severely. The covering was in good repair." This suit is based upon the theory that the covering maintained, as above stated, was dangerous, and that it was negligence on the part of the defendant to maintain the same. This covering was placed over the cellar window only during the winter months, and was removed in the spring of each year, and not replaced until the following winter. This custom had continued for over 35 years. The evidence shows that previous to the leasing of said premises this defendant and her husband had occupied the same, and during the time of their occupancy they had each winter placed this covering over the cellar window.

[1-3] 1. It is the first contention of the appellant that there was a failure of proof of negligence of the defendant, and that a verdict should have been directed on that ground. Assuming, first, that the defendant was instrumental in placing the obstruction complained of, did it render the sidewalk not reasonably safe for the use of pedestrians? Or, rather, can it be said as a matter of law that such sidewalk was reasonably safe for the use of pedestrians notwithstanding such obstruction? We have held that the city may authorize areas and cellarways leading into basements of abutting buildings. *Perry v. Castner*, 124 Iowa, 391, 100 N. W. 84, 66 L. R. A. 160, 2 Ann. Cas. 363. The evidence in this case would warrant a finding of authority by the city from long acquiescence to maintain the obstruction complained of. We have held also that a property owner may be held liable for negligence in the use of such privilege notwithstanding the permission of the city. *Calder v. Smalley*, 66 Iowa, 219, 23 N. W. 638, 55 Am. Rep. 270. In the case at bar it must be said that the evidence in support of the alleged negligence of the defendant is very slender. But it must also be said that it is sufficient to carry the question

into the field of fact. We cannot say as a matter of law that the maintenance of this obstruction in the manner shown was not negligence.

[4] 2. It appears that the property was in possession of a tenant. The trial court instructed the jury that the defendant could not be held liable for the obstruction complained of, unless they found "that such cover was furnished by the defendant for use by her lessee, for the purpose and in the manner in which it was used at the time." It is urged by appellant that there is no evidence in the record to sustain the hypothesis that the cover in question was furnished by the defendant to her lessee. It is true that there is no direct statement in the record to that effect, but such fact may be found as a fair inference from other facts in the case. The defendant testified that she had used such cover in like manner in the winter time for several years during her actual occupancy of the premises, and that she rented the premises in December, 1908, to one Traeger who sublet to his brother-in-law, Joens. One witness testified that the cover was in place in the fall of 1908. Joens testified that it was there when he went into possession on January 1, 1909. We think this evidence furnished sufficient basis for the instruction of the court. No other complaint is made of the instructions.

It is our conclusion that the judgment below must be affirmed.

WELSH v. HALEEN.

(Supreme Court of Iowa. Nov. 19, 1912.)

1. PLEADING (§ 236*) — AMENDMENT — LEAVE OF COURT — AMENDMENT AFTER CLOSE OF EVIDENCE.

In an action on an account, aided by an attachment, where defendant counterclaimed on an account in his favor, and also for damages from wrongful attachment without basing this second counterclaim on the attachment bond, the court did not abuse its discretion in permitting him to amend the counterclaim in this respect after the close of the evidence, since this did not prejudice plaintiff, but was in the interest of justice to both, operating to give them an opportunity to submit their claims to the jury.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.*]

2. TRIAL (§ 296*) — ACTION FOR WRONGFUL ATTACHMENT—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In an action wherein defendant counterclaimed for wrongful attachment, an instruction that, if plaintiff had no reasonable cause to believe that either of the grounds alleged by him for the attachment were true, the jury might infer that it was sued out maliciously, was not erroneous as placing the burden on plaintiff to show want of malice, in view of another instruction that the burden was on defendant to prove that plaintiff had no reasonable cause to believe that the grounds for the attachment were true, this burden carrying with it the burden of proving malice, since, under the instruc-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tions, malice could only be inferred from facts proved by defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-718, 715, 716, 718; Dec. Dig. § 296.*]

3. ATTACHMENT (§ 374*) — ACTIONS FOR WRONGFUL ATTACHMENT — PRESUMPTIONS AND BURDEN.

Where there is direct evidence that an attachment was sued out maliciously, it combines with the inferences of malice from the fact that the attachment creditor had no reasonable cause to believe that the grounds for attachment alleged by him were true to establish the preponderance that must be furnished by the party claiming that such attachment was wrongful.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1363-1372, 1392; Dec. Dig. § 374.*]

4. ATTACHMENT (§ 380*) — ACTIONS FOR WRONGFUL ATTACHMENT—INSTRUCTIONS.

In an action involving a counterclaim for wrongful attachment, an instruction that the jury were not limited to actual compensation nor required to scrutinize very closely the amount of the verdict was not erroneous, since it could not have been understood to apply to anything except the amount of exemplary damages allowed, if any.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1373-1375; Dec. Dig. § 380.*]

5. ATTACHMENT (§ 377*) — ACTIONS FOR WRONGFUL ATTACHMENT—DAMAGES.

Whether exemplary damages shall be allowed for a wrongful attachment and the amount thereof rests with the jury.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 204, 1389-1392, 1397; Dec. Dig. § 377.*]

6. ATTACHMENT (§ 377*) — ACTIONS FOR WRONGFUL ATTACHMENT—DAMAGES.

Where the exemplary damages allowed for wrongful attachment could not have exceeded \$90 and may have been less than that amount, they were not so out of proportion to the actual damages as to justify interference therewith on appeal, although the actual damages were small.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 204, 1389-1392, 1397; Dec. Dig. § 377.*]

Appeal from District Court, Boone County; Robert M. Wright, Judge.

The facts are stated in the opinion. Affirmed.

Goodykoonts & Mahoney, of Boone, for appellant. D. G. Baker, of Boone, for appellee.

SHERWIN, J. [1] The plaintiff brought this action on an account claimed to be due from the defendant, who was for several years a tenant on his farm. The action was aided by a general attachment. The defendant filed counterclaims for sums said to be due him on account, and for the wrongful suing out of the attachment. The case was tried to a jury, and a general verdict was returned for the defendant upon which judgment was entered. The plaintiff appeals.

The plaintiff's account amounted to \$261.75, and of this sum \$100 was claimed for feed furnished to two colts that defendant had kept on the place for a time before the

termination of his tenancy. The defendant counterclaimed on an account amounting to \$77.68, and in a separate counterclaim asked damages for the wrongful suing out of the writ of attachment. Defendant admitted in his answer that there was due the plaintiff on his account the sum of \$144.84, and plaintiff admitted defendant's account to the extent of \$9.69. The defendant's original counterclaim for the wrongful suing out of the attachment was not based on the attachment bond, and, after the close of the evidence, the plaintiff moved for a directed verdict on that part of the case for the reason above stated. Thereupon, the court told defendant's attorney that he might amend, and he did so, whereupon the motion to direct was overruled. There was no abuse of the court's discretion in the matter, and the plaintiff does not appear to have been prejudiced by the indulgence. Permitting the amendment operated to give both parties an opportunity to submit their claims to the jury, and was in the interest of justice to both.

Some other minor matters are complained of, but we see nothing of a nature requiring more specific treatment, and we shall, therefore, discuss the grounds upon which appellant evidently relies for a reversal.

[2] The most serious complaint is made of instruction No. 15, wherein the jury was told that, if it found that plaintiff had no reasonable cause to believe that either of the grounds alleged for attachment were true, then, in such case, the jury would have a right to infer that the attachment was maliciously sued out. Appellant's principal contentions at this point are that the instruction did not state the correct rule of law, and that, if it did, it placed the burden, under the record, on plaintiff to show want of malice. The rule stated is in harmony with *Ahrens v. Fenton*, 138 Iowa, 559, 115 N. W. 233, and the cases therein cited, and need not be further discussed here. In another instruction the court distinctly told the jury that the burden of proof was upon the defendant to prove that plaintiff had no reasonable ground to believe that the grounds stated for the attachment were true, and this burden carried with it the burden of proving malice, because, under the instructions, malice could only be inferred from facts proven by defendant. The inference of malice, under the circumstances given, may be inferred whether there is direct proof of malice or not.

[3] If there is direct proof thereof, the two combine in establishing the preponderance that must be furnished by the defendant. Here there was independent evidence from which the jury might have found malice, and we think the evidence, as a whole, sufficient to warrant the verdict.

[4] The court instructed that, where malice

is found, the "jury are not limited to actual compensation nor are they required to scrutinize very closely the amount of the verdict." This language seems to be so clear that a jury could not have understood it to apply to any matter other than the amount of exemplary damages allowed, if any were allowed.

[5] The matter of allowing exemplary damages and the amount thereof rests with the jury. *International Harvester Co. v. Hardware Co.*, 148 Iowa, 172, 122 N. W. 951, 29 L. R. A. (N. S.) 272; *Union Mill v. Prenzler*, 100 Iowa, 540, 69 N. W. 878.

[6] Appellant argues that the record shows that the jury awarded the defendant exemplary damages all out of proportion to the actual damages proven. We shall not attempt to determine just the amount of actual or exemplary damages allowed by the jury. It is true that defendant's actual damage could not have been large, but, in any event, the exemplary damages actually allowed cannot exceed about \$90, and it may be even less than that amount. There was actual damage and a warrant for exemplary damages, and we do not think the latter so excessive as to require our interference therewith. We find no substantial reason for either modifying or reversing this judgment, and it is therefore affirmed.

Affirmed.

WATERLOO LUMBER CO. et al. v. DES MOINES INS. CO.

(Supreme Court of Iowa. Nov. 20, 1912.)

1. INSURANCE (§ 229*)—FIRE INSURANCE—CONTRACTS—CANCELLATION.

Where an agent of an insurer with authority to issue fire policies and collect premiums issued a policy to an applicant therefor, delivered it to him and received the premium and reported the same to insurer, who thereafter notified the agent that the rate was inadequate, and, unless a higher rate could be procured, he should take up the policy and return it for cancellation, the policy, in the absence of any notice to insured, was valid, and could not be canceled by the agent without notice to insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 500-503; Dec. Dig. § 229.*]

2. INSURANCE (§ 111*)—CONTRACTS—VALIDITY.

Where one applied to an agent authorized to issue policies and collect premiums for insurance in a stated sum, and the agent issued a policy therefor, delivered it, and collected the premium, the contract was complete, and the agent on notice from insurer to cancel the policy could not without insured's knowledge place the risk with another insurer.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 111.*]

3. INSURANCE (§ 233*)—CONTRACTS—VALIDITY.

An insurer liable on a fire policy issued by its agent within his authority to issue policies and collect premiums may not relieve itself from liability for loss already incurred by inducing insured to receive the policy of another

company issued without authority, and affording no indemnity.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 505; Dec. Dig. § 233.*]

4. INSURANCE (§ 127*)—FIRE INSURANCE—AUTHORITY OF AGENT—ISSUING POLICY AFTER LOSS.

An agent authorized to issue fire policies and collect premiums has no authority to insure property already destroyed, and a policy written and intended as a substitute for a subsisting policy by another insurer, but not delivered or brought to the notice of insured until after a loss, is not a valid contract, and does not work a cancellation of the first policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 186, 187; Dec. Dig. § 127.*]

5. INSURANCE (§ 130*)—FIRE INSURANCE—CONTRACTS—ASSENT OF INSURED.

The assent of insured obtaining a fire policy from one insurer to a policy from another insurer as a substitute for the first policy is essential to the existence of a completed contract evidenced by the second policy, and, where such assent is not procured until after the property has been destroyed, the second insurer is not bound.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 195-202; Dec. Dig. § 130.*]

6. APPEAL AND ERROR (§ 173*)—QUESTIONS REVIEWABLE—QUESTIONS RAISED FOR THE FIRST TIME ON APPEAL.

An objection that an action on a fire policy was prematurely begun does not go to the jurisdiction of the court, and will not be considered when raised for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.*]

Sherwin, J., dissenting.

Appeal from District Court, Blackhawk County; F. C. Platt, Judge.

Action at law upon a policy of fire insurance. There was judgment for plaintiffs, and defendant appeals. The material facts are stated in the opinion. Affirmed.

Read & Read, of Des Moines, for appellants. Edwards & Longley, of Waterloo, for appellee.

WEAVER, J. The plaintiff is a lumber dealer at Waterloo, Iowa. The defendant insurance company maintains a recording agency in that city conducted by Jameson & French. Through this agency the policy in suit was issued, and during the period named in such policy the property insured was destroyed by fire. These facts are conceded, but defendant denies liability on the grounds (1) that, when the issuance of the policy was reported by its agents, defendant rejected the risk and canceled the policy, and that same was never in fact delivered or paid for; and (2) that, in violation of a provision of said policy, the plaintiff procured other insurance upon the property without the knowledge or consent of the defendant, whereby the contract of insurance with defendant became void and of no effect.

The facts conceded or well established are as follows: Upon plaintiff's application Jameson & French, defendant's recording

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

agents, acting within the scope of their authority, issued the policy in suit, and received payment of the stipulated premium. This policy was issued on January 27, 1908, and duly reported by said agents to the defendant at Des Moines. Eight days later defendant addressed a letter to Jameson & French, saying that the rate was inadequate, and, unless a higher rate could be procured, they were directed to take up the policy and return it for cancellation. This demand or direction was received by Jameson & French on February 5, 1908, but was not then reported by them to the plaintiff lumber company. On the same day they entered upon their records a note of the cancellation of the policy, and directed an employé to rewrite the same risk in the Iowa Manufacturers' Insurance Company, which they also represented. Such policy was prepared not earlier than February 5, 1908, but it was antedated as of February 1, 1908, and it is not entirely clear from the record whether the instrument was executed before the property was destroyed by fire on February 7, 1908. As a matter of bookkeeping the defendant's payment of premium which had been credited to the defendant company was transferred to the credit of the Manufacturers' Company. On the morning of February 8, 1908, having learned of the fire, a representative of Jameson & French went to the manager of the plaintiff company, told him that the defendant had asked a cancellation of its policy, and that the agents had on the day before written up another in the Manufacturers' Company to take its place, and upon the strength of such alleged facts demanded an exchange of said policies. The manager replied that he only wanted what was right and to get the insurance for which he had paid, took the policy offered to him, and returned the one previously issued. Thereafter the plaintiff demanded of said agents a return of the policy sued upon and offered to surrender the policy of the Manufacturers' Company.

[1] 1. There is no evidence whatever to support the plea that the policy was never delivered or paid for. The delivery and the payment are both shown, and neither was disputed upon the trial. We have, then, to consider whether the policy was canceled and defendant released from liability thereon. Jameson & French being recording agents authorized to countersign and deliver policies, it requires neither argument nor citation of authorities to support the proposition that this policy upon delivery to plaintiff became a valid contract of insurance. It is equally clear that such policy could not be effectually canceled by notice or instruction from the company to its own agents that the premium was inadequate, and that, unless a higher rate could be obtained, the policy must be taken up. The insured could, of course, authorize the agents to act for him in receiving notice of cancellation and in procuring other

insurance in case his policy was thereafter canceled, but the giving of such authority in this case was nowhere shown, nor is it to be fairly implied from the record. It should also be here remembered as having material bearing upon this controversy that the defendant did not attempt nor order an unconditional cancellation of the policy. Addressing its agents under date of February 4, 1908, it called their attention to the character of the risk disapproving the rate charged as being insufficient, and adding: "We consider it well worth $1\frac{1}{2}$ per cent. for three years, fire and lightning, and unless you can obtain this rate we will ask you to very kindly take up our policy and return it to us for cancellation." This direction quite clearly contemplated an effort on the part of the agents to obtain the increased premium, and that cancellation should only follow the failure of such effort. So far as shown, the agents did not consult the plaintiff on the subject or attempt to induce it to meet the company's demand. This even without respect to the lack of due notice to the insured would seem to be not so much an act of cancellation as it was a proposition or threat of cancellation to be made upon the failure of the insured to comply with the demand for a greater premium. The case thus presented is similar in principle to the one decided in *Van Tassel v. Insurance Co.*, 151 N. Y. 130, 45 N. E. 365. There the plaintiff held a policy for \$10,000 which was renewed or extended for a year. A week later the company addressed a letter to the agent, saying the risk was declined for \$10,000, but that the company would renew for \$5,000 if wanted, and that the risk would not be held binding for more than \$5,000. No reply was made to this communication, and a loss was incurred within six days thereafter. Suit being brought, defendant sought to escape liability on the ground that the policy as issued had been canceled, and that the proposition or offer to renew for the smaller amount had not been accepted. The defense was overruled, it being held that the letter constituted no more than a proposed cancellation, and not a cancellation in fact. See, also, *Chrisman v. Insurance Co.*, 75 Mo. App. 310.

[2] The point is made in argument that, plaintiff having applied to Jameson & French for insurance without designating any particular company in which the policy was desired, the agents were authorized to place it in any responsible company represented by them, and that, upon notice to them of the cancellation of such policy, it was within the scope of their implied authority to place the risk with some other insurer. With this contention we are unable to agree. Plaintiff did not deal with Jameson & French as mere soliciting agents to present its application to different companies in succession until one was found willing to accept the risk. They were, as we have seen, recording agents au-

thorized to issue policies for the company. Plaintiff applied to them for insurance in a stated sum. They furnished it, and plaintiff paid for it. The contract was complete, and thenceforward these agents ceased in any manner to represent the insured. If the defendant thereafter undertook to cancel the policy, it was a new and independent transaction, in which its agents could not represent nor bind the plaintiff without special authority so to do, or a previous course of dealing between such parties from which the authority may be implied. *Lumber Co. v. Dans*, 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131; *Hartford Ins. Co. v. McKenzie*, 70 Ill. App. 615; *Commercial Co. v. Urbansky*, 113 Ky. 624, 68 S. W. 653; *Clark v. Insurance Co.*, 89 Me. 26, 35 Atl. 1008, 35 L. R. A. 276; *Partridge v. Insurance Co.*, 13 App. Div. 519, 43 N. Y. Supp. 632; *Merchants' Ins. Co. v. Shults*, 8 Kan. App. 798, 57 Pac. 306; *Snedlicor v. Insurance Co.*, 106 Mich. 83, 64 N. W. 35; *Edwards v. Insurance Co.*, 101 Mo. App. 45, 73 S. W. 886; *Mutual v. Insurance Co.*, 84 Va. 116, 4 S. E. 178, 10 Am. St. Rep. 819; *Martin v. Insurance Co.*, 106 Tenn. 523, 61 S. W. 1024; *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; *Insurance Co. v. Sammons*, 110 Ill. 166; *Stilwell v. Insurance Co.*, 72 N. Y. 385; *Hermann v. Insurance Co.*, 100 N. Y. 411, 3 N. E. 341, 53 Am. Rep. 197; *Broadwater v. Lion Co.*, 34 Minn. 466, 26 N. W. 455. The precedents cited to the contrary effect—*Arnfeld v. Insurance Co.*, 172 Pa. 605, 34 Atl. 580; *Koolstra v. Insurance Co.*, 122 Mich. 628, 81 N. W. 568; *Standard Oil Co. v. Insurance Co.*, 64 N. Y. 85—and others of that class, are not in point. In each of these cases the person receiving the notice was the admitted agent or broker of the insured or the course of business between the insured and the company's agent for a considerable period had been such as to justify an implication of authority to act in the premises.

[3] Here there is no claim of express authority, nor is there any proof of prior transactions or course of business from which a finding of implied authority could be sustained. The notice of Jameson & French, not having been communicated to plaintiff till after the loss had occurred, was necessarily unavailing to relieve the defendant from its liability, unless we are required to hold as a matter of law that plaintiff's act in receiving the policy in the Manufacturers' Company and giving up the one in suit is an act which bars or estops it from denying the effectiveness of the alleged cancellation. Counsel argued that if plaintiff had been informed of the change in the policies before the loss occurred, and had accepted the one last written in exchange for the first, he would be held to have ratified the act, and could not recover from the defendant. This is, of course, true, but it does not follow that such

an exchange or attempted substitution made after the loss would have the same effect. In the case supposed by counsel the plaintiff's ratification having been made while the insured property was still in existence, the Manufacturers' Company would clearly be bound by the contract made by its agents and the defendant discharged from further liability. In the case before us, the alleged ratification cannot upon any theory be said to have taken place until after the loss occurred when the insured property had ceased to exist, and the agents could no longer bind the Manufacturers' Company by any attempt to insure it at that time. Defendant cannot relieve itself from liability for loss already occurred by inducing the insured to receive the alleged policy of another company issued without authority and affording no indemnity whatever. Decisions touching upon transactions of this kind are quite numerous.

[4] It has frequently been held that an agent has no authority to insure property already destroyed and a policy written and intended as a substitute for a subsisting policy in another company, but not delivered or brought to the notice of the property owner until after loss, is not a valid contract of insurance. *Stebbins v. Insurance Co.*, 60 N. H. 65; *Clark v. Insurance Co.*, 89 Me. 26, 35 Atl. 1008, 35 L. R. A. 276; *Kerr v. Insurance Co.*, 117 Fed. 442, 54 C. C. A. 616. In the last-cited case, as in the case at bar, the insurer in the first policy, the Phoenix Company, notified its agent to cancel it. The agent Rohrer made the entry in his books, transferred the premium credit to the Milwaukee Company, and wrote up a policy in the last-named company ready for delivery to the insured, who was given no notice of the transaction until after a fire had destroyed the property when an actual delivery of the policy was made. In holding that such acts did not work a cancellation of the first policy the court reviews the precedents to which we have already called attention, and says: "These cases hold that the written but undelivered policy never matured into a contract for insurance, and that liability upon the subsisting policy which was intended to be replaced was fixed by the burning of the property while it was still in force. The acts of bookkeeping of Rohrer in marking cancellation on his office record of the Phoenix Company's policy and transferring in his accounts the credit for premium from that company to the defendant company, all done in anticipation of his purposed delivery of defendant company's policy in replacement for the expected surrender of the policy of the Phoenix Company, were futile, and affected no existing rights or liabilities. *Insurance Co. v. Turnbull*, 86 Ky. 230, 237, 5 S. W. 542; *Insurance Co. v. McKenzie*, 70 Ill. App. 615, 623. In the present case it clearly appeared that at the time of the burning of the ele-

vator the policy of the Phoenix Insurance Company was a valid contract of insurance, which had never been surrendered nor canceled; and that plaintiff, the insured, then held it as such. The policy of the defendant company was then an undelivered writing, not yet a contract, and because of the destruction of the property while it was in that condition it never became a contract." The Clark Case cited from the Maine court arose upon a state of facts very similar to those we have here to deal with. The plaintiff applied to the agents for insurance which they wrote in the Commercial Union Company. A few days later that company wrote the agents to cancel the policy. Without notifying the insured, they directed their clerk to write another policy in the Insurance Company of North America. That policy was antedated, as was done in this case, and credit for the premium paid was transferred to the last-named company. Before the change was reported to the insured, the property burned. Thereafter the agent induced the insured to receive the last policy and give up the one first written, assuring him that it would be all right. As a matter of safety separate actions were brought on these policies setting up the facts of the attempted cancellation and change. Speaking with reference to the action upon the policy last issued, the court says: "The agent had no authority, express or implied, to effect any insurance for the plaintiff beyond what had already been completed. His authority was to procure for the plaintiff \$1,200 insurance in one of the companies which he represented, and, having done that to the acceptance of the plaintiff, his agency so far as the plaintiff was concerned was accomplished, and he had no authority to make further insurance on the behalf of the plaintiff. Nor was it the intention even of the agent to effect additional insurance. It was, at the most, an attempt to transfer a risk from one company to another at the instance of the company then carrying the risk and without the consent of the insured. The attempted cancellation and the effort to place the risk in the defendant company were parts of the same transaction with no consent of the assured. Unless the cancellation was valid, the second risk did not attach. It is not pretended that plaintiff was aware of any intention or attempt at cancellation until the morning after the loss occurred. Until the five days' notice provided in the policy should be given him, or until he should consent to such cancellation, the first policy would remain in force, and the second would not become operative as a legal subsisting contract." Quite in point and to the same effect are *Massasoit v. Assurance Co.*, 125 Mass. 110; *Wilson v. Insurance Co.*, 140 Mass. 210, 5 N. E. 818; *Stebbins v. Insurance Co.*, 60 N. H. 65.

[5] If it be said that Jameson & French,

being agents of the Manufacturers' Company, its assent to the issuance of the second policy must be assumed, it is none the less true that the assent of the plaintiff was essential to the existence of a completed contract, and, if such assent was not given or procured until after the subject of insurance had been destroyed, the company would not be bound thereby. *Mutual v. Young*, 90 U. S. (23 Wall.) 85, 23 L. Ed. 152; *Michigan Pipe Co. v. Insurance Co.*, 92 Mich. 493, 52 N. W. 1070, 20 L. R. A. 277, and cases already cited. Counsel's illustration of a case in which the insurance companies dealing directly together, the second company agreeing to take the risk which is being carried by the first company and loss ensues before the policy is delivered, does not cover the case at bar. In such instance there is a complete contract of reinsurance for the benefit of the first insurer which may be enforced. But the first company is in no manner relieved from its obligation to the property owner, although it is in position to protect itself against ultimate loss by calling upon the second company for the promised indemnity. *Massasoit v. Assurance Co.*, 125 Mass. 110.

Neither company is empowered to speak or act for the holder of the first policy or to bind him to an acceptance of the second policy, and he is equally powerless to bind the second insurer by a consent given after a loss has occurred. But two cases are brought to our attention from which any apparent support for defendant's position can be extracted—*Larsen v. Insurance Co.*, 208 Ill. 166, 70 N. E. 31; *Arnfeld v. Insurance Co.*, 172 Pa. 605, 34 Atl. 580—and a careful reading of these demonstrates that neither goes to the extent claimed for it. In the *Arnfeld* Case plaintiff employed a broker to procure insurance and the broker obtained a policy from the Guardian Company. This company thereafter notified the broker of its purpose to cancel the policy within five days. Acting upon the notice, the broker at once procured a policy in the Queen Company, and notified the Guardian Company thereof, and assured it that it was relieved from further liability. The insured accepted the policy from the Queen Company, and that company conceded its liability, and paid its proportion of the loss. Action was also brought on the first policy, and the essence of the decision upon appeal in that case is that the court should have instructed the jury that if the second policy was taken as a substitute for the first, and not merely as additional insurance, and if the second company accepted responsibility and paid its share of the loss, then the first policy should be treated as canceled, and no recovery could be had thereon. Of the soundness of this proposition there can be no dispute, and it is in no manner inconsistent with the conclusions we have above announced. The *Larsen* Case, decided by the

Illinois court, is substantially similar in its facts to the Arnfeld Case, in that, after being notified of the exchange of policies, the insured not only assented thereto, but presented its claim to the substituted company, which acknowledged its liability and paid its proportion of the loss. The insured having thus received the indemnity promised in the policy last issued, the court very properly says: "It cannot now lie in him to say that there was no consideration for the surrender of the policy issued by the appellee and that appellee is not relieved from liability by that transaction." Without further consideration of the authorities, we have to say that we are quite clear that there was never any efficient cancellation of the policy issued by the defendant, nor was there a valid substitution therefor of the policy of the Manufacturers' Company. For the reasons already stated, it must be held that the defense based upon an alleged avoidance of the policy by the act of the plaintiff in procuring additional insurance is without any support in the record.

[§] 2. The defendant further insists that the judgment below must be reversed because the action was prematurely begun. This fact is said to affirmatively appear from the printed record, a statement which the appellee questions. We have not undertaken to satisfy ourselves in that respect because it appears to be unnecessary. The objection to the timeliness of the action was not raised in pleading or by motion in arrest, nor does it appear to have been in any manner called to the attention of the trial court. Under such circumstances, it cannot be raised for the first time in this court. *Petty v. Mutual Ins. Co.*, 111 Iowa, 358, 82 N. W. 767; *Van Camp v. Keokuk*, 130 Iowa, 716, 107 N. W. 933; *Borghart v. Cedar Rapids*, 126 Iowa, 313, 101 N. W. 1120, 68 L. R. A. 306. The objection is quite certainly not one which goes to the jurisdiction of the court, and the general rule that other objections not in any manner raised in the trial court will not be considered on appeal is so general and universal that citation of authorities in support thereof is not required. The action is at law. The burden was upon defendant to make good its several defenses, or some of them, and the findings of the trial court upon all disputed matters of fact is in favor of the plaintiff.

We find no reversible error in the record, and the judgment below is therefore affirmed.

SHERWIN, J. (dissenting). By mistake an opinion written upon the original submission of this case reversing the judgment below was released and published pending a petition for rehearing. See *Waterloo Lumber Co. v. Ins. Co.*, 150 Iowa, 607, 130 N. W. 147.

Said opinion is hereby ordered withdrawn.

AMERICAN FIDELITY CO. v. BLEAKLEY, Auditor of State.

(Supreme Court of Iowa. Nov. 20, 1912.)

1. INSURANCE (§ 126*)—ACCIDENTS—AUTOMOBILES.

Code Supp. 1907, § 1709, subd. 5, cl. 1, providing that any company "may insure the health of persons and against personal injuries, disablement or death resulting from traveling or general accidents by land or water," does not authorize the issuing of a policy to indemnify the owner of an automobile against liability that may be imposed by law; such clause being limited to personal injuries that are received by the insured himself.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 183-185; Dec. Dig. § 126.*]

2. INSURANCE (§ 126*)—LIABILITY INSURANCE—MASTER AND SERVANT.

Code Supp. 1907, § 1709, subd. 5, cl. 2, relating to insuring of employers against liability on account of acts of employes, and accidents due to machinery, to persons and property, etc., does not authorize the issuing of a policy to indemnify the owner and driver of an automobile "against loss from liability imposed by law for damages and expenses incurred on account of bodily injuries including death accidentally suffered by reason of the use of such automobile," such clause providing for indemnity to an employer only arising from the act of his employe, and prohibits liability insurance not therein authorized.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 183-185; Dec. Dig. § 126.*]

3. CORPORATIONS (§ 636*)—FOREIGN CORPORATIONS—COMITY.

Foreign corporations are only allowed to do business upon such terms and conditions as the state shall prescribe and may be prohibited from doing business altogether, and the court cannot override such legislation on the ground of comity, since within its powers the state, through its Legislature, is supreme, and the court's duty is ended when it determines what the statutory law is.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2506-2509, 2571; Dec. Dig. § 636.*]

Appeal from District Court, Polk County; Lawrence De Graff, Judge.

The facts are stated in the opinion. Affirmed.

James C. Hume, of Des Moines, for appellant. George Cosson, Atty. Gen., and Henry E. Sampson, of Des Moines, special counsel, for appellee.

SHERWIN, J. The American Fidelity Company is a foreign corporation, organized under the laws of the state of Vermont, and holds a license to transact business in this state in accordance with the laws thereof. It has the power under its charter, by-laws, and the laws of Vermont to insure persons against loss and damage from all kinds of accidents, including the power and authority to insure drivers of automobiles against liability for damages to the persons and property of other persons resulting from accidents caused by the driver's negligence in operating his machine. In September, 1911, the said company entered into a contract of insurance with one W. F. Gabrio, a citizen

and resident of Des Moines, insuring and agreeing to indemnify him as the owner and driver of a certain automobile "against loss from liability imposed by law for damages and expenses incurred on account of bodily injuries, including death resulting therefrom, accidentally suffered by any person or persons by reason of the maintenance, use, loading and unloading of" said automobile, and against loss "from the liability imposed by law on the insured for damages to property, and resulting from any accident caused directly by" said automobile. A few days later this policy of insurance was submitted to the defendant as Auditor of the State for his examination and approval. Defendant refused to approve the policy, and ordered its cancellation under threat of expulsion of the plaintiff from the state. Thereafter this action was brought in equity, asking that the policy be declared legal under the laws of the state, and that the defendant and those acting under his authority be enjoined from interfering in any way with plaintiff's right to write such insurance, and from revoking plaintiff's license to do business in the state because of the issuance of said policy. A writ of mandamus was also asked, compelling the defendant to approve said policy. A demurrer to the petition was sustained, and, the plaintiff electing to stand on its petition, the action was dismissed, and plaintiff appeals.

The sole question for our determination is thus stated by appellant's counsel: "May a foreign insurance company, which has complied with all of the provisions of the statutes of Iowa relative to its admission to this state, and has received a license from the State Auditor to do business within the state, having power by the laws of its own state and by its charter to insure the owner or driver of an automobile, who is not an employer, against liability for damages to persons resulting from an accident caused by the owner's or driver's negligence in operating his machine, issue such insurance in Iowa?" In support of appellant's contention that an affirmative answer should be made to this question, reliance is placed on the following propositions: First, that such insurance is authorized by the first clause of subdivision 5 of section 1709 of the Code; second, that such insurance is authorized by the second or "employer's liability" clause of subdivision 5 of the same section; and, third, that such insurance may be issued in this state under the doctrine of interstate comity, appellant having the power under its charter to issue such insurance and being licensed to do business in this state. These propositions will be considered in the order of their statement. The first clause of subdivision 5 of section 1709, as it appears in the Supplement of 1907, provides that any company authorized to do business in this state "may insure the health of persons and

against personal injuries, disablement or death resulting from traveling or general accidents by land or water," and the second clause of subdivision 5 of the section provides that any company may "insure employers against loss in consequence of accidents or casualties of any kind to employes or other persons or to property resulting from any act of an employe, or any accident or casualty of any kind to persons or property, or both, occurring in or connected with the transaction of their business, or from the operation of any machinery connected therewith."

[1] In our judgment the first of these two clauses cannot be so construed as to furnish authority for the issuance of the policy in question. It is true that it authorizes the insurance of persons "against personal injuries, disablement or death," and that any person may be so insured. But it is clear to us that such insurance is limited by the terms of the clause and by the chapter generally to personal injuries that are received by the insured himself. It authorizes insurance against accidents, but only against accidents that result in personal injury to the insured. We are aware of the fact that these limitations are not made by the express language of the clause, but we think a fair construction of the language used leads inevitably to the conclusion we reach. The policy sought to be issued by the appellant is one to indemnify the insured against liability that may be imposed by law for some negligent or wrongful act of his own. In other words, its purpose is to insure against a liability that might follow the insured's negligence, other than as an employer. There is a very decided difference between accident and liability insurance, and we think a clear distinction between the two classes was made by the Legislature in enacting subdivision 5 of section 1709. The second clause provides for liability insurance, but limits it to employers.

[2] If the appellant's construction of the first clause were to obtain, it is manifest that the second clause would be useless, for the first clause would alone completely cover the ground, and, liability insurance having been provided for in the second clause, the statute is to be construed as prohibiting liability insurance not therein authorized. 36 Cyc. 1122.

2. The second clause of subdivision 5 does not in our opinion furnish the appellant any authority for its contention. It plainly and clearly provides for indemnity to an employer, and to an employer only. It provides that he may insure himself against liability arising from the act of his employe, but nothing more.

[3] The appellant's claim that the policy in question should issue because of interstate comity cannot be sustained. The state has

the undoubted right to say whether foreign corporations shall be permitted to do business here at all, and, if such permission is granted, it may be upon such terms and conditions as the state shall prescribe. And, where it is the manifest intention to limit or restrict the powers given to such corporation by its charter, courts have no authority to override such legislation on the ground of comity between the states. Within its power, the state, through its Legislature, is supreme, and the court's duty is ended when it determines what the statutory law is. The Attorney General urges that it would be against public policy to permit such insurance as the appellant proposes. If it is meant that it would contravene the declared policy of the state, we fully agree with the contention. But, if it is contended that sound, undeclared public policy demands a denial of such policies of insurance, we cannot agree to the proposition. Out of the nearly 50,000 drivers of automobiles in this state there may be a few who are so careless and heedless about the lives and limbs of their neighbors as to be unworthy of any kind of protection. On the other hand, accidents may happen to the other large class of drivers, the men who are law abiding, and who are careful not to injure even a stray dog or an old hen that persists either in crossing the road just ahead of the car or under it, and this great majority of decent drivers should not be denied reasonable protection because of the recklessness of a few. As we have said, however, we think this insurance is not permitted under the present statute, and the judgment must, therefore be affirmed.

Affirmed.

MORRISON v. ALTIG.

(Supreme Court of Iowa. Nov. 19, 1912.)

1. PHYSICIANS AND SURGEONS (§ 14*)—VETERINARY—CARE REQUIRED.

Where a veterinary holds himself out to the public or to the plaintiff as a competent veterinary surgeon, and as such undertakes to treat a horse, he is bound to bring to the service the learning, skill, and care which characterize the profession generally in that neighborhood or vicinity, whether he receives compensation for the service or not.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 21-30; Dec. Dig. § 14.*]

2. PHYSICIANS AND SURGEONS (§ 14*)—VETERINARY—STUDENTS—CARE REQUIRED.

Where defendant, at the time he treated plaintiff's horse, did not hold himself out as a competent veterinary, and stated that he was an undergraduate, undertaking the treatment without compensation only on plaintiff's urgent request, he was bound only to perform the service honestly and to the best of his ability, and was not liable for damages for malpractice, even though the service, if performed by one claiming to be a competent surgeon, might

justly be characterized as negligent and unskillful in a high degree.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 21-30; Dec. Dig. § 14.*]

3. PHYSICIANS AND SURGEONS (§ 16*)—INCOMPETENCY—MALPRACTICE.

A practicing physician who informs a person employing him that he lacks experience or skill in the service he is asked to perform is charged with no liability on account of his professional incompetency.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 31; Dec. Dig. § 16.*]

4. PHYSICIANS AND SURGEONS (§ 18*)—INSTRUCTIONS—DEFENSES—DUTY TO PRESENT.

Defendant, a veterinary student, was requested by plaintiff to treat his horse. Defendant proved that he was reluctant to do so because he had not completed his course, but, on being pressed by plaintiff, finally consented, and did so, as plaintiff claimed, to the injury of the horse. The court, in an action for damages, charged that, if defendant held himself out as a competent veterinarian, he was bound to bring to the service the learning, care, and skill which characterized the profession generally in the vicinity, and then charged that if the services were rendered and received by plaintiff as a gratuity at plaintiff's request, and defendant did not hold himself out to plaintiff as a veterinary surgeon, nor as one skilled in the profession, then, before the jury could find for plaintiff, they must find that defendant was guilty of gross negligence. The court also charged that, if one undertakes for hire the treatment or care of disease or any injury, he is bound to use the skill, learning, and prudence which is ordinarily and usually employed by members of the profession practicing in similar localities, taking into consideration the improved methods and advanced state of learning at the time in question, and failure to exercise such degree of care would be negligence, and, if by reason of such negligence on the part of a veterinary surgeon the animal is injured or the owner is put to unnecessary expense, the surgeon would be liable for damages. *Held*, that such instructions did not constitute an adequate presentation of defendant's defense, and were further objectionable as separating negligence into degrees.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. § 18.*]

5. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE.

Where defendant in a suit for malpractice proved that he did not hold himself out as a veterinarian, but only consented to treat plaintiff's horse as a student without pay, an instruction that any one who undertakes for hire the treatment or care of disease or injury is bound to exercise the skill, learning, and prudence which is ordinarily exercised by members of the profession practicing in similar localities was erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

Appeal from District Court, Jasper County; K. E. Wilcockson, Judge.

Action at law to recover damages for alleged negligence in the treatment of a diseased horse. Verdict and judgment for plaintiff, and defendant appeals. Reversed.

For former opinion, see 134 N. W. 529.

Rayburn & Lyman, of Grinnell, for appellant. Bray & Shifflett, of Grinnell, for appellee.

WEAVER, J. The defendant was a student in a school of veterinary science. While at home during vacation he had castrated colts for various persons in that vicinity, and on the occasion in question went to the farm of one Figland to perform an operation of that nature, and while there the plaintiff brought to him a horse having a sweenied shoulder, and asked him to treat it. According to all the witnesses present and testifying upon both sides of the case (except the plaintiff himself), defendant made no profession of being a doctor of veterinary science, but stated that he was still attending school, and had a good record or class standing. The plaintiff alone testifies that defendant said he "was a veterinarian," but he nowhere denies the statement attributed to the defendant by the other witnesses concerning his attendance at school, and that he expected to return to the school in the fall. Figland, at whose invitation defendant was there and through whose intervention the horse was produced for defendant's treatment, says defendant told them he was not a veterinarian, but a student, and had not completed his course at school. All agree that defendant was reluctant to undertake the treatment, and offered several excuses for not doing so, but finally consented. He made an incision in the atrophied shoulder of the animal, and injected therein a quantity of turpentine, and advised the plaintiff to turn the horse out to pasture. The shoulder and body of the horse thereafter became seriously swollen and inflamed, and plaintiff was put to expense in curing it. Defendant says the turpentine injected into the shoulder did not exceed $\frac{3}{4}$ of an ounce, while plaintiff estimated the quantity at 24 teaspoonsful. No other witness attempts to state the quantity. Prior to the operation, nothing had been said about payment for defendant's services and after they had been performed, though payment was offered, he declined it. The experts testifying in the case unite in saying that the injection of turpentine was proper treatment, but the quantity as stated by plaintiff would be excessive, and probably produce injurious results. In his petition plaintiff alleges that defendant held himself out to the public as a skilled veterinarian, and as such accepted employment to treat plaintiff's horse, but performed the service so negligently and unskillfully as to greatly injure the animal, to plaintiff's damage, for which he demands recovery in the sum of \$200. The defendant answers, denying the allegations of the petition.

[1] The right to recover damages in an action of this character is based on the theory that the defendant has failed to discharge a legal duty which he owed the plaintiff, resulting in the injury complained of. The nature and extent of that duty, if any, depends upon the circumstances under which

defendant undertook the service. If he was holding himself out to the public or to the plaintiff as a competent veterinary surgeon, and as such undertook to treat the horse, he was in duty bound to bring to that service the learning, skill, and care which characterized the profession generally in that neighborhood or vicinity, and this duty would be none the less obligatory because he performed the service without compensation. 2 Cooley on Torts (3d Ed.) p. 1393.

[2] If, however, he did not hold himself out to be a competent veterinarian, if he was as yet a mere student or learner or undergraduate, and frankly disclosed that fact and consented to undertake the treatment only upon the urgent request of the plaintiff, and without compensation, and performed the service honestly and to the best of his ability, then his duty to the plaintiff was discharged, and he is not liable in this action, even though the same service, if performed by one claiming to be a competent surgeon, might justly be characterized as negligent and unskillful in a high degree. *Higgins v. McCabe*, 126 Mass. 13, 30 Am. Rep. 642; *McNevin v. Lowe*, 40 Ill. 209; *Carroll v. Bell* (B. C.) 15 West Law Rep. 327; *McCandless v. McWha*, 22 Pa. 261.

[3] Even a practicing physician who informs a person employing him that he lacks experience or skill in the service he is asked to perform is charged with no liability on account of his professional incompetence. *Lorenz v. Jackson*, 88 Hun, 200, 34 N. Y. Supp. 652.

[4] The chief complaint of the appellant in argument is that, while the court instructed the jury upon the law applicable to the theory that he was holding himself out as a veterinary surgeon and as such took employment to treat the plaintiff's horse, the instructions did not fully or properly state the law governing his responsibility, if he did not pretend to be a competent practitioner, and at the request of the plaintiff, and without compensation, performed the service to the best of his ability. The objection we think is well grounded. In different paragraphs of the charge the court stated that, if the defendant held himself out as a veterinary surgeon, he would be held in law to exercise the skill and care of veterinary surgeons generally practicing in that vicinity, and that if he failed in this respect, and thereby the horse sustained material injury, he was liable in damages. This is probably a correct statement of the law governing that theory of the case, and we do not understand appellant to seriously question it. But it was equally necessary to a proper submission of the case that the jury be instructed upon the law applicable to the theory of the defense. This the court seems to have omitted unless it is to be found in the sixth and seventh paragraphs of the instructions. If these instructions were intended to cover

that phase of the case, we think it must be said they were erroneous.

They read as follows:

"(6) You are instructed that if you find from the evidence that the services of the defendant in the treatment of the mare was rendered to plaintiff and received by him as a gratuity and at the request of the plaintiff, and the defendant did not hold himself out to plaintiff as a veterinary surgeon, nor as one skilled in that profession, and you so find, then, before the plaintiff can recover the defendant must have been guilty of gross negligence.

"(7) You are instructed that one who undertakes for hire the treatment or care of disease or any injury is bound to use and exercise the skill, learning, and prudence which is ordinarily and usually employed by members of the profession practicing in similar localities, taking into consideration the improved methods and advanced state of learning at the time in question, and failure to exercise such degree of learning or skill or care is negligence, and, if by reason of such negligence on the part of a veterinary surgeon an animal is injured or the owner of the animal is put to unnecessary expense, then the surgeon is to be held liable to the owner of the animal for all damages so sustained."

Concerning the first quoted paragraph, it is to be said that for many years this court has refused to recognize the so-called degrees of negligence—"slight," "ordinary," and "gross"—and the introduction of such distinctions into instructions to juries has been said to be wrong in principle, and likely to confuse the jurors. *Gould v. Schermer*, 101 Iowa, 582, 70 N. W. 697; *Kerns v. Railroad Co.*, 94 Iowa, 121, 62 N. W. 692.

[5] In view of the verdict, however, this error might perhaps be said to have been without prejudice, were it not for the seventh paragraph. The jury are there told that any "one who undertakes for hire the treatment or care of disease or injury is bound to exercise the skill, learning and prudence which is ordinarily employed by members of the profession practicing in similar localities." Under the rule thus stated, even if defendant told plaintiff that he was not a veterinary, and was without skill or experience in such science, and plaintiff with full knowledge of the fact requested and employed him to treat the horse, and he treated it in good faith and according to the best of his knowledge and ability, he would be held to the same high standard of responsibility which governs the case of a professed veterinarian holding himself out to the world as possessed of the learning, skill, and experience which characterizes the profession generally. This we have seen is not the law, and the instruction could not have been otherwise than prejudicial to the defendant. Indeed, in view of the record before us, it is not easy to ac-

count for the verdict otherwise than upon the theory that the jury felt bound to follow the instruction last mentioned, and gave it effect in accordance with the interpretation we have here placed upon it. To deny a new trial would in our judgment work an apparent miscarriage of justice.

For the reasons stated, the judgment below will be reversed, and cause remanded for a new trial.

Reversed.

SCOTT v. O'LEARY.

(Supreme Court of Iowa. Nov. 16, 1912.)

1. APPEAL AND ERROR (§ 1001*)—FINDINGS SUPPORTED BY TESTIMONY—CONCLUSIVENESS.

The Supreme Court on appeal will not interfere with a finding in answer to a special interrogatory, which has support in the testimony.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3923-3934; Dec. Dig. § 1001.*]

2. EVIDENCE (§ 471*)—EXPERT TESTIMONY—MATTER OF OPINION OR FACT.

A witness who went on the scene of a collision and assisted in pulling an automobile off a horse was competent to testify that the machine was in gear and that the brakes were not set; such statements being statements of fact requiring no expert knowledge.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

3. EVIDENCE (§ 471*)—FACTS OR OPINION—BODILY APPEARANCE AND CONDITION.

A nonexpert witness was competent to testify that plaintiff, on leaving the hospital after being struck by an automobile, had cuts and burns on his face and had no use of his head, neck, and right arm; that whenever he tried to turn his head he would have to turn his whole body; that he remained in that condition some seven weeks—since he really described nothing more than he saw.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

4. EVIDENCE (§ 471*)—FACT OR CONCLUSION—PLACE OR CONDITION.

Testimony regarding buggy and automobile tracks near the scene of a collision was not incompetent as calling for a conclusion of the witness.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

5. DEATH (§ 68*)—EVIDENCE—CONTRIBUTORY NEGLIGENCE—HABITS AND CHARACTERISTICS.

Where there are no eyewitnesses of a transaction, testimony as to the habits of one whose conduct is in question may be shown as bearing upon his care or the want of it, but the testimony must relate to his general habits and not to particular instances; the general rule being that good character or the reverse cannot be shown in a negligence case.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 86, 87; Dec. Dig. § 68.*]

6. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EVIDENCE.

In an action for damages, etc., from an automobile collision to which there were eyewitnesses, the exclusion of evidence of admissions by plaintiff's intestate regarding his conduct with reference to another horse and vehicle in an instance a year or more before the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

accident, if erroneous, was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.*]

7. WITNESSES (§ 159*)—COMPETENCY—TRANSACTIONS WITH DECEDENT.

In an action by an administratrix for injuries sustained by her intestate, and for damages done to his property in an automobile collision, the mother of deceased was not incompetent to testify that she had given him his time and permitted him to work for himself, that he collected his own wages, attended to his own business affairs, and owned property in his own name, on the ground that the testimony related to a personal transaction between herself and one deceased.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 629, 664, 666-669, 671-682; Dec. Dig. § 159.*]

8. EVIDENCE (§ 471*)—CONCLUSION OR FACT—EMANCIPATION OF MINOR.

In an action to recover damages for injuries sustained by plaintiff's intestate and damages done to his property as a result of an automobile collision, testimony of his mother that she had given him his time and permitted him to work for himself, that he collected his own wages, attended to his own business affairs, and owned property in his own name, was not objectionable as being a conclusion of the witnesses.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

9. PARENT AND CHILD (§ 7*)—INJURIES TO CHILD—ADMISSIBILITY OF EVIDENCE—EMANCIPATION.

In an action to recover damages for injuries sustained by plaintiff's intestate and damages done to his property as a result of an automobile collision, evidence that his mother had given him his time, permitted him to work for himself, that he collected his own wages, attended to his own business affairs, and owned property in his own name, was admissible.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 72, 86-99; Dec. Dig. § 7.*]

10. HIGHWAYS (§ 184*)—ACTION FOR INJURIES—INSTRUCTIONS—SPEED.

In an action for injuries from being struck by an automobile, an instruction that one "operating an automobile at an average speed of more than 20 miles per hour is prima facie guilty of negligence," following the wording of Code Supp. 1907, § 1571h, was not error, although the language is obscure.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. § 184.*]

11. HIGHWAYS (§ 172*)—USE—CARE REQUIRED—AUTOMOBILES.

The driver of an automobile on a country road is bound to know that people are likely to be traveling on it at all seasons and at all times of the day and night, and has no right to expect a free and unobstructed road.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 459, 460; Dec. Dig. § 172.*]

12. APPEAL AND ERROR (§ 215*)—NECESSITY OF OBJECTION—ADMISSION OF EVIDENCE.

In an action to recover for injuries sustained by plaintiff's intestate and damages to his property from an automobile collision, where there was no showing that plaintiff's father was dead at the time, error, if any, in an instruction that, decedent being a minor at the time of the injury, his administratrix could not recover anything for loss of his earnings which during that time belonged to his parents, unless he had been given his time before the accident, was cured by failure to object that

the mother was not the proper person to emancipate him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215.*]

13. APPEAL AND ERROR (§ 930*)—REVIEW—PRESUMPTION—FOLLOWING INSTRUCTIONS.

In an action for injuries sustained by plaintiff's intestate and for damages to his horse and buggy from an automobile collision, where there was no testimony as to any injury to the harness or as to its value, it will be presumed that the jury followed an instruction authorizing recovery for damages to the harness only in the event that such damages were shown by the testimony, and made no allowance for damages to the harness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. § 930.*]

14. APPEAL AND ERROR (§ 1171*)—REVIEW—HARMLESS ERROR—AMOUNT OF RECOVERY.

Where the verdict for plaintiff in an action for injuries sustained, and for damages to his horse and buggy from an automobile collision, was small in view of the injuries sustained, an allowance for damages to the harness, small in any event, would not call for a reversal, even though the jury disregarded the instruction to allow no damages therefor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4546-4554; Dec. Dig. § 1171.*]

Appeal from District Court, Johnson County; R. P. Howell, Judge.

Action to recover damages for injuries sustained by plaintiff's intestate, and damages done to his property as a result of an automobile collision. Defendant filed a general denial, and upon the issues joined the cause was tried to a jury, resulting in a verdict for plaintiff in the sum of \$550, upon which judgment was rendered, and defendant appeals. Affirmed.

Wade, Dutcher & Davis, of Iowa City, for appellant. Edwin B. Wilson and Ranck & Bradley, all of Iowa City, for appellee.

DEEMER, J. This action was brought by Clyde Scott, a minor, during his lifetime in the name of George Scott, his next friend. During its pendency, but before trial, Clyde Scott died, and plaintiff, Blanche Scott, the administratrix of his estate, was substituted as plaintiff. It is not claimed that Clyde Scott died as a result of his injuries; but it is averred that he suffered personal injuries, was at expense for medical treatment, that he lost time, and that his horse was killed and his buggy and harness injured. In speaking of the plaintiff, we shall, unless otherwise stated, refer to Clyde Scott.

It is averred in the petition that plaintiff, while driving a single horse hitched to a top buggy along a public highway in Johnson county, Iowa, known as the lower Muscatine road, traveling in a southeasterly direction, met the defendant, who was coming from an opposite direction in a large high-powered automobile at an excessive, unlawful, and unreasonable rate of speed, with the lights of his car in an imperfect condi-

tion, and that he (defendant) recklessly and carelessly and without looking to see if there was any one in the road, and without using any care or caution, drove his automobile directly into plaintiff's horse and vehicle, killing the horse, injuring the buggy and harness, and throwing him (plaintiff) to the ground, seriously injuring him. He further pleaded that defendant did not turn out or give him any part of the highway, and that he might have avoided plaintiff had he been so minded; but on account of not paying attention to where he was going, the defective condition of his lights, and the high rate of speed, the collision occurred. Plaintiff introduced testimony in support of all of these issues, and it is not seriously contended that the verdict is without support. The points relied upon for reversal have reference to rulings made on the admission and rejection of testimony, to the instructions given, and to the proposition that deceased was, as a matter of law, guilty of contributory negligence.

[1] 2. Without setting forth the testimony, it is sufficient to say that the question of contributory negligence was for a jury. For defendant it is contended that deceased was asleep at the time of the collision, but the jury in answer to a special interrogatory found this was not true, and, as this finding has support in the testimony, we should not interfere.

[2] 3. A witness for the plaintiff, who went to the scene of the collision, and who assisted in pulling the automobile off the horse, was permitted to testify, over objections, that he was incompetent, and that the inquiry called for an opinion and not a fact, that the machine was in gear, and that the brakes were not set. Surely these statements were of facts, and no expert knowledge was required to determine the matter.

[3] The following extract from the record presents the next ruling complained of: "Q. What condition was he in when he came out of the hospital? Describe to the jury from what you saw what condition he was in. A. Well, he had cuts and burns on his face; he had no use of his head and neck and the right arm. (Defendant moves to strike out the statement that he had no use of his head and neck and right arm as a statement of the conclusion of witness and incompetent; the witness is not competent to testify on that subject. Overruled; exception saved.) Q. Now, explain to the jury. Describe what you mean by not having use of his head, neck, arm, and shoulders. A. Whenever he went to turn his head like any person would, he would have to turn his whole body; he had no use of his neck, or couldn't turn his head like any one else. (Defendant moves to strike out the answer for the same reason—statement of a conclusion as to what he could do or could not do. Overruled as to the whole answer if the motion includes

the whole; exception saved.) Q. How long did he remain in the condition that you have described? (Same objection for the same reasons and asking for the opinion of the witness. Overruled; exception saved.) A. Why, he remained that way some seven weeks like that when he got so he could do little things around." The witness giving this testimony was not an expert; but we think his testimony was competent, for he really described nothing more than he saw. That such testimony is competent, see *Reininghaus v. Association*, 116 Iowa, 364, 89 N. W. 1113; *Stone v. Moore*, 83 Iowa, 186, 49 N. W. 76; *Kosteletzky v. Scherhart*, 99 Iowa, 120, 68 N. W. 591; *Bailey v. Centerville*, 106 Iowa, 20, 78 N. W. 831; *State v. Shelton*, 64 Iowa, 333, 20 N. W. 459.

[4] Testimony regarding buggy and automobile tracks near the scene of the accident was objected to as calling for the conclusion of the witness. Manifestly these objections are untenable.

[5] A witness was asked if he knew of the habits of the deceased as to his sleeping while driving upon the public highway, and another as to certain statements made by Clyde Scott during his lifetime in which he stated that he was in the habit of going to sleep while driving on the highway. All this testimony was excluded, and of this complaint is made. In this connection it should be stated that defendant claimed Scott was asleep at the time of the collision. Where there are no eyewitnesses of a transaction, it has been held that testimony as to the habits of one whose conduct is in question may be shown as bearing upon his care or the want of it. *Frederickson v. Railroad Co.*, 135 N. W. 13. See, also, *Dalton v. Railroad Co.*, 114 Iowa, 259, 86 N. W. 272; *Gray v. Railroad Co.*, 143 Iowa, 268, 121 N. W. 1097; *Hall v. Rankin*, 87 Iowa, 261, 54 N. W. 217; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737, 28 N. W. 47, 56 Am. Rep. 870. But the testimony must relate to his general habits and not to particular instances. The general rule in civil cases is that good character or the reverse cannot be shown in negligence cases. *Wigmore on Evidence*, §§ 64, 65, and cases cited.

[6] In the instant cases there were eyewitnesses of the transaction, and defendant was permitted to introduce certain admissions said to have been made by plaintiff's intestate regarding the transaction. Under the rules previously announced by us, there was no error in the rulings, and in any event no prejudice. Answers to the questions necessarily would have involved Scott's conduct with reference to another horse and vehicle, and in one instance at a time a year or more prior to the accident. The testimony, even if admissible, was so inconsequential in character that we would not be justified in reversing the case. Under the testimony, the jury might very well have

found for plaintiff, although he was asleep at the time of the collision.

[7-9] Mrs. Kate Scott, Clyde's mother, was called as a witness and permitted to testify, over objection, that deceased was her son, and that she had given him his time and permitted him to work for himself; that he collected his own wages, attended to his own business affairs, and owned property in his own name. The only specific objection was that the questions eliciting this information called for a personal transaction with one deceased; that the witness was incompetent; and that the statement would be a conclusion of the witness. There was also a general objection that the testimony was incompetent. None of these objections were tenable. This testimony will be considered again when dealing with the instructions.

It should also be stated that the son, Clyde, was married on November 16, 1910, which was something like three months after the accident. These are all the rulings on the testimony which need be considered.

[10, 11] 4. The trial court gave the following instructions: "You are instructed that it is the law of this state that no person shall operate an automobile on a public highway at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb of any person, and not at a greater average rate than 20 miles per hour. You are instructed that the statute expressly authorized the use of automobiles on the highway and confers on the operators of such vehicles the same rights in the road as are accorded to the drivers of other vehicles, and you are instructed that if the defendant operated his automobile with such care as an ordinarily cautious and prudent man would use under like circumstances, having a regard for the use of the road at the time by others (he being bound to know that people were likely to be traveling upon the same), and using reasonable and ordinary care under all of the circumstances, there can be no recovery, and you are instructed that, while a party operating an automobile at an average speed of more than 20 miles per hour is prima facie guilty of negligence, yet this may be overcome by evidence or the facts and circumstances surrounding the case as stated above. All that is required is that he should use such care as an ordinarily cautious and prudent person would use under like circumstances, having a regard for the use of the road at the time by others, and, if he did so, he would not be guilty of negligence." This is complained of because of the use of the phrase "operating an automobile at an average speed of more than 20 miles per hour is prima facie guilty of negligence." The words in parenthesis are also complained of. The instruction, in so far as it relates to speed, was in the language of the statute. Code Supp. § 1571h.

And we see no error in repeating that language although it may be a little obscure. Defendant admitted, while on the stand, that he was running his automobile at the time of the accident at the rate of 30 miles per hour, and he also admitted that fact to others. Of course it may be difficult to determine whether or no one is operating an automobile at an average speed of more than 20 miles per hour, without knowing the distance traveled, and the time occupied, but that is no reason for withholding a statement of the law as written. It would seem that a "joker" was introduced into this section of the statute, and that it might be well for the Legislature to remedy the matter. If the jury should have thought the court intended to charge that a rate of speed of more than 20 miles an hour was prima facie evidence of negligence, still we would not be disposed to reverse the judgment, for, under the circumstances disclosed by this record, we should say that such a rate of speed was prima facie evidence of negligence. But this is not what the instruction said.

As to the part of the instruction in parenthesis, we think the instruction correct, and here copy from a case in Wisconsin the following: "The driver of every automobile on a country road knows that live stock roam about the roads unattended; that travelers on foot, on horseback, and in various kinds of vehicles are found using the highways at all seasons of the year and all times of the day and night; such a driver has no right to expect, and does not expect, a free and unobstructed driveway over a well-defined track, as does the engineer of a locomotive, or even the motor-man of an electric car. The automobile has created a new peril in the use of our public highways—a peril that unfortunately has been greatly enhanced by the recklessness of the operators who propel the machines with the speed of railway trains along crowded thoroughfares. Some rule, consummate with the public safety and not unduly harsh or restrictive upon the users of motor cars, must be evolved to meet a situation which has recently arisen." *Lauson v. Fond du Lac*, 141 Wis. 57, 123 N. W. 629, 135 Am. St. Rep. 30. This, it seems to us, is a sound principle of law, and we here adopt it as a proper rule for this state.

[12] 5. Instruction No. 12 reads as follows: "It being admitted that the deceased, Clyde Scott, was but 19 years of age at the time of the claimed injury, you are instructed that, if you have found that plaintiff is entitled to recover in this action, she would not be entitled to anything for loss of earnings from the time of the accident or injury, if any, until the date of his marriage, for during that time his earnings in law belonged to his parents, unless the plaintiff has shown you that, prior to the time of the claimed injury, deceased had been given his

time by his parents—that is, he had been allowed to work and collect his wages and keep them for his own use without accounting to his parents for the same.” This instruction is challenged because there was no testimony as to emancipation. This is bottomed upon the thought that there was no showing that his father was dead; hence the mother’s testimony hitherto recited was not sufficient to show emancipation. There was testimony from Clyde’s brother that he (Clyde) had been living in his family attending to his own business and drawing his own wages; and, while there was no testimony that his father was dead, this is the fair import of the evidence. But if this were not true, no such objection was made to the mother’s testimony, and the fair inference from the objection made to her testimony is that she was the proper person to emancipate her son. Had the objection been made that she was not the proper person to emancipate him, the matter might easily have been cured. As this was not the objection, the defect was cured. *Kubic v. Zemke*, 105 Iowa, 271, 74 N. W. 748, sustains the action of the trial court.

[13] The trial court told the jury that it might allow for damages to the buggy and harness if it found that any such damages were shown, and it is now said that there was no testimony whatever that there was any such damage, and that there was no direct testimony as to the amount of such damage. This is a mistake. There was sufficient testimony to take the matter to the jury upon the question of damage to the buggy. There was no testimony as to any injury to the harness, or as to the value thereof, and it would have been better had the court made no reference thereto. But the instruction authorized recovery for damages to the harness only in the event such damages were shown by the testimony. We must presume that the jury followed the instructions, and that it made no allowance for damages to the harness. There is no reason for supposing that the jury allowed anything for harness damage. The harness was not described, nor was there any testimony as to the value thereof at any time, or as to damages done. Upon such a record we should not reverse because of the instruction given by the court as to this matter. In support of these views see *Trapnell v. City*, 76 Iowa, 747, 39 N. W. 894; *Parks v. Town of Laurens*, 133 N. W. 1034.

[14] If the jury disregarded the instructions of the court, the allowance for damages to the harness must have been small in any event, and such allowance would not call for a reversal. The verdict was small in view of the injuries sustained, and such errors as appear in the record are not sufficient to call for a reversal.

No prejudicial error appears, and the judgment will be, and it is, affirmed.

JOHNSON v. CORN PRODUCTS REFINING CO.

(Supreme Court of Iowa. Nov. 20, 1912.)

1. MASTER AND SERVANT (§ 276*)—PROXIMATE CAUSE OF INJURY—EVIDENCE.

Evidence in an employee’s injury action must convince an ordinarily reasonable person that the injury resulted proximately from the cause alleged, and must not show another inconsistent cause to have been the equally probable cause of the injury, though, if one probable cause is shown, it may be presumed that it was the operative cause, in absence of evidence showing another cause.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

2. MASTER AND SERVANT (§ 285*)—INJURIES—JURY QUESTION—CAUSE OF ACCIDENT.

Evidence in an employee’s action for personal injuries by something falling upon him while working in an excavation held to make it a jury question whether the injury was caused by sand and dirt falling upon plaintiff from a pilaster near which he was excavating.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1002, 1003, 1007, 1016, 1035, 1043, 1053; Dec. Dig. § 285.*]

3. MASTER AND SERVANT (§ 286*)—INJURIES—JURY QUESTION—SAFE PLACE TO WORK.

Evidence in an employee’s action for personal injury by sand and dirt falling upon him while excavating held to make it a jury question whether defendant was negligent in failing to furnish a safe place to work, or guarding against any dangerous condition.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

4. MASTER AND SERVANT (§ 217*)—ASSUMED RISK.

If an employee did not know of any danger to be anticipated from a pillar near which he was excavating, and his work did not apparently undermine the pillar, he could assume that it was safe to work near it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

5. TRIAL (§ 296*)—INSTRUCTIONS—ISSUES—CURE BY OTHER INSTRUCTIONS.

In an employee’s action for injuries by material falling upon him while excavating, the pleadings were copied in the instructions and showed five grounds of alleged negligence, to wit, that the pillar near which plaintiff was working was not supported, in failing to make use of another device for the purpose for which the pillar was left, in failing to warn of the danger in the work, in failing to light the pit, and in not providing a safe place of work. The instructions stated that, to recover, it must appear that the falling of the pillar upon plaintiff was due to defendant’s negligence, and also instructed that, to warrant recovery, it must appear that defendant was negligent substantially as claimed, that its negligence caused the injury, that plaintiff was free from fault contributing thereto, and the amount of damages, and another instruction charged that the question of defendant’s negligence for the jury’s consideration was whether plaintiff’s place of work was unsafe, and, if the jury found it was safe, they should find for defendant, but, if it was found unsafe, they should decide whether defendant should have known thereof, and have warned plaintiff. Held, that defendant was not prejudiced by copying the pleadings into the instructions; the grounds of neg-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep’r Indexes

ligence therein stated having been eliminated by the instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

6. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

While an instruction in an employee's injury action that the negligence of defendant corporation's officers or agents was that of the corporation, and that as its foreman in charge of plaintiff's work was an officer, his negligence was imputable to it, was not accurate in describing the foreman as an officer, or in saying that any negligence by him was imputable to defendant where it was not shown that he was a vice principal, the error was not prejudicial where the acts of the foreman involved were in providing a safe place of work, or in not giving warning, which duties the master was bound to perform.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

Appeal from District Court, Scott County; L. J. Horan, Judge.

Action for damages resulted in judgment against defendant, from which it appeals. Affirmed.

Lane & Waterman, of Davenport, for appellant. Walter H. Peterson and Bollinger & Block, all of Davenport, for appellee.

LADD, J. 1. The defendant is a manufacturer of edible products from corn, and plaintiff was in its employment as a common laborer. Prior thereto he had worked in car construction and repair shops, and at excavating for and laying sewers and tile. He had been working for defendant in the "roustabout gang," of which one Lane was foreman, for some time, when required by the foreman to go to the blacksmith shop. This shop was about 18 feet square with a wooden floor about 3 feet above a granitoid floor 6 inches thick. The defendant, for some purpose in relation to the foundation, had caused a pit to be excavated beneath this shop about 11 feet deep, measuring from the wooden floor, and therein a pillar of dirt or sand covered with granitoid had been left as a sort of platform onto which the dirt from the bottom could be thrown, and then taken by a man on top of the pillar, and thrown through a hole in the wood floor about two feet square. The excavation is more particularly described by plaintiff, and, as the right to recover at all is challenged, his testimony with respect thereto and of how the injury was received may be set out somewhat fully.

"The excavation had been there before that day about a week. I did not have anything to do with the excavating or the digging of this trench or hole. There was a space cut off of the outside wall in the neighborhood of 3½ feet wide, running back 8 feet, and then north 8 feet to the main wall of the steephouse. Then take it over in this side, we will say 4 feet, and there

was another cut-off made. It ran to the bottom and then this strip here in the main wall of the steephouse was to be dug out so as to allow the masons to work on the floor of this cement foundation, and this space in here, along next the main foundation, was to be opened in order to give the masons a chance to lower the main foundation to the bottom of this pillar. And they left a pillar in the neighborhood of 3½ or 4 feet square at the top that went to the bottom, standing there unprotected. It was about the same size at the bottom as at the top. A little bit wider at the bottom, probably a few inches. On the top of this pillar it was granitoid about 6 inches through. That granitoid covered pretty nearly the entire top. There was a three-cornered point right across the corner from the square that was unprotected with granitoid. The granitoid had been taken off it. The pillar was left for the purpose of throwing the material out of this excavation on top to enable the men to get through the floor to get it outside where it could be disposed of. On the day I was hurt before I went into this excavation I had been cleaning up inside of the building. I had nothing to do with excavating or digging in the hole before that day. I had never been in that hole. I had never seen it before. * * * Mr. Lane came to me in the afternoon around about 4 o'clock, and he was pretty well cleaned up on the inside, and he asked me to go with him to the blacksmith shop, and we went there, and he put me down on top of this granitoid to help the other fellow to throw up the dirt, because being so low that a man couldn't shovel only a few shovels until he would have to crawl out of it. I got into the hole by going over to this corner where the trapdoor is, and getting down on this granitoid and crawl through underneath. I crawled as far as the hole in the wooden floor. At this time there was a man down in the hole when I crawled in. He was shoveling dirt up onto this pier. At that time I was staying back to one side of the place, and there was another man shoveling. I was waiting until he got tired and came up, so as to make a change. I threw dirt through this little hole. They had one extension light with two lights on is all they had. That was hanging over the rafters, over to one side of the excavation. The lights were not directly over the hole. They were just to one side. To a certain extent they were thrown in, but not sufficient force in them to give a person a clear sight. It was just light enough so you could see to work, and that was all. There were two lights on one extension. I should judge the lights were probably 16 candle power. They had glossed over with dirt. You could hardly see through them. * * * When I went to the hole, I did not know what the pillar and walls were made of. I was on

top of the pillar about half an hour. I went down in the hole because I was required by the foreman Mr. Lane. * * * The other man that was down there came up. I took his place. I did not take my shovel. There were shovels already in the pit. When I got down there, it was betwixt and between dark and light in the hole. It was light enough to work, but not to see what kind of material. I could not see what kind this material was when I got down. I was hurt as near as I can judge about 15 or 20 minutes after I got down. After I got down, I went ahead as I was directed. There was a little piece of dirt laying in the main wall of the steephouse that was to be removed. It was in the neighborhood—we will say it was 16 inches wide, a strip remaining of the pier that goes to the bottom, to give the room for the masons to work under this main wall. It was an addition to the pillar. It was not a part of the pillar. It was fastened on to the pillar on one side. It was cleared out so as to give the masons a chance to work on the main foundation, the main wall. We had already removed that. I started to remove that little piece that was along this main wall. It was attached on up against the main wall of the steephouse. It was an addition to the pillar, but then it was at the bottom. I did not at any time dig any dirt in under this pillar. I did not take any dirt off the pillar at all. I was working from the foundation or underneath the main foundation for to give room for the masons to extend that foundation. I did not remove any dirt from the pillar. As to what happened when I started to remove this dirt, well, I was bent over shoveling straightening up the back part underneath this pier or main foundation when the fall got me. Q. What was it that fell on you? A. I don't know. I was standing with my right side to the pillar. As near as I can get it, I was facing east. There was a foundation down there, part of the way down of the steephouse. I was working near that foundation. I suppose the foundation was made of brick and mortar, but I don't know. It might have been made of concrete, but the piers that were put in there were made of brick. I couldn't see what any of this was made of when I went down there. Q. Now, what effect did this caving in or falling have on you, Mr. Johnson? What happened to you then? A. I don't know. I didn't know anything until after I was taken to the office."

Upon being recalled, after defendant had moved for a directed verdict, plaintiff testified further: "I was bending over, shoveling. I was probably eight or ten inches from the pillar. Q. And then what happened? A. And then there was—I noticed there was a squeeze that turned me half around. Q. What do you mean by 'squeeze'? A. A caving. A caving of sand or dirt or some kind of soft material. Q. What happened then?

A. Then I didn't know anything more until I came into the office. Q. Did you notice anything falling on you? A. No; just nothing only what fell at that slide. Q. Just describe what fell on you. What did it feel like, would you say? A. It was either dirt or sand or some soft material. At that time I couldn't tell. Q. How do you know that? A. Because it caught me around above the waist here, and buried me that deep [indicating]. I remember that. This fall came from the right side. It came from the south. It came from the pier, and then I lost consciousness. Q. Did I understand you to say you felt yourself being buried? What do you mean? I don't understand. A. Yes. I felt myself being buried by some soft material that closed in around. It struck me first on the shoulder here. Q. State whether or not you lost consciousness immediately. A. I didn't know at the time that they took me out at all. Q. But you felt yourself being buried by something? A. Yes, sir."

On cross-examination: "Q. When you were asked this morning the plain simple question what was it that struck you and hurt you, and said 'I don't know'— A. Well, I don't know yet. Q. What have you been saying then—that sand and dirt came down and buried you. A. I just said that it seemed to me that was. Q. You don't mean now that you know anything about what it was, do you? A. I am not positive, no; but then I say it seemed to me as it came around me and buried me up. Q. You said this morning you lost consciousness as soon as something struck you on the shoulder. A. As soon as it buried me. * * * Q. Now you are not able to say now that that man might not have dropped something on your shoulder that broke the bone, and caused you to become unconscious, are you? A. I know he didn't. Q. How do you know, if you lost consciousness and don't know what hit you, how do you know he didn't drop something on you if you lost consciousness? A. Well, one reason is that I kept the stuff pretty well thrown up to him on the upper floor. Q. How do you know he didn't pick up a piece of this concrete, and try to throw that out, and it dropped on you? A. Because there was no concrete loosened up. Q. How do you know there wasn't any loosened up at that time? You never went back afterwards, did you, to look at the top of that pillar? A. No; and then I spoke to Mr. Lane just before the thing fell asking for the privilege of taking that there granitoid off and throwing it out of there, and working from the top. Q. You don't know what that man on top of the pillar might have had in his hands, and suddenly let fall on you, do you? A. No, sir."

2. It will be noted that plaintiff relied wholly on circumstantial evidence to show how the accident occurred. Appellant insists that he did not succeed. The testimony

was that there was a caving of sand, dirt or some kind of soft material from the direction of the pilaster beside which he was working; that it seemed to come from the pilaster; that it filled in about him above the waist; that it first struck him on the shoulder; and that he felt himself being buried by some soft material when he lost consciousness. He admitted on cross-examination that he was not positive that this occurred, but said that it seemed so to him. Apparently all happened in so short a time that he had no opportunity to observe before he was rendered unconscious by the falling sand or something striking his shoulder. From this evidence the only reasonable inference was that the sand or dirt had slid or fallen away from the pilaster about him. The jury might have concluded it came from that direction, and it could not well have come from the side of the pit beyond the pilaster. This was about three or four feet square and eight feet high, with the granitoid on top, and must have dried out some in the several days it had been in this condition, and the inference that the sand or dirt which slid about plaintiff came therefrom is exceedingly probable, and, in the absence of any other explanation, might well have been adopted by the jury. If the falling dirt or sand carried the granitoid with it, or a tool used from the laborer above and one of these struck plaintiff, such falling was quite as much the proximate result as though a stone or other substance in the dirt or sand had been carried against his shoulder, and caused the fracture. Of course, the injury may have been occasioned by the laborer above dropping a tool or a piece of granitoid, as suggested by appellant, or in other conceivable ways, but there is nothing in the evidence pointing to any such cause, and, as the falling of the sand and dirt from the pilaster reasonably might have produced the injury and no other explanation is afforded by the record, the jury might have concluded that this was the operating agency in bringing about the result.

[1] As contended, if the injury might have been caused in several different ways and the probabilities as to two or more are balanced, then there can be no recovery. *Neal v. Railway*, 129 Iowa, 5, 105 N. W. 197, 2 L. R. A. (N. S.) 905. This is only another way of expressing the rule laid down in *Asbach v. Railway*, 74 Iowa, 248, 37 N. W. 182, in saying that the theory on which recovery must be had cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they may be consistent merely with that theory, for that may be true, and yet they may have no tendency to

prove the theory. This is tantamount to saying the evidence must be such as in the nature of the case will convince an ordinarily reasonable person that the injury complained of was the proximate result of the particular cause alleged. If another inconsistent with the cause alleged is equally probable, the former cannot be said to have been proven. But, as said in *Brownfield v. Railway*, 107 Iowa, 254, 77 N. W. 1038: "Where a cause is shown which might produce an accident in a certain way, and an accident happens in that manner, it is a warrantable presumption, in the absence of showing of other cause, that the one known was the operative agency in bringing about the result." *Degelau v. Wight*, 114 Iowa, 52, 86 N. W. 271; *Tibbits v. Railway*, 138 Iowa, 179, 115 N. W. 1021; *Brown v. Coal Co.*, 143 Iowa, 663, 120 N. W. 732, 28 L. R. A. (N. S.) 1260; *Bell v. Bettendorf Axle Co.*, 146 Iowa, 337, 125 N. W. 170; *Paulson v. Bettendorf Axle Co.*, 146 Iowa, 399, 125 N. W. 174.

[2] The evidence was sufficient under this rule to carry to the jury the issue as to whether the injury was caused by the sand and dirt falling or sliding from the pilaster.

[3] 3. Counsel for appellant argue that there was no evidence tending to sustain findings that the pit was an unsafe place to work, or that the defendant was negligent in not warning the plaintiff of the dangers incident to the work. The evidence tended to show that the pit was so dimly lighted that plaintiff, when he entered, could not see the nature of the soil, but was able to see the ridge next to the pilaster, but apparently forming no part of it. He was directed to remove the ridge, and there is nothing in the record indicating that he attempted anything else. The falling or sliding of the earth composing the pilaster was not a thing to be anticipated, as where laborers are shoveling banks of clay or gravel, and it falls or slides down as the work proceeds. See *Fredericks v. Brick & Tile Co.*, 151 Iowa, 637, 131 N. W. 766; *Naylor v. Railway*, 53 Wis. 661, 11 N. W. 24; *Swanson v. Railway*, 68 Minn. 184, 70 N. W. 978. This pillar did not constitute a transitory danger incident to the work, at least nothing in the record indicates but that it was intended to remain permanently.

[4] Plaintiff knew nothing of danger to be anticipated therefrom, but proceeded to do the very thing required, which, as it did not apparently undermine said pilaster, he had the right to assume might be done in safety. *Herr v. Green*, 136 N. W. 513. True, he had excavated tile and sewer drains, but in what manner that would have aided him in ascertaining in this dimly lighted pit that this pilaster was not likely to stand we are not informed. Conditions were such that the court did not err in leaving the jury to say whether defendant was negligent in fail-

ing to furnish a safe place to work and in omitting to put a guard against its dangerous condition if so found.

[5] 4. Another contention is that the instructions are confusing as to the issues with respect to the negligence alleged. The pleadings were copied therein, and therefrom it appears that there were five grounds for negligence: (1) the pillar was dangerous, in that no support therefor was provided; (2) in failing to make use of another device for the purpose for which the pillar was left; (3) in failing to warn of the dangers in doing what was required of him; (4) in failing to light the pit; and (5) in not providing a safe place in which to work. In the third instruction the jury was told that, in order to recover, it must appear that "the falling upon him of the pillar in question was the result of some negligence upon the part of defendant," and in the fifth instruction that, to warrant a recovery, it must be found (1) "that before or at the time of his injuries the defendant was negligent substantially as claimed, as above set out and that its negligence was the cause of his injuries; (2) that he was himself free from any negligence which contributed to his injuries; (3) the amount which he was damaged by reason of such injuries. And you should, in your deliberations, take up each one of these propositions in the order stated, and discuss and decide them one at a time." In the sixth instruction the alleged negligence of defendant is taken up, and, after some discussion, the jury are told the questions of defendant's negligence for their consideration are narrowed down to these:

"(1) Was the place in which the plaintiff was working at the time he received the injuries complained of an unsafe place to work?

"(2) If you find that it was a safe place to work, then you need go no further, and your verdict should be for the defendant. If, on the other hand, you find it to be an unsafe place to work, then you should determine whether or not the defendant, in the exercise of reasonable care, should have known that it was an unsafe place to work.

"(3) Should defendant have warned plaintiff of such dangers?"

This statement of the record excludes all doubt as to the grounds of negligence actually submitted. The jury are plainly told in the sixth instruction that these were narrowed down to two, and then this is emphasized by instructing that, in event the pit was a safe place to work, to find for defendant, and, if not, to determine whether plaintiff should have been given warning. There was no prejudice in copying the pleadings as subsequently grounds of negligence stated therein not sustained by the evidence were eliminated and the issues to be determined clearly expressed.

[8] 5. In the seventh instruction the court told the jury that the negligence of the officers or agents of a corporation is that of the corporation, and, as Lane was an officer of defendant, any negligence on his part was imputable to it. The instruction is not accurate in describing Lane as an officer, for he was not, nor in saying broadly that "any" negligence on his part was that of defendant, for whether he was vice principal was not conclusively established. But all this was without prejudice, for Lane in what he did in the matter of providing a safe place in which to work or in the matter of giving necessary warning of conditions rendering the place unsafe was performing a masterial duty, and any negligence of the foreman therein was that of defendant. *McGuire v. Waterloo & C. F. Union Mill Co.*, 137 Iowa, 447, 113 N. W. 850; *Hamm v. Bettendorf Axle Co.*, 147 Iowa, 681, 125 N. W. 186; *Hardy v. Railway*, 149 Iowa, 41, 127 N. W. 1093. The amount allowed as damages was not so large as to justify interference therewith.

Affirmed.

STATE v. PRICE.

(Supreme Court of Iowa. Nov. 20, 1912.)

1. SEDUCTION (§ 50*) — EVIDENCE — INSTRUCTIONS.

Where prosecutrix, 16 years old, testified that accused had told her he loved her and had proposed marriage, which she accepted, that he solicited intercourse with her, and assured her that it was not wrong, as they were to marry, and that he would marry her if anything happened, and that she yielded after requiring him to repeat the last statement, instructions permitting a conviction if the act were procured by protestations of love, deception, or other seductive arts were not erroneous.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 89-92; Dec. Dig. § 50.*]

2. SEDUCTION (§ 33*)—ACTS CONSTITUTING—EVIDENCE.

Where the previous chastity of an unmarried woman has been ascertained and the act of sexual intercourse established, the inquiry is as to the means by which it was accomplished; and where accused, by false promise, protestations of love, or other artifice, persuades the woman to yield, when but for some or all of these she would not have yielded, he is guilty of seduction.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 56, 57; Dec. Dig. § 33.*]

3. SEDUCTION (§ 49*) — CRIMINAL RESPONSIBILITY—EVIDENCE—QUESTION FOR JURY.

Whether prosecutrix yielded in consequence of accused's false promise and protestations of love, deception, or other artifice *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. § 88; Dec. Dig. § 49.*]

4. SEDUCTION (§ 34*) — CRIMINAL RESPONSIBILITY—EVIDENCE—QUESTION FOR JURY.

Where prosecutrix, 16 years old, yielded to accused's solicitations, and showed that he had told her that he loved her, that he had proposed marriage, which proposal she had accepted, that on the occasion in question he had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

assured her that it was not wrong, as they were to marry, and that he would marry her if anything happened, the fact that she admitted that she yielded, after requiring him to repeat the statement that he would marry her if anything happened, did not prevent a conviction of accused.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 58-60; Dec. Dig. § 34.*]

Appeal from District Court, Van Buren County; Francis M. Hunter, Judge.

The defendant was convicted of having committed the crime of seduction. He appeals. Affirmed.

J. C. Mitchell, of Ottumwa, and Walker & McBeth, of Keosauqua, for appellant. George Cosson, Atty. Gen., and John Fletcher, Asst. Atty. Gen., for the State.

LADD, J. Prosecutrix testified that the accused had sexual intercourse with her in the evening of December 16, 1910. She was then 16 years old, and he 18 or 19. She testified that he walked home with her frequently, had accompanied her to dances, and had been in her company on other occasions; that some time previous to the date named he had told her that he loved her and proposed marriage, which she had accepted; that he had hugged and kissed her whenever with her alone; that he so did and told her that he loved her on the way home on the night in question, and asked her to "let him do it," assured her that it was not wrong, as they were to marry anyway, and finally said that he would marry her "if anything happened"; and that she yielded to his embraces after requiring him to repeat this last statement. On cross-examination she stated that but for this last promise she would not have submitted, and that it was what finally led her to yield.

[1, 2] 1. Appellant complains of several instructions, in that they permitted conviction if intercourse were procured by protestations of love, deception, or other seductive arts, for that prosecutrix testified that the conditional promise of marriage was what finally induced her to yield, and there was no evidence of other seductive arts. But she did not say that this was the only influence operating on her will. For all that appears, she may not, and the jury might have found that she would not, have yielded had all protestations of love been omitted, or had he not insisted that, as they were engaged to marry, sexual indulgence would be no harm. This last, doubtless, was what the court alluded to as "other seductive arts," and of which, contrary to appellant's contention, there was evidence. The mere fact that the promise to marry her if anything happened was the final argument which persuaded prosecutrix to yield did not eliminate from consideration the other influences which may have operated

to overcome her scruples. Indeed, it is scarcely conceivable that a chaste woman could be induced to step aside from the path of virtue in the absence of all blandishments of love; and, even though a false promise may be essential to overcome her inclinations to virtue's side, other influences, such as protestations of love and artifices, such as assurances that there would be no harm because of an engagement, may have been quite as potential in accomplishing the seduction. If, then, by his protestations of love or other deception or other artifices, in connection with a conditional agreement to marry, or without this, the accused persuaded the prosecutrix to yield to his embraces, when but for such protestations or deception or other artifices she would not have done so, this was sufficient to sustain a finding of guilt, regardless of whether some of these or the conditional promise was what finally determined the issue. In other words, the previous chastity of an unmarried woman having been ascertained and the fact of intercourse established, the inquiry is as to the means by which this was accomplished; and if the accused, by false promise, protestations of love, deception, or other artifice, persuades such woman to yield, when but for some or all of these she would have known "no bliss but that which virtue gives," he is guilty of the crime of seduction. See *State v. Criswell*, 143 Iowa, 254, 127 N. W. 65; *State v. McIntire*, 39 Iowa, 139, 56 N. W. 419; *Breiner v. Nugent*, 136 Iowa, 322, 111 N. W. 446.

Our conclusion is that, notwithstanding the testimony of prosecutrix that the conditional promise of marriage was what finally induced her to yield to sexual indulgence, the court did not err in submitting to the jury whether seduction was accomplished by protestations of love, deception, or other artifices.

[3] Whether the evidence was sufficient to warrant a finding on these separately necessarily depends somewhat on the age and experience of the parties, their relation to one another, and other circumstances. *State v. Hayes*, 105 Iowa, 82, 74 N. W. 757; *Hawn v. Banghart*, 76 Iowa, 683, 39 N. W. 251, 14 Am. St. Rep. 261; *Marshall v. Taylor*, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144. Enough of the evidence has been recited to indicate that the issues were for the jury to pass on.

[4] 2. Counsel for appellant also criticise the instructions in authorizing conviction upon a finding that intercourse was procured on the conditional promise of marriage in event pregnancy followed. Where the matter is one merely of barter, as in *People v. Smith*, 132 Mich. 58, 92 N. W. 776, there is reason for saying this does not amount to seduction. It is then but a blunt offer of wedlock in futuro in exchange for sexual

favours in present. *State v. Reeves*, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349.

But it ought not to be said that a young girl of 16 years, in yielding to one professing to love her, and in the circumstances described by prosecutrix, on the strength of such a promise, is necessarily of previous unchastity, or submitted as the result of passion, rather than the false promise of the accused. *State v. Hughes*, 106 Iowa, 125, 76 N. W. 520, 68 Am. St. Rep. 288; *State v. Knutson*, 91 Iowa, 549, 60 N. W. 129; *State v. O'Hare*, 36 Wash. 516, 79 Pac. 39, 68 L. R. A. 107, 104 Am. St. Rep. 970. We adhere to the rule announced in the *Hughes* Case.

The definition of previous chastity was correct, and the evidence such as to preclude interference with the verdict by this court. Affirmed.

COLLIER v. McCLINTIC-MARSHALL CONST. CO.

(Supreme Court of Iowa. Nov. 18, 1912.)

1. MASTER AND SERVANT (§§ 288, 289*)—INJURY TO SERVANT—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

Where one, without experience, was put to work holding a "dolly hammer" for riveting the steel frame of a building, in doing which he had to lie on a plank laid across two beams, and extending over each a foot and a half, and the blows of the riveters caused the plank to creep lengthwise and go off, he cannot be held, as matter of law, to have assumed the risk or been guilty of contributory negligence; it not appearing conclusively he knew the blows would have such effect, or that his attention was called to the fact that the plank would creep, or was creeping, and his position making it almost impossible to watch it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1088, 1089-1132; Dec. Dig. §§ 288, 289.*]

2. TRIAL (§ 295*)—INSTRUCTIONS AS A WHOLE—"CONTRIBUTED."

The jury being instructed that plaintiff to recover must prove he did not contribute to his injuries by his own negligence, they will be held to have understood that the word "contributed" was used in the sense of "caused," in the further instructions as to determining whether defendant's negligence, if they find any, was the proximate cause of or contributed to plaintiff's injuries.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

3. MASTER AND SERVANT (§ 296*)—INJURY TO SERVANT—ASSUMPTION OF RISK—INSTRUCTIONS—"FULL EXTENT."

The instruction that the defense of contributory negligence involves the element that plaintiff knew and appreciated the full extent of the danger can, notwithstanding the words "full extent," mean nothing more than that plaintiff had full appreciation of the danger; and so is not erroneous.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.*]

Appeal from District Court, Scott County; Wm. Theophilus, Judge.

Suit to recover damages for a personal injury. Verdict and judgment for the plaintiff. The defendant appeals. Affirmed.

Lane & Waterman, of Davenport, for appellant Ely & Bush, of Davenport, for appellee.

SHERWIN, J. The plaintiff was employed by the defendant as a common laborer about a steel frame building that defendant was constructing. The plaintiff worked on the ground about the building for a few days, when the foreman sent him up on the frame to "buck" rivets. Bucking rivets is done with a "dolly hammer," a tool that has a heavy head, and a handle about 4 feet long that operates as a lever, when pressed down, and holds the head of the hammer against the head of the rivet, while a man with a sledge strikes the other end of the rivet to form a head there. The place where plaintiff was put to work was about 22 feet above the ground. To do this work he had to lie down on a plank that was between 6 and 7 feet long that was laid across two steel beams that run at an angle and met at the place where the rivets were driven. The plank extended over each of the beams about one foot and a half. There were from three to six rivets driven at each place, and it took about 15 blows of the sledge to finish one rivet. The riveters moved from place to place on the building, and there had been two or three changes of place after plaintiff went to work and before he was injured. The plank, on which plaintiff lay while holding the dolly hammer, was moved along by the vibration caused by the blows of the sledge, and it fell, carrying the plaintiff with it. There were no cleats or other obstructions on the under side of the plank; nor was it fastened to the beams in any way. The plaintiff's work and position were such, while rivets were being driven, as to render it almost impossible for him to watch the position of the plank, and he had nothing to do with changing the plank from place to place.

[1] Appellant contends that the judgment should not be allowed to stand, because the verdict is not supported by the evidence, and because plaintiff was guilty of contributory negligence, and, knowing that the blows of the sledge would move the plank, assumed that risk. It cannot be said, as a matter of law, that the plaintiff assumed the risk of the slipping of the plank because of the blows of the sledge, or was guilty of contributory negligence. The record does not show conclusively that plaintiff knew that the blows of the sledge would cause the plank to slip lengthwise to such an extent as to result in its fall. While the average man, without experience, would undoubtedly know that such blows would have a tendency to jar the plank, it would not neces-

sarily follow that all would understand that the effect would be to move the plank in such direction as to cause it to fall. It does not appear that plaintiff's attention was ever called to the fact that the plank would creep, or that it was creeping, although it does appear that those who were familiar with the work knew that the work of riveting would cause the plank to creep, unless it was fastened in some way. These questions were for the jury, and the court properly refused to direct a verdict for the defendant.

[2] The court instructed that to entitle plaintiff to recover he must prove that the defendant was negligent as charged, and that such negligence was the cause of plaintiff's injuries, and, further, that the plaintiff himself did not contribute to such injuries by his own negligence. The court instructed as follows: "If you should find that the defendant was guilty of negligence as charged, you should then proceed and determine whether such negligence was the proximate cause of or contributed to the plaintiff's injuries; and if not such proximate cause, or contributed to such injuries, you need not proceed any farther with your deliberations, and in that event your verdict must be for the defendant. If you should find that the defendant was guilty of negligence as charged, and also that such negligence was the proximate cause of or contributed to the plaintiff's injuries, you should then proceed to ascertain and determine the amount of plaintiff's damages by reason of such injuries, provided the plaintiff had not been guilty of negligence contributing to such injuries; and provided, further, you do not find that the plaintiff assumed the risks and dangers of the work as hereinafter explained."

Appellant complains of these instructions, because the jury was told therein that the defendant was liable if its negligence contributed to plaintiff's injuries. There was an unfortunate use of language in these two instructions; but, taking the charge as a whole, we think the jury could not have understood that the plaintiff could recover, notwithstanding negligence of his own contributing to his injuries. Jurors of average intelligence understand that no liability exists where the defendant is not at fault, and understand equally as well that no liability exists where the injured party is partly to blame for the accident. And in this case the jury could not fail to understand that there could be no recovery by plaintiff if he had been guilty of negligence contributing to his injuries; and this for the reason that the court had given that positive instruction. And such being the case we think the jury must have understood that the word "contributed," as used in these two instructions, meant "caused" simply.

[3] In the seventeenth instruction the jury was told that, before an employé can be held to have assumed the risk of the employer's negligence, "it must be shown by the preponderance or greater weight of the evidence that he knew and appreciated the danger to which he was subjected, or that by the exercise of ordinary care he would have known the danger and appreciated the extent thereof." No complaint is made of the instruction so far; but following the language quoted above, and in the same instruction, the court said: "The doctrine or defense of the assumption of risk of this kind involves two elements: (1) That the plaintiff knew and appreciated the full extent of the danger to which he was subjected; and (2) that he voluntarily put himself in the way of that danger." Appellant says that this part of the instruction made the assumption of risk depend on the fact that the plaintiff knew and appreciated the full extent of his danger. In *Huggard v. Refining Co.*, 132 Iowa, 724, 109 N. W. 475, we said that, generally speaking, full appreciation of the danger is necessary, and we think that the correct rule, because the authorities generally hold that there can be no assumption of risk, unless the party knows of and appreciates the danger, or in the exercise of reasonable care should know the danger, and a party cannot be said to appreciate danger when he is only partially sensible of it. The instruction criticised here, while it uses the words "full extent," can mean nothing more than full appreciation of the danger, and, as so construed, it was not erroneous.

Error is predicated on rulings on defendant's objections to certain testimony; but no such prejudice appears as would warrant a reversal. The judgment is affirmed.

Affirmed.

STATE v. MCKINNON.

(Supreme Court of Iowa. Nov. 20, 1912.)

1. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where, on a trial for rape, the imbecility of prosecutrix was established, the admission of the opinion of witnesses that she was odd acting, that she cried much without apparent reason, and that she appeared to lack will power, was not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

2. WITNESSES (§ 349*)—CROSS-EXAMINATION.

Where, on a trial for rape, an uncle of prosecutrix testified as a witness for the state to the imbecility of prosecutrix, and that she was at his house on the afternoon of the day of the offense, when accused took her away in his buggy, a question on his cross-examination whether he knew when he (accused) came for her that he had gone with her some, was properly excluded, since the witness could assume

that the intention of accused in calling for prosecutrix was honorable.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1135-1139; Dec. Dig. § 349.*]

3. WITNESSES (§ 269*)—EXAMINATION—CROSS-EXAMINATION.

Where, on a trial for rape, a witness testifying to the imbecility of prosecutrix testified that she had not learned to walk at 18 months, and that she had never learned to talk plainly, questions on cross-examination relative to her brothers and sisters as to when they, respectively, learned to walk and talk were properly excluded, because not cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*]

4. RAPE (§ 43*)—EVIDENCE—ADMISSIBILITY.

Where a witness for the state testified to the imbecility of prosecutrix, and that she had not learned to walk at 18 months, and that she had never learned to talk plainly, questions on cross-examination as to when her brothers and sisters learned to walk and talk were properly excluded as immaterial.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 62, 65; Dec. Dig. § 43.*]

5. CRIMINAL LAW (§ 800*)—TRIAL—INSTRUCTIONS.

The court in its instructions must define the terms of an indictment or statute when such definition is necessary to their fair understanding by the jury, and this is particularly true when such technical terms are involved as are not within the common use and understanding of jurors.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1808-1810, 1812; Dec. Dig. § 800.*]

6. RAPE (§ 59*)—IMBECILITY OF PROSECUTRIX—STATUTORY OFFENSES—EVIDENCE—INSTRUCTIONS—"RESISTANCE"—"EFFECTUAL RESISTANCE."

Where, on a trial for rape on a female imbecile, punishable by Code, § 4758, punishing rape on a female of such imbecility of mind as to prevent effectual resistance, the evidence showed imbecility, requested instructions that, if prosecutrix was an imbecile, a conviction was not warranted, unless such imbecility was of such an extent that by reason thereof she was unable to offer such resistance as would ordinarily be offered by the average girl of her age, and that effectual resistance in the statute did not mean such entire resistance as would prevent accused from ravishing her, but meant simply ordinary, usual, and fair resistance, were properly refused because introducing elements not in the statutory offense; the word "effectual" being defined as adequate, effective, and efficient, and "effectual resistance" meaning more than mere resistance.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 88-100; Dec. Dig. § 59.*]

For other definitions, see Words and Phrases, vol. 7, p. 6172.]

7. RAPE (§ 51*)—IMBECILITY OF PROSECUTRIX—STATUTORY OFFENSES.

The state on the trial of accused for rape on an imbecile female in violation of Code, § 4758, punishing rape on a female of such imbecility of mind as to prevent effectual resistance, need only show that the imbecility of prosecutrix was such that effectual resistance was impossible, and need not show that her passions were not induced by weak-mindedness, and, where such mental condition was shown, it was immaterial whether she resisted or what other circumstances aided in the accomplishment of the act.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-77; Dec. Dig. § 51.*]

8. CRIMINAL LAW (§ 830*)—INSTRUCTIONS—REQUESTS—NECESSITY.

Where accused on a trial for rape on an imbecile female, in violation of Code, § 4758, desired instructions aiding the jury in understanding the statute, he must present a proper instruction, and it is not enough to request improper instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. § 830.*]

9. CRIMINAL LAW (§ 730*)—IMPROPER ARGUMENT OF COUNSEL—OBJECTIONS—CORRECTION BY COURT.

The sustaining of an objection to a statement of the prosecuting attorney in his closing argument that it was practically admitted that accused had committed the crime sufficiently dealt with the argument; accused not asking for a new trial on the ground that the statement was a violation of Code, § 5484, as referring to the failure of accused to testify.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

10. CRIMINAL LAW (§ 722*)—IMPROPER ARGUMENT OF COUNSEL—OBJECTIONS—CORRECTION BY COURT.

Where accused during the time prosecutrix testified sat and grinned at her, the argument of the prosecuting attorney that accused while prosecutrix testified grinned at her, and apparently gloated over his conquest, was not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1674; Dec. Dig. § 722.*]

11. CRIMINAL LAW (§ 1055*)—IMPROPER ARGUMENT OF COUNSEL—OBJECTIONS—REVIEW.

A motion for new trial on the ground of misconduct of the prosecuting attorney in his closing argument does not go beyond the objections and exceptions taken to the argument, and the court on appeal will only consider such objections and exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2666, 2667; Dec. Dig. § 1055.*]

12. CRIMINAL LAW (§ 1055*)—IMPROPER ARGUMENT OF PROSECUTING ATTORNEY—REVIEW—OBJECTIONS—EXCEPTIONS.

The court on appeal will only consider objections to the improper argument of the prosecuting attorney taken during the trial, and exceptions reserved thereto, and accused complaining of the argument must bring specific complaint to the notice of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2666, 2667; Dec. Dig. § 1055.*]

13. CRIMINAL LAW (§ 1119*)—IMPROPER ARGUMENT OF PROSECUTING ATTORNEY—REVIEW—OBJECTIONS—EXCEPTIONS.

Where accused complained of the closing argument of the prosecuting attorney, which purported to be in response to statements of counsel for accused, and such statements were not in the record, the court on appeal would not disturb the action of the trial court overruling objections to the argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2927, 2928-2930; Dec. Dig. § 1119.*]

14. CRIMINAL LAW (§ 1064*)—IMPROPER ARGUMENT OF PROSECUTING ATTORNEY—REVIEW—OBJECTIONS—EXCEPTIONS.

Where accused did not ask for a new trial on the ground that the prosecuting attorney in his closing argument referred to the failure of accused to testify, and thereby violated Code, § 5484, the question whether that statement was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a violation of the statute would not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676-2684; Dec. Dig. § 1064.*]

Appeal from District Court, Hancock County; J. F. Clyde, Judge.

Indictment for rape under the provisions of section 4758 of the Code. There was a verdict of guilty and judgment entered thereon. Defendant appeals. Affirmed.

John Hammill and Senneff, Bliss & Witter, all of Britt, for appellant. C. R. Wood, of Corwith, and J. E. Wichman, of Garner, for the State.

EVANS, J. The charging part of the indictment is as follows: "The said William McKinnon on or about the 10th day of September, in the year of our Lord one thousand nine hundred and eleven, in the county aforesaid, did wilfully, unlawfully, and feloniously ravish and carnally know one Jessie Glanville, then and there being, the said Jessie Glanville being then and there a girl of the age of twenty years, and naturally imbecile and weak in mind, and deficit in understanding, to such an extent that she did not know or comprehend the nature of the act, and naturally of such imbecility of mind and weakness of body as to prevent her making effectual resistance to said defendant and his unlawful act, contrary to and in violation of law and against the peace and dignity of the state of Iowa." In support of the indictment the state offered evidence tending to show that the prosecuting witness was naturally of such imbecility of mind as to come within the classification of the statute. The defendant was not a witness in his own behalf.

On behalf of the state, the illicit intercourse was proved by the testimony of the prosecuting witness and by corroborative evidence which was all but conclusive. On the question of the mental condition of the prosecuting witness, many witnesses, both expert and nonexpert, testified. All such testimony tended to show that the prosecuting witness was not normal in her mental development. She had considerable intelligence and ability to learn in school, but in all her association with others she was backward and nonresisting. She lacked initiative both in conversation and conduct. She seldom spoke except to answer questions, such answers being usually "Yes" or "No." She was industrious and obedient to any request for assistance, but her conduct was usually set in motion by some one else. She was 20 years of age at the time of the alleged offense. Her bodily condition also was abnormal. Her eyes "rolled." She had a defective spine, and walked with a "shuffling gait." All the testimony tended to show that she lacked materially in mental capac-

ty and in resisting power. The defendant called as witnesses three medical experts, all of whom had previously made an examination of the prosecutrix. We quote from their testimony as follows:

Dr. Cole testified: "I would class her on the dividing line between a low mentality and an imbecile. She had the will power to make the ordinary resistance in proportion to her intellectual power. I think she is somewhat below the average girl of her age in intelligence. She has the will power between the highest class of imbecile and the low average person. I don't think she would have the same power to distinguish between right and wrong that a girl of average mentality would have. I think her mental defects would lead her to yield to the desires and the importunities of man asking her for sexual intercourse easier than a girl of higher mentality. Imbeciles can't resist temptations with the same degree that a person of average mentality can. The ability to converse is not always a true test of imbecility. Her physical defects are more abnormal than her mental defects. The symptoms point very strongly to a degeneration in one of the cords of the spinal column. She has enlarged tonsils and adenoids which makes it difficult for her to breathe, and causes mouth breathing."

Dr. Burke testified: "She is below the average in intelligence and brightness for a girl of her age. You would probably have to class her as an imbecile. She'd be a person with a weakened intellect, but she'd be above the average of intellect of an imbecile. She'd be a high-standard imbecile. Her ability to choose her desires would be limited according to the amount of her intellect. The fact that she stated when asked to have sexual intercourse that she was afraid she would get in a family way would indicate reasoning power and intelligence, and the fact that she refused to tell her parents would indicate the same thing. She has many physical defects." Cross-examination: "My entire testimony is based on the examination of last night. An imbecile is a person with an impaired mentality and intellect by various degrees. Most of her answers that she made us were in monosyllables. Jessie Glanville didn't have the resisting power of the average girl of her age."

Dr. Irish testified in accord with the two preceding witnesses, and also: "I think her physical defects exaggerate her mental defects."

The evidence as a whole leaves no room for reasonable doubt of the imbecility of mind of the prosecuting witness to a noticeable degree. The defendant worked at the home of the prosecutrix for about three months prior to the illicit relation charged. He had also boarded there a short time in the previous fall. He appears to have re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cently come into the neighborhood. His previous history is not disclosed in the record.

[1] Many points relating to the admission of testimony are relied upon for reversal. The testimony of the witnesses is interspersed with many statements of conclusion or opinion as to the mental condition of the prosecutrix, and the claims of error in the admission of testimony are directed largely to these points. One witness testified that she was "odd acting"; another that she cried much without apparent reason; others that she appeared to lack will power. We cannot undertake to pass now in detail upon these specific objections. The state of the evidence on both sides as to the imbecility of the prosecuting witness was such as we have sufficiently indicated above that no possible prejudice could result from the expressions of opinion complained of, even if they were technically improper. We are of the opinion, also, that as to many of such opinions at least there was sufficient basis for their admission under the rules heretofore announced by us. *Reinlinghaus v. Association*, 116 Iowa, 364, 89 N. W. 1113; *State v. McKnight*, 119 Iowa, 79, 93 N. W. 63. On the question of opinion as to will power, the medical evidence introduced by the defendant shows that imbecility of mind reduces the will power. There is nothing in the opinions of the medical witnesses of the state inconsistent with this view, and we see no ground of prejudice at this point.

[2] 2. Frank Glanville was a witness for the state. He was an uncle of the prosecutrix. She was at his house the Sunday afternoon of September 10th, when the defendant called for her. He testified briefly to the circumstances of such call, and that the prosecutrix went away with the defendant in his buggy. On cross-examination, defendant's counsel put to him the following question: "You knew from what you had heard and was conscious of the fact that Sunday when he came there that he had gone with her some?" The trial court sustained an objection to this question on the ground that it was not cross-examination and hearsay. Complaint is made of this ruling. It is contended that an answer to this question would have tended to show conduct on the part of this witness inconsistent with his present testimony as to the mental weakness of the prosecutrix. It is argued that, if he had believed that she was mentally weak, he would not have permitted her to go with the defendant, and the fact that he did permit her to go with him indicated his belief in her normal mental condition. The argument assumes too much. The question was not a very important one, and was well within the discretion of the trial court to permit or refuse. The witness had no control over the prosecutrix. Even if he had been her father, he had a right to assume that the intentions of the defendant in calling for her

were honorable. If they had been honorable, they might have been an aid to her recovery of normal mental condition. What is here said will apply also to appellant's similar complaint as to the testimony of the wife of this witness.

[3] The defendant complains, also, of the refusal of the court to permit him to cross-examine this witness as to the comparative condition of her brothers and sisters. The witness testified on direct examination that the prosecutrix had not learned to walk at 18 months, and that she had never learned to talk plainly. He was asked on cross-examination how old the brother Vergil was when he learned to talk and walk; also how old the brother Howard was when he learned to talk and walk; and how old the other sister was when she learned to talk and walk. The trial court sustained objections to all these questions. Clearly, they were not cross-examination. The trial court held them to be immaterial.

[4] We think in the state of the record the ruling was proper. We can see no aid to the defendant in the inquiry in this case to be had by any answer that might be given to the questions propounded. If it should appear that the other children were defective also, it could not aid the defendant. Neither would it aid him to show that they were not defective. If it were shown that they were as old as the prosecutrix when they learned to walk and talk, and were now mentally normal, it would not contradict or explain away the present condition of the prosecutrix. Even if the evidence were material for the defendant, its exclusion on the cross-examination was clearly within the discretion of the court.

[5, 6] 3. Perhaps the most strenuous complaint of the defendant is that the trial court failed to define to the jury the statute under which he was indicted. Section 4758 of the Code is as follows: "Carnal knowledge of imbecile or insensible female. If any person unlawfully have carnal knowledge of any female by administering to her any substance, or by any other means producing such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, or have such carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance, he shall be punished as provided in the section relating to ravishment." At the request of the defendant, the trial court gave to the jury the following instruction: "Before you would be warranted in finding the defendant guilty, you must be convinced beyond a reasonable doubt that the defendant did have sexual intercourse with prosecutrix as alleged, and further convinced beyond a reasonable doubt that Jessie Glanville was at such time of such imbecility of mind as to prevent effectual resistance." The defendant at the same

time asked the trial court to give the following instructions:

"No. 5. Even though you should find that Jessie Glanville was an imbecile or weak-minded, or below the ordinary girl in intelligence or will power, you would not be warranted in convicting defendant, unless such imbecility or weakness was of such an extent that by reason thereof she was prevented and unable to offer such resistance as would ordinarily be offered by the average girl of her age.

"No. 6. Even though you should believe from the evidence that Jessie Glanville was of weak mind, but you should further find that she permitted defendant to have sexual intercourse with her because of her passions having been aroused, not induced by weak-mindedness, it would be your duty to find the defendant not guilty."

"No. 7. Effectual resistance as mentioned in the statute does not mean such entire resistance as would prevent the defendant from having sexual intercourse with her, but it means simply ordinary, usual, and fair resistance."

These latter were refused by the trial court. The point here made is not free from difficulty. It undoubtedly devolves upon the trial court to define the terms of an indictment or statute when such definition is necessary to their fair understanding by the jury. *State v. Clark*, 78 Iowa, 492, 43 N. W. 273; *State v. Brainard*, 25 Iowa, 572. This is particularly so when such technical terms are involved as are not within common use and understanding of jurors. The words here involved are not technical in that sense. They have no technical legal meaning as distinguished from their ordinary meaning. They are as well understood by the ordinary juror as any synonym which could be substituted therefor. The word "resistance" could perhaps be more readily understood by a juror than the word "effectual." Surely no aid to an understanding of the word "resistance" could be given by an attempted definition thereof. According to Webster's International Dictionary, the only definition of which the word "effectual" is capable is "adequate, effective, efficient." The term "effectual" is used in the statute as a word of emphasis. "Effectual resistance" is something more than mere resistance. The implication of the statute is that the normal, virtuous woman is capable of "effectual resistance" against assault upon her virtue. Instruction No. 7 requested by the defendant, seeks to introduce an element of moderation into the quality of the resistance. For the word "effectual" it substitutes "simply ordinary, usual, and fair." The statute itself deals not in such distinctions, nor does it imply any element of moderation or acquiescence in the quality of the resistance which a normal woman would put forth. The trial court therefore properly refused the requested instruction No. 7. Requested instruction No. 6 is equally objectionable on

a slightly different ground. It was not incumbent upon the state to show whether the passions of the prosecutrix were "not induced by weak-mindedness."

[7] It was sufficient to show that her imbecility of mind was such that "effectual resistance" was impossible. Such mental condition being shown to the satisfaction of the jury, then the prosecutrix was within the prohibited class, as much so as if she were under the age of consent or were an idiot. If she was of such imbecility of mind as to prevent effectual resistance, then it was immaterial whether she did resist or what other circumstances aided in her pollution. In such a case it is not for the jury to speculate whether the circumstances were such that she would have yielded her virtue, even though she had not been imbecile.

We see no great objection to the requested instruction No. 5, nor can we say that the court necessarily erred in refusing it. As respects the real question at this point, it amounted substantially to a repetition of the statute and of the instructions already given by the court. The real question at this point was the mental condition of the prosecutrix, as already stated. We do not think the requested instruction would render the statute any plainer at that point. It is not wholly free from objection, in that it is so worded as to bear a possible objectionable construction, and as to direct the mind of the jury in the wrong direction. The question for the jury was not what an average girl "would ordinarily" do under the same circumstances. It is what she could do in a moral sense, and what she would be expected to do under the demands of her virtue. We think, therefore, that the court did not err in the refusal of any of the three requested instructions on this subject.

[8] It is urged, however, that, even though the requested instructions were not proper, the subject was brought to the attention of the court in such a way as to impose upon it the duty of a proper instruction involving a definition of the statute. In view of the manifest difficulty and apparent impossibility of making the statute any plainer by definition, we think it devolved upon counsel to formulate and present a proper instruction which would aid in an understanding of the statute.

[9,10] 4. In the closing argument to the jury, the prosecuting attorney used the following language: "It is practically admitted that he committed this crime." This statement was objected to by counsel for the defense as improper and unfair, and the objection was sustained by the court. Later in the argument the following was said: "While she is telling her story of shame and disgrace, the defendant sits here smiling, grinning at her, apparently gloating

over his conquest." This was objected to as improper, and as referring to something that cannot be in the record. No direct ruling was made upon this objection. Later in the argument the following occurred: "They want you to say that he is a poor homeless boy; that he has got an imaginary father and mother somewhere. I think, if counsel would imagine a little more correctly, they would imagine a deserted wife and children somewhere instead of a father. Mr. Senneff: Just a moment; your honor, we object to such a statement as that as misconduct on the part of the state's attorney in closing argument, and ask that the jury be admonished not to consider such statement. Court: I think that objection should be sustained. The jury should not pay any attention to the statement made by counsel." Complaint is made of the statements in argument above quoted. The conduct of attorneys in the course of argument is a matter peculiarly within the discretion and power of the trial court. As to the first and third of the above complaints, we think they were fairly and sufficiently dealt with by the trial court. The last statement particularly purports to have been made in response to statements in argument by defendant's counsel. The trial court was in a position to know how much justification or mitigation there was for the purported response of the county attorney. As to the second complaint, the propriety of the argument was peculiarly within the observation of the court. If the defendant conducted himself in the manner stated while the prosecutrix was upon the stand, he was necessarily subject to the observation of the jury, nor do we see any fair reason why reasonable comment upon such conduct might not be made in argument to the jury.

[11-14] 5. In the foregoing paragraph, we have confined our consideration to those parts of the argument of the county attorney to which objection was made at the trial. Objections are now urged here to considerable portions of such argument to which no objection appears to have been made in the trial court. The closing address of the county attorney was taken down in full in shorthand, and was included as part of the record. It is presented to us in full. Several portions of it are singled out in argument, and urged upon our attention as grounds of reversal. The record does not disclose that any of these passages were made the basis of a complaint or a ground of motion for a new trial in the court below. The motion for a new trial presented 23 grounds or paragraphs. The twenty-third paragraph was as follows: "Misconduct of the prosecuting attorney in closing argument." So far as appears in this record, the only misconduct to which the attention of the trial court was directed either by

motion for new trial or otherwise was that which we have already considered in the preceding paragraph. The argument of the county attorney cannot be brought here for original review. We will only consider those portions thereof which were presented to the consideration of the trial court. It is perhaps true that it was not necessary for the appellant to renew repeated objections to the argument of the county attorney. But it was necessary for him in some way at some time to bring his specific complaint as to alleged misconduct to the notice of the trial court. The twenty-third paragraph of the motion for a new trial did not purport to go beyond the objections and exceptions already made. We may say, also, that such portions of the closing argument as are complained of purported to be in response to statements of counsel for defendant in argument. Such arguments were not presented. Whether such closing argument was fairly responsive to what had been said by counsel for defendants, even though beyond the record, was peculiarly within the observation and knowledge of the trial judge. It is sometimes true in the trial of criminal cases that the county attorney is not the first offender along that line. In view of the state of the record as indicated, we will not undertake to review further the closing argument. It is suggested in argument that the defendant did not become a witness in his own behalf, and that he was therefore prejudiced by the statement that the crime was practically admitted. The defendant, however, asked an instruction on that subject which the court gave. If this statement of the closing argument should be deemed a violation of the provisions of section 5484, then defendant was entitled to a new trial for that cause alone under the provisions of such section. But the defendant did not ask for a new trial on that ground. That question is therefore eliminated from our consideration. The foregoing disposes of the principal matters pressed upon our attention. The case is one of great importance. We are satisfied upon the record that the defendant has had a fair trial, and that the evidence of his guilt is practically conclusive.

The judgment entered below is therefore affirmed.

FISHER v. TRUMBAUER & SMITH et al.
(Supreme Court of Iowa. Nov. 20, 1912.)

1. EXCHANGE OF PROPERTY (§ 4*)—BASIS OF EXCHANGE—ACREAGE VALUATION.

Where an original contract for the exchange of property provided for an exchange of defendant's farm of 200 acres to be taken at \$60 per acre, or \$12,000, for plaintiff's stock of merchandise, the farm was exchanged at the estimated value per acre and not at a gross valuation, and this, notwithstanding defendants

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

afterwards agreed to reduce the price of the farm \$250, and hence plaintiff was entitled to recover for a material deficiency in quantity.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 4; Dec. Dig. § 4.*]

2. EXCHANGE OF PROPERTY (§ 8*)—DEFICIENCY IN QUANTITY—"MORE OR LESS."

Where a contract for the exchange of a stock of goods for a farm described it as containing 200 acres "more or less according to the government survey," such quoted words contemplated only such differences as were due to errors incident to measurements by different surveyors and the variance in the instruments used, and did not cover a discrepancy of 8.58; such discrepancy being sufficient to justify an allowance of damages.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 14-18; Dec. Dig. § 8.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4582-4595.]

3. EXCHANGE OF PROPERTY (§ 8*)—LAND—DEFICIENCY IN QUANTITY—QUANTUM MERUIT.

Where the value of certain land as stated in a contract for an exchange of the land for a stock of goods was a mere estimate for trading purposes, and plaintiff testified that the land was worth much less per acre than the price fixed, he was only entitled to recover for a shortage in acreage on quantum meruit.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 14-18; Dec. Dig. § 8.*]

4. TRIAL (§ 11*)—CALENDARS—WAIVER OF ERROR.

Where no grounds of equitable relief are alleged, and defendant does not move to transfer the case to the law side of the calendar at or before the filing of the answer, any error in placing the cause on the equity calendar is waived, as provided by Code, § 3434.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 28-30; Dec. Dig. § 11.*]

5. TRIAL (§ 3*)—CALENDARS—EQUITY CASE—LEGAL ISSUES.

Where plaintiff's suit was begun and might have been maintained on the equity side of the court, defendants could not insist on a trial of a counterclaim at law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 6, 7; Dec. Dig. § 3.*]

6. EQUITY (§ 39*)—TRIAL—COMPLETE RELIEF.

When equity has obtained jurisdiction of a controversy, it will determine all questions material or necessary to the accomplishment of complete justice between the parties, though in doing so it may be required to pass on matters ordinarily cognizable at law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

7. DISMISSAL AND NONSUIT (§ 54*)—TRANSFER—NATURE OF PROCEEDINGS—ERROR—STATUTES.

Code, § 3432, provides that an error of the plaintiff as to the name of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change to the proper proceedings, and a transfer to the proper docket. *Held*, that where a suit was brought on the equity side of the court, in which a legal counterclaim was pleaded, and plaintiff failed to establish a case for equitable relief, but did prove a cause of action at law, it was error to dismiss the suit, the proper procedure being to either award plaintiff the relief to which his proof showed him to be entitled, or to transfer the case to the law calendar for trial.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 111; Dec. Dig. § 34.*]

Appeal from District Court, Washington County; K. E. Willcockson, Judge.

Action in equity to reform deed and recover for shortage in acreage. There was a counterclaim. On hearing, both petition and counterclaim were dismissed without prejudice to the beginning or maintenance of an action on either at law. The plaintiff appeals. Reversed.

Edmund D. Morrison, of Washington, for appellant. Eicher & Livingston, of Washington, for appellees.

LADD, J. On February 10, 1909, plaintiff entered into a written contract with Trumbauer & Smith, a copartnership composed of Charles A. Trumbauer and L. H. Smith, whereby he undertook to exchange a stock of hardware and implements located in Wellman for "their farm of two hundred acres located in Jackson county, Iowa, three miles north of Maquoketa * * * to be taken at \$60.00 per acre or \$12,000.00," and "the entire stock to be taken at its original invoice price, and where invoice cannot be shown, same to be taken at present wholesale price. All furniture and fixtures, consisting of shelving, tinnern tools, plumbers tools, pump tools, pump wagon, cash register, show cases, counters, chairs, desk, two stoves, and all other tools and fixtures now used in connection with the business, to be taken at the lump and fixed price of \$1,825.00." The contract was made subject to approval on examination of the land, and shortly afterwards the plaintiff examined the farm, which resulted in a supplemental agreement wherein the defendants agree "to reduce the price of the farm \$250." The invoice was taken, and the defendants executed to plaintiff their note for \$511.38, being the difference between the stipulated price of the farm, less incumbrance, and the stock of goods and fixtures according to the invoice. The plaintiff executed a bill of sale for the stock of goods in pursuance of the contract, and the defendants conveyed the land to plaintiff by deed containing the ordinary covenants of warranty, and following the description these words, "two hundred acres more or less according to government survey." Some months later plaintiff discovered that the farm contained only 191.42 acres, and on October 22, 1909, this suit in equity was begun to reform the deed by striking therefrom the words above quoted, on the ground that the acreage had been fraudulently misrepresented, and that said words were fraudulently inserted. In the second count of the petition it was alleged that there was a mutual mistake whereby each party supposed there were 200 acres in the farm, when, in fact, it contained 8.58 acres less. The prayer was that the deed be reformed and judgment be entered against the defendants for \$700 and interest. On

January 10, 1911, the defendants filed an amended and substituted answer, putting in issue the allegations of the petition, and pleading by way of counterclaim concealment and misrepresentation as to certain implements being complete and the contents of certain packages of goods which were not opened, and also alleging false representation as to the value of fixtures and the like included at the fixed valuation of \$1,825. The defendants prayed that plaintiff's petition be dismissed, and that they have judgment on the counterclaim in the sum of \$1,800.

On the same day the defendants moved the court to "separate the issues and causes of action, and set that portion of the plaintiff's allegations and demands for the reformation of the deed on the equity docket, and that portion of the allegations and demands for a recovery of damages on the law docket, and for an order that the same be separately tried. This motion was overruled, and on January 14th following the defendants moved that the suit be transferred to the law side of the calendar. This motion also was overruled. On hearing it appeared that there were only 191.42 acres in the farm conveyed to plaintiff; that neither party knew of the shortage until discovered by plaintiff in disposing of it to another; that defendants supposed that the farm contained 200 acres; that both parties acted in good faith, the plaintiff in what he said of the stock of merchandise and defendants in what they said of the land; and that, if some parts of articles were lacking or broken, the value of some of these was not shown, and the only representation concerning the fixtures was what had been paid for them and this was proven true. The deed was prepared in accordance with the understanding of the parties. A case then was not made out for the reformation of the deed, as the court rightly decided, though the right to recover some damages was conclusively established. The price of the land was estimated by the acre.

[1] In the original contract it was designated as "their farm of 200 acres," and was to be taken in at \$60 per acre, or \$12,000. This clearly indicates that it was exchanged at the estimated value per acre, and nothing in the supplemental contract wherein defendants "agree to reduce the price of the farm \$250" obviates this conclusion.

[2] Where the sale is by the acre, the differences presumed to have been contemplated by the insertion of the clause, "more or less according to the government survey," are only such as are due to the errors incident to measurements by different surveyors and the variation in the instruments used. They are words of safety or precaution merely, and intended to cover slight and unimportant inaccuracies. A discrepancy of 8.58 acres in 200 acres is such a one as will be

remedied by the allowance of damages. *Rathke v. Tyler*, 136 Iowa, 284, 111 N. W. 435.

[3] The evidence as a whole, however, discloses that the price named in the contract was merely an estimate for trading purposes. Indeed, the plaintiff testified that it was worth but \$45 per acre, and the price of the fixtures, etc., was estimated at what they cost in the trade rather than their value. Moreover, the goods, though a "trading stock," were invoiced at original cost, or, when this was not ascertainable from the bills, at catalogue prices. In these circumstances the transaction is to be regarded as an exchange and the recovery had for the shortage on a quantum meruit. *Fagan v. Hook*, 134 Iowa, 381, 391, 105 N. W. 155, 111 N. W. 981. The petition contained sufficient to make out a cause of action at law, and, as seen, the proof was such as to put in issue the amount owing because of the deficiency in the amount of land, and also what amount, if any, were recoverable on the counterclaim had the trial been at law. *Boddy v. Henry*, 126 Iowa, 31, 101 N. W. 447.

[4] Had no grounds of equitable relief been alleged, relief might have been granted for by not moving "at or before" the filing of "the answer" to transfer the cause to the law side of the calendar. Defendants waived any error in the proceedings. Section 3434, Code; *Moore v. District Twp.*, 28 Iowa, 425; *Bibbins v. Clark*, 90 Iowa, 231, 57 N. W. 884, 59 N. W. 290, 29 L. R. A. 278; *Matthews v. Luers Drug Co.*, 116 Iowa, 231, 81 N. W. 464.

[5] And, plaintiff's suit having been begun on the equity side, it might there be maintained and the defendants were not in a situation to insist on their counterclaim being heard on the law side of the calendar. *Ryman v. Lynch*, 76 Iowa, 587, 41 N. W. 320; *Wilkinson v. Pritchard*, 93 Iowa, 308, 61 N. W. 965; *Crissman v. McDuff*, 114 Iowa, 83, 86 N. W. 50; *Gatch v. Garretson*, 100 Iowa, 252, 69 N. W. 550. Or had the equities alleged in the petition been proven, and the relief "been denied on some other ground than for want of evidence as that it was impracticable or impossible, then the court might well have retained the cause and disposed of it on the merits, even though this might have resulted in awarding a remedy peculiar to law." *Richmond v. Railway*, 33 Iowa, 441, 489; *Clinton v. Shugart*, 126 Iowa, 179, 101 N. W. 785; *Johnson v. Carter*, 143 Iowa, 95, 120 N. W. 320; *Reiger v. Turley*, 151 Iowa, 491, 131 N. W. 866.

[6] The principle is well stated in the last-cited case as follows: "When equity has once obtained jurisdiction of a controversy, it will determine all questions material or necessary to the accomplishment of full and complete justice between the parties, even though in doing so it may require passing on some matters ordinarily cognizable at law."

[7] But here the equities, though alleged, were not proven, and that was the ground for denying equitable relief. The practice in such a case, in the absence of statutory provisions to the contrary, is to dismiss the cause and relegate the parties to an action at law, as was done by the district court in this case. *Roberts v. Taliferro*, 7 Iowa, 110; *Cooper v. Armstrong*, 3 G. Greene, 120; *Cornyngham v. Smith*, 16 Iowa, 471; *Mitchell v. Dowell*, 105 U. S. 430, 26 L. Ed. 1142; *Denny v. McCown*, 34 Or. 47, 54 Pac. 952; 10 Cyc. 111, and cases collected. But see *Pomeroy's Code Remedies*, § 20 et seq. As observed in *Corey v. Sherman*, 96 Iowa, 114, 64 N. W. 828, 32 L. R. A. 490, 514: "It is contrary to the policy of the statutes of this state to dismiss an action or defeat a recovery on the mere ground that the plaintiff has erred in selecting the proceedings to obtain the relief to which he is entitled." Suits in equity and actions at law are heard and tried by the same tribunal, and section 3432 of the Code declares that "an error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings, and a transfer to the proper docket."

This obviates the dismissal of a suit in equity when the equities fail if enough is contained in the petition to make out a cause of action at law, and there is sufficient evidence to sustain it. In other words, if there is enough in the record to warrant the entry of a judgment at law, it was error to enter a dismissal of the action. In doing so, the court must have overlooked this statute. The only courses open were either to award the relief to which plaintiff had shown himself entitled, or to order the cause transferred to the law side of the calendar, and that the issues be determined as at law. As the equities alleged had failed, none incidental thereto might have been awarded, and, if a judgment at law might be entered in such a case, a party could be deprived of a trial at law, and incidentally denied the benefit of the guaranty of a trial by jury through the ingenuity of a pleader in so formulating the petition as to allege equities enough to retain the cause on the equity side of the calendar and include enough to make out a cause of action at law. In other words, the forms of pleadings, regardless of the proofs, would determine the forum whether at law or in equity, would depend not so much upon the character of the cause of action as upon the purpose of the pleader in preparing the petition. If such were the rule, the defendant would be helpless, for a motion to transfer to the law calendar would be of no avail, and as equitable issues were raised, even though no equity were proven, the chancellor would administer the remedy. We are not ready to sanc-

tion such a practice, nor do we find anything in the Code authorizing it. Language may be found in *Green Bay Lumber Co. v. Miller*, 98 Iowa, 468, 62 N. W. 742, 87 N. W. 383, squinting that way, but the plaintiff was there found entitled to equitable relief. The distinction between cases where the equities have been established and those wherein these have failed does not appear to have been noted, and the same may be said of *Walters v. Farmers' Bank*, 76 Va. 12. This last decision was followed by *Evans v. Kelley*, 49 W. Va. 181, 38 S. E. 497, citing in support thereof cases wherein the equities have been established. No reasons are stated in support of the practice indorsed in these cases, and we are inclined to adhere to the rule approved by the overwhelming weight of authority that when the equities of a petition fail for want of proof, and enough is contained therein to state a cause of action at law, relief ought not to be granted, but the cause transferred to the law side of the calendar and there tried.

It follows that the court erred in dismissing the action, and its order in so doing is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

IN RE LAW'S ESTATE.

LAW et al. v. JONES et al.

(Supreme Court of Iowa. Nov. 20, 1912.)

1. WILLS (§ 55*)—TESTAMENTARY CAPACITY—EVIDENCE.

Evidence on a contest of a will held to support a finding of lack of testamentary capacity.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 137-161; Dec. Dig. § 55.*]

2. EVIDENCE (§ 553*)—EXPERTS—HYPOTHETICAL QUESTION.

A question to experts as to soundness of mind of testator, hypothesizing facts which contestants' testimony tends to show, is proper.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2369-2374; Dec. Dig. § 553.*]

3. APPEAL AND ERROR (§ 1001*)—REVIEW—VERDICT.

There being substantial evidence in support of a verdict, the appellate court cannot disturb it as the result of passion or prejudice.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

4. EVIDENCE (§ 478*)—OPINION EVIDENCE—NONEXPERTS—TESTAMENTARY CAPACITY.

A nonexpert may give his opinion, on the facts testified to by him, that testator's mind was unsound, if such facts justify an inference of unsoundness.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2242-2244; Dec. Dig. § 478.*]

5. WILLS (§ 330*)—CONTESTS—"TESTAMENTARY CAPACITY"—INSTRUCTIONS.

An instruction that a person of sufficient mental capacity to make a will is one who has "full and intelligent" knowledge of the act he is engaged in, and "full" knowledge of the

property he possesses, etc., does not call for too high a degree of capacity, at least where it is further stated that it was enough if testator had an intelligent knowledge of the nature of the instrument he was executing, and sufficient strength of mind to know and comprehend the natural objects of his bounty, the nature and extent of his estate, and the distribution he wished to make thereof.

[Ed. Note.—For other case, see *Wills*, Cent. Dig. §§ 779-781; Dec. Dig. § 330.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 6929-6931.]

6. WILLS (§ 329*)—OPINION EVIDENCE—WEIGHT—INSTRUCTIONS.

An instruction that the weight to be given the opinions of experts and nonexperts who have testified to unsoundness of testator's mind is a matter for the jury to say, and peculiarly within their sound judgment and discretion, they being first required to determine whether the facts and circumstances testified to by the nonexpert, and on which his opinion is based, are consistent with unsoundness of mind, and whether the facts enumerated in the hypothetical question to the expert have been established by the evidence, is proper.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 774-778; Dec. Dig. § 329.*]

7. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—REPETITION.

The nongiving of a requested instruction, substantially given in the court's charge, is not ground for complaint.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

8. WILLS (§ 384*)—APPEAL—HARMLESS ERROR—REFUSING INSTRUCTIONS.

The nongiving of a correct requested instruction that the opinions of nonexperts testifying that testator's mind was sound need not be based on any detailed facts or circumstances given by them, but only on acquaintance and opportunity for observation, was harmless; the court having admitted such testimony, and so in effect given the rule of instruction, and having directed the consideration of all the testimony adduced in determining the issue.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 855-858; Dec. Dig. § 384.*]

9. WILLS (§ 53*)—CONTESTS—TESTAMENTARY CAPACITY—EVIDENCE.

Evidence that testator's widow, named as one of his executors, could not read, and that his son, one of the main devisees, named as the other executor, was addicted to drink, as well as evidence of the character and habits of all the other children and heirs, is admissible on a will contest as bearing on the state of testator's mind.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 111, 112, 120-130; Dec. Dig. § 53.*]

10. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Exclusion of evidence of a fact practically admitted was harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.*]

Appeal from District Court, Polk County; James P. Hewitt, Judge.

This is a contest over what purports to be the last will and testament of Andrew Law, deceased. The will was executed in April of the year 1903, and a duly executed codicil was attached some time in the year 1909. Contestants claimed that testator was un-

sound of mind at the time both will and codicil were executed, and also that the execution thereof was brought about by undue influence. The case was tried to the jury upon the issue of mental capacity; the issue of undue influence having been withdrawn by the trial court. The jury returned a general verdict for contestants, and also in answer to special interrogatories found that testator was of unsound mind and mentally incompetent when the will was executed, and also at the time of the execution of the codicil. Proponents appeal. Affirmed.

Bowen & Alberson and A. B. Schnetz, all of Des Moines, for appellants. C. L. Nourse and R. G. Patton, both of Des Moines, for appellees.

DEEMER, J. [1] At the time of the execution of the will testator was about 71 years of age, and the codicil was executed about six years thereafter. He died in February of the year 1910 at the age of 78 years. It is claimed that he was unsound of mind at the time of the execution of both will and codicil, and testimony was adduced to show that he was afflicted with senile dementia. As the chief point made by appellant for a reversal is the insufficiency of the testimony to take the case to the jury, and to sustain the verdict returned, we have concluded to adopt the state of facts recited in a hypothetical question put to the experts as a basis for the discussion of this proposition. It is as follows: "Q. Doctor, we want your opinion as to the probable malady and mental soundness or unsoundness of a man who, at the age of about 72 years or 73 years, executed a written instrument, the validity of which is in controversy in this suit. About 10 years prior to the execution of the instrument this man had a severe illness lasting about six weeks; the illness coming upon him suddenly in cornhusking time and while he was working unusually hard. During the early part of the illness he was unconscious at times; his mind wandering. After the illness he walked for a time with a cane, and then with a crutch and cane, and then in later years upon crutches—two crutches—his shoulders drooped; his back was greatly bent forward, almost double; he carried his head bent; he dragged his feet as he walked; he had difficulty in getting about; he complained of headaches and of dizziness; he was at times melancholy and despondent. These conditions grew worse up to the time of his death which occurred in February, 1910. After his illness he never worked except at times for a short period doing small chores; his general health was bad; he suffered pain in various parts of his body; he was physically weak and infirm; his joints were stiff, his arteries hardened, his hands shrunken and they trembled when he attempted to use them for ordinary purposes;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

his vision was impaired; his hearing was impaired. Prior to his illness he had always been a strong man upright in carriage, good health, self-reliant. After the illness he was physically as above described; he was childish, pessimistic as to his health, fretful, querulous, was restless, would wander around his premises and amongst his stock in the nighttime in his barnyard, would frequently worry over immaterial matters, and he would sit in his chair and whisper, mumble to himself, and would talk to himself and among his stock when he was among them, and although he was a man worth \$40,000, neighborhood of \$40,000 unincumbered property, he would worry over poverty, probably the poorhouse would be his end. He was forgetful, and asked questions and soon after repeat them, would miscall names, would tell foolish stories, sing foolish songs, and a few weeks before he executed the instrument in question his sister died, and it became necessary for him to make a sworn statement of his heirs, which consisted of his and her brothers and sisters and a nephew and niece, and he gave his own name and names of the nephew and niece as the only heirs of the deceased sister, forgetting the names of two brothers and three sisters who were equal heirs with himself and entitled to a portion of the estate. His sister left a watch, and immediately after the funeral he took it and gave it to a grandchild. The parents of the grandchild told her she was not entitled to it; that her grandfather had no right to give it to her; and she returned it to him and he became provoked—said he did have a right to give it."

[2] This is a fairly accurate statement of what the testimony offered for contestants tended to show. And we may here pause long enough to say that the ruling on the objection to this question was correct, for there was sufficient testimony upon which to base it. *Meeker v. Meeker*, 74 Iowa, 357, 37 N. W. 773, 7 Am. St. Rep. 489.

[3] The answer made by the expert to the direct question of whether or not, assuming the facts stated to be true, testator was sound or unsound of mind was that he was of unsound mind. Of course this answer is not binding either upon us or the jury, but we may and should view the testimony in the light of the opinion of both experts and non-experts. Assuming that the jury accepted this testimony as true, notwithstanding the testimony introduced by proponents which tended to show sanity, and conceding that to our minds this testimony overcame the showing made for contestants, we yet have to consider the verdict as a verity, unless the testimony be such as to indicate passion or prejudice on the part of the jury, and this we cannot do unless there be no substantial evidence in support of the verdict. *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Sheffield v. Hanna*, 136 Iowa, 579, 114 N. W. 24; *Nutter v. Insurance Co.*, 136 N. W. 892;

Betts v. Betts, 113 Iowa, 115, 84 N. W. 975; *In re Hannaher's Will*, 135 N. W. 34. Manifestly there was such a showing here on behalf of contestants that we are not justified in interfering.

[4] 2. Various nonexpert witnesses were permitted to give their opinion as to testator's unsoundness of mind. This they did upon facts stated by them, and these opinions were properly limited to a state of facts to which they had given testimony. In this there was no error. *Stutsman v. Sharpless*, 125 Iowa, 335, 101 N. W. 105; *Barry v. Walker*, 152 Iowa, 154, 128 N. W. 386; *Betts v. Betts*, 113 Iowa, 118, 84 N. W. 975. It is said, however, that in some instances the facts related were not sufficient, in themselves, to indicate insanity, and that the trial court should have sustained objections calling for these opinions on the facts so recited. Ordinarily, if there be any facts which would justify an inference of insanity, the witness is permitted to answer, and the value of the opinion is for the jury. *Barry v. Walker*, 152 Iowa, 154, 128 N. W. 386; *Betts v. Betts*, 113 Iowa, 118, 84 N. W. 975. Of course if no facts are recited which tend to show unsoundness of mind, the court should not permit the witness to give an opinion, but, in case reasonable minds might differ on the proposition, the witness should be allowed to answer, and the whole matter should go to the jury, which is the final arbiter of the facts in every case. In the light of these rules, we have examined the record upon each and all of the rulings complained of and find no error. *Stutsman v. Sharpless*, 125 Iowa, 335, 101 N. W. 105.

[5] 3. The trial court gave the following, among other, instructions: "(6) A person of sound mind—that is, one who has sufficient mental capacity to make a valid will—within the meaning of the law in this case, is one who has *full and intelligent knowledge* of the act he is engaged in, a *full knowledge* of the property he possesses, and intelligent perception and understanding of the disposition he desires to make of it, and of the persons he desires shall be the recipients of his bounty, and the capacity to recollect and comprehend the nature of the claims of those who are excluded from participating in his bounty; but it is not necessary that he should have sufficient capacity to make contracts and do business generally, nor to engage in complex and intricate business matters. If the testator had an intelligent knowledge of the nature of the instrument he was executing, and sufficient intelligence and strength of mind to know and comprehend the natural objects of his bounty, the nature and extent of his estate, and the distribution he wished to make of his property, he had sufficient mental capacity to make a will." The italicized parts of the instruction are complained of. The instruction is fully approved in *Meeker v. Meeker*, 74 Iowa, 352, 37 N. W. 773, 7 Am. St. Rep. 489, and we

have never departed from the rule there announced. Taken as a whole, the words complained of are so modified and explained that the instruction as a whole does not run counter to the rules expressed in *Re Evans' Estate*, 114 Iowa, 240, 86 N. W. 283, and *Perkins v. Perkins*, 116 Iowa, 253, 90 N. W. 55. Of course complete and perfect knowledge in the broadest sense is not required; but testator must have had strength of mind enough to know and comprehend the nature and extent of his property, the objects of his bounty, and the distribution he wishes to make of his estate. This is what the court instructed, and there was no error.

[6] 4. The following instruction is also complained of: "(13) Testimony has been given in this case consisting of opinions of nonexpert witnesses as to the unsoundness of mind of the testator, Andrew Law, and in relation thereto said witnesses have testified to certain facts and circumstances which they claim to have observed as to the acts, appearance, and conduct of said Andrew Law both before and after the times of the execution of the said will and the codicil thereto. The law requires the opinion of such witnesses to be based upon facts which are given in evidence and detailed to the jury by said witnesses before giving said opinion, and it is for you to say what weight is to be given to such opinion of any such witnesses after first determining whether the facts and circumstances testified to by him and detailed to the jury upon which said opinion is based, are consistent with unsoundness of mind as elsewhere defined in these instructions. With such limitation, the weight to be given the opinions of witnesses, both expert and nonexpert, is a matter peculiarly within your sound judgment and discretion, and you should consider, in connection therewith, the facts disclosed by those witnesses who have given opinions of unsoundness of mind, based upon their observations of the deceased as detailed in evidence, and also whether or not the facts enumerated in the hypothetical questions propounded to expert witnesses have been established by the evidence offered and admitted upon the trial." This instruction has ample support in the cases.

5. Proponents asked the court to give two instructions, which we here quote: "(20) Evidence has been introduced in this case tending to show that Andrew Law, deceased, at the time of the making of the will in controversy involved in this action, was afflicted with a mental disease known as senile dementia. The fact that Andrew Law was afflicted with such disease, if you find from the evidence that it is a fact, does not necessarily mean that Andrew Law was by reason thereof incapable of making the will and codicil in controversy. A person may be insane or unsound in mind on some subjects, and be perfectly sane or sound as to others. The law is that, in order to defeat

the will and codicil in this action, Andrew Law, deceased, must have been mentally incompetent to transact the very business in question, to wit, the making of the will and codicil; and if you find with reference to making such will and codicil, at the time of the making thereof, he was competent to understand, without prompting, the nature and extent of his property, the distribution he desired to make thereof, the proportionate shares he wished to make descend to those he wished to make the recipients of his bounty, and was capable of understanding who were the natural objects of his bounty, then, and in that event, your verdict will be for the proponents." "(14) Testimony has been given in this cause consisting of opinions of law of nonexpert witnesses as to the unsoundness of mind of the testator, Andrew Law. In this connection you are instructed that such testimony, to be of any value, must be based and based alone on facts and circumstances detailed by such witnesses to you while on the stand, showing or tending to show indications of mental unsoundness. On the other hand, opinion evidence of witnesses testifying as to the soundness of mind of the testator, Andrew Law, need not be based upon any detailed facts or circumstances given by the witness giving testimony as to such soundness, but only upon acquaintance and opportunity for observation. In determining what weight you shall give to the opinions of lay or nonexpert witnesses testifying to the unsoundness of mind of the testator, Andrew Law, you are to take into consideration what facts upon which such witness bases his opinion, and those only, and give to such opinion such weight as you may deem them entitled to."

[7, 8] The substance of the first of these instructions was given by the court in its charge, and proponents have no just ground for complaint. The second announces a correct rule of evidence, and no specific instruction was given with reference to this matter. However, the court admitted such testimony, thus in effect announcing the rule of the requested instruction, and further directed the jury to consider all the testimony adduced in determining the issue submitted. We are constrained to hold that no prejudicial error resulted from the court's failure to give the second of the foregoing requests. The instruction with reference to the opinions of nonexperts who gave their opinions as to testator's insanity was correct, and such an instruction, although relating somewhat to rules of evidence, was a proper one and one favorable to proponents.

[9] 6. Although a little out of order, we shall here consider some minor matters complained of. Contestants were permitted, over objections from proponents, to show that testator's widow could not read or write, and also that Frank Law, one of the proponents and main devisees under the will, was addicted to drink. Frank Law, and his mother.

Mary Law, were named as executors of the will, and it is claimed that the testimony was admissible as bearing upon testator's strength of mind; the thought being that the parties named as executors were incompetent to act as such, which testator would have known and realized had he been of sound mind. For this purpose the testimony was admissible. In this connection the trial court gave the following instructions: "(14) Testimony has been given in this case relating to the habits of Frank Law, one of the proponents in the case and named as executor in the will in controversy herein, with reference to his use of intoxicating liquors. You are instructed that this testimony has been admitted for the purpose of showing the relations existing between Frank Law and the deceased, Andrew Law, and as bearing upon the mental condition or capacity of the deceased testator, Andrew Law. Standing alone, such testimony is not evidence of mental incapacity, but the same may be considered by you in connection with all the other evidence admitted upon the trial bearing upon that question." Moreover, testimony as to the habits of Frank Law was admissible, as also was testimony as to the character and habits of all the other children and heirs of the testator, in determining testator's state of mind and the nature of the bounty he gave by his will. In order to judge of the nature of the will, it was important for the jury to know each and all of these matters.

[10] 7. It is said that nonexperts as to unsoundness of mind were not confined in the questions propounded to the testimony given by them with reference to testator's conduct. An examination of the record discloses that this is a mistake. The trial court exercised great care in this matter, and we discover no error. Proponents offered the records and files of the Polk county district court, in the case of Doubleday v. Burns, for the purpose of explaining a matter referred to by some of the witnesses for contestants. This testimony might very well have been received; but, as the matter sought to be shown thereby was practically an admitted fact, no prejudice resulted from the ruling excluding them.

Having gone over the record with great care and found no prejudicial error, it follows that the judgment must be, and it is, affirmed.

BLACK v. MILLER.

(Supreme Court of Iowa. Nov. 20, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 228*)—CLAIMS—FILING WITHDRAWAL.

Where, notwithstanding a suit to enforce specific performance of decedent's alleged contract to convey certain land to claimant in consideration of his services, claimant filed a

claim in proper time consisting of 17 items, including one relating to purchases for or improvements on land for decedent and another relating to a note for money borrowed, a notice served on the administrator that the items other than those specified were, "for the present, withdrawn," and that the two excepted items were to come on for trial, the remaining items being held until determination of a claim for specific performance, the items withdrawn were never dismissed from the claim filed, but, even if they were, claimant was entitled to refile the same within five months after the final disposition of the claim for specific performance and while the estate remained unsettled.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 819-826, 827½; Dec. Dig. § 223.*]

2. JUDGMENT (§ 721*)—FORMER ADJUDICATION—RES JUDICATA.

In a suit by three of decedent's children for partition of certain real property, defendant pleaded an oral agreement with decedent to convey to him 60 acres of the land in consideration of furnishing decedent care and board for the remainder of his life. On the hearing, this claim was dismissed as "not substantiated by the evidence," without any provision in the decree that the same was without prejudice. *Held*, that such decree was res judicata of claimant's right to recover on a claim against decedent's estate for the reasonable value of the services rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1252; Dec. Dig. § 721.*]

3. SPECIFIC PERFORMANCE (§ 8*)—NATURE OF REMEDY.

While specific performance is not a remedy that may be claimed by a litigant as a matter of right, but rests in the sound discretion of the chancellor, yet if the evidence is sufficient, and there are no equitable considerations in the way, performance will be decreed as a matter of course.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 17, 18; Dec. Dig. § 8.*]

4. BILLS AND NOTES (§ 492*)—CLAIM—BURDEN OF PROOF—STATUTES.

Code, § 3640, provides that, where an action is founded on a note and the copy has been attached to the petition, the signature is presumed to be genuine unless its genuineness is denied by the person whose signature it purports to be. *Held*, that where neither an original note nor a copy thereof was attached to a claim thereon against decedent's estate, and the validity of the note was denied, the burden was on claimant to show the genuineness of decedent's signature before introducing the note in evidence.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1649-1651; Dec. Dig. § 492.*]

5. APPEAL AND ERROR (§ 501*)—PRESERVATION OF EXCEPTIONS—SIGNATURE OF JUDGE AND REPORTER.

Code, § 3675, provides that the reporter may note in his report in shorthand or in writing the fact that the jury was instructed, together with all exceptions and objections to instructions given by the court on its own motion. *Held*, that neither such section nor any other provision of the Code authorized the preservation of the record of such exceptions by mere certificate of the judge and reporter that they were taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2300-2305; Dec. Dig. § 501.*]

6. TRIAL (§ 233*)—INSTRUCTIONS—STATEMENT OF ISSUES.

In instructing the jury, the court should state the issues, instead of copying the pleadings as a part of the instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 527-530; Dec. Dig. § 233.*]

7. TRIAL (§ 191*)—INSTRUCTIONS—CONTESTED FACTS—ASSUMPTION.

Where the genuineness of decedent's signature on a note sought to be proved as a claim against his estate was denied, it was improper for the court to assume the genuineness of decedent's signature in its instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

8. USE AND OCCUPATION (§ 9*)—PRIMA FACIE CASE.

In a suit for use and occupation of land, it was not necessary for decedent's administrator to show that there was a mutual understanding between the occupant and decedent that the latter should receive pay for the use of the land, but it was sufficient to establish a prima facie case that the occupant entered on the land and used and occupied it for his own benefit with decedent's assent, whereupon the law would imply the promise to pay the reasonable value for such use, in the absence of proof by the occupant that the use had been paid for, or that it was to be gratuitous.

[Ed. Note.—For other cases, see Use and Occupation, Cent. Dig. § 25; Dec. Dig. § 9.*]

9. USE AND OCCUPATION (§ 8*)—DEFENSE—PLEADING.

A defense that the use and occupation of certain land belonging to defendant was to be gratuitous was unavailable unless pleaded.

[Ed. Note.—For other cases, see Use and Occupation, Cent. Dig. § 24; Dec. Dig. § 8.*]

10. USE AND OCCUPATION (§ 1*)—PERSONS AND FAMILY RELATION—PRESUMPTION.

The rule with respect to the rendition of services to a relative living in a family has no application to a claim against an occupant of decedent's land for use and occupation while decedent was living with and being supported by such occupant.

[Ed. Note.—For other cases, see Use and Occupation, Cent. Dig. §§ 1-11; Dec. Dig. § 1.*]

Appeal from District Court, Jefferson County; M. A. Roberts, Judge.

The claim of plaintiff was allowed against the estate of George Black, deceased, in the sum of \$2,500. The administrator appeals. Reversed.

Crail & Crail, of Fairfield, for appellant. Leggett & McKemey, of Fairfield, for appellee.

LADD, J. I. The plaintiff filed his claim against the estate of George Black, deceased, March 10, 1908, consisting of 17 items. The first 14 items, except the twelfth, related to purchases for or improvements on land. Item 15 related to the amount claimed to be due on a note, and the twelfth item was for money borrowed. The sixteenth item was for services in caring for stock and work on the farm, and the seventeenth was for "board, washing, and mending 20 years, 1,040 weeks, at \$1.50 per week \$1,560."

On September, 1908, term of the district court the plaintiff caused to be served on the

administrator notice of the filing of the claim, and "that the items of said claim except Nos. 12 and 15 are for the present withdrawn," and that the claim in respect to the said items would come on for hearing on the 5th day of October, 1908, and "that the remaining items of said claim are withheld until the court passes upon the petition of said Archibald Black and wife to quiet his title" to 60 acres of land described, which lands George Black agreed to convey to said Archibald Black in consideration of the services covered by said remaining items of the claim. No trial was had at the time stated, and on November 12, 1910, plaintiff filed what is designated as an "amendment to claim," alleging therein that he amended "his claim heretofore filed against this estate by changing the seventeenth item of the claim so it will read as follows: First. '(17). Boarding, washing, and mending, 20 years, 1,040 weeks, at \$3 per week, \$3,120, total amount of claim, \$5,170.00,' and files again the claim as amended. Second. He shows that this claim was not filed heretofore in the present form, because of the pendency of certain litigation in this court in reference to the partition of the real estate of said George Black, in which this claimant presented the claim to 60 acres of land under the verbal agreement of the deceased; that claimant should have the same in consideration of the services heretofore stated; that said cause was pending in the courts of this state until the ——— day of ———, 1910, when the same was determined by the court's finding against the claim of this claimant of said land, on the ground that same was not sustained by sufficient evidence to comply with the rules of the court in such cases." The defendant answered denying each item of the claim and that the estate was in any wise indebted to claimant, and pleaded that the claim was not filed within a year after the appointment of defendant as administrator of the estate of deceased and that the circumstances alleged were not sufficient to authorize the filing of the claim thereafter. The answer also pleaded a former adjudication and interposed a counterclaim for the use and rental of the land. To this answer the claimant filed a demurrer in several grounds: (1) That the claim for the items in controversy was never withdrawn. (2) That, as the claim was filed within six months after the appointment of the administrator, claimant was entitled to prove the same. (3) That the record affirmatively showed equitable reasons sufficient to excuse delay in the time of filing the claim, if delay there was. (4) That the facts pleaded did not constitute a former adjudication. The demurrer was sustained, and we shall first dispose of those grounds assailing the claim as filed.

[1] It will be observed that the several items of the claim were only "for the present withdrawn," and that the two excepted

items were to come on for trial; and further on the notice recites that "the remaining items of said claim are withheld until the court passes upon the petition of said Archibald Black and wife to quiet his title in 60 acres of land," describing it. Plainly enough the purpose of the notice was to bring the two items on for trial, and in doing so to withdraw the others from the trial, but not from the claim as filed. Whether this might be done is not important, for the proposed trial did not proceed and the claim continued on file as before the service of the notice. We are of the opinion that the items thereof were never actually withdrawn from the claim, and that even if they were, under the circumstances disclosed, i. e., that the estate was unsettled, that the two items were undisposed of, and the amendment filed within five months after the final disposition of the case, involving the same matter, presents a case calling for equitable relief in permitting the filing of the amendment to the claim more than one year after the appointment of the administrator and when it was filed. See *Asher v. Pegg*, 146 Iowa, 541, 123 N. W. 739, 30 L. R. A. (N. S.) 890.

[2] II. In count 3 of the answer the defendant pleaded the decree in *Black et al. v. Chase et al.*, 145 Iowa, 715, 122 N. W. 916, as res adjudicata and by way of estoppel. The petition in that action was by three children of the deceased praying for the partition of 200 acres of land left by him. Three other children, Samuel, George, and Arch, set up claims to 40 acres each, and subsequently Arch (with his wife) amended his answer by alleging an oral agreement with deceased, said to have been made in 1896, whereby they were to make their home with, care for, and board deceased during the remainder of his life, and as compensation therefor to have 60 acres of land, that they had performed the contract, and prayed that title to said land be quieted in Arch, or the administrator be required to execute a deed therefor, in compliance with said agreement. On hearing, the several 40's were held to belong to those claiming them, but the amendment of Arch Black to his answer, setting up said agreement and praying for the conveyance of the 60 acres in compliance therewith, was dismissed and decree entered "that the claim of Arch Black to own 60 acres is without merit and not substantiated by the evidence."

In this action Arch Black presented his claim against the estate of the deceased for the care and board alleged in said amendment during precisely the same period, and prayed that it be established for the value thereof. The evidence relied on was the same in both cases, save that in the last trial proof of the reasonable value of such board and care was adduced. The only evidence of deceased's expectation to pay for the board and care introduced on the last trial was that of his agreement to give Arch

the 60 acres of land alleged in the amendment to the answer in the first action. So that in each trial herein the claimant herein relied on the same proof of furnishing care and board and upon the alleged agreement to pay therefor by transferring the 60 acres of land, in the former praying that he have the land as compensation, and in the latter that payment therefor be from the funds of the estate. In other words, the issues in both actions are the same; the relief sought only being different. It is plain enough that, had the issues now being tried been first determined, the decision would have been conclusive in an action for specific performance. Is the converse true?

Of course, to recover in this action, proof that the board and care were furnished with the mutual expectation of the father to pay, and the son to receive, compensation therefor, would be sufficient. *Tank v. Rohweder*, 98 Iowa, 154, 67 N. W. 106; *Weitnaur v. Weitnaur*, 117 Iowa, 578, 91 N. W. 815. But no testimony of this character was introduced, save as this might be inferred from the evidence of a promise that the son should have the land. Under the evidence, then, if there was to be compensation at all, this was to be the land, and the measure of recovery should be the land, or, in event this cannot be conveyed, then clearly enough claimant would be entitled to its value. It may be conceded that the causes of action are different, the one having been prosecuted in equity and the other at law, the relief sought in one being specific performance and in the other compensation by way of damages, but the same essential issues were involved in each: (1) The existence of the contract and (2) the performance of the services. These were determined in the former action, for there was a hearing and no reservation in dismissing the cross-bill.

Where there is a hearing, and no such words as "without prejudice" appear in the decree, and no reason for dismissal is stated therein, and a decision on the merits is in no wise negatived, the issues raised are presumed to have been heard and decided on the merits. *Durant v. Essex Co.*, 7 Wall. 107, 19 L. Ed. 154; *Carberry v. Railway*, 44 W. Va. 260, 28 S. E. 694; 2 *Black on Judgments*, § 720. See *Finch v. Hollinger*, 46 Iowa, 216; *Hahn v. Miller*, 68 Iowa, 745, 28 N. W. 51. Says Story, in his *Equity Pleading* (793): "A decree or order dismissing a former bill for the same matter may be pleaded in bar to a new bill, if the dismissal was upon the hearing and was not in terms directed to be without prejudice." It was said in *Taylor v. Yarbrough*, 13 Grat. (Va.) 183: "A bill in equity having been dismissed generally without a reservation of any right of the plaintiff to sue thereafter, is conclusive upon all the issues made up in the case." An error may be predicated on the omission to so indicate in the decree

dismissing a cause on hearing if this is done for want of jurisdiction or other cause not going to the merits. *Freeman*, Judgm. § 270A; 2 *Black*, Judgm. § 720. The circumstance that the former suit was in equity and that now considered at law is not material, as both are triable in the same court. *Madison v. Garfield Coal Co.*, 114 Iowa, 56, 86 N. W. 41; *Bruce v. Foley*, 18 Wash. 96, 50 Pac. 935; *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85.

That the issues essential to recovery by the claimant in this action were decided against him in the former suit is put beyond controversy by the record and ordinarily must have been regarded as conclusive in support of the plea of estoppel. *Madison v. Garfield Coal Co.*, 114 Iowa, 56, 86 N. W. 41; *Reynolds v. Babcock*, 60 Iowa, 289, 14 N. W. 321; *Stevens v. Wadleigh*, 6 Ariz. 351, 57 Pac. 622; *Southern P. R. Co. v. U. S.*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; 23 Cyc. 1218. But appellee would obviate this result by saying that, whereas strict proof was exacted to make out a case in the former suit, it was only necessary to establish his claim in this action by a preponderance of the evidence; and further that, in prosecuting the former suit, plaintiff merely mistook his remedy, and, though defeated, may demand an appropriate remedy in a subsequent action. The last proposition may be disposed of on two grounds: (1) The claimant did not fall in the former suit because of having mistaken his remedy but owing to a failure of proof, and (2) even if there were a mistake in the remedy sought, the essential facts to sustain his claim to a different remedy were conclusively adjudicated against him in that suit.

Nothing contained in the decisions cited by the appellee indicates that the conclusive character of a decision of an issue in a former suit is obviated by the circumstance that the plaintiff might have prosecuted a different action or have sought a different remedy. In *Zimmerman v. Robinson & Co.*, 128 Iowa, 72, 102 N. W. 814, 5 Ann. Cas. 960, it appeared that plaintiff's assignor had prosecuted an action for the recovery of the price paid on a machine on the theory that the contract of purchase had been rescinded, and it having been decided on appeal that, as the machine had not been returned or a return tendered, recovery might not be had (*Zimmerman v. Robinson*, 118 Iowa, 117, 91 N. W. 918), it was held that the prosecution of that action was not an election of a remedy inconsistent with the maintenance of an action for a breach of warranty in the contract. Manifestly there was no issue decided in the one action, which was essential to the maintenance of the other, and this was true in *Lemon v. Sigourney Savings Bank*, 131 Iowa, 79, 108 N. W. 104, where an action was first prosecuted against the bank for the amount of deposit which it ap-

peared had been paid by the defendants in notes of third parties payable to the plaintiff, and it was held that this was not an adjudication constituting an estoppel in a subsequent suit against the bank for the proceeds of these notes collected by it.

Not a single issue involved in the first action was raised in the second. In *Asher v. Pegg*, 146 Iowa, 541, 123 N. W. 739, 30 L. R. A. (N. S.) 890, the plaintiff, under the name of Margaret Pegg, asserted the right to a widow's share in the estate of the deceased, and, this having been denied, she prosecuted a claim against the administrator of the estate for services rendered by her to deceased as housekeeper and assistant in carrying on his farm, and the court held that there was no identity whatever "either of law or fact between the claim asserted in the former action and the one which is now being asserted." The circumstance that a person may have availed himself of a different remedy does not obviate the principle that that which has once been judicially determined shall not again be made the subject of judicial controversy. See *Reynolds v. Lyon*, 121 Iowa, 733, 96 N. W. 1096. The failure of plaintiff in the former action was not owing to mistake of remedy, for that demanded was specific and precisely that to which he was entitled, if any. True, the adverse decision may have been owing to the quantum of proof exacted, for to have succeeded he must have established the contract as well as its performance by clear, definite, and convincing evidence. *Chew v. Holt*, 111 Iowa, 362, 82 N. W. 901; *McDonald v. Basom*, 102 Iowa, 419, 71 N. W. 341; *Briles v. Goodrich*, 116 Iowa, 517, 90 N. W. 354; *Moore v. Pierson*, 6 Iowa, 279, 71 Am. Dec. 409. This does not mean that the facts must be proven beyond reasonable doubt (*Skeggs v. Horton*, 82 Ala. 352, 2 South. 110, and *Sherrin v. Flinn*, 155 Ind. 422, 58 N. E. 649), but may amount to no more than saying that a higher degree of proof than exacted in actions at law is essential to constitute a preponderance of evidence (*Schmuck v. Hill*, 2 Neb. [Unof.] 79, 96 N. W. 153).

Whatever the explanation, more evidence was necessary to make out a case in the former suit than was essential to establish the right to recover for services rendered on the claim filed against the administrator. But the claimant voluntarily selected the forum in which to litigate his claim under the alleged contract, and our attention has not been directed to any decision holding that the effect to be given to a judicial decision depended on and is to be measured by the quantum of proof exacted. It is said that acquittal of a person in a criminal action is not conclusive in a civil action involving the same issues unless for a forfeiture, penalty, or the like exacting the same amount of proof, and the reason sometimes given is that the matter of motive or

intent differentiates the two classes of actions, and at others that the evidence determinative in a criminal action is more than sufficient to support a civil action. In other words, the evidence might preponderate against the defendant and yet not be sufficient to exclude all reasonable doubt. See *Stone v. U. S.*, 167 U. S. 184, 17 Sup. Ct. 778, 42 L. Ed. 130, explaining *Coffey v. U. S.*, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684; *State v. Meek*, 112 Iowa, 338, 84 N. W. 3, 51 L. R. A. 414, 84 Am. St. Rep. 342.

But the state never prosecutes a civil action based on a criminal act save for forfeiture, penalty, or the like, and for this reason the parties in criminal and civil actions are never the same. Because of diversity of parties, an adjudication in a criminal prosecution is not binding in the subsequent civil action instituted by an individual for the recovery of damages consequent of the wrongful act. Often several different actions may be maintained on a particular state of facts, and the quantum of evidence exacted in each is a matter to be considered in selecting the remedy to be sought and the forum in which to seek relief; but the determination of the issues presented is not any less binding on the parties because decided in one form of action rather than another. The fact that the issue has been decided by a court having jurisdiction of the parties and the subject-matter is that which renders the decision effective in support of a plea of an estoppel interposed in a subsequent action between the same parties involving the same issue. The amount of proof essential to establish an allegation of the petition, like the burden of proof and other matters, is a mere incident to the trial, exacted as the result of long experience as best adapted to the ascertainment of truth. Whatever the quantum of evidence required to establish a fact, or on whomsoever the burden of proof, the adjudication is binding on the parties and cannot again be litigated if properly interposed as a defense.

Cases like *Gwin v. Sumur*, 49 Mo. App. 361, *Porter v. Wagner*, 36 Ohio St. 471, 475, and *McNamara v. Arthur*, 1 Ball & Beatty, 175, are sometimes cited as sustaining a different view; but none of these were determined on the merits.

Many cases may be found in which a different quantum of evidence was required; but this was given no consideration in determining whether the decision of the issues involved sustained the plea of estoppel. As bearing hereon, see *Wolverton v. Baker*, 86 Cal. 591, 25 Pac. 54; *Bruce v. Foley*, 18 Wash. 96, 50 Pac. 935; *Trayhern v. Colburn*, 66 Md. 277, 7 Atl. 459; *Fidelity, etc., Trust Co. v. Fridenberg*, 175 Pa. 500, 34 Atl. 848, 52 Am. St. Rep. 851; *Myers v. Kingstone Coal Co.*, 126 Pa. 582, 17 Atl. 891. To hold otherwise would permit a party to experiment with different forms of action in en-

forcing the same right and impair the force which always has been and should be given to solemn adjudications of issues properly raised and regularly decided. Of course, the evidence adduced on the hearing of causes in equity is frequently thought not to be of the conclusive character essential to warrant the relief prayed and a dismissal entered for that reason. Such a decree is negative merely, and it may be that the recitals would be construed as a sufficient reservation of the issues for an action at law—a point not now necessarily to be determined, for the decree in the former suit purported to be on the merits.

[3] Specific performance has never been regarded as a remedy to be claimed by a litigant as a right, but is said to rest in the sound discretion of the chancellor. Where the evidence is sufficient, however, and there are no equitable considerations in the way, such decrees are entered as a matter of course. *Baltimore, etc., R. Co. v. Brubaker*, 217 Ill. 462, 75 N. E. 523; *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635; *Yazoo, etc., R. Co. v. Railway*, 83 Miss. 743, 36 South. 74; *Shuman v. Willets*, 17 Neb. 478, 23 N. W. 358; *Steadman v. Handy*, 102 Va. 382, 46 S. E. 380; 36 Cyc. 550.

There were no peculiar equities in the former suit obstructing the granting of specific performance, and, as recited in the decree, relief must have been denied on the merits alone.

There were no peculiar equities involved in the former suit, and the evidence was such that, had the contract and performance thereunder been proven, the relief prayed must have been granted as a matter of course. It was denied, as recited in the decree, on a finding that the claim of Arch Black was "without merit and not substantiated by the evidence." This adjudication of the precise issues now involved and essential to the maintenance of his claim against the estate of deceased is conclusive against him and should have been held to constitute an estoppel. The demurrer to the plea in estoppel should have been overruled.

[4] III. Item 15 of the claim was a note of \$300, dated October 18, 1902, and purporting to be signed by H. C. Black, Luman Black, and George Black, the latter by his mark. This had been assigned to claimant, and the only testimony tending to identify the note as having been signed by deceased was that of claimant, who testified as follows: "Q. Have you a note of George Black in your possession? A. Yes, sir; I have a note. Q. Will you be kind enough to let me see it? A. Yes, sir. (Exhibit A marked.) Q. Whose property is this note? A. Mine." The note was then received in evidence over objection as not having been properly identified, incompetent, and not binding on the administrator. The signature to a note upon which an action is founded, a copy of which has been attached

to the petition, is presumed to be genuine unless its genuineness is denied by the person whose signature it purports to be, under oath. Section 3640, Code. Neither the original note nor copy thereof was attached to the claim or amendment thereto, and, as each item thereof was specifically denied, the burden of proof was on claimant to show the genuineness of the signature, prior to the introduction of the note in evidence. *Smith v. King*, 88 Iowa, 105, 55 N. W. 88; *Schulte v. Coulthurst*, 94 Iowa, 418, 62 N. W. 770. See, also, *Hay v. Frazier*, 49 Iowa, 454. It follows that the court erred in receiving the note in evidence.

[5] IV. Appellant asserted in his abstract that exceptions had been saved to the several instructions. This was denied by appellee, and to sustain his assertion plaintiff has presented here a copy of the certificate of the trial judge and the reporter attached to the report of the trial in shorthand, certifying that "all instructions given were duly excepted to by the party adversely affected or interested." Whether the exceptions were noted by the reporter in his report does not appear, as the transcript is not before us. Nor is it claimed that any exceptions to the instructions were preserved as required by section 3709 of the Code, or otherwise. Section 3675 of the Code authorizes the reporter to note in his report in shorthand or in writing "the fact that the jury is instructed, all exceptions and objections to instructions given by the court on its own motion," and this report, when properly certified, undoubtedly would be sufficient evidence of the taking of exceptions to the instructions. But the Code nowhere authorizes the preservation of the record of such exceptions by the mere certificate of the judge and reporter that they were taken. This would enable a party to supply the record from memory of these officers, rather than to establish the preservation of exceptions by what was done at the time. We think, therefore, that the appellant has failed to sustain the abstract in this respect by the certification of the record.

[6-9] In view of another trial, however, it may be as well to suggest that the issues be clearly stated by the trial court, instead of copying the pleadings as a part of the instructions. See *Swanson v. Allen*, 108 Iowa, 419, 79 N. W. 132. Also, that genuineness of the signature to the note of \$300 included in the claim ought not to be assumed in the instructions, but that this is a matter of proof. Also, that the burden is not upon the defendant, in establishing his counterclaim for the use of the land alleged to have been occupied since 1886, to show that there was a mutual understanding between him and deceased that the latter should receive pay therefor. Upon proof that the claimant entered upon the land and used and occupied the same for his own benefit with the as-

sent of the deceased, in the absence of other proof, a promise to pay a reasonable compensation therefor arose. 24 Cyc. 1139. The burden of proof was on the claimant to show that use of the land had been paid for, or that its use was to be gratuitous. *Oakes v. Oakes*, 16 Ill. 106; *Sterrett v. Wright*, 27 Pa. 259.

[9, 10] And if claimed to be gratuitous, this was a matter to be set up in the pleadings. *Saddler v. Pickard*, 142 Iowa, 691, 121 N. W. 874. Of course, the relation of the parties and the circumstances under which the land was occupied are to be considered in determining the understanding between the parties. But the rule prevailing with respect to the rendition of services to a relative living in a family has no application to such a case.

Because of the errors pointed out, the judgment is reversed.

KECKEVOET v. CITY OF DUBUQUE et al. (Supreme Court of Iowa. Nov. 20, 1912.)

1. MUNICIPAL CORPORATIONS (§ 719*) — WHARVES—FEES.

The right of a city to impose wharfage fees does not arise solely out of the expense which it incurs in the maintenance of the wharf.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1425, 1529-1535; Dec. Dig. § 719.*]

2. COMMERCE (§ 63*)—MUNICIPAL CORPORATIONS (§ 719*)—WHARFAGE—POLICE POWER.

The imposing of wharfage fees by a city on a river which is the boundary between the states is not an interference with interstate commerce, and ordinances providing for such are a valid exercise of the police power, but they must be reasonable, and cannot be used as a guise for tonnage tax or a port warden's fee or for other ulterior purposes.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 100, 103-122; Dec. Dig. § 63.* *Municipal Corporations*, Cent. Dig. §§ 1425, 1529-1535; Dec. Dig. § 719.*]

3. MUNICIPAL CORPORATIONS (§ 719*) — WHARFAGE FEES — REASONABLE ORDINANCES.

In an action to enjoin the enforcement of ordinances imposing wharfage charges, evidence held to show that the ordinances were unreasonable and discriminatory.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1425, 1529-1535; Dec. Dig. § 719.*]

4. MUNICIPAL CORPORATIONS (§ 121*) — WHARFAGE FEES.

In an action to enjoin the enforcement of ordinances in relation to wharfage charges and prohibiting the keeping of house boats in the harbor, the question of the reasonableness of the wharfage charges was properly before the court, although the city only attempted to enforce the provision relating to house boats, where it was the failure of plaintiff to pay the wharfage fees that resulted in the demand for the removal of the house boats, and the payment thereof stopped the threatened removal for the time being.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 257; Dec. Dig. § 121.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

5. MUNICIPAL CORPORATIONS (§ 719*)—NAVIGABLE WATERS—RIVER CRAFT.

The city of Dubuque has no power under its charter to prohibit house boats to land or remain on any part of the ice harbor of the city of Dubuque; there being no congestion therein except so far as is caused by the devoting of part of the shores to private enterprises, which does not change the duty of the city with respect to the harbor, and the use to which it was originally dedicated.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1425, 1529-1535; Dec. Dig. § 719.*]

6. ACTION (§ 46*)—MISJOINDER OF CAUSES.

In an action to enjoin the enforcement of ordinances of a city relating to wharfage fees and the keeping of certain river craft in the harbor, a supplemental petition alleging the payment of fees under duress after the suit was commenced and asking to recover it back, being purely an action at law, should have been stricken for misjoinder on motion.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 449, 451-468; Dec. Dig. § 46.*]

Appeal from District Court, Dubuque County; Robert Bonson, Judge.

Action to enjoin the enforcement of certain ordinances of the city of Dubuque in relation to wharfage charges and in relation to the use of the ice harbor by certain river craft. There was a trial to the court. The plaintiff's petition was dismissed, and he appeals. Reversed.

Kendine & Roedell, of Dubuque, for appellant. George T. Lyon and E. H. Willging, both of Dubuque, for appellees.

EVANS, J. For more than 30 years the plaintiff has maintained a ferry across the Mississippi river at Dubuque, and has also maintained a small boat livery. He has at all times received and landed his passengers at this end upon and from the levee or wharf of the ice harbor in the city of Dubuque. He has also at all times housed his boats in such harbor, and has occupied a house boat in connection therewith. In 1907 the city of Dubuque enacted a certain amendment to an ordinance, the enforcement of which seriously affects the business of the plaintiff. Such amending ordinance contains the following provision:

"Sec. 9. That for the purpose of wharfage for all boats and water craft, the entire frontage of the city shall be deemed the levee (except such parts as have been heretofore excepted by the ordinances of the city). And all boats, shanty or house boats, boathouses or launch boat houses and water craft of any description landing at, anchoring or making fast within one hundred feet of such frontage, shall pay the city therefor the following amounts: All launches five (\$5.00) dollars per season for each 15 feet of frontage of the levee used, payable in advance. All shanty boats, house boats or fish houses shall pay the sum of fifteen (\$15.00) dollars per year wharfage, payable in

advance. All boat liveries shall pay the sum of twenty-five (\$25.00) dollars per year for each twenty-five feet of levee frontage used. All boating associations erecting a building or buildings on the wharf or levee of the city shall pay twenty-five (\$25.00) dollars per year as wharfage.

"Sec. 10. No shanty, house boat or fish house shall be allowed to land or remain on any part of the levee or landing within any part of the ice harbor in the city of Dubuque."

Appellant's argument states the issues as follows:

"By petition as amended, appellant avers that, under a coasting license issued by the United States, he used, in interstate commerce, a gasoline boat upon the Mississippi river in transporting passengers and property to and from a point near the northwesterly shore of the ice harbor and to and from Illinois; that, incident and necessary to such traffic, he has, in the water near the natural shore of said harbor, a boathouse, house boat, barge, float or dock, and other equipment; that the defendant city unlawfully pretends to impose a wharfage charge of \$1 per foot for space so occupied in said harbor; and that the defendant city and harbor master threaten to remove said boats from said harbor. Abst. pp. 2, 3, 24, 25, 28.

"By answer, the defendants aver that they sought only to remove plaintiff's house boats from said harbor and, in justification therefor and the imposition of wharfage charges, pleaded the city ordinance, as amended, by which (1) the entire water front is declared a levee; (2) a wharfage charge is imposed against any and all boats and crafts landing at or anchoring within 100 feet of such frontage; (3) no house boat is permitted to land or remain on any part of said levee or within any part of the ice harbor; and (4) the harbor master shall assign places for and remove water crafts of all descriptions. Abst. pp. 4 to 13-26.

"By reply, plaintiff avers that the shore and bed of said harbor was granted to the defendant city for use as an ice harbor in perpetuity and upon condition that the defendant city would establish and maintain a public levee upon the north shore thereof; that the defendant city duly authorized and empowered the United States government to dredge and otherwise improve and maintain said premises as and for a harbor in perpetuity; that the United States government did dredge and improve said premises (which constituted the bed and shores of a body of water leading to the Mississippi river), and has so maintained the same ever since; that the shores of said harbor and river front are unimproved and in their natural state; that the defendant city at no time ever constructed or maintained any wharves, docks, or landing places in said

harbor or the shores thereof, or upon said river front, nor has the defendant city ever invested anything to either construct or maintain any such improvements; that the shores of said harbor and river front consist of nothing but the naked shore without any wharves or docks at which boats may land; that such landings are effected by means of a plank or gangway leading from such boat to said natural shore; that the defendant city has by no investment upon its part afforded any facilities whatever for boats in said waters or the shores thereof, nor has said city ever rendered any service or benefit to boats in that respect or any other; that such waters are navigable and free common public highways; that such ordinances, and the powers sought to be exercised thereunder are illegal and invalid in the respects, among others, as follows: (1) Because they impose wharfage charges against boats and water craft landing at or anchoring within 100 feet of the entire unimproved water front and natural shores of said harbor in the city limits, without having provided or invested anything in any wharves, docks, or landing places, or rendering any service whatever to such boats, and without having established the levee required by the grant to said city or any other levee. (2) Because they absolutely forbid any house boat from entering or remaining in any part of said harbor, or landing or remaining on any part of the levee, without regard to the perils of the river which necessitate a place of shelter and refuge, and although the city has not the power to prohibit the use thereof. (3) Because they clothe the harbor master with arbitrary power to assign or remove boats to places wholly unsuitable and dangerous and without regard to the needs, convenience, or danger of the boat. (4) Because they obstruct and burden interstate commerce, although Congress alone has power to regulate same. (5) Because they are confiscatory and discriminatory. That the defendants attempt to remove his said boats solely because of plaintiff's refusal to pay the illegal wharfage so exacted by said ordinances. Abst. 13 to 24.

"By supplemental petition, plaintiff avers that, upon the vacation of the temporary injunction herein, the defendant city, acting through its mayor, harbor master, police, sewer gang, and other agencies then present, threatened to at once forcibly remove his said house boat and boathouse then in said ice harbor unless plaintiff at once paid the wharfage charges of \$290 for the years 1909 and 1910, although said harbor was then frozen over with ice, and such removal would wholly destroy said property; and that, solely under such compulsion, he then paid defendants said wharfage of \$290, which defendants still retain. Abst. 28.

"In answer thereto, defendants aver that such payment was not made under compul-

sion, but under an arrangement whereby plaintiff's said house boats might remain in said harbor until removal thereof could be made in the spring, and upon condition that no action would be taken to recover back any part of said \$290 save by petition to the city council. Abst. 29-30.

"In reply thereto, plaintiff avers that the evidence shows that the pretended arrangements referred to are void in that the same were made, if at all, under compulsion."

The facts in the case, as distinguished from legal conclusion, are not greatly in dispute. These facts, however, are quite voluminous in their details. It is important that many of these details be incorporated in this opinion. We cannot do better at this point than to avail ourselves of the labor of counsel and to incorporate herein the substance of the "statement of facts" appearing in each brief. From appellant's statement we quote as follows:

"The pleadings and proof show that in 1880 the defendant city and its inhabitants desired the United States government to provide and maintain an ice or winter harbor at Dubuque, fronting upon and connecting with the Mississippi river, to promote navigation and afford a place of shelter and safety for boats and other water craft from the dangers of ice, storms, and other perils of the river. The then nearest harbor from Dubuque was at Quincy, Ill., to the south, and at St. Paul, Minn., to the north.

"Subsequently in 1882, and in order to consummate the plan for such a harbor, certain Dubuque citizens by deed conveyed to the defendant city the bed and shores of what is known as the ice harbor, and that a public levee at least 100 feet wide be maintained on the north shore of said harbor.

"Thereupon, in 1882, the defendant city by resolution authorized and empowered the United States government to improve and maintain said premises for an ice harbor in perpetuity.

"Thereupon (1882-1885) the United States government at its own expense dredged said premises (which by nature constituted the bed and shores of a body of water leading to said river) so as to convert same into a navigable harbor leading into and connecting with the Mississippi river, and the United States government has since, at its own expense, so maintained the same.

"The defendant city has not established any public levee upon the north shore of said harbor as required by the deed already referred to, but, in disregard of such deed, has granted to private parties for various private industries the whole of the north shore of said harbor.

"The defendant city at no time ever provided, constructed, or maintained any wharves, docks, landing places, or other improvements of any kind in said harbor or the shores thereof, nor has the defendant

city ever invested anything to either construct or maintain any such improvements; that the shores of said harbor are wholly unimproved and consist of nothing but the naked shore without any wharves or docks at which boats may land for either loading or unloading passengers and property; that landings are effected by means of a plank or gangway leading from the boat or barge to such natural and unimproved shore; that the defendant city has by no investment upon its part afforded any facilities whatever for boats in said harbor and the shores thereof, nor has the defendant city ever rendered any service or benefit to boats in that respect or any other.

"That the easterly part of said harbor leads to and joins with the Mississippi river, a navigable waterway extending from St. Paul, Minn., southerly to New Orleans, La.; that during the winter boats of all kinds seek said harbor to escape destruction from the moving ice in the river, and such boats remain there at anchor until the opening of navigation; that the use of the northerly shore of said harbor has been granted by the defendant city to various parties free of charge, and is in use by said parties for boat building, sand company, and other purposes; that practically the whole of the space at and toward the southerly shore of said harbor is assigned to and utilized by the United States government's boats, and the remainder of said space at and toward the southerly shore is occupied by launchhouses and launches; that the larger part of the space at and toward the westerly shore is assigned to and occupied by launches and launchhouses, which are anchored in the water near said shore during the entire year; that the space occupied by plaintiff's boats and necessary equipment is in the water near the northwesterly part of the shore of said harbor; and that there is no other space in said harbor either available or at all suitable for his said boats and the necessary equipment therefor in order to handle the interstate traffic in which he is engaged or to remain during the close of navigation.

"While the defendant city's charter (section 26) gives the city council the exclusive right to license and regulate ferries, and to establish the rates of ferriage, between Dubuque and the opposite bank of the Mississippi river, yet the city has not seen fit to exercise such right.

"The defendant city's charter (section 7, par. 17) gives the 'city council the power to regulate the use of wharves and public landings, fix the rate of wharfage, and regulate the stationary anchorage and mooring of all boats within the city.'

"Thereunder the defendant city in 1907 adopted an ordinance giving the harbor master full power to assign places for all water crafts and compel the removal thereof, de-

claring the entire water front a levee, imposing wharfage charges, and prohibiting house boats, among others, from landing at or remaining on any part of said levee or within any part of said ice harbor.

"That in August, 1910, defendant's harbor master, under instructions of the city council, gave plaintiff notice to remove his house boats from said ice harbor within 24 hours, otherwise he would remove same, solely because of failure to pay said wharfage charges, and based his right so to do upon the said ordinance.

"That thereupon plaintiff commenced this action and obtained a temporary restraining order.

"That although such ordinance as amended purports to designate the entire water front within the defendant city and along the Mississippi river as a levee for the purpose of wharfage, except such parts as have been heretofore excepted by the ordinances of the city, yet the defendant city has never constructed any wharves, docks, or landings upon such water front, nor has the defendant city ever maintained any such improvements thereat; that the defendant has no facilities whatever on said water front for the landing of boats; that said entire water front consists of nothing but the natural unimproved shore of the river other than one or two places occupied by others under ordinances granted by the defendant city and not available for the use of this plaintiff and the public; that the said natural shore on said river front is so shallow as to make it dangerous to life and property, if not impossible, to effect a landing on said river front by boats plying said river, and that said river front has never been used, and it is impracticable and dangerous to use the same, for any such purposes; that there are no facilities whatever provided, nor any source of benefit whatever rendered, by the defendant city for landing boats upon said river front so designated by said ordinance as a levee, and for which the defendant city thereunder erroneously and illegally attempts to collect and enforce the payment of wharfage charges as prescribed by the terms of said ordinance as amended.

"That plaintiff (who is and since birth has been a citizen of the United States) is the owner and operates a 50-foot boat, exclusive of rudder, propelled by gasoline engine, upon the waters of said harbor and river, duly enrolled and licensed by, and under the regulations of, the United States government, for the coasting trade in carrying and transporting people and property from Iowa to Illinois and from the latter state to the former, by operating said boat across the Mississippi river from the port or harbor in the city of Dubuque, Iowa, to the port of East Dubuque, Ill.; that likewise, by an arrangement with the Chicago, Burlington & Quincy Railway Company, an Illinois corporation and inter-

state common carrier, plaintiff's said boat carries and honors the tickets of citizens and passengers traveling from one state to another partly by rail and partly by boat; that, because of the failure of the defendant city to provide and maintain a public levee on the north shore of said harbor as required by the deed already referred to, it is necessary for the safety of said boat and passengers thereon, in the conduct of such interstate traffic, to have a reasonable water space in said harbor, and being the space now and long since occupied by him for that purpose, in order that said boat may turn and land without collision or danger, and to maintain suitable appliances and equipment for the purpose of landing said boat and the passengers so carried, because of the shallow water toward, and the wholly unimproved condition of, the shores in said harbor; that by reason of these things, and in order to carry on said interstate commerce and as part of the appliances toward that end, it is necessary for him to maintain a barge in the water and near the shore of said harbor in order that said boat may land thereat to receive and discharge said passengers, and also what are more properly termed two barges, upon each of which a substantial and permanent house is constructed in order to afford a place of rest and shelter for said passengers in case of storms or while waiting for the boat, and which houses upon said barges are likewise necessary to keep small boats and repair supplies in the event of accident or casualty upon the water to person or property; that furthermore such houses upon said barges are necessary to provide living quarters for those in charge of and caring for said boats and property which require attention day and night, and which are commonly termed 'house boats' or 'boathouses'; that house boats are a type of boat which frequently ply the waters of the Mississippi river and touch at ports in various states along the river; that practically all boats plying said river are so equipped as to provide shelter and living quarters for those in charge and care of the boat, as well as others being carried thereon; that the plaintiff's said house boats, so called, are likewise utilized as a boat livery, consisting of seven skiffs, for use by the public, and also in reserve a 30-foot full-decked launch, exclusive of rudder, propelled by a gasoline engine, for use in interstate commerce in the event of accident or casualty to the larger boat already referred to; that each and all of said boats in their use upon said river touch the shores of the state of Wisconsin and Illinois; that said house boats and barge float wholly upon the water and are anchored near and about 10 feet from that part of the shore already stated, the arrangement being such that one barge touches and abuts the other extending into the harbor a distance of about 40 feet, and to a point where the water is of sufficient depth to permit said

boat to land; that from the barge nearest the shore there is a gangplank or gangway leading from the barge to the shore in order to enable passengers to either land or reach the boat; that from the point where said gangplank reaches said shore there is an unimproved steep embankment for a distance of about 35 feet leading to the said railway right of way and Second street in said city; that said entire equipment, as described and owned and maintained by plaintiff, is a necessary part of the appliances by which the interstate commerce, as described, may be carried on, and but for which the same could not be done with reasonable safety or otherwise.

"That there are anchored and moored near the shores of said harbor 39 launchhouses and 29 launches, each of which occupy shore space, so called, of from 15 to 30 feet, and which space is so occupied and reserved for that purpose during the entire year and from year to year; that the defendants have never assigned for plaintiff's said boats in said harbor and not already occupied as before stated, and his said boats and equipment in no wise hinder or obstruct navigation upon said waters; that the chief engineer of the United States government in charge of said harbor and waters, and the person in immediate charge of the maintenance thereof, acquiesced in the space so occupied by this plaintiff; that for many years last past the plaintiff has paid to the defendant city taxes upon said boats and equipment; that the only reason for defendant's action in threatening and attempting to remove plaintiff's said house boats, so called, and thus hinder and stop the running of his said boats and the instrumentalities so engaged in interstate commerce, is his failure to pay to the defendant city the unjust and illegal wharfage charge of \$145 yearly in pursuance of the defendant city's invalid ordinance already referred to; that, while defendants unjustly undertake to enforce such invalid ordinance against this plaintiff, yet they fail to do so against others likewise using space in said harbor and on said levee."

From appellee's statement we quote as follows:

"John Keckevoet, the plaintiff, has been engaged in the boat business, in one form or another, in the ice harbor since 1880. This harbor is located wholly within the boundaries of the city of Dubuque, the city holding the title to its bed and shores; these having been deeded to it in 1882 by the then owners of the property.

"Within the last few years this harbor became congested, due in part to the coming of the era of gasoline motor boats and extensive improvements of the river by the United States government and the fleet necessary to carry on such work, which fleet had its winter quarters in this harbor.

"In 1907 the city council adopted an

amendment to its 'ordinance appointing a harbor master and defining his duties and regulating public landings and wharfage'; section 10 of which provides that 'no shanty, house boat or fish house shall be allowed to land or remain on any part of the levee or landing within any part of the ice harbor in the city of Dubuque. * * * Shortly after the adoption of the amendment the harbor master removed 11 house boats from the harbor. Plaintiff at that time conducted a boat livery, and also operated a gasoline ferry between Dubuque and East Dubuque. He was then and is now located along the northwest shore of the harbor, the most convenient and accessible location in the harbor, and occupies 145 feet along such shore with floats, barges, and house boats. He uses two gasoline launches in his ferry business, the largest of which is 50 feet long. He contends that all the floats, docks, barges, and house boats are an indispensable necessity to the operation of this ferry. On the East Dubuque side he has one barge about 14 by 32 feet, which seems to answer the purposes.

"On August 10, 1910, the city council directed the harbor master and city attorney to take steps at once to remove the house boats of the plaintiff from any part of the harbor.

"On August 15, 1910, the harbor master served upon the plaintiff a notice to remove his house boats from that part of the levee or landing within the ice harbor * * * within 24 hours, and on the same day plaintiff commenced this action and secured an order granting a temporary injunction.

"On August 17, 1910, this defendant filed its answer and also a motion to dissolve the temporary injunction. November 15, 1910, the court sustained the motion and dissolved the temporary injunction."

We omit from the foregoing some contentions of fact which have no support in the evidence.

1. The appellant challenges the validity of the ordinance on the grounds (1) that the city had no power to collect wharfage fees because it had incurred no expense in the building or maintenance of a wharf, and (2) that the ordinance was an interference with interstate commerce, and (3) that it was unreasonable and confiscatory in the rates charged, and (4) that it was discriminatory.

[1] The first contention cannot be sustained. The right of a city to impose wharfage fees within its jurisdiction does not arise solely out of the expense which it incurs in the maintenance of the wharf. Ordinarily it is true that the establishment and maintenance of a wharf implies more or less expense. The extent of such expense is necessarily dependent to some degree upon the natural conditions of the bank. In the case before us the evidence does show that some improvement has been made upon

natural conditions. Artificial steps are maintained and some riprapping upon the banks. The wharf has been specified and established as such. The police protection of the city and its police power extend to it. The city charter of the defendant especially confers power upon it to regulate the use of wharves and fix the rate of wharfage.

[2] Neither is the exercise of such power an interference with interstate commerce. The authorities are united in holding that ordinances providing for reasonable wharfage fees are a valid exercise of police power. *Cannon v. New Orleans*, 20 Wall. 577, 22 L. Ed. 417; *Packet Co. v. Keokuk*, 95 U. S. 88, 24 L. Ed. 377; *Muscatine v. Packet Co.*, 45 Iowa, 190; *Dubuque v. Stout*, 32 Iowa, 80, 7 Am. Rep. 171. But the wharfage fees exacted must be reasonable. The name cannot be used as a guise for a "tonnage tax" or a "port warden's fee," or for other ulterior purposes. *Cannon v. New Orleans*, supra; *Steamship v. Port Wardens*, 6 Wall. 31, 18 L. Ed. 749. These holdings are in harmony with our own to the effect that ordinances of a city must be fair and reasonable. *State Center v. Barenstein*, 66 Iowa, 249, 23 N. W. 652.

[3] The serious question in the case before us is whether the ordinance under consideration fixing the wharfage fees was fair and reasonable, or whether it was confiscatory as contended by appellant. That at least several members of the city council regarded the rate as exorbitant is admitted by them as witnesses. They had only intended to collect from the appellant thereunder \$50 instead of \$145. The harbor committee had agreed upon that rate, although no formal action had been taken by the city council. The city attorney testified as a witness for the defendant. On cross-examination he testified: "I know I considered \$1 per foot pretty strong, and had always considered it pretty strong, and had recommended to the city council that we accept less before and would do so again." As already indicated, the expense incurred by the city in the maintenance of the wharf is very slight indeed. The business of the plaintiff is manifestly for the public convenience. It is conducted at very modest rates, and he realizes, from the business as a whole, a very modest reward for his labor. His regular rate of ferrying across the river is 5 cents per passenger, with a reduced rate of 2½ cents for working people. He maintains a livery of seven boats, which he rents to the public at \$1 per day or fifteen cents an hour. The proof shows his earnings over and above his expense to be very modest indeed. These facts are by no means controlling upon the city council, but they throw some light upon the other testimony in the case bearing upon the question of reasonableness of rate. The ordinance is so word-

ed that this rate applies to only a very few persons who use the river frontage. To this feature we will refer later. The ordinance rate was not at first exacted from the plaintiff. Later, however, the harbor master made demand upon him for the full rate for the years 1909 and 1910. Other craft is so classified in the ordinance as to get the benefit of a much smaller rate of wharfage fees. Practically all the north shore of this harbor is appropriated by private enterprises from which no fees whatever are exacted. The same may be said of other portions of the shore. We think it must be said that the ordinance is unreasonable at this point in the rate of wharfage charged. It is also clear from the record that great discrimination has been practiced, in fact, under this ordinance. Whether this has resulted from the particular form and classification of the ordinance, or whether its actual enforcement has been a matter of favor and partiality, is not so clear.

[4] It is strongly urged by appellees that the question of wharfage fees is not in the case. It is said that the city has only enforced against the appellant that provision of the ordinance which prohibits the remaining of house boats within the harbor. A notice was served upon the appellant to remove his house boats. Upon his failure to do so the city officers proceeded to remove the same. It is said that this action had nothing to do with the collection of the wharfage fees. An examination of the evidence satisfies us that this position is not well taken. It was the failure of the appellant to pay his wharfage fees that resulted in the demand for the removal of the house boats. Members of the city council so admit in their testimony. The payment of the wharfage fees under protest stopped the threatened removal for the time being. The plaintiff's petition tendered an issue at this point. The question is therefore fairly before us in the case. It is our conclusion that the ordinance is void for unreasonableness in the respect indicated.

[5] 2. We turn now to that part of the amended ordinance known as section 10 and which is quoted above. This section prohibits any "house boat * * * to land or remain on any part of the river or landing within any part of the ice harbor of the city of Dubuque." This is prohibition and not regulation. We find nothing in the charter of the city nor in the statutes which empower the city to enact such a sweeping prohibition. The testimony shows a house boat to be a very useful and ordinary adjunct of river craft. The very purpose of the ice harbor is to furnish winter refuge to the craft that plies the river. The city has full power to enact ordinances providing reasonable regulations for the use of such harbor. We do not think, however, that it can select a particular craft and

prohibit the use of the harbor thereto unless there be some reason of public policy or protection which does not appear in this record. It is urged in argument by appellee that the harbor is becoming congested, and that some prohibitory provision is necessary. The record is not favorable to this contention by appellee. It has voluntarily devoted, if not diverted, a large part of the harbor and its shores to the use of private enterprises which were not contemplated in the original dedication of the harbor. These enterprises are doubtless advantageous to the city in the sense that they employ a large amount of labor and capital, and tend thus to increase the trade of the city; but the presence of these private enterprises does not change the duty of the city with respect to this harbor and the use to which it was originally dedicated. This provision of the ordinance is void as being in excess of the power of the city council.

[6] 3. The plaintiff paid to the city \$290, under protest, pending the controversy between him and the harbor master and the city council as to the threatened removal of his house boat out of the harbor. It is the contention of the appellant that he paid the money under duress. The payment occurred long after the beginning of this suit. Thereafter the plaintiff filed a supplemental petition pleading the payment of such amount under duress and asking to recover it back. He now asks us to determine this issue and to award him judgment for the recovery of the amount so paid.

Upon the filing of his supplemental petition, the defendant moved to strike it for misjoinder. Such motion being overruled, the defendant demurred on the same ground. This demurrer was also overruled. Thereupon the defendant answered, and the case proceeded to trial. There was manifest error on the part of the learned trial court as against the defendant city in overruling its objection to the misjoinder of causes of action. This error was cured, so far as the city was concerned, by the subsequent result. This branch of the plaintiff's case was purely an action at law. Either party was entitled to demand a jury. There was no warrant under the statute for joining it with the equitable action. The defendant was entitled to the separation when it asked it in the trial court. If we were now to proceed to a trial of this branch of the case upon its merits, we would be repeating the error of the trial court without giving the city any right of exception or appeal; it being in no position to appeal from the ruling of the district court when final judgment went in its favor there. We will therefore give no consideration to the merits of this branch of the case. We will sustain the dismissal thereof by the district court as on the ground of misjoinder and abatement, reserving the merits of the case, whatever they be, from the adjudication. This

will leave the merits of the case undetermined and subject to a further action between the parties.

For the reasons indicated above, the decree of the trial court must be, and it is, reversed.

EK v. PHILLIPS FUEL CO.

(Supreme Court of Iowa. Nov. 20, 1912.)

1. MASTER AND SERVANT (§ 286*)—INJURY TO SERVANT—NEGLIGENCE—SAFE PLACE TO WORK—EVIDENCE.

Evidence in an action for injury to a driver of a mule team in a coal mine from a protrusion on the rib of an entry leaving a clearance above the edge of a car of only two inches held to make a question of fact as to negligence in not furnishing a safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§§ 288, 289*)—INJURY TO SERVANT—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Evidence in an action for injury to a driver of a mule team in a coal mine received on the day he was put at such work, from a protrusion on the rib of the entry held, in view of the fact that he had not seen it, his position when driving, not favorable to discovery of it, and his position when previously walking through the entry to his work, to make assumption of risk and contributory negligence questions for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1006, 1068-1088; Dec. Dig. §§ 288, 289.*]

3. APPEAL AND ERROR (§ 766*)—BRIEFS—AMENDMENT.

The question of appellant's brief complying with Supreme Court rule 53 is eliminated by his filing, after the raising of the question, an amended brief fully meeting the requirements.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3101; Dec. Dig. § 766.*]

4. APPEAL AND ERROR (§ 939*)—ABSTRACT—PRESUMPTION.

Under Supreme Court rules 30, 31, 32, and Code, § 4118, it is presumed that appellant's abstract, certified to contain all the evidence "material," contains all the evidence necessary for consideration of the errors presented, unless appellee supplies alleged omissions by amended abstract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3804-3806; Dec. Dig. § 939.*]

Appeal from District Court, Wapello County; F. M. Hunter, Judge.

Actions for damages against an employer for personal injury sustained by his employé in a coal mine. The defense was a general denial and a plea of contributory negligence and assumption of risk. At the close of plaintiff's evidence, the trial court directed a verdict for the defendant. Plaintiff appeals. Reversed.

EL R. MITCHELL and J. C. MITCHELL, both of Ottumwa, for appellant. McNETT & McNETT, of Ottumwa, for appellee.

EVANS, J. The plaintiff was a coal miner, and was in the employ of the defendant. He began work for the defendant on December 1, 1909, and worked at "driving entries" until and including January 28, 1910. On the morning of January 29th he was ordered to drive a mule team for that day. At 3:40 p. m. of that day he received the injury complained of, which resulted in the partial loss of his thumb. His thumb was crushed by a protruding rock which extended from the rib of the entry to a point which was perpendicular above the track rail. The point to which such protrusion extended was three feet and four inches above the rail, and gave a clearance above the edge of the car of only two inches. The immediate circumstances of the accident are described by the plaintiff in his testimony as follows: "At the time of the accident, I had my right foot on the bumper of the car and my left foot on the tail chain, and my left hand on the mule's rump, and my right hand on the car inside a little ways from the corner of the car on a chunk of coal. The tail chain run from the singletree and hooked onto the bumper or drawbar. The drawbar passes through the car. As much as I have been around mines and seen drivers, I would say this is the usual position for drivers. This position is taken so that in going over a little hill, or if you have to stop the car, you can do so without the car running upon the mule. The mule doesn't work in shafts, and has no way to hold a car that is going down a hill or incline. * * * As I was going down with my load to the bottom in that position, my thumb was crushed down to the joint by a rock protruding out. This is the same rock I testified to as to its height and distance above and below." Plaintiff's evidence tends to show that the entries in this mine were required to be from 7 to 8 feet wide, and to have perpendicular walls or ribs and to be 4½ feet high. This particular entry had the appropriate width at its bottom, and had also the appropriate height, but its walls sloped toward each other, so that the top width was only 2 feet and 4 inches.

[1] 1. The first question presented for our consideration is: Was there evidence of negligence on the part of the defendant in failing to furnish to plaintiff a safe place to work as a driver? This question must be answered in the affirmative. Under the evidence, the question of defendant's negligence was fairly one of fact under all the circumstances. Such a protrusion is naturally suggestive of increased danger to a driver and especially while upon a loaded car. The case is similar at this point to *Duffey v. Consolidated Co.*, 147 Iowa, 225, 124 N. W. 609, 30 L. R. A. (N. S.) 1067.

[2] 2. Did it appear from all the evidence that there was contributory negligence or

assumption of risk on the part of the plaintiff as a matter of law? The facts in support of both of these defenses are so interwoven that we need not consider the defenses separately. There is more difficulty at this point than at the first. The plaintiff was an experienced miner. But this was his first day as a mule driver in this mine. For three weeks prior to this time, however, he had passed along this entry while going to and from his mining work, and had thereby had the opportunity thus afforded to ascertain the general condition of the entry and its ribs. On the day of the accident he had hauled between 30 and 35 loads before the accident occurred, and had therefore passed the place of the protruding rock more than 60 times. The evidence is that he had not in fact observed at any time the protrusion. As against this, it is urged by the appellee that the condition was so obvious that he was bound to observe it, and that he is therefore charged with knowledge whether he observed it or not. The evidence shows plaintiff to be about five feet seven inches tall. His custom in passing along the entry to his mining work was to walk in a stooped position, with his hands behind his back and with his face down, and his head about two feet lower than his usual height. He carried a miner's lamp in his cap, which threw its light five or six feet or more in front of him. He kept his course in the middle of the track. In so doing he necessarily passed each time within a few inches of the protrusion. It is quite manifest that such protrusion did not present so great a menace to a person passing along the entry in such manner as it presented to a driver of a coal car, nor was the plaintiff bound as a matter of law at that time to look beyond his own safety, nor to ascertain the defects which involved danger to a driver. True, the fact that he had had so many opportunities to discover the protruding rock would be a proper circumstance to go to the jury, and the jury might properly find therefrom that he did know the condition of the entry and its ribs, notwithstanding his denial of knowledge of this particular condition. But, even so, it was a question for the jury, and not for the court at this point.

Turning, therefore, to the other phase of the evidence, wherein it appears that he had passed this point with a load more than thirty times on the day of the accident, was he thereby bound as a matter of law to have discovered this protrusion? The position occupied by the plaintiff—with one foot upon the tail chain and one upon the drawbar, and with one hand upon the mule and one upon the car—was the usual one for drivers to occupy. He necessarily occupied a low

stooping position with his face forward and down. This ordinary position was not favorable to the discovery of this particular danger. It is not claimed by appellee that the plaintiff was bound to make inspection of the entry in the ordinary sense. Its contention is that the condition was so obvious that the plaintiff was bound to see it. Special reliance is based upon the case of *Flockhart v. Coal Co.*, 126 Iowa, 576, 102 N. W. 494. In that case the accident occurred upon a new track. The specification of negligence was that there was no ballast thereon. The plaintiff therein was an experienced driver. It was held in that case that the unballasted condition of the track was so obvious that the plaintiff was bound to know it. The cases are not parallel. The obviousness of the defect stands out much more clearly in the cited case than in the case before us. In order to hold, therefore, in the case at bar that the plaintiff was bound to discover the protrusion complained of, we would have to go a step farther than we did in the *Flockhart* Case. We think we would not be justified in so holding. We must hold, therefore, that the questions of contributory negligence and assumption of risk were for the jury.

[3, 4] 3. A question of appellate practice is presented in appellee's brief. The first complaint is that appellant's brief fails to comply with the requirements of section 53 of the court rules. Since this objection was made appellant has filed an amended brief which fully meets the question thus raised, and we need give no further attention to this feature of the case. The further objection is made that appellant's abstract does not purport to give all the evidence; the certificate thereto being as follows: "The above and foregoing is all the evidence offered or introduced on the trial of the cause material to or in any manner bearing on any matter, question or issue involved in this appeal." This objection is based upon a long line of decisions under the rules formerly in force from *Hubbard v. Epperson*, 40 Iowa, 408, to *State v. Stone*, 88 Iowa, 724, 55 N. W. 6. Counsel for appellee have evidently overlooked the change of rules which went into effect some years ago. Under our present rules, we indulge the presumption that appellant's abstract does contain all the evidence necessary for the consideration of the errors presented, unless the appellee shall supply alleged omissions by amended abstract. Code, § 4118, and rules 30, 31, 32. Appellee's exception to the state of the record must therefore be overruled.

For the reasons already indicated, the judgment of the trial court must be reversed.

CHENEY et al. v. CITY OF FT. DODGE.

(Supreme Court of Iowa. Nov. 19, 1912.)

1. MUNICIPAL CORPORATIONS (§ 511*)—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—OBJECTIONS—CHANGE OF PLAN.

Under Code, § 824, which provides that all objections to errors or irregularities in special assessments, or in any of the prior proceedings or notices, not made before the council as therein provided, shall be waived, except where fraud is shown, and section 839, which allowed any person to appeal from a special assessment to the district court, where all questions touching the validity of such assessment or the amount thereof, not waived, should be determined, and that the court may make such assessment as should have been made, and Acts 28th Gen. Assem. c. 29, providing that upon appeal the court shall determine all questions, including that of benefits to the property assessed, the question whether a variance between the improvement, as constructed, and that planned by the preliminary proceedings is sufficient to invalidate special assessments is a matter of inquiry for the city council, and the mere fact of such variance and departure, not affecting the substantial character of the improvement, does not deprive it of jurisdiction to make the assessment; the remedy of owners being by objection before it and by appeal from its action.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1183, 1184; Dec. Dig. § 511.*]

2. MUNICIPAL CORPORATIONS (§ 511*)—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—REVIEW.

Where a property owner in his suit to vacate a special assessment for street paving does not claim that the paving renders the use of the street less convenient to him, or deprives it of substantial value to him, he can not, for the first time, raise such objections on appeal from an annulment of the assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1183, 1184; Dec. Dig. § 511.*]

3. MUNICIPAL CORPORATIONS (§ 466*)—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—OBJECTIONS—EVIDENCE.

Abutting owners have the right to use a street for any proper purpose in connection with their property; and the availability of a pavement, as constructed, for future use in connection with such property may be considered in determining whether the amount of the assessment exceeds the benefits, with relation to such future use.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1109; Dec. Dig. § 466.*]

Appeal from District Court, Webster County; Charles E. Albrook, Judge.

The plaintiffs filed before the city council of Ft. Dodge their objections to a special assessment on their property for a street improvement. Thereupon the city council reduced the assessment from \$734 to \$500, and from the action of the council in confirming the assessment in the latter amount the plaintiffs appealed to the district court and filed a petition in equity renewing the objections made before the council, specifying other objections to the assessment, and praying that said assessment be declared unwarranted, illegal, and void, and that it be

annulled. After hearing the case on its merits, the court held that the city did not have lawful right or authority to make or levy the assessment, for the reason that the improvement, as actually constructed, did not comply with the specifications and contract therefor, and was materially and radically different from the improvement provided for in the preliminary proceedings and contract; and the court thereupon decreed that the entire assessment be annulled, set aside, and canceled. From this decree, the defendant appeals. Reversed.

Mitchell & Fitzpatrick, of Ft. Dodge, for appellant. Healy, Burnquist & Thomas, of Ft. Dodge, for appellees.

McCLAIN, C. J. By preliminary proceedings in every respect regular and valid, so far as this record discloses, the council of the defendant city ordered the paving of Seventeenth street in that city from Twelfth Avenue South to Third Avenue North, according to plans and specifications calling for a double roadway from Twelfth Avenue South to Fifth Avenue South, each roadway 16 feet in width and a parking in the center of the street, 18 feet in width, and a single roadway 30 feet in width from Fifth Avenue South to Third Avenue North. A contract was let for the laying of this paving in accordance with these plans and specifications at a specified price per square yard.

After the contract was let, two petitions were presented to the city council, signed by all the owners of property abutting on Seventeenth street between Fifth Avenue South and Third Avenue North, except the plaintiffs, asking that the plan of paving that portion of the street be changed and that between these limits the street be boulevarded in the same manner as the portion of the street south of Fifth Avenue South; that is, that between the limits prescribed there be a double roadway of 16 feet in width, with parking 18 feet in width along the middle, except at street and alley intersections. The city council adopted a resolution granting the prayer of the petitions, subject to the written approval and consent of the contractor. Although the contractor did not file a written consent to this modification of the contract, he did, in fact, orally, before the city council, accept such modification, and he proceeded to construct the entire pavement in accordance with the plans and specifications, with the modification above indicated.

After the completion of the pavement and within the time provided by law, plaintiffs presented to the city council in due form their objections to the assessment on their property, which abuts on Seventeenth street north of Fifth Avenue South, with a frontage of 160 feet, specifying various grounds of objection, some of which are not now in-

sisted upon. The objections pertinent to the controversy as now presented were that the pavement, as constructed with double roadway and parking in the center, was a different improvement from that provided for in the preliminary proceedings and contract, which contemplated a single roadway 30 feet in width, and that the improvement, as thus constructed, was unauthorized; and, further, that on account of the change in plan the best results from bidders were not obtained for the improvement as constructed, and the contract price was far in excess of what it would have been had the city proceeded under the original plan. The last objection is not now urged, and there is nothing in the record to support it. It appears that after the filing of these objections the city council reduced the assessment on plaintiffs' property from \$734 to \$500, and that this reduction was more than sufficient to cover the increased cost of the pavement in front of plaintiffs' property resulting from the construction of two roadways, each 16 feet in width, instead of one roadway 30 feet in width.

[1] In their petition filed in the district court on appeal from the action of the council in overruling their objections to any assessment being made on their property, the objections before the council were amplified; but the substantial complaint was still that the pavement, as constructed, was not the one contracted for or provided for in the preliminary proceedings, and that the assessment was therefore void and nonenforceable, with a prayer that the assessment to plaintiffs on account thereof be annulled.

The statutory provision as to objections, found in the Code, is as follows: "Sec. 824. All objections to errors, irregularities or inequalities in the making of said special assessments, or in any of the prior proceedings or notices, not made before the council at the time and in the manner herein provided for, shall be waived except where fraud is shown."

There is also a provision in the Code, relating to appeals from the council in such cases, as follows: "Sec. 839. Any person affected by the levy of any special assessment provided for in this chapter may appeal therefrom to the district court within ten days from the date of such levy, by serving written notice thereof upon the mayor or clerk, and filing a bond for costs, to be fixed and approved by either of said officers. Upon such appeal, all questions touching the validity of such assessment, or the amount thereof, and not waived under the provisions of this chapter, shall be heard and determined. The appeal shall be tried as an equitable action, and the court may make such assessment as should have been made, or direct the making of such assessment by the council. The costs of the appeal shall be taxed as in other actions."

In 1900 the General Assembly enacted an

additional statute, relating to special assessments (28 G. A. c. 29), requiring that such assessments shall be in proportion to the special benefits conferred upon the property thereby, and not in excess of such benefits, and not in excess of 25 per centum of the actual value of the property at the time of the levy; and, further, that the excess of the cost over the special assessment which may be levied on abutting property shall be paid out of the general fund of the city. In this statute sections 824 and 839 of the Code, above quoted, are reaffirmed as applicable to all special assessments, with this additional provision, that, "upon appeal, the court shall determine all questions, including that of benefits to the property assessed."

Under these statutory provisions we have recently held that the question whether the variance between the improvement, as constructed, and that provided for in the preliminary proceedings is sufficient to invalidate the assessment is an appropriate matter of inquiry for the city council, and that the mere fact of such variance, without regard to its materiality and extent, does not deprive the council of jurisdiction to make the assessment; the remedy of the property owners being by objection before the council and by appeal from its action. *Shaver v. Turner Improvement Co.*, 136 N. W. 711. In that case the decisions of this court particularly relied upon for appellee are reviewed, and the case of *Hubbell v. Bennett*, 130 Iowa, 66, 106 N. W. 375, so far as it was therein held that any departure from the plans and specifications under which the contract was made deprived the council of jurisdiction to levy the assessment, was overruled.

The purpose of the statutory provisions above referred to clearly seems to have been to relegate the property owner to his remedy by objection and appeal in all cases where the city council has not exceeded its jurisdiction; and the holding of the *Shaver Case*, just cited, is, in effect, that in the case of a mere departure from the plans and specifications, not substantially changing the nature of the improvement, the council does not lose jurisdiction to make assessment for the improvement as constructed, but may, on objections, grant the property owner such relief as he should have, and that on appeal the district court may review the action of the council and grant the relief which should have been granted by it.

[2] The objections to the assessment presented by plaintiffs to the city council and on appeal to the lower court were predicated upon the contention that any departure from the plans and specifications rendered the attempted assessment against plaintiffs for the improvement illegal and void. It was not objected that the boulevarding of the street, departing in that respect from the plans and specifications, so far as they covered the improvement of Seventeenth street in front of plaintiffs' property, rendered the

use of the street less convenient to plaintiffs, or deprived it of substantial value to them. It is conceded that the street has been paved, and that the council might originally have provided for such paving as has been in fact constructed. It must be presumed that the paving is of some advantage to the plaintiffs, as well as to the other abutting property owners. If the benefit is, on account of the peculiar situation and use of plaintiff's property, less than the amount of the assessment, such objection might have been raised and determined by the court on appeal. But no such objection was made until it is now urged in this court that, as plaintiffs' property is used for business purposes, a boulevard street in front of it is less convenient than a single paved roadway, such as was originally contemplated. If such objection had been made, it would have been substantially without support in the evidence, so far as the present use of the property is concerned; for it appears that before the pavement was constructed the building on plaintiffs' property, which is used for manufacturing purposes, was provided with loading platforms on a cross street and alley, and that Seventeenth street was not used in any such way as to require the turning of wagons therein, in order that material be delivered to or taken from the building.

[3] Of course, the plaintiffs have the right to make use of the street for any proper purpose in connection with their property, and the availability of the pavement, as constructed, for future use in connection with such property may be well taken into account in determining whether the amount of the assessment exceeds the benefits to the property with relation to such future proper use; but it is not contended that the benefits from the pavement, as constructed, are less than the amount of the assessment.

The plaintiffs are attempting to escape any assessment whatever for a beneficial improvement in front of their property on account of a change of plan made by the city council, which, so far as it appears from this record, does not deprive the improvement of its beneficial character, so far as plaintiffs are concerned. Plaintiffs have been relieved by the council of the additional burden imposed by the change in the increase of the number of square yards of paving involved. Had the plaintiffs objected that by reason of the boulevarding of the street the improvement was of no substantial benefit to them, they might have been relieved entirely of the obligation to pay for it. But we are unwilling to hold that a mere departure in plan, not affecting the substantial character of the improvement, and not rendering the contract under which it was made invalid, will justify an annulment of the assessment in toto.

The conclusions above indicated make it

unnecessary that we discuss the question whether plaintiffs are estopped by acquiescence in the improvement from raising the objection that the assessment is invalid.

The decree of the trial court is therefore reversed.

HEALY v. HOHN et al.

(Supreme Court of Iowa. Nov. 19, 1912.)

1. SPECIFIC PERFORMANCE (§ 1*)—NATURE OF REMEDY.

The remedy of specific performance is, in its last analysis, a matter of equity rather than a strict right.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. EVIDENCE (§ 444*)—PAROL EVIDENCE TO VARY WRITTEN INSTRUMENT.

In an action for the specific performance of a written contract for the sale of land, which was signed only by the defendant, and which called for part payment in unsecured notes, parol evidence was admissible to show that the contract was not to be binding until signed by defendant's wife, or until defendant was satisfied with the unsecured note; such evidence not tending to vary the provisions of a written contract, but going to the question of whether there was ever a contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929-1944, 2049; Dec. Dig. § 444.*]

3. SPECIFIC PERFORMANCE (§ 59*)—CONTRACTS—ENFORCEABLE—CONDITIONS PRECEDENT.

Where it was agreed that a contract for the sale of land should not be binding until signed by defendant's wife, specific performance of the contract, though signed by the defendant, will not be awarded until there has been compliance with that condition precedent.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 181; Dec. Dig. § 59.*]

4. SPECIFIC PERFORMANCE (§ 121*)—ACTIONS—EVIDENCE SUFFICIENT.

In an action for the specific performance of a contract for the sale of land, evidence held sufficient to support a finding that it was mutually agreed that the contract should not be binding until signed by defendant's wife.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-396; Dec. Dig. § 121.*]

5. APPEAL AND ERROR (§ 1009*)—REVIEW—FINDINGS IN EQUITY CASES—WEIGHT.

Where the trial court had all the witnesses present before it, its findings, even in equity cases, should be given some weight.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3973; Dec. Dig. § 1009.*]

6. SPECIFIC PERFORMANCE (§ 14*)—NATURE OF REMEDY—DISCRETION OF TRIAL COURT.

A written contract for the sale of land at a gross sum included the homestead of the vendor; all of the land being subject to a mortgage. The contract was not signed by the vendor's wife, who refused to acquiesce in the sale, and the land was subsequently sold to others, who purchased in good faith; the consideration not being much greater. Held that, in the discretion of the trial court, specific performance might properly be refused on the ground that it might injure the wife and com-

plicate the situation, so as to draw her into litigation.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 33, 41; Dec. Dig. § 14.*]

Appeal from District Court, Webster County; C. G. Lee, Judge.

Suit in equity for the specific performance of a contract to convey real estate. The trial court, upon issues duly joined, heard the case upon its merits and rendered a decree dismissing plaintiff's petition. Plaintiff appeals. Affirmed.

Robert Healy, B. B. Burnquist, and A. N. Botsford, all of Ft. Dodge, for appellant. Mitchell & Fitzpatrick, of Ft. Dodge, for appellees.

DEEMER, J. The suit is upon an alleged contract in words and figures as follows: "This contract, made and entered into on the 25th day of January, A. D. 1910, by and between Chris Hohn and Emma Hohn of Webster county, Iowa, parties of the first part, and L. W. Schaffner and W. M. Healy of Webster county, Iowa, parties of the second part, witnesseth: That for and in consideration of the agreements and covenants therein contained and set forth in this contract, the parties of the first part hereby agree to sell and to convey to the parties of the second part, and the parties of the second part agree to buy, the east one-half of the northeast quarter (E. $\frac{1}{2}$ N. E. $\frac{1}{4}$) of section 13, township 89, range 29, Webster county, Iowa, for and at the agreed consideration of the sum of \$9,900, which sum is to be paid in the following manner: The sum of \$100.00 to be paid on the signing of this contract. The sum of \$1,900 to be paid on or before March 1, 1910, and a note signed by the parties of the second part, payable on or before March 1, 1913, drawing 6 per cent. interest, for the sum of \$3,900. The parties of the second part buy said above-described premises subject to a mortgage of \$4,000, which they assume and agree to pay. It is further agreed by the parties hereto that the parties of the first part are to pay and discharge all liens, incumbrances, taxes, and interests that are due and payable March 1, 1910, due and levied against the above-described land, with the exception of the above-mentioned mortgage of \$4,000. It is further agreed by the parties hereto that the parties of the first part are to deliver to the parties of the second part on or before March 1, 1910, a warranty deed and an abstract of title showing good and merchantable title in the party of the first part. [Signed] L. W. Schaffner. W. M. Healy. Chris Hohn."

While the signature of defendant Chris Hohn is not denied, he alleges that the contract never became valid and binding because of a condition to the effect that it

should not become effective until his wife signed the same, and this she refused to do. He also alleges that the contract was conditional upon his becoming satisfied with the sufficiency of the unsecured notes of the purchasers, and that upon inquiry he found this sort of security was unsatisfactory, and that he refused to complete the contract. Another part of his pleading was to the effect that the purchasers represented that the contract would not be binding until his wife signed, and that he signed the same with this understanding and in reliance upon the statements made him, and that there never was any meeting of the minds upon the contract, and that it never became binding. Mrs. Hohn was made a party to the action, and she pleaded that the subject-matter of the contract was her homestead; that she did not sign the contract; and that it was of no validity. She also pleaded that the property was incumbered by mortgage in the sum of \$4,000, and that this mortgage should be paid out of the 40 acres of land not included in the homestead, and that her rights should be protected. In this plea her husband joined, and he also pleaded the invalidity of the contract because of the homestead character of the land. The other defendants, although purchasers of the land, claim no rights save those possessed by their grantors. Such were the issues on which the case was tried, and the court below found that there never was a completed contract between the parties.

By this appeal that finding is challenged; and it is also claimed that plaintiff is entitled to specific performance of the contract, in so far as the nonhomestead 40 acres is concerned, with proper abatement from the purchase price to protect the plaintiff, and, as we understand it, plaintiff is willing to have the \$4,000 made a special lien upon this 40. Plaintiff's chief reliance, so far as the law is concerned, is upon *Venator v. Swenson*, 100 Iowa, 295, 69 N. W. 522, *Townsend v. Blanchard*, 117 Iowa, 36, 90 N. W. 519, *Donaldson v. Smith*, 122 Iowa, 388, 93 N. W. 138, *Bradford v. Smith*, 123 Iowa, 41, 98 N. W. 377, and other like cases.

[1] But the issues also raise the question as to whether there ever was a completed contract, and, if so, whether or not a court of equity should specifically enforce the same; specific performance being, in its last analysis, a matter of equity rather than of strict right. *Malloy v. Foley*, 133 N. W. 778; *Findley v. Kock*, 126 Iowa, 131, 101 N. W. 766.

[2] The primary and fundamental question in the case is: Was there a completed contract for the sale of the land? The trial court found that there was not, either because the wife was to sign, or Hohn was to be satisfied with the unsecured note for \$3,900, before the contract was to become ef-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fective. That such conditions may be shown by parol is well settled, because they go not to the terms of the contract, but to the vital question of whether or not there ever was a contract between the parties. *Cavanagh v. Beer Co.*, 136 Iowa, 236, 113 N. W. 856; *Foshier v. Fetzer*, 134 N. W. 557; *Iowa Loan Co. v. Haller*, 119 Iowa, 645, 93 N. W. 636; *Venator v. Swenson*, 100 Iowa, 295, 69 N. W. 522; *Green Ridge Co. v. Littlejohn*, 141 Iowa, 221, 119 N. W. 698; *Sutton v. Weber*, 127 Iowa, 361, 101 N. W. 775.

[3, 4] Reduced to its last analysis, these questions are of fact, and plaintiff comes to us with a finding against him on one or the other, or both, of these propositions. We have examined the record with care upon these questions and conclude that, while there is a conflict in the testimony relating thereto, the evidence is not such as to justify us in disregarding the finding of the trial court. It is agreed that there was talk about the necessity for the wife signing; and the scrivener who drew the contract (plaintiff in the case) evidently thought it was necessary for the wife to sign, or her signature was contemplated, because in drafting the contract he inserted the wife's name, after making inquiry as to her first name. This is a strong circumstance in support of defendant's contention, and, although not conclusive, because, under our law, it might be enforced against the husband without the wife's signature, is entitled to great weight.

Again, the matter of the unsecured note for \$3,900 was the subject of comment between the parties, and defendant undertook an investigation as to whether such paper was regarded as good security by the banks, and, finding that it was not, concluded not to complete the contract. However, he did not give the plaintiff time or opportunity to make satisfactory terms in this respect; and we do not think a finding for defendants on this ground alone could be sustained.

The proposed contract was executed in triplicate, and we are satisfied that all parties understood that defendant was to take one copy, in order to secure his wife's signature, and that after this was done they contemplated an exchange of papers, defendant to turn over the copy upon which he had secured his wife's signature, and to receive from plaintiff the copy bearing the signatures of the purchasers. This was never done, and in our view the trial court was justified in finding that this was a condition precedent to the full consummation of any contract. If it was, then, as the condition was never performed, there was no such contract as a court of equity would enforce. *Sheldon v. Orane*, 146 Iowa, 461, 125 N. W. 238.

[5] The trial court had all the witnesses before him and the advantage of their personal presence; and upon an issue so close in its facts as here appears his finding should be given some weight. *Schurz v. Schurz*, 128 N. W. 944; *Kent v. La Rue*, 136 Iowa, 113, 113 N. W. 547; *Bank v. Porter*, 116 Iowa, 377, 89 N. W. 1094.

[6] 2. Aside from this, and assuming that there was a completed contract between the parties signing the same, we still have the question as to whether it should be specifically enforced. Forty acres of the property was the homestead of Hohn and his wife. The wife did not join in the conveyance; nor, so far as shown, did she ever promise to do so. She is entitled to have her homestead protected, and if there had been no mortgage upon the land this might be done, no doubt, by a proper order. But the sale was for a gross sum and not by the acre, and the entire land is incumbered by mortgage for \$4,000. The wife's inchoate interest in the non-homestead 40 acres must also be protected, or, at least, such rules adopted as would protect her therein. It is true that all the land has now been sold; but this is not regarded as controlling, for the reason that these purchasers have no greater right than their grantors here had, and to grant specific performance at this time would greatly complicate the situation and possibly result in harm or misfortune to the wife. The sale of the homestead 40 acres to Butler and Rhodes is a complicating circumstance, which should be considered. That sale may be good, although not good as to the nonhomestead 40. If that result should follow, with an outstanding mortgage of \$4,000 on both 40-acre tracts, there would doubtless be further litigation between the parties and considerable confusion in the adjustment of the respective rights thereof. There is nothing to indicate want of good faith in these purchasers. They paid but little, if any, more for the land than plaintiff agreed to pay, and there is nothing to indicate that there was any special bargain in the land at the price which plaintiff agreed to pay. Recognizing the rule that the trial court is vested with a discretion as to whether or not he will, under such circumstances, grant a decree of specific performance, we feel constrained to hold that the case is not one where we should interfere with that discretion. It is not enough to say, in answer to this, that the trial court specifically found there was no contract to be enforced. The other finding necessarily inhered in the decree, and the rule as to discretion may have influenced the finding.

The case, as presented, is not one which justifies our interference. The decree must therefore be, and it is, affirmed.

SYKES v. PURE FOOD CIDER CO. et al.
(Supreme Court of Iowa. Nov. 16, 1912.)

1. CORPORATIONS (§ 108*)—SUBSCRIPTION TO STOCK—FRAUDULENT REPRESENTATIONS.

Under Acts 32d Gen. Assem. c. 71, as amended by Acts 33d Gen. Assem. c. 104, § 4, which requires payment in cash to be made for all shares of stock unless leave be procured from the executive council of the state to accept property in payment therefor, and that within 10 days from the issuance of any capital stock a certificate under oath shall be filed stating the date issued, the amount issued, etc., an issuance of shares after its passage amounted to a representation by the officers of the issuing corporation that the corporation had received par value therefor, which would support an action for a recovery of money paid for shares purchased in reliance upon such representation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 459, 460; Dec. Dig. § 108.*]

2. CORPORATIONS (§ 108*)—SUBSCRIPTION TO STOCK—FRAUDULENT REPRESENTATIONS.

Where officers of a corporation authenticated and issued stock certificates containing untrue representations, it will be inferred that they acted with intent to defraud in an action for the recovery of money paid for shares on the inducement of such representations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 459, 460; Dec. Dig. § 108.*]

3. CORPORATIONS (§ 108*)—ISSUANCE OF SHARES—REPRESENTATIONS.

Officers of a corporation who authenticate and issue shares of stock are liable, not only to those who deal directly with them, but also to all who deal with the shares, in reliance on false representations contained therein, and who suffer damage thereby, though they do not profit from the making of such representations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 459, 460; Dec. Dig. § 108.*]

Appeal from District Court, Polk County; Wm. H. McHenry, Judge.

Action for the purchase price of capital stock illegally issued resulted in judgment as prayed. The defendants appeal. Affirmed.

John C. De Mar and Sullivan & Sullivan, all of Des Moines, for appellants. W. C. Strock, of Des Moines, for appellee.

LADD, J. On the 27th day of April, 1909, E. H. Lundy sold the property, business, and good will of the Pure Food Cider Company, located at Eldora, in the name of which he appears to have been engaged in the manufacture and sale of certain soft drinks, to M. G. Albrook and W. A. Clinite for a consideration designated \$8,000; each undertaking to pay one-half of this sum. The negotiations were through Albrook, and articles of incorporation, previously prepared by him, were signed by the purchasers. These fixed the capital stock at \$20,000, divided in shares of \$100 each, reciting that "80 shares shall be fully paid up at the time of the commencement of business"; that the principal place of business "shall be at the city of Des Moines"; that until the first

meeting of stockholders Clinite shall be president and treasurer and Albrook vice president and secretary of the corporation; and that these shall constitute the board of directors with the privilege of electing another stockholder as director at any time. Thereupon certificates of shares of capital stock, signed by Clinite as president and Albrook as secretary, were issued, 80 shares to each, and on each certificate was printed these words: "One hundred per cent. of the face value of this certificate has been paid for to the company in cash." But not a dollar had been so paid, nor had leave been obtained from or granted by the executive council of the state to issue capital stock in consideration of property. Bogus checks were signed by Clinite at Albrook's suggestion, and passed through the bank where the company did business to so "balance" its account as to indicate that cash had reached the bank to the company's credit in an amount equal to the stock issued. About 15 or 20 days later, Arcellus Sykes, a farmer from Ida county, who had moved to Des Moines, in looking for an investment, was informed by a stockbroker that he thought Clinite would sell some of this stock, and knew Albrook would. He called on Clinite, who informed him that none of his stock was for sale, but said that Albrook might sell some, and stated to him that \$16,000 in stock had been issued, all of which was fully paid and equally divided between himself and Albrook, and that the company had been incorporated. In pursuance of an arrangement then made, Sykes returned in the evening, when Albrook was present and the latter, in the presence of Clinite, repeated substantially what Clinite had said. Sykes saw Albrook several times in the next three days, and was shown the articles of incorporation, and told by him that chapter 71, Acts 32d Gen. Assem., had been complied with, and, when asked by Sykes whether the \$16,000 in stock represented the consideration paid Lundy, answered "the purchase price and money and equipment put in since the purchase," that the bank books would show that this amount had been put in the business, and he made out this statement as indicating the property of the company:

Mdse. & Fixt.	\$ 1,700
Dispensaries	4,200
Accts.	7,324
New business	3,500
Bk. balance	500
	\$17,224
Indebt.	\$ 200

Thereupon Sykes bought of him 20 shares at par, though without knowledge of the effects of the company other than as furnished in this statement, and, as he testified, in reliance on the representation that the stock was fully paid, and the corporation duly organized June 2, 1909, was elected a

director and manager of the company. He testified that in doing so he relied on Clinite's statement that the company was incorporated under the laws of Iowa, and there was \$16,000 of paid-up capital. The 20 shares of stock were first assigned to Sykes by Albrook, but later new certificates with same recital thereon were issued in their stead. The property of the company was moved to Des Moines, and the business there conducted until some time in July of the same year, when Sykes discovered the truth concerning its affairs and severed his relations therewith.

[1] The property went into the hands of a receiver and less than enough to satisfy its indebtedness was realized therefrom. In this action Sykes seeks to recover the \$2,000 paid for the stock with interest thereon from May 21, 1909, because of fraud alleged to have been practiced on him, and for that the laws were not complied with in organizing the company or in issuing the stock.

The statute, in so far as material, may be set out:

"Section 1. That from and after the passage of this act no corporation organized under the laws of the state of Iowa, except building and loan associations as defined and provided for in chapter thirteen (13) title (9) of the code, shall issue any stock or any certificate or certificates of shares of capital stock, or any substitute therefor, until the corporation has received the par value thereof. If it is proposed to pay for said capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing capital stock in any form, apply to the executive council of the state of Iowa for leave so to do. Such application shall state the amount of capital stock proposed to be issued for a consideration other than money, and set forth specifically the property or other thing to be received in payment for such stock. Thereupon, it shall be the duty of the executive council to make investigation, under such rules as it may prescribe, and to ascertain the real value of the property or other thing which the corporation is to receive for the stock; and shall enter its finding, fixing the value at which the corporation may receive the same in payment for capital stock; and no corporation shall issue capital stock for the said property or thing in a greater amount than the value so fixed and determined by the executive council.

"Sec. 2. It shall be the duty of every corporation to file a certificate under oath to the Secretary of State, within ten days after the issuance of any capital stock, stating the date of issue, the amount issued, the sum received therefor, if payment be made in money, or the property or thing taken, if such be the method of payment."

"Sec. 5. Any officer, agent or representative of a corporation who violates any of the

provisions hereof shall, upon conviction, be fined not less than two hundred (\$200) dollars nor more than one thousand (\$1,000) dollars, and be imprisoned in the county jail for not less than thirty (30) days nor more than six (6) months."

Chapter 71, Acts 32d G. A., as amended by section 4, c. 104, Acts 33d G. A.

From the recital of facts it will be observed that the defendant and Albrook violated the above statutes in three respects: (1) In issuing certificates of capital stock before the company had received the par value thereof; (2) in issuing capital stock solely for property without first having applied to the executive council of the state for leave to do so and without having obtained such leave with the value of property ascertained at which the corporation might receive the same in payment for the capital stock; and (3) in not filing a certificate with the Secretary of State within 10 days after the issuance of the stock.

Under the last section of the act, each of these constitute a misdemeanor punishable by fine and imprisonment, and, of course, in the respects pointed out the officers of the company were negligent. But the action is not founded on negligence, and could not well be. *Warfield v. Clark*, 118 Iowa, 69, 91 N. W. 833. It is for the deceit alleged to have been practiced by the defendant. That he represented the shares of stock to have been fully paid in cash, that this was false, and so known to him was fully established. Indeed, the mere issuance of certificates of stock since the enactment of chapter 71 of the Acts of the Thirty-Second General Assembly was a representation that the corporation had received par value therefor as exacted therein.

[2] Moreover, in signing the certificates of shares, reciting that payment had been made in cash, and in participating in issuing the same, he specifically so represented. That he knew that payment had not been so made, that not to exceed \$8,000 had been paid for the property before the organization of the corporation, and that no appraisal thereof had been made by or at the instance of the executive council, although certificates of paid-up stock amounting to \$16,000 was issued, is not disputed, for in these facts it is to be inferred that he acted with intent to defraud. *Hanson v. Kline*, 136 Iowa, 101, 113 N. W. 504; *Nash v. Minnesota Title Ins. Co.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. Rep. 439.

[3] Had plaintiff purchased the shares of stock from defendant, then there could have been no doubt as to the liability of the latter. In authenticating and issuing the certificates of stock, the defendant in connection with Albrook, as officers of the company, made the representations contained therein and implied from their issuance, "which, like the offer of a letter of credit,

addressed themselves to whoever should purchase these certificates thereafter whoever he might be." *Windram v. French*, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750; *Bruff v. Mail*, 36 N. Y. 200; *First Nat. Bank v. Lanier*, 11 Wall. 369, 20 L. Ed. 172; *Stickel v. Atwood*, 25 R. I. 456, 56 Atl. 687. Although neither in form or character negotiable instruments, stock certificates are readily transferable, and are bought and sold in the open market like other securities, and a corporation and its officers in issuing them are not only responsible to the persons dealing directly with them, but to all who deal with the stock in reliance on the representations made. It may be that defendant did not profit thereby, but this was not necessary to render him liable. His liability is predicated upon his wrongful act and the consequent injury to plaintiff. 14 Am. & Eng. Ency. of Law (2d Ed.) 153; *Nash v. Minnesota Title Ins. Co.*, supra; *Stickel v. Atwood*, supra.

The damage to plaintiff in the loss of money paid to Albroom for the shares of stock was a direct consequence of the fraudulent representations in which the latter and defendant participated in issuing the certificates, and we are unable to discover any avenue by which he may escape liability.

The verdict for the amount prayed was rightly directed, and judgment entered thereon.

Affirmed.

HARADON v. SLOAN.

(Supreme Court of Iowa. Nov. 16, 1912.)

1. PHYSICIANS AND SURGEONS (§ 18*)—ACTION FOR MALPRACTICE—INSTRUCTIONS.

In an action against a physician for malpractice, an instruction that the burden was on plaintiff to prove, by a preponderance of the evidence, that defendant did not properly treat plaintiff, and that such failure to use ordinary skill resulted in the injury, and that the injury was due to the lack of ordinary skill, and that plaintiff was not guilty of contributory negligence, was not objectionable as not requiring plaintiff to prove that he was damaged in any amount.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 34-48; Dec. Dig. § 18.*]

2. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action against a physician for malpractice, there was no evidence to show contributory negligence, an instruction authorizing recovery if defendant did not use ordinary skill, but ignoring contributory negligence, was not prejudicially erroneous.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

3. PHYSICIANS AND SURGEONS (§ 18*)—ACTION FOR MALPRACTICE—INSTRUCTIONS.

In an action against a physician for malpractice, an instruction that fixed the measure of skill by that of physicians of "this commu-

nity" and in the "same neighborhood" was inaccurate.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 34-48; Dec. Dig. § 18.*]

4. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

In an action against a physician for malpractice in the setting of a leg, broken between the knee and ankle, where there was nothing to show that the general professional skill in the community in question was greater than that of physicians in similar localities, instructions fixing the measure of skill by that of physicians "of this community" and in the "same neighborhood," though inaccurate, were not prejudicial to defendant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

5. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS.

In an action against a physician for malpractice, the court instructed that the jury should carefully consider the testimony of medical experts, based on hypothetical questions, and give it such weight as it was justly entitled to, taking into consideration the skill and learning of the experts, and their candor or interest as manifested on the stand; and that, while such testimony might be given such weight as the jury might think proper, still they were not bound to find the facts as testified to, but should consider all the evidence in the case. *Held* that, though the instruction did not state that the value of opinion evidence, based on hypothetical questions, depended upon the establishment of the facts assumed, it was sufficient, in the absence of a request for a more specific instruction.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

6. PHYSICIANS AND SURGEONS (§ 18*)—MALPRACTICE—NEGLIGENCE—QUESTION FOR JURY.

In an action against a physician for malpractice in setting a broken leg, the question of negligence *held* for the jury.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 34-48; Dec. Dig. § 18.*]

Appeal from District Court, Polk County. Hugh Brennan, Judge.

Suit to recover damages for malpractice. There was a verdict and judgment for the plaintiff. The defendant appeals. Affirmed.

Wade, Dutcher & Davis, of Iowa City, and Parsons & Mills, of Des Moines, for appellant. Bannister & Cox and R. B. Albers, all of Des Moines, for appellee.

SHERWIN, J. In May, 1910, the plaintiff's left leg was broken between the ankle and knee by a heavy iron pipe that rolled onto his foot and struck his leg. Soon thereafter the appellant was called and took charge of the case. The plaintiff was taken to his home by appellant, and the necessary preliminary matters attended to that day. The next morning the appellant put the leg in a fracture box, where it remained for about two weeks, for the purpose of reducing the swelling sufficiently to permit a reduction of the break. When the leg was taken from the fracture box, the swelling was entirely gone, and the appellant then

placed it in a plaster cast, where it remained undisturbed for about three weeks. The appellant then removed a part of the cast and found a discoloration of the skin, which he successfully treated. The entire cast was removed about four weeks later, or about seven weeks after the leg was broken. There is a conflict in the evidence as to whether the break was a transverse or comminuted one. The appellant testified that both tibia and fibula had a comminuted fracture, and in this he was corroborated by Dr. Huston, who assisted appellant in placing the leg in the cast. On the other hand, an X-ray examination of the break, after the cast had been removed, showed that the bones had been broken transversely, and such was the opinion of medical men who testified for the plaintiff. There was also evidence tending to show that the appellant, at the time of the injury, told the plaintiff that it was a square break, and that he told plaintiff's brother the next morning, after placing the leg in the fracture box, that it was a "clean, straight break." When the plaintiff's leg was taken from the cast, it was crooked. It was some two inches shorter than it was before it was broken; and it is practically undisputed that the ends of the large bone, the tibia, were neither aligned nor in apposition, but were overlapped from one to two inches. Overlapping as they do, the bones cannot unite to form a good union and make a good leg. The best that nature can do under such conditions is to form what the doctors term a "fibrous union," which all agree is not as good as a union of the bones, and which the evidence tends to show makes the leg practically useless.

[1] 1. No. 1 of the court's instructions is as follows: "The burden of proof is upon the plaintiff; and in order that he may recover in this case he must prove, by a preponderance of the evidence, the following: First. That defendant did not, with medical skill and care, properly treat plaintiff for his ailment. Second. That such failure to so treat plaintiff with reasonable and ordinary skill, as defined in these instructions, resulted in the injury complained of. Third. That said alleged injury is due to the lack of ordinary skill and care, and not otherwise. Fourth. That the plaintiff was not guilty of negligence contributing to such injury. And a failure to so establish any of these matters requires that the jury shall find a verdict for the defendant." Complaint is made of this, because it did not require the plaintiff to prove that he was damaged in any amount, but left that for the jury to infer. The complaint is without merit. The instruction did not authorize a recovery without proof of damages, and in a subsequent instruction the court fully covered the question of damages.

[2] 2. Instruction 7, given by the court, is as follows, so far as the same is material to our present discussion: "If you find from

the evidence that the defendant did not use ordinary skill and diligence in the treatment of the plaintiff's leg, and that his failure to use such skill and diligence resulted in the increased injury complained of, you will, in that case, find for the plaintiff." The quoted part of the instruction is assailed, because it wholly ignored the question of the plaintiff's contributory negligence, and was in conflict with instructions 1 and 5, which told the jury that plaintiff must prove that he was not guilty of contributory negligence. It was error to give the instruction under consideration. *Lauer v. Banning*, 140 Iowa, 319, 118 N. W. 446; *Quinn v. Railway Co.*, 107 Iowa, 711, 77 N. W. 464; *Thayer v. Smoky Hollow Coal Co.*, 121 Iowa, 121, 96 N. W. 718; *Christy v. Railway Co.*, 126 Iowa, 432, 102 N. W. 191.

But it does not necessarily follow that the error was prejudicial to the appellant; and, of course, if it was not there should be no reversal on account thereof. We have examined the record in this case with great care for the express purpose of ascertaining whether it contains any evidence tending, in the least, to show that the plaintiff is chargeable with any act that contributed to the injury complained of, and we have been unable to find any evidence upon which a jury or a court could predicate a finding that the plaintiff was negligent. He did not try to use this leg until urged by the appellant to do so, and then his use of it seems to have been in strict accord with appellant's instructions. The appellant himself testified that the use that plaintiff first made of his leg after the cast was removed "did not make it materially worse at all." It is apparent, therefore, that there was no question of contributory negligence to go to the jury, and that the appellant suffered no prejudice on account of this instruction.

3. There is no merit in appellant's contention that the court did not confine the jury to a consideration of the negligence charged. The instructions, read as a whole, clearly state the plaintiff's case and limit the consideration to such case.

[3, 4] 4. In the second instruction the court told the jury that appellant's skill was to be measured by that of "good physicians and surgeons of ordinary ability and skill practicing in similar localities," and then, in the same instruction, he said that if appellant omitted to use the "ordinary skill and diligence of his profession * * * in this locality" he might be liable. In other instructions he fixed the measure of skill by that of physicians of "this community" and in the "same neighborhood." Complaint is made of the use of these latter expressions. They are inaccurate, and did not give the jury the correct rule. *Whitesell v. Hill*, 101 Iowa, 629, 70 N. W. 750, 37 L. R. A. 830; *Decatur v. Simpson*, 115 Iowa, 348, 88 N. W. 830. But the appellant could not possibly have been prejudiced by the language used. In

the first place, there is nothing in the record tending to show that the general professional skill of Des Moines is greater than that of their brethren in localities similar to Des Moines; and, unless such an inference can be drawn, no prejudice could result. In the second place, the setting of a broken leg, where the break is between the ankle and knee, is a simple matter, and one that does not require extraordinary skill. Every little town in the state has from one to a half dozen physicians, who are fully qualified to set fractures of this kind. See *Whitesell v. Hill*, supra; *Kline v. Nicholson*, 151 Iowa, 710, 130 N. W. 722.

5. Instruction 7 is further criticised, because it permitted the jury to speculate as to plaintiff's future pain and suffering, and because it did not point out the elements of plaintiff's damages. Both criticisms are without merit.

[5] 6. Appellant insists that the following part of an instruction is erroneous: "In this case a number of witnesses have been called and testified as medical experts; that is, they have given you their opinion, based upon hypothetical questions put to them. You will carefully consider this testimony and give it the weight you think it justly entitled to, taking into consideration the amount of skill and learning possessed by such experts; also their candor or want of candor upon the witness stand, or the interest manifested by them, if any, in the result of the suit. But while it is proper for you to consider this class of evidence and give it such weight as you may think it justly entitled to, still you are not bound to find the facts to be as they have been testified; but you should consider their evidence and all other evidence in the case, and then give it such weight and credit as you may think it entitled to receive. The value of such testimony depends upon the circumstances of each case, and of these circumstances the jury must be the judges. When expert witnesses testify to matters of fact, from personal knowledge, then their testimony as to such facts within their personal knowledge should be considered the same as of any other witnesses who testify from personal knowledge."

This instruction did not tell the jury that the value of opinion evidence, based wholly on hypothetical questions, depended upon the establishment of the facts assumed; but, as far as the instruction went, we think it correct and in line with the following decisions: *Spiers v. Hendershott*, 142 Iowa, 446, 120 N. W. 1058; *Ball v. Skinner*, 134 Iowa, 298, 111 N. W. 1022; *Morrow v. Association*, 125 Iowa, 633, 101 N. W. 468; *Borland v. Walrath*, 33 Iowa, 130; *Whitaker v. Parker*, 42 Iowa, 585. If the appellant desired further instructions, he should have asked for them. The case was fairly covered by the court,

and nothing further can be claimed, in the absence of specified requests.

[5] We cannot agree with the appellant's contention that there was a total failure to show negligence on his part, and that there should have been a directed verdict in his favor. In our opinion, the verdict is amply supported by the facts appearing in the record. We find no error for which there should be a reversal, and the judgment is therefore affirmed.

Affirmed.

MANION v. BRADY et al.

(Supreme Court of Iowa. Nov. 20, 1912.)

1. JUDGMENT (§ 17*)—SERVICE BY PUBLICATION—ATTACHMENTS.

Statutes conferring jurisdiction to render a judgment against a nonresident defendant on service of notice by publication only must be strictly complied with, or the judgment and all subsequent proceedings based thereon are void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33; Dec. Dig. § 17.*]

2. PROCESS (§ 96*)—SERVICE BY PUBLICATION—APPLICATION FOR ORDER—AFFIDAVIT.

An affidavit that personal service cannot be made on the defendant within this state must be made before publication of the notice.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 108-120; Dec. Dig. § 96.*]

3. PROCESS (§ 96*)—SERVICE BY PUBLICATION—AFFIDAVIT OF SERVICE.

Code, § 3535, provides that publication must be of the original notice required for the commencement of actions once each week for four consecutive weeks before or after the filing of the petition in some newspaper printed in the county where the petition is or will be filed, and section 3536 requires the affidavit to be made by the publisher or his foreman. An affidavit of service by publication, in which H. J. M., publisher of the *Globe*, a weekly newspaper published in the city, county, and state, swore that the advertisement, a copy of which was annexed, was published in said paper four consecutive weeks, the first insertion being on the 7th day of August and the last on the 28th day of August, signed by H. J. M., publisher, and subscribed and sworn to before a notary public by G. W. M., was fatally defective in that it showed on its face that it was not published once each week for four consecutive weeks, in that it was made August 27th, at which time but three publications had been made, and in that it purported to have been sworn to by G. W. M., who was not shown to be the foreman of the publisher or in any way connected with the paper, as well as in other respects; and hence conferred no jurisdiction on the trial court.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 108-120; Dec. Dig. § 96.*]

4. EVIDENCE (§ 158*)—PAROL EVIDENCE—JUDICIAL RECORDS.

Parol testimony is inadmissible to show matters as to the service of notice by publication that should appear of record.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 472, 473, 474½-504, 506, 526; Dec. Dig. § 158.*]

5. APPEAL AND ERROR (§ 174*)—NECESSITY OF OBJECTION—PARTIES.

Where defendant in an action to set aside an execution sale of land raises no question

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the court below as to plaintiff not being the real party in interest, no such question can be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1121-1132; Dec. Dig. § 174.*]

6. EXECUTION (§ 245*)—SALE—ACTION TO SET ASIDE—ESTOPPEL.

The former owner of land sold under execution by merely attempting a redemption, not shown to prejudice the execution creditor and the purchaser, is not estopped by conduct from maintaining a suit to set aside the sale.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 681-686; Dec. Dig. § 245.*]

Appeal from District Court, Allamakee County; A. N. Hobson, Judge.

Suit in equity to set aside a judgment in rem and a sale thereunder. Judgment for the defendants. The plaintiff appeals. Reversed.

See, also, 126 N. W. 801.

D. Ed. Dwyer, of St. Paul Minn., Stilwell & Stilwell, of Waukon, and Samson & Noble, of Des Moines, for appellant. William S. Hart, of Waukon, for appellees.

SHERWIN, J. The plaintiff herein was a resident of Minnesota, and owed the defendants herein, who were residents of Allamakee county, Iowa. The defendant Brady brought a suit in attachment against Manion, and had a levy made on land in Allamakee county, in which Manion owned an equity and to which he held title. Brady obtained a judgment, and the land was sold under execution to satisfy the same; the defendant Hart finally becoming the owner thereof under sheriff's deed. The only notice of suit was by publication. The appellant contends that the statute authorizing such service was not strictly complied with, and because thereof that the court was without jurisdiction to render the judgment under which his land was sold. Two specific objections are made to the jurisdiction of the trial court in connection with the question of notice. The first is that no affidavit was filed that personal service could not be made on the defendant within this state; and the second, that proof of the publication of the notice was not made as required by the statute. Within the time required by law there was filed in the case a paper, which remained of record, of which the following is an exact copy in both substance and form:

"I, William S. Hart, being first duly sworn on oath, say that I am the attorney for the plaintiff in the above-entitled action; that the defendant is a nonresident of the state of Iowa, and service of the original notice in the said action cannot be made personally upon the defendant in the state of Iowa. [Signed] Wm. S. Hart.

"Subscribed and sworn to before me by the said William S. Hart this 31st day of July, 1901. _____, Clerk Dist. Court.

"Plaintiff respectfully designates the New Albin Globe, a newspaper published in Allamakee county, Iowa, as the medium which he desires to have designated for the publication of the original notice in this action. [Signed] Wm. S. Hart, Attorney for Plaintiff.

"Upon reading the foregoing affidavit, it is hereby ordered that publication be made in the paper above designated by plaintiff's attorney. [Signed] J. C. Ludeking, Dep. Clerk Dist. Court."

The appellant urges that this paper was not an affidavit, for the reason that it does not appear to have been sworn to, and that it amounted to no more than a declaration made in the form of a certificate. On the other hand, the appellees contend that the paper itself shows that it was sworn to, and, further, that it was, in fact, sworn to, and, having been duly filed, was in fact and in law the affidavit that the law requires, notwithstanding irregularity in the jurat. On the trial, it was shown that Mr. Hart did in fact swear to the body of the paper, and that the signature of the officer was placed below the direction for publication through inadvertence or mistake.

[1] It is settled, and in fact conceded, by the appellees that the statutes conferring jurisdiction to render a judgment against a nonresident defendant on service of notice by publication only must be strictly and literally complied with, or the judgment and all subsequent proceedings based thereon are void. *Schaller & Son v. Marker*, 136 Iowa, 575, 114 N. W. 43; *Empire Real Estate & Mtg. Co. v. Beechley*, 137 Iowa, 7, 114 N. W. 556, 126 Am. St. Rep. 248.

[2] It is also the rule that an affidavit that personal service cannot be made on the defendant within this state must be filed before publication of the notice. *Carnes v. Mitchell*, 82 Iowa, 601, 48 N. W. 941. Whether the paper under present consideration was an affidavit within the contemplation of the statute, or such an affidavit as it requires, is, at least, very doubtful, and we shall not determine the question in view of the fact that we are agreed that the affidavit of service was fatally defective, and hence conferred no jurisdiction on the trial court.

[3] 2. The notice was published in a newspaper published in New Albin, Allamakee county, Iowa, called the New Albin Globe, and the following affidavit of such publication was made:

"I, H. J. Metcalf, publisher of the Globe, a weekly newspaper published in the city of New Albin, in said county and state, do solemnly swear that the advertisement (a copy of which is hereto annexed) was published in said paper 4 consecutive weeks, the first insertion being on the 7th day of Aug. A. D. 1901, and the last on the 28th day of August, A. D. 1901. H. J. Metcalf, Publisher.

"Subscribed and sworn to by Geo. W. Met-

calf, before me, a notary public of the state of Iowa, in and for Allamakee county, this 27th day of August, 1901. Witness my hand and notarial seal. [Signed] L. Ferris, Notary Public. [Seal.]”

This affidavit wholly failed to meet the requirements of the statute (Code, § 3535), which is as follows: “The publication must be of the original notice required for the commencement of actions, once each week for four consecutive weeks, before or after the filing of the petition, in some newspaper printed in the county where the petition is or will be filed, which paper shall be determined by the plaintiff or his attorney.”

In the first place, the affidavit on its face shows that it was not published once each week for four consecutive weeks. The first publication was made on the 7th day of August, and to comply with the statute it was necessary to publish it again on the 14th, 21st, and 28th of August. The affidavit was made on the 27th day of August, at which time but three publications had been made, and the statement therein that the notice was published on the 28th day of August was manifestly false. Proof of publication of notice each week for four consecutive weeks in a newspaper printed in the county where the petition is or will be filed must be made by the publisher or his foreman and filed before default. *Tunis v. Withrow*, 10 Iowa, 307, 77 Am. Dec. 117; *Cooke v. Tallman*, 40 Iowa, 133; *Littlejohn v. Bulles*, 136 Iowa, 151, 113 N. W. 756; *Mortgage Co. v. Beechley*, supra. The affidavit also purports to have been sworn to by Geo. W. Metcalf, who was not shown to be the foreman of the publisher, or in any way connected with the paper. The statute (Code, § 3536) says that the affidavit shall be made by the publisher or his foreman, and this affidavit itself shows that it was not made by the publisher, because it is stated therein that H. J. Metcalf was the publisher.

[4] The record must show that the statutory requirements as to notice have been complied with, and parol testimony to show matters that should appear of record is inadmissible. *Schaller & Son v. Marker*, supra; *Bradley v. Jamison*, 46 Iowa, 68; *Bardley v. Hines*, 33 Iowa, 159; *Mortgage Co. v. Beechley*, supra; *Maynes v. Brockway*, 55 Iowa, 460, 8 N. W. 317. The affidavit of publication is fatally defective in two or more respects, and, under the rule that the statute must be literally complied with to confer jurisdiction by publication of the notice, it is clear that the court has no jurisdiction to render the judgment in question.

[5] The appellee contends that the plaintiff is not the real party in interest, and hence cannot maintain this suit. No such question was raised in the court below, and, of course, it cannot be considered here.

[6] Appellee also says that appellant is estopped from maintaining suit by his conduct

after appellees had obtained their judgment and a sale had been made thereunder. Plaintiff did nothing more than to attempt a redemption, and it is not shown that the defendants herein were in any way prejudiced by his action. Appellees' motion to strike appellant's amendment to abstract is overruled. For the reasons indicated, the judgment is reversed.

Reversed.

STATE v. KING.

(Supreme Court of Iowa. Nov. 20, 1912.)

Appeal from District Court, Shelby County. The defendant was indicted and convicted for the crime of burglariously attempting to break and enter a bank building, and from the sentence he appeals. Affirmed.

Shelby Cullison, of Harlan, for appellant. George Cosson, Atty. Gen., and John Fletcher, Asst. Atty. Gen., for the State.

PER OURIAM. The case is prosecuted on short transcript, showing only indictment, the verdict, and the sentence. No error appears in the record, and the judgment is affirmed.

BOYD v. LINCOLN & N. W. R. CO. et al. (No. 16,468.)

(Supreme Court of Nebraska. Nov. 13, 1912.)

On motion for rehearing. Overruled.

For former opinion, see 89 Neb. 840, 132 N. W. 529.

H. F. Rose and Byron Clark, both of Omaha, for appellant. A. G. Wolfenbarger and Geo. W. Berge, both of Lincoln, for appellee.

SEDGWICK, J. A statement of the issues in the case may be found in our former opinion. 89 Neb. 840, 132 N. W. 529. In the argument upon the motion for rehearing the question discussed was whether the grades of the defendant company caused the overflow on the plaintiff's land, and in determining this question it was thought that the principal, if not substantially the only question involved was whether the water, at the time the damage was caused, was substantially higher on the south side than on the north side of the grade, so much so as to justify the conclusion that this grade must have caused the overflow on the plaintiff's land. The parties have submitted memoranda briefs upon this point. They have quoted the evidence from the record bearing upon it, with references to the record, and to the exhibits showing the elevations at the grade, and at the plaintiff's land and other points. While the evidence is quite voluminous, it must be conceded that upon the points so presented it is unsatisfactory, and in some respects conflicting. It is impracticable to present an analysis of this testimony, and, while we might not have reached the conclusion of the jury, we cannot see that there is

not sufficient substantial evidence in this record to support their verdict.

The motion for rehearing is therefore overruled.

BARNES, J., dissents.

LABS v. LABS et al. (No. 16,795.)
(Supreme Court of Nebraska. Nov. 13, 1912.)

(Syllabus by the Court.)

WILLS (§ 58*)—AGREEMENT TO MAKE—SPECIFIC PERFORMANCE—EVIDENCE.

Where it is sought to establish an oral agreement to make a testamentary disposition of property and to set aside the provisions of a will in so far as they conflict with said alleged agreement, the proof to establish the existence of such oral agreement must be clear, convincing, and satisfactory, in order to overcome the presumption that the testator acted in good faith in the execution of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 164, 165; Dec. Dig. § 58.*]

Appeal from District Court, Douglas County; Sutton, Judge.

Action by Wilhelm Labs against Charles Labs and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Charles Haffke and T. E. Brady, both of Omaha, for appellant. Mahoney & Kennedy, of Omaha, for appellees.

LEITON, J. This is an action for the specific performance of an alleged parol agreement between the plaintiff and his father, Ferdinand Labs, now deceased, that the father would make a testamentary disposition of 80 acres of land in his favor, and praying that a will executed by the father, wherein the defendants are bequeathed certain sums of money, which by the will are made a charge upon the land in controversy, be set aside, that a deed executed by the father in his lifetime, conveying the same premises to Ferdinand F. Labs, be also set aside, and the plaintiff's title to the real estate be quieted. The district court found for the defendants and dismissed the suit. Plaintiff bases his right to recover upon the proposition that the facts in the case bring it within the rule of *Kofka v. Rosicky*, 41 Neb. 328, 59 N. W. 788, 25 L. R. A. 207, 43 Am. St. Rep. 685; *Harrison v. Harrison*, 80 Neb. 103, 113 N. W. 1042; *Peterson v. Bauer*, 83 Neb. 405, 119 N. W. 764; *Hespin v. Wendeln*, 85 Neb. 172, 122 N. W. 352; *O'Conner v. Waters*, 88 Neb. 224, 129 N. W. 261. Defendants assert that the evidence is wholly insufficient to establish the alleged contract. A number of questions of law as to the admission and rejection of evidence are argued in the briefs; but, owing to the view that we take with respect to the evidence, we are satisfied that, even if the district court had ruled otherwise as to the admissibility of this testi-

mony, we would have been compelled, on a view of the whole case, to reach the same result. For this reason, these questions will not be considered.

Ferdinand Labs came to this country from Germany more than 30 years ago. When he first came, he became a tenant farmer in Douglas county, but finally purchased 160 acres of land, which at the time of his death was incumbered to the extent of \$2,700. The land was then worth from \$65 to \$70 per acre. He made the will, which is attacked, in March, 1907, and died in July, 1909. He was the father of eight children, one of whom is the plaintiff. The others are the defendants in this case. The will, after providing for the payment of his debts, left \$400 for a suitable monument and for the care of his grave. To the plaintiff, his son William, he left \$1,000; to each of his sons Charles and August he left \$500; to each of his three daughters he left \$400; to his son Albert he devised the east one-half of the home farm of 160 acres, subject to half of the mortgage indebtedness, and charged with the payment of one-half of the debts, charges, and legacies; and to his son Ferdinand F. Labs he devised the west 80 acres, subject to incumbrance and charged to the same extent. In the interim between the making of the will and his death, Ferdinand Labs conveyed by deed to his sons Albert and Ferdinand F. the same premises which the will provided should be devised to them, subject to the same charges, and also subject to a life estate in the grantor. At the same time each son leased his portion of the land from the father, agreeing to pay \$200 a year and taxes upon the property as rent for each 80-acre tract.

Coming, now, to the evidence upon which plaintiff relies: His testimony is to the effect that, when he was about 22 or 23 years of age, he and his parents went for a visit to the home of a man named Lucht, who lived near Millard; that he then heard a conversation between his father and Lucht, in the course of which Lucht asked his father what he would give William if he stayed at home, and that the father told Lucht he was going to give him an 80-acre tract if he worked for him until he got married. Plaintiff also testified, further, that he continued to live upon the farm and work for his father until he was 33 years old; that his mother died about 6 years ago, and that about that time he heard a conversation between Mr. Gehrke, the Lutheran minister, and his father; that Gehrke said, "You better let him have the 80 now to build a house on," and he says, "No, you can build that after I am dead." He further testifies: "I asked father for wages, and he said, 'No,' he would not give me wages, but he would give me an 80 after he is dead; and that is the reason Mr. Gehrke came in there and wanted to settle between us two."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
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On cross-examination he says that he claimed his father owed him wages from the time he was 21 years old up to that time; that he took no part in the conversation with Gehrke, and that he does not know how Gehrke came to know of the dispute; that he did not ask Gehrke to come and settle it. Other witnesses testify to statements by the father that he intended to give plaintiff 80 acres of land when William was married, or that William should have 80 acres when he died; but their testimony is indefinite, and does not appear to relate to any definite contract made between the father and son. On the other hand, Gehrke denies that such a conversation as William relates ever took place with the father. On cross-examination he states that, about the time spoken of by William, he had a conversation with the mother, who said that they planned to give William an 80; but there was nothing said about any agreement having been made to that effect. Mr. Lucht was also unable to remember any such conversation as was testified to by plaintiff, and said positively none such took place.

Some other facts relating to the usage of the family and the manner in which each child was started in life by the parents cast some light upon the problem. Charles Labs was married at the age of 27. Before that time his father received the benefit of his work. Upon his marriage his father gave him \$500, and by the will he is to receive \$500 more, half of which is charged upon the 80 acres in controversy. August was married at the age of 22. Until that time his father received his wages. Under the will he was to receive \$500, one-half of which is charged upon this 80. Each of the daughters went out at service, brought her wages home for the use of the family, and each at marriage received a few household goods. Under the will each will receive \$400. Albert was 39 years old when the trial was had. He was married, but worked upon the home place until his father died. He received some personal property upon his marriage, and, as before stated, has received the E. $\frac{1}{2}$ of the quarter section, subject to the debts and charges. His inheritance will be the same as specified in the will, even if the plaintiff should recover; while Ferdinand, who turned over to the family the fruit of his labor until he was 25 years of age, at which time he was married and received some personal property, will, if the plaintiff is successful, lose his land, and will also lose \$350, which he has already paid in cash in part satisfaction of the incumbrance existing upon the land at his father's death. If plaintiff prevails, one-half of all the legacies charged upon the land of Ferdinand must fail, and Ferdinand himself will lose the land. A reading of the whole record convinces us

that Ferdinand Labs, who was apparently a hard-working, God-fearing, and just man, endeavored to discharge his duties to his family impartially and with justice. His conduct in this respect, subsequent to the time of the alleged making of a contract with plaintiff, seems inconsistent with plaintiff's theory.

Considering all the testimony in the record with relation to the history of the family, the conduct of each of the children with reference to the father and mother, the time each worked upon the farm, the provision made for each of them by the father when he or she married and set up housekeeping for himself or herself, and the provisions made in the will for the distribution of the property, in connection with the evidence in behalf of plaintiff, we are convinced that the plaintiff has not sustained the burden of proof by clear, convincing, and satisfactory evidence, such as is required in cases of this nature.

The judgment of the district court is affirmed.

MOORE v. BRITIZUS et al. (No. 16,815.)
(Supreme Court of Nebraska. Nov. 18, 1912.)

(Syllabus by the Court.)

DEEDS (§ 211*)—UNDUE INFLUENCE—EVIDENCE.

In a suit in equity to cancel a deed as having been procured by undue influence and by promise of services never performed, decree in favor of defendant affirmed as being a proper determination of the issues under the evidence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647, 649; Dec. Dig. § 211.*]

Appeal from District Court, Boone County; Paul, Judge.

Action by John S. Moore against Letta F. Britizus and others. Judgment for defendants, and plaintiff appeals. Affirmed.

H. C. Vall, of Albion, for appellant. W. L. Rose and W. F. Critchfield, both of Fullerton, for appellees.

ROSE, J. The relief sought by plaintiff is the cancellation of a deed to a quarter section of land in Boone county. It was executed October 17, 1900, and promptly delivered. Plaintiff was grantor, and his daughter, Letta F. Moore, now Letta F. Britizus, was grantee. At the time he was a widower, 71 years old. He had a number of children, but all were married or absent, except grantee, who remained single until she was 30. In 1903 she married and moved to South Dakota. Three years later she went to California, where she still resides. In the deed grantee reserved the right to use and occupy the premises during the remainder of his life, and exercised that right nine years before bringing suit. Plaintiff alleged, and attempted to prove, that he was infirm in body and mind, that his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

daughter unduly influenced him to execute the deed, by promising to remain at home with him and to care for him during the remainder of his life, and that she failed to keep her promises. Grantee denied undue influence or fraud, pleaded that the deed was executed for a valuable consideration paid in other lands and in a valid note, and that the condition alleged in the petition was no part of the transaction, though she never refused to provide a home for her father. The trial resulted in a dismissal of the suit, and plaintiff has appealed.

The question presented by the record is: What does equity require under the evidence? After a careful consideration of the proofs of both parties, the conclusion is unanimous that there must be a finding in favor of grantee on all the controverted issues. It follows that the decree below is without error.

Affirmed.

LAZURE v. MAVERICK LOAN & TRUST CO. (No. 16,794.)

(Supreme Court of Nebraska. Nov. 13, 1912.)

(Syllabus by the Court.)

TAXATION (§ 709*)—REDEMPTION FROM TAX SALE—PAYMENT OF TAXES—NECESSITY.

Before bringing an action to redeem from tax sale and treasurer's deed, all taxes subsequent to the sale, due and payable, must be paid. If subsequent taxes have been paid by the purchaser at tax sale, the amount so paid, with interest, should be included in the decree allowing the redemption. The landowner is not required to reimburse the purchaser at tax sale before bringing his action to redeem.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1430-1435; Dec. Dig. § 709.*]

Appeal from District Court, Box Butte County; Westover, Judge.

Action by Adolph Lazure against the Maverick Loan & Trust Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

John Lothrop, of Blair, and B. F. Gilman, of Alliance, for appellant. C. Patterson, of Rushville, for appellee.

SEDGWICK, J. The defendant claims an interest in the land in question by virtue of an administrative sale for the taxes assessed thereon in the year 1904 and a treasurer's deed pursuant thereto. The plaintiff brought this action to redeem the land from the taxes, claiming that the treasurer's deed was void. The trial court found for the defendant, and the plaintiff has appealed.

It is conceded that the tax deed was void for several reasons, and it is contended by the defendant that he has paid all the subsequent taxes upon the land, and that the plaintiff cannot maintain this action to redeem without first reimbursing him for the taxes so paid. This does not constitute a defense to the action. Section 11,111, Ann.

St., provides that the owner of land sold for taxes may redeem by paying the amount of taxes for which the land was sold, with interest, "together with all other taxes subsequently paid." The taxes, according to the admissions of the parties upon the record, have all been paid, and to require the plaintiff to reimburse the defendant for subsequent taxes paid would, in the language of the Supreme Court of Iowa, "not be a payment of the taxes. It would be a reimbursement for taxes previously paid." *Taylor v. Ormsby Bros.*, 66 Iowa, 109, 23 N. W. 288. Our statute requiring the payment of taxes before bringing an action to redeem was borrowed from Iowa. The construction that court put upon it is a reasonable one, and we are content to follow it.

The judgment of the district court is reversed, and the cause remanded, with directions to allow the plaintiff to redeem as herein indicated.

Reversed and remanded.

CENTRAL NAT. BANK v. ERICSON et al. (No. 16,793.)

(Supreme Court of Nebraska. Nov. 13, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 927*)—REVIEW—QUESTIONS OF FACT—DIRECTION OF VERDICT.

In reviewing a direction to the jury to return a verdict in favor of plaintiff, the appellate court will assume the existence of every material fact which the evidence on behalf of defendant establishes or tends to prove, and give him the benefit of proper inferences from such facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 4024; Dec. Dig. § 927.*]

2. BILLS AND NOTES (§ 497*)—ACTIONS—BURDEN OF PROOF.

Where fraud in the inception of a note is pleaded as a defense and supported by proof, in an action by an indorsee against the maker, the burden is on plaintiff to show he is a bona fide holder.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1675-1687; Dec. Dig. § 497.*]

3. BILLS AND NOTES (§ 537*)—ACTIONS—QUESTION FOR JURY.

In a suit on a promissory note, a peremptory instruction in favor of plaintiff on the ground that the note was purchased from an innocent holder is erroneous, where reasonable men may properly infer, from all the facts and circumstances of which there is proof, that the holder, in making the purchase, acted on behalf of plaintiff who had actual knowledge of valid defenses.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1894; Dec. Dig. § 537.*]

Hamer, J., dissenting.

Appeal from District Court, Buffalo County; Hostettler, Judge.

Action by the Central National Bank against John Ericson and others. From a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

judgment for plaintiff, defendant Ericson appeals. Reversed and remanded.

Joseph C. Saylor and John A. Miller, both of Kearney, for appellant. N. P. McDonald, of Kearney, for appellee.

ROSE, J. This is a suit on a promissory note for \$500 dated February 12, 1909, and due October 1, 1909. On the face of the instrument, John H. Bearss is payee and John Ericson maker. The Central National Bank of Kearney is plaintiff, and John Ericson, John H. Bearss, and Frank E. Wilcox are defendants. Bona fide transfers for value before maturity without notice of defenses, from Bearss to Wilcox, from Wilcox to the State Bank of Riverdale, and from the latter to plaintiff, are alleged in the petition. For the purposes of review, the defenses pleaded by Ericson may be summarized as follows: There was no consideration for the note. With others aggregating \$2,000, it was given to Bearss for one-sixth interest in a patent right for a five-horse doubletree. With the aid of Wilcox, Bearss falsely represented the article to be a new and workable invention of the value of \$100,000. It would not work and was of no value. Bearss, with the aid of Wilcox, fraudulently induced Ericson to sign the note by falsely representing to him that it contained the words, "Given for a patent right on a five-horse doubletree and void if doubletree fails to work," and "note to bear 7 per cent. interest when business pays 10 per cent." Ericson is an old man and cannot read without his glasses. He did not have them with him when he signed the note, and did not know what he was signing, but relied upon the false representations of Bearss and Wilcox as to the contents of the note. Before he signed it, they entered into an agreement with him that the notes would not be sold, but would be returned to him if the patent right did not prove to be beneficial. That agreement was violated. Plaintiff procured possession of the note with full knowledge of the facts constituting the defenses pleaded. The State Bank of Riverdale was not a purchaser in good faith, but had due notice of the infirmities in the note before it purchased and transferred it. After the parties had adduced their proofs on both sides of the issues raised by the pleadings, the following charge was given: "The court instructs the jury to find for plaintiff on the ground that the Riverdale Bank became an innocent purchaser of the note and plaintiff, through it, became an innocent holder." From a judgment in favor of plaintiff, Ericson has appealed.

[1] The correctness of the peremptory instruction in favor of plaintiff is the controlling question. Since the trial court directed a verdict in favor of plaintiff, it is necessary, in reviewing that ruling, to assume the existence of every material fact which

the evidence on behalf of Ericson establishes or tends to prove, and to give him the benefit of proper inferences from such facts. *Nothdurft v. City of Lincoln*, 66 Neb. 434, 92 N. W. 628, 96 N. W. 163; *Paxton v. State*, 59 Neb. 460, 81 N. W. 383, 80 Am. St. Rep. 689; *Harris v. Lincoln Traction Co.*, 78 Neb. 681, 111 N. W. 580; *Tate & Ehrhardt v. Loney*, 85 Neb. 559, 123 N. W. 1050.

[2] The answer alleges, and the evidence tends to show, fraud in the inception of the note. It was incumbent on plaintiff, therefore, in making its case to comply with the following rule of law: Where fraud in the inception of a note is pleaded as a defense and supported by proof in an action by an indorsee against the maker, the burden is on plaintiff to show he is a bona fide holder. *Wyman v. Searle*, 83 Neb. 28, 128 N. W. 801; *Norwood v. Bank of Commerce*, 77 Neb. 205, 109 N. W. 152; *Lahrman v. Bauman*, 76 Neb. 848, 107 N. W. 1008; *Thompson v. West*, 59 Neb. 677, 82 N. W. 13, 49 L. R. A. 337; *National Bank of Battle Creek v. Miller*, 51 Neb. 156, 70 N. W. 933; *Kelman v. Calhoun*, 43 Neb. 157, 61 N. W. 615; *Violet v. Rose*, 39 Neb. 660, 58 N. W. 216; *Haggland v. Stuart*, 29 Neb. 69, 45 N. W. 263. This feature of the case must also be considered in reviewing the peremptory instruction.

[3] Ericson testified that during the second week in March, 1909, he learned the notes were not drawn according to agreement, and that he then notified all the banks in Kearney, including plaintiff and its cashier, of his defenses and warned them not to buy the notes; that plaintiff's cashier in response to the notice said, "I will not buy them"; that, after Ericson had been notified in October, 1909, that the note in suit was in possession of plaintiff, he went into its place of business and inquired of its cashier, "Didn't I notify you last spring not to buy it?" He further testified that the cashier replied, "Yes; I don't want you to have any hard feelings against me. I haven't bought this note. I just took it as collateral from Wilcox. Bearss he owed something on a threshing machine, and I took them as collateral. If I can't collect from you, I will have to collect out of Wilcox." Other evidence tends to prove: The business of the State Bank of Riverdale is conducted in a little town a few miles from Kearney. Its capital stock is \$5,000. Legally it cannot make an individual loan in excess of \$1,000. It was a correspondent of plaintiff. It kept an account at plaintiff's bank. It bought commercial paper for plaintiff. Though Wilcox transacted business with plaintiff in Kearney at a time when it was buying such paper, he entered into correspondence with the State Bank of Riverdale and offered to sell two of Ericson's notes at a discount. The three notes, aggregating \$2,000, were received by the State Bank of Riverdale March 31, 1909. The same day it sent to Wilcox its draft on plaintiff's bank

for \$1,650. A few hours after the purchase it sent the note in suit to plaintiff without making any indorsement thereon, and received credit on its account for the sum paid to Wilcox. The State Bank of Riverdale made no profit on the transaction, but understood in advance that the notes should be sent to plaintiff when purchased from Wilcox. No transaction showing a transfer from Wilcox to the State Bank of Riverdale was entered on its books, nor did the note itself show that the State Bank of Riverdale was a transferee. From all the facts and circumstances of which there is proof, reasonable men might properly infer that the State Bank of Riverdale acted for plaintiff in purchasing the note in suit, when the latter had full knowledge of the defenses thereto, and that therefore plaintiff was not an innocent holder, as instructed by the trial court. In this view of the testimony, the case ought to have been submitted to the jury.

Reasons for this conclusion were recently stated by the Supreme Court of Iowa as follows: "It is ordinarily to be expected, in these cases, that the purchaser will testify to his good faith and want of notice, and that defendant is compelled to rely upon circumstantial evidence to rebut such showing. Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an innocent purchaser is therefore a question for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase, but is such that no fair-minded person can draw any other inference therefrom. A categorical denial of notice or knowledge is something which in many, if not in most, instances cannot be opposed by direct proof; and the credibility of the witnesses, their interest in the case, the reasonableness or unreasonableness of their statements, the time, place, and manner of the transaction, its conformity to or its departure from the ordinary methods of business, and all the other facts and circumstances which, though of slight moment in themselves, yet, when taken together, give character and color to the purchase under inquiry, constitute a showing which the court cannot properly pass upon as a matter of law." *Arnd v. Aylesworth*, 145 Iowa, 185, 123 N. W. 1000, 29 L. R. A. (N. S.) 638.

For the error in directing a verdict for plaintiff, the judgment is reversed and the cause remanded for further proceedings.

Reversed and remanded.

HAMER, J. I dissent from the views expressed in the majority opinion upon the ground that there was no offer, upon the part of the defendant, to prove that the cashier or any officer of the plaintiff bank had any knowledge of the alleged fraudulent inception of the note sued on at the

time the same was delivered to the plaintiff. Nor is there sufficient evidence, as it seems to me, to prove any improper purpose upon the part of any officer of the plaintiff.

SANDWICH MFG. CO. et al. v. HUCKFELDT. (No. 16,782.)

(Supreme Court of Nebraska. Nov. 13, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1011*)—REVIEW—QUESTIONS OF FACT.

Proceedings to revive a dormant judgment. A transcript of the judgment was filed in the office of the clerk of the district court November 3, 1884. December 29, 1884, defendant conveyed certain land to plaintiff by deed containing the usual covenants of warranty, and upon which the judgment was a lien. Plaintiff paid the judgment August 6, 1885, when it was assigned to his agent, who subsequently assigned to him. No effort was made to collect, perpetuate, or revive the judgment until 1907. Upon an application to revive the judgment, defendant pleaded payment and testified that, at the time of the sale of the real estate, \$1,000 of the purchase price of the land was withheld by plaintiff, with defendant's consent, with which to pay the judgment liens. There was a general finding in favor of defendant by the trial court. The sum of \$1,000 was more than sufficient to cancel the judgment liens. The judgment docket contains no record of the satisfaction of the judgment. *Held* that, if such sum was retained by plaintiff for that purpose, it would be a complete defense to his action to revive without reference to whether the money was applied by him to the payment or not, which was a question of fact to be decided by the trial court. The finding, being in favor of defendant on conflicting evidence, but which is sufficient to support the conclusion reached, will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Appeal from District Court, Adams County; Dungan, Judge.

Action by the Sandwich Manufacturing Company and others against Heinrich B. Huckfeldt. From a judgment for defendant, plaintiffs appeal. *Affirmed*.

John C. Stevens and J. A. Gardiner, both of Hastings, for appellants. John Snider and W. F. Button, both of Hastings, for appellee.

REESE, C. J. On the 27th day of October, 1884, the Sandwich Manufacturing Company recovered a judgment against appellee, Huckfeldt, for the sum of \$102.20 and costs of suit taxed at \$4.90. A transcript was filed in the office of the clerk of the district court on the 3d day of November, 1884. An assignment of the judgment to R. S. Langley was made August 6, 1886, and on the 6th day of November, 1886, Langley assigned the same to William Gardiner, who on the 12th day of March, 1910, assigned to J. A. Gardiner, who was substituted as appellant herein January 19, 1911. No execution was is-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sued upon the judgment, nor was any other effort made to collect it until the 2d day of October, 1907, when, the judgment being dormant, a proceeding was instituted in the district court for its revival in the name of William Gardiner as the owner thereof. In the course of time, and on the 11th day of May, 1908, an answer was filed in which the sufficiency of the petition or application was denied and called in question. The rendition of the judgment, the filing of the transcript, the absence of issuance of execution, and the dormancy of the judgment were admitted. All other allegations were denied. It was alleged that after said judgment was rendered, but before the institution of the revivor proceedings, defendant satisfied and discharged the judgment by payment in full. It was further alleged that the judgment was presumed to have been paid "on account of the lapse of time." A reply denying the payment was filed. A number of dilatory motions and stipulations were filed, but none of which need be noticed at this time.

It is said, and so appears, that on the 29th day of December, 1884, defendant sold and conveyed certain land in Adams county to William Gardiner, executing to him a warranty deed, subject to a mortgage of \$1,800, but otherwise containing full covenants of warranty. The transcript of the judgment being then on file, it was probably a lien on the land. On the 8th day of June, 1885, the judgment plaintiff wrote Mr. Gardiner calling his attention to the fact and expressing a purpose to hold the land liable for its payment. He then paid off the judgment, and it was assigned to his agent by Ballinger & Cherry, who executed the assignment as attorneys for the Sandwich Manufacturing Company. The agent afterwards assigned to William Gardiner. Prior to the trial, some question having arisen as to the authority of the attorneys to assign the judgment, a paper denominated "disclaimer and confirmation of assignment" was, by leave of court, filed by the Sandwich Manufacturing Company, in which, among other recitals, the assignment of the judgment "by Ballinger & Cherry, its attorneys," was approved and confirmed. This paper was in the nature of an intervention. It was subsequently stricken from the files over the exception of plaintiff, and of which he now complains. As the only matter of importance contained in the paper was the approval of the assignment by Ballinger & Cherry, and as the authority to make the assignment would be subject to proof upon the trial by competent evidence, we are unable to see where the court erred in the action complained of. But even were the ruling erroneous, it could work no prejudice, as the question of authority or subsequent

ratification was not thereby foreclosed. The cause was tried to the court, the result being a general finding in favor of the defendant and a dismissal of the proceedings. Plaintiff appeals.

A number of questions are presented in the briefs and were argued at the bar which, in the view we take of the case, it is not necessary to decide. The answer pleads payment, and defendant testified that, at the time of the closing of the sale of the real estate in the state of Illinois, the sum of \$1,000 was deducted from the purchase price of the land by plaintiff Gardiner and was to be, and he supposed was, sent to the clerk of the district court for the purpose of satisfying any judgments which might be a lien or cloud upon the title, and that he afterwards drew out of the clerk's hands the overplus. As touching one view of the case, we are deprived of the testimony of the former clerk, as he is shown to be deceased. The judgments were not satisfied upon the record, nor is there any entry showing the receipt of the \$1,000 by the then clerk. But there is another view of the case, which was probably adopted by the district court. This effort to revive the judgment was, in reality, instituted by and on behalf of William Gardiner, the person who purchased the land from defendant. If defendant paid or allowed plaintiff the \$1,000, as testified to, for the purpose of paying the judgment, it could make no legal difference whether plaintiff remitted the money to the clerk or not; for that, as between them, would so far work a cancellation of the judgment as to prevent its revivor at the suit of plaintiff. It is true that the evidence as to that transaction is conflicting, and this is not surprising when we remember that it occurred in 1884, and this proceeding was instituted in 1907, and the trial was had in January, 1910. While a fairly reasonable excuse is given for the failure to take any steps to perpetuate the life of the judgment by the issuance of execution, or to revive it for the 23 intervening years, yet that fact, coupled with the positive testimony of defendant, and the presumption of payment, probably satisfied the mind of the trial court that the money was so paid or withheld, and upon that issue the decision was made; and we do not feel justified, in view of the evidence and all the circumstances, in reversing such finding.

The judgment of the district court is therefore affirmed.

FAWCETT, J., not sitting.

LETTON, J. (concurring in result only). I am unable to take the same view as to the evidence as is taken in the majority opinion, but concur in the result for other reasons.

SHERRILL et al. v. COAD. (No. 16,760.)
(Supreme Court of Nebraska. Nov. 13, 1912.)

(Syllabus by the Court.)

1. SALES (§§ 124, 127*)—RESCISSION BY PURCHASER—RESTORATION OF PROPERTY.

In order to entitle a vendee of a chattel to a rescission of the contract of purchase, he must allege and prove notice to the vendor of his election to rescind and a return or an offer to return the property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 303-312, 318, 319, 321; Dec. Dig. §§ 124, 127*.]

2. FRAUD (§ 59*)—SALES (§ 442*)—BREACH OF WARRANTY—MEASURE OF DAMAGES.

In an action by a vendee for damages for a breach of warranty or fraudulent representations by the vendor as to the quality of personal property purchased, where there is no rescission of the contract, the measure of damages is the difference between the value of the property as it actually was and what would have been its value had it been as represented at the time the representation or warranty was made.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62, 64; Dec. Dig. § 59* Sales, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442*.]

3. SALES (§ 120*)—RESCISSION—GROUNDS—BREACH OF WARRANTY.

"A sale of personal property with a warranty of its fitness for a prescribed use may be treated as a sale upon condition subsequent at the election of the purchaser, and in the event of a breach of the warranty the property may be restored and the sale rescinded." *Mundt v. Simpkins*, 81 Neb. 1, 115 N. W. 325, 129 Am. St. Rep. 670.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 294; Dec. Dig. § 120*.]

4. FRAUD (§ 41*)—SALES (§ 434*)—REMEDIES OF PURCHASER—NATURE AND FORM.

The petition examined and set out in the opinion held insufficient to entitle plaintiffs to recover under either of the rules above announced.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 36, 37; Dec. Dig. § 41* Sales, Cent. Dig. §§ 1234-1238; Dec. Dig. § 434*.]

Hamer, J., dissenting.

Appeal from District Court, Dawes County; Harrington, Judge.

Action by William Sherrill and others against Mark M. Coad, revived in names of John F. Coad, Jr., and others, executors of the will of Mark M. Coad. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Albert W. Crites, of Chadron, and W. J. Coad and W. H. Herdman, both of Omaha, for appellant. A. G. Fisher, of Chadron, J. E. Porter, of Crawford, A. M. Morrissey, of Lincoln, and William P. Rooney, of Chadron, for appellees.

FAWCETT, J. From a judgment of the district court for Dawes county in favor of the plaintiffs, for alleged damages by reason of the purchase of a stallion from defendant, defendant appeals.

[4] The petition alleges that in April, 1907, plaintiffs purchased from defendant a certain stallion for the sum of \$500, under an oral

warranty that the horse was a fair, average foal-getter, defendant well knowing that plaintiffs proposed to stand the horse for breeding purposes; that plaintiffs had no knowledge as to the qualities of the horse in that regard, and relied upon defendant's representations and warranty; that upon a trial of the horse for an entire season, under proper care and handling in every respect, the horse proved to be utterly worthless as a breeder, and "has proved of no value whatever for the purpose purchased. That he is not and was not as warranted therein any foal-getter, and that he has proved of no value to the plaintiffs, to their damage in the sum of \$500 in that regard." The petition then alleges that the time of one man was devoted to the care and handling of the horse; that the care, board, feed, and nurture of the horse have been wholly lost; and that the fair and reasonable value thereof is the sum of \$600. It is further alleged that plaintiffs' damages accrued through no fault or negligence of their own, but solely through the inherent defects in the horse and through his failure "to come up to the warranty aforesaid." The prayer is for judgment for \$1,100, "their damages as aforesaid," with interest on \$500 from April 30, 1907, and on \$600 from June 12, 1908. The answer is: First, a plea to the jurisdiction, which need not be considered here. Second, it admits the sale and delivery of the horse for the agreed consideration of \$500, "which stallion the said plaintiffs did receive, and have kept to this day," and denies each and every other allegation in the petition. The third averment in the answer relates to the question as to whether the horse was sold upon a written or oral agreement. It is conceded by defendant that, for the purpose of this hearing, that question is foreclosed against them by the verdict of the jury. It therefore will not be considered. At the trial upon these pleadings the court instructed the jury as follows:

"No. 2. The burden of proof is upon the plaintiffs to establish by a preponderance of the evidence, as to the stallion, that they purchased said stallion for breeding purposes at an agreed price of \$500, and that they paid to defendant the said sum of \$500. * * * That said stallion was entirely worthless for the purpose for which he was sold and purchased, and that the plaintiffs were damaged by reason thereof in the sum of \$500."

"No. 5. The jury are instructed that, if you find in favor of the plaintiffs, then it will be your duty to allow the plaintiffs interest on the \$500, being the purchase price of said stallion, from April 30, 1907, to the first day of this term of court.

"No. 5½. You are instructed that you have nothing to do with the fact as to whether or not the stallion in question would be good

for other than breeding purposes. If the plaintiffs bought him for breeding purposes, and he was not of the kind of horse that the defendant warranted him to be in respect to foal-getting, then the plaintiffs are not required in law to keep the horse at his fair value for any other purposes."

[1] It is apparent from a reading of the pleadings, in connection with these instructions, that the judgment of the district court cannot be sustained. If the action be treated as one for rescission, the petition is clearly insufficient in that it contains no allegation that plaintiffs ever attempted to rescind the contract, or that they ever returned or offered to return the stallion to defendant. Such an allegation is necessary to sustain an action for rescission. *McCormick Harvesting Machine Co. v. Knoll*, 57 Neb. 790, 78 N. W. 394; *Alfree Mfg. Co. v. Grape*, 59 Neb. 777, 82 N. W. 11.

[2] If the action be treated as one for damages for a breach of warranty, the measure of plaintiffs' damages would be the difference between the actual market value of the horse at the time of its purchase by plaintiffs and its market value had it been as warranted and represented to him. *McClatchey v. Anderson*, 84 Neb. 783, 122 N. W. 67. The court failed to recognize either of these rules in its instructions to the jury, and the verdict returned is in excess of any sum which could be returned under either of such rules. The petition does not allege any offer to return the horse by plaintiffs, nor does it allege that the horse was of no value. The only allegation is that it was valueless for the purpose for which they purchased it. The evidence discloses that, while the horse was valueless as a breeder, plaintiffs had worked him for two or three months; that, after the horse was "broke" to harness, he was "a very nice buggy horse, was a fine looking individual," and a good coach horse.

It is suggested that the judgment might be sustained on the ground of fraud, and it is argued that defendant's agent at the time of the sale made representations as to the quality of the horse, which were false and therefore fraudulent; but here again the petition is defective in not containing any such averments. Moreover, in *Young v. Filley*, 19 Neb. 543, 26 N. W. 256, we held: "In an action for damages for a breach of warranty or fraudulent representations as to the quality of personal property sold, where there is no rescission of the contract, the measure of damages is the difference between the value of the property as it actually was and what would have been its value had it been as represented at the time the representation or warranty was made." In the opinion by Reese, J., our present Chief Justice (19 Neb. 545, 26 N. W. 657), it is said: "It is insisted by defendant in error that the petition alleges both a breach of

warranty and fraud, and for the purpose of the case we will assume that such is the fact. In either case where there is no allegation of a rescission of the contract, the measure of damages is the difference between the value of the corn as it really was at that time and what it would have been worth had it been as represented." It is also argued that in June, 1908, as soon as the horse was found to be valueless, plaintiffs advised defendant of such fact, and that such notice was a waiver of any claim of necessity of a tender. Upon this point also the petition is silent.

[3] In support of their claim for \$600 for the care, keeping, and handling of the horse during the season following their purchase, which it may be conceded was necessary to demonstrate whether or not he was as warranted, plaintiffs contend that "It seems to be the general rule in cases of breach of warranty for special purposes, etc., the damages should be such as may fairly and reasonably be considered arising naturally—that is, according to the usual course of things from the breach—or such as may be reasonably supposed to have been within the contemplation of the parties at the time, as the probable result of the breach." Upon this point we said in *Mundt v. Simpkins*, 81 Neb. 1, 115 N. W. 325, 129 Am. St. Rep. 670: "A sale of personal property with a warranty of its fitness for a prescribed use may be treated as a sale upon condition subsequent at the election of the purchaser, and in the event of a breach of the warranty the property may be restored and the sale rescinded." Plaintiffs have not brought themselves within this rule by claiming a rescission and offering to restore the horse.

For the reasons above outlined, the judgment of the district court is reversed and the cause remanded for further proceedings. Reversed and remanded.

HAMER, J. (dissenting). I am unable to agree with my Associates in this case. I start out with the legal proposition that misrepresentation, deception, and fraud in the sale of personal property resulting in damages to the vendee, if shown by competent evidence, will support a judgment in his favor whether the action be only for a breach of warranty or for fraud and deceit. Under the application of the rule stated, the evidence in this case is clearly sufficient to sustain the judgment of the trial court. The stallion in this case was sold purely for a breeder. The agent of Coad, Mr. Hall, in order to induce the purchase, said to the plaintiffs, "You can't lose nothing buying this horse. We will guarantee him. We know him to be a breeder. We have two or three colts out of him now down at Mr. Coad's ranch at Fremont." He also presented to plaintiffs a printed circular describing the horse as "Bay Billy, by W. J. Bryan,

2389, foaled May 1, 1901; he by Kadris, 284. Dam Queen, Hambletonian mare. Bay Billy is a fine five year old coach stallion; he comes of good lineage, and is worthy of all good things that can be said of him, and has proved a sure foal-getter in our hands." Mr. Hall knew that these representations were false; he knew that there were no colts at the ranch from this horse, or anywhere else. There could be no case containing a greater amount of deceit than this one. The purchasers desired a good breeder and sure foal-getter. The defendant's agent told them that that was just what they were getting. To get such a horse the plaintiffs paid \$500 in cash. They employed a man to take care of the horse. They were put to the expense of \$800 in taking care of him. If I understand this court right, it determines that the plaintiffs shall find Coad, if they can, and "tender" to him the horse in question; that is, they shall have a halter on the horse and shall send him up and down the country accompanied by a caretaker until they can find Coad, and then, having the horse with them, they are to offer him the halter strap so that he may lead the horse away. There was no contention concerning the fact that \$500 had been paid as the price of the horse by the plaintiffs, and there was no serious contention but that it cost the plaintiffs \$800 to keep him until the suit was brought.

It certainly is not debatable that, if Coad told the plaintiffs, or either of them, that he would not receive the horse back, that of itself would relieve the plaintiffs from attempting to return him. What was said on this subject? The parties met at Chadron. Coad was there in one of his other stallion cases. Sherrill told Coad that the horse would not breed. On cross-examination Coad admitted this talk. Coad was told by Sherrill that he could have the horse back. On cross-examination Sherrill testified: "Q. When was that? A. Why, since I have been in Chadron. Q. Who was present? A. Him and Mr. Hall was there and Muzzey." This conversation happened at Chadron. It is not denied. In order to render the majority opinion, the other members of the court seem to shut their eyes to these facts. They do that or they ignore them. At that time the horse was at Crawford, only 28 miles distant from Chadron. Coad could not have meant by what he said anything except that he would not receive the horse back. Second. But, if there is any doubt upon this question, it is forever settled by the fact that Coad answered setting up the alleged fact that there was a bargain to the effect that, if the horse turned out not to be a sure foal-getter, he was to be returned to Coad at Fremont, and that Coad was to furnish the plaintiffs another stallion that would be a sure foal-getter. When Coad makes this defense, how can it reasonably be contended that Coad would receive the

horse back if it was offered to him? Coad tenaciously hung on to this defense until the jury determined it against him. Why should the majority of the court refuse to listen to the evidence which determines this stubborn fact beyond all question?

Where a party intentionally and by deceit produces a false impression in order to mislead another, or to entrap him, or to obtain an undue advantage over him, it is then a cause of positive fraud in the true sense of the term. In every case where there is positive fraud, the man who perpetrates the fraud is entitled to no standing. *McCready v. Phillips*, 56 Neb. 446, 78 N. W. 885. Coad is no more entitled to protection against the deceitful act perpetrated than was the criminal who "gold-bricked" a prominent banker from the central part of this state a few years ago, or Mabry and his gang, who "confided" victims from all classes and from all parts of the United States. Coad by his answer said: "I will not take the stallion back and give you your money. You can bring me the stallion, but you must take another stallion in place of him. I keep your money." In the face of Mr. Coad's contention, how can there be any doubt about it? No man who practices a "confidence game" and by the deception of an unsuspecting and innocent person, and without other consideration except the use of some instrument as the basis of such deception, should be permitted to successfully interpose the well-intentioned forms of the law adapted to ordinary commercial transactions as a shield to ill-gotten fruits of his iniquity, and such instrument, whether of a trifling or substantial value, is not entitled to special consideration at the hands of the court. Courts are in some instances called upon to lend their aid to a skillful and unprincipled wrongdoer who uses the form of the law to accomplish his wicked purpose. In *Graffam v. Burgess*, 117 U. S. 180, 186, 6 Sup. Ct. 686, 689 (29 L. Ed. 839), Mr. Justice Bradley, delivering the opinion of the court, said: "It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest form of law."

It is a mistake for the majority to rule that the plaintiffs shall not be allowed to recover for the injury that has been done to them through the deception practised upon them by the defendant Coad and his agent, Hall. It is the impractical nature of the majority opinion which makes men look askance at a "legal decision." The difficulty with the majority opinion would seem to be that it fails to take notice that there may be three or more things instead of two. If I may use the illustration, the opinion is along the line that all wagons must be red

wagons or green ones, while I think there are no good objections to wagons of other colors. It is an idea of ancient legal learning that there can only be two suits in this class of cases—one to recover for the injury done, claimed to be the difference between the true value of the thing sold and its sale price; and the other to recover back the price paid for the article sold, based upon a rescission of the sale. Under the first theory, the purchaser must keep the article which he was deceived into purchasing. He is bound to keep it although he never intended to buy and would not have bought it if he had known the actual facts surrounding it; and, though induced by deception to make the purchase, he must sue for the difference in value between what it is actually worth and the sale price. The other idea is that, before there can be a recovery, there must be a rescission of the contract. I maintain that this doctrine is obsolete in all cases of willful fraud and deception. The majority opinion is not justified by common sense as applied to business. It is a contention for overtechnical nicety. It would have done great credit to the period of 200 years ago. I am trying to make the contention that the law is something to which common sense—just ordinary business sense—may be applied just as it may be applied to other occupations, to farming, to surgery, and to merchandizing. The great danger is that the application of the law is likely to be unnecessarily mixed with a tincture of fictitious and far-fetched learning that is, or ought to be, obsolete. In this case the purchase was clearly brought about by the misrepresentation of Hall, the agent of the defendant, Coad. What he said was wholly false. There were no colts from the horse at Fremont. The horse was unable to get foals. Hall and Coad knew that. Coad comes into this court and asks this court to lay down the doctrine that, notwithstanding the deception which he practiced upon the purchasers, they are bound to keep the horse for whatever he is worth, although they did not buy him for any other purpose than to be a foal-getter, and he is absolutely worthless for that purpose; or, they are bound to find Coad wherever he may be and to "tender" the horse back. And they are bound to do this although Coad has said that he would not take the horse back, and has made a long and strenuous contention attempting to prove that there was to be an exchange of stallions if the horse turned out not to be a foal-getter, and has been beaten.

The majority opinion imposes upon the plaintiffs the burden of hunting up Coad, who was always a difficult man to find because he was continually going from one end of the state to the other, besides making trips into Wyoming, Colorado, and Chicago. Under the majority opinion, the plain-

tiffs are to be forever burdened with taking the horse along with them from one end of the state to the other looking for Coad. They are always to have the horse on hand to offer him to Coad. The thing proposed to be done is impracticable and wholly unbusinesslike.

The pleadings and facts allege and show deception. The plaintiffs were defrauded out of the \$500 that they paid for the horse, and they were compelled to keep the horse about a year before they could know that he was not a breeder and that he was sterile and wholly without capacity as a breeder. The plaintiffs have lost the money which they expended in keeping the horse. It is the idea of the writer that, when the deception is alleged and proved, the plaintiffs ought to be allowed the damage that they have suffered by reason of such deception, and that it is immaterial whether they tender back the instrument used to deceive or to accomplish the deceit intended. The plaintiffs have not refused to give Coad his horse; Coad never demanded the horse. Besides they have told him that he could have the horse.

The effect of the majority opinion is to offer a premium for the practice of deception, and that premium is that the purchasers shall be compelled to keep the horse in any event if the seller, by any sort of misrepresentation and fraud to the purchaser, gets the horse delivered to the man he deceives. Suppose the case of one who is "gold-bricked." Suppose that by deception the swindler gets out of the purchaser \$5,000 for his gold brick, and the purchaser is fortunate enough to discover the deception, and he finds the man who has deceived him and sues him to recover the \$5,000 out of which he has been defrauded. Then suppose the defendant coolly meets the plaintiff with the proposition that the brick was actually worth \$7.50; that the actual brass, copper, and lead contained in it was of the value of \$7.50; and then insists that there was no offer to return the brick, and he objects to the plaintiff's right of action on the ground that there has been no "tender" to him of the brick. There is no difference in principle in the actual case and the case supposed. This case is the same as any other case where confidence men secure victims by misrepresentation. It is time that our courts refused to coddle confidence men who secure victims by selling stallions that are known not to be breeders, or by selling gold bricks, or by promoting sham prize fights and sham races, after the manner of the Mabry gang.

There is no good reason why the judgment of the district court should not stand. It is the judgment of a practical business judge who is a good lawyer and 12 practical business men and farmers who sat on the jury.

Section 92 of the Civil Code provides that the petition must contain: "First. The name

of the court and county in which the action is brought, and the names of the parties, plaintiff and defendant. Second. A statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition. Third. A demand of the relief to which the party supposes himself entitled." The provisions of the Code touching the contents of the petition permit any statement of facts to be made which constitutes the cause of action, and no form of language is required, and there is no restriction except that the story is to be told without repetition. The language used is "ordinary language." We make the point that any statement complying with the Code as above quoted and that demands relief and is supported by evidence sufficient entitles the litigant to recover. Section 90 of the Code specifically provides that the rules of pleadings heretofore existing in civil actions are abolished, and that the forms and rules by which the sufficiency of a pleading is to be determined are only such forms and rules as are "prescribed by this Code." There is, therefore, no reason whatever to go to any of the old forms. The pleader is simply to tell his story, and if that story is sufficient, and is supported by the evidence, then he is entitled to the relief which his story gives him. There is nothing in our Code touching the pleadings in this case which compels the use of a particular form for a breach of warranty or deceit. If the "law" demands something that is not in the Code, then I demand that this court shall change what it calls the "law," because there is nothing that requires this court to stand by an ancient, inappropriate, and obsolete doctrine which has been legislated out of existence. The defendant asks this court to protect him in the practice of his deception. He asks that the mode used shall be after the manner of an ox wagon or a donkey's cart when there are carriages, beautiful horses, and automobiles all about.

In *Martin v. Hutton*, 90 Neb. 34, 132 N. W. 727, 36 L. R. A. (N. S.) 602, defendant falsely represented to the plaintiff that a certain quarter section of land was not subject to entry because of a homestead filing thereon, and that he (Hutton) would secure a relinquishment of that filing for \$2 an acre, or \$320 all told. Hutton received the money from the plaintiff. There was no consideration for the payment of the money because the land was all the time subject to entry and Hutton obtained it from the plaintiff by fraud. In a suit by the plaintiff to recover the money back, the defendant seems to have contended that the plaintiff, as a condition precedent to prosecuting the action, was required to rescind the contract. The plaintiff lived on the land. Hutton wanted him to give it up. He made the same contention Coad does, only he says there was

no rescission of the contract, and that the horse was not tendered back to him. The contention was overruled, and there was judgment for the plaintiff for the full amount of money out of which the defendant had defrauded him.

In *Warder, Bushnell & Glessner Co. v. Myers*, 70 Neb. 15, 96 N. W. 992, the plaintiff undertook to repair a harvesting machine so that it would do good work, and if it did not do good work it was to be taken back by the plaintiff and the defendant's note surrendered. In a suit upon the note, where the defendant answered that there was a failure to repair and furnish such a machine as was agreed upon, the plaintiff objected that it was nowhere alleged in the answer that there was an offer to return the machine and rescind the contract or any demand for the return of the note or any notice to the plaintiff. This court said that an allegation of notice and rescission of the contract was not necessary in order to tender a valid defense, and that "the plaintiff undertook affirmatively, under the agreement, to repair the machine and to put it in good working order, or take it back and return the defendant's note. This it failed to do, and, until it had complied with the terms of the agreement, it had no cause of action on the note, the consideration of which, because of its neglect and refusal to put the machine in good working order, had, by reason thereof, failed. It was not a question of rescission of contract, but of compliance with its terms on the part of the plaintiff in order to entitle it to a recovery on the note sued on." Applying the doctrine to the instant case, the defendant would have had no cause of action if he had brought suit upon the note given for the purchase price of the horse and simply because he did not furnish a stallion such as he had agreed to furnish—a stallion with the breeding power to get colts—and neither does the defendant have any defense for the same reason.

In *Murray v. Mann*, 2 Exch. (Eng.) *538, the agent sold a horse very much as the agent in the instant case. The agent took the horse back and refunded the purchaser the money which he had paid. If Hall had taken the stallion back and had repaid the plaintiffs the purchase price, there would have been a still stronger similarity between the cases. If Hall and the plaintiffs had together endeavored to trade back, they could have been met by the principal Coad, with the proposition that they had no right to trade back, and that was the proposition with which the principal in the English case met his agent, the livery stable keeper. *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598, and *Eames v. Morgan*, 37 Ill. 260, seem to justify the contention I am making. Coad's evidence admits the deception.

CORYELL v. STATE. (No. 17,641.)
(Supreme Court of Nebraska. Nov. 13, 1912.)

(Syllabus by the Court.)

HIGHWAYS (§ 186*)—AUTOMOBILES—CONTROL BY INFANT.

An information which under three counts in reference to a single transaction charges in the first count that the defendant permitted his infant son, under 16 years of age, to operate defendant's automobile on the highway, and in the second count charges that defendant permitted said infant son to drive said automobile past a vehicle drawn by a team of horses without reasonable caution and without calling to, or giving any sound, to indicate to the driver of said horses a desire to pass the same, and in the third count charges that the defendant permitted said son to drive said automobile past said team of horses at a swift rate of speed, and return to the center of the road within less than 30 feet from said team of horses and said spring wagon, will not sustain a conviction upon either count, where the evidence clearly establishes the fact that at the time charged the defendant himself had actual control of, and was operating, said automobile.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 476, 477; Dec. Dig. § 186.*]

Reese, C. J., and Rose, J., dissenting.

Error to District Court, Nemaha County; Raper, Judge.

Levi L. Coryell was convicted of permitting his son to operate an automobile on a public highway, and brings error. Reversed and remanded.

M. S. McIninch and Ernest F. Armstrong, both of South Auburn, for plaintiff in error. Grant G. Martin and Frank E. Edgerton, both of Lincoln, for the State.

HAMER, J. The plaintiff in error, Levi L. Coryell, hereinafter called the defendant, was informed against in the district court of Nemaha county and charged with (1) permitting his infant son to operate his, defendant's, automobile on the public highway; (2) permitting his said son to drive past a team without using reasonable care; (3) permitting his said son to drive past a team without using reasonable care and to return to the road less than 30 feet in advance of said team. The particular acts charged against the defendant are all shown to have occurred at the same time, and therefore constitute one transaction. There was a trial to a jury, and the defendant was found guilty on each count, and was on each count sentenced to pay a fine of \$5.

The defendant asks a reversal of the judgment upon five distinct grounds, only one of which we deem it necessary to consider, and that is that "the verdict is contrary to the evidence."

The facts as they appear are sworn to by the defendant and his little son, Leland, and their testimony is not controverted in any material matter so far as it relates to the operation of the automobile by the defendant himself. The little son is shown by

the evidence to have been only 11 years old, and there is testimony that he had his hands on the "steering wheel," but he testified, and no one disputes him, that "I was sitting there and I had my hands here. I was sitting here, and papa had his hand right in under my hand. He had between these two fingers. He had the throttle. He could operate the throttle. He had it right between his fingers there." He also testifies that his father was guiding the car, and that it was not possible for him (the little boy) sitting in the automobile seat to reach the pedals. No one says it was.

The defendant testified that, when he saw the team after turning the corner, he blew the whistle several times, but "I presumed that they would (hear the whistle), and I took the right side, which placed me on the right between Whitmore's team and the fence. I proceeded along that line, thinking they would give me their right of the road, and, as we proceeded, it put me in this 'V' shape. The gutter I seen was deep. The dirt was washed in from the culvert below, and I thought I could get in the gutter, but, when I got to this gate, the ditch became immediately abrupt, I having pulled to the right, and about that time I was about even with the team, my machine was about even with the team. I either had to pull in to that gate or that ditch, or put the team over on the other side of the road. It was the only thing I could do in the emergency, and I did it. * * * Q. State whether or not you were driving the car or Leland driving the car. A. I had my hand on the lever and a hand on the throttle. My left foot was on the pedal. My left hand was reached under the throttle. I have a device which is about the size of that pencil, beneath the wheel. I had the mechanic's pin that right close to the wheel so that I could reach it, and govern the throttle. My throttle is pinned so I can drive it when Leland is at the wheel. He had both hands on the wheel at the time." He then testified that his hand was under the boy's hand, and that he had hold of the throttle. "Q. Tell the jury whether or not, in that condition, you can control that car? A. Yes, sir. Q. Tell the jury whether or not you were controlling that car? A. Yes, sir; I was." He then testified that the ditch became suddenly abrupt, and that he had to make a turn or go into the ditch, and that the ditch was four feet deep.

The evidence clearly seems to show that whatever was done towards the driving and control of the automobile was done by the father and not by his little son, and therefore that the defendant is not guilty of permitting his son to do the three several acts alleged to be done in the three counts of the information. The evidence is insufficient to sustain the judgment. This court held in *Garfield v. Hodges & Baldwin*, 90 Neb. 122, 132 N. W. 923, that where "a ver-

dict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record will be set aside and a new trial awarded."

It may be urged that the automobile turned into the road after passing the team less than 30 feet in advance of it, and therefore that the defendant is guilty of that offense in any event. It should be remembered, however, that there is no charge that the defendant did it. The charge is that he permitted his infant son to do it, and the evidence does not support that charge. The thing forbidden by the statute (Ann. St. 1911, § 6234) is permitting "a person under sixteen years of age or an intoxicated person to operate a motor vehicle." The charge in the third count is "the said Levi L. Coryell, then and there being, did wilfully and unlawfully permit his infant son, Leland Coryell, a boy under 16 years of age, to drive said automobile past the said team of horses and said spring wagon," and "wilfully and unlawfully return to the center of the road within less than 30 feet of said team of horses and said spring wagon." Seemingly the charge alleges a violation of sections 6234, 6236, Ann. St. 1911. The former relates to the permitting of one under 16 to drive, and the latter to the manner of driving. As the driving is alleged to have been done by the little boy, it is fairly to be presumed that the returning to the center of the road was intended to be alleged as done by the little boy, all under the permission of his father. If so, and it appears from the evidence that the little boy only had his hands upon the "steering wheel," and could not reach and did not touch the pedals, and that he had nothing to do with the throttle, but that the father had hold of the "steering wheel" and could and did reach the pedals, and also had his hand upon the throttle and that he actually controlled the car, and what the little boy did was only a make-believe, a sort of play or pretense, something not uncommon in the lives of children who seek to imitate the actions of their parents and others, then there is no evidence to sustain the verdict and judgment and the same should not be allowed to stand.

The most that any of the witnesses for the state testified to in the case is that they saw Leland's hands on the "steering wheel." They did not all testify to that. No one of them testified to seeing his feet on the pedals or his fingers on the throttle. It would seem not to be possible to operate such an automobile as this one was without doing these things. In order to operate such a car, it would seem to be necessary to have the feet on the pedals and to have hold of the throttle, and the little boy was too small, as the testimony shows, to reach the pedals with his feet while sitting in the seat.

There is no dispute about the fact that the defendant was in the car at the time and sitting with his little son. Some of the witnesses were of the opinion that the defendant did not have his hand on the "steering wheel," while others said that they did not know, but they did not testify to the other necessary things to show that the defendant was not operating the machine. In operating a motor vehicle, it would seem that the person who does so has charge of the vehicle and is directing its course without the interference or control of another person. The defendant did not place his little son in charge of the car and start him out on the road. It is such an act as that that the statute is calculated to prohibit. It could not have been contemplated that a man should be punished who was driving his car because his little boy placed his hands on the "steering wheel."

The charge in the first count is that the defendant permitted his infant son to operate his automobile on the public highway. The mere operation of the machine is itself the offense. The fact alleged that the defendant permitted his infant son to drive past a team without using reasonable care does not state something that is forbidden by law except as the defendant is forbidden to permit his infant son to operate a motor vehicle. There is no penalty to be inflicted upon the defendant because he permits his infant son to drive past a team without using reasonable care. Driving past a team without using reasonable care might be charged as an offense against the defendant, but the defendant is not forbidden to allow his son to do so except as he is forbidden to allow his son, if he be less than 16 years old, to operate his automobile. The second count, therefore, charges nothing to be tried if the first count is disposed of. The third count attempts to charge, and does charge, that the defendant permitted his son to drive past a team without using reasonable care and to return to the road less than 30 feet in advance of said team. That act is not forbidden so far as it might prohibit the father from permitting his son to drive past a team and to return to the road less than 30 feet in advance of the team. It is only forbidden under the general provision that the father cannot permit his son to operate his automobile on the public highway. The things attempted to be charged in the second and third counts are not offenses. The thing that the father is forbidden to do is to permit his infant son to "operate a motor vehicle." Whether the infant son drives straight in the road, whether he drives past a team, and whether he returns to the road less than 30 feet in advance of the team are all matters along the same line and immaterial, except as they show, if proven, that the defendant permitted his son to operate a motor vehicle. If the fa-

ther permitted his son to do the things attempted to be alleged in the second and third counts, then he is punishable because he permitted the son to operate the automobile, and not because of what the son did in going around the team or in returning to the road. It is the permission given to the son to operate the machine that makes the offense. It is not the way that the son operates the machine that makes the offense, but the mere fact that he does operate it.

Instructions 3 and 5 are possibly misleading upon the ground that the charges contained in the second and third counts do not justify them. As no complaint is made of these instructions, we will not consider them. The evidence is not sufficient to sustain the verdict. The judgment is reversed.

Reversed and remanded.

REESE, C. J., and ROSE, J., dissent upon the ground that the evidence was conflicting, and the verdict of the jury should stand.

MAJORS v. MAJORS. (No. 16,806.)

(Supreme Court of Nebraska. Nov. 18, 1912.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§ 68*)—INTERESTS IN REAL PROPERTY—PARTNERSHIP PROPERTY.

An agreement of settlement between partners, or between one partner and the representatives of a deceased partner, by which a division is made of all or a part of the partnership property, some of which is real estate, is not within the statute providing that no estate or interest in land shall be created, granted, assigned, surrendered, or declared, unless by operation of law, "or by a deed or conveyance in writing." Comp. St. 1911, c. 32, § 3. Such agreement between partners may be oral, if upon sufficient consideration.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 109, 110; Dec. Dig. § 68*.]

2. BROKERS (§ 43*)—EMPLOYMENT—NECESSITY FOR WRITING.

Such agreement between partners providing that one of the partners may find a purchaser for the land, and have the proceeds above a certain amount, is not within section 74, c. 73, Comp. St. 1911, relating to contracts with agents or brokers to sell lands.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 44; Dec. Dig. § 43*.]

3. COMPROMISE AND SETTLEMENT (§ 6*)—CONSIDERATION—FOUNDATION FOR CLAIM.

In an action upon an alleged settlement or compromise, the plaintiff must allege that there was some reasonable foundation for his claim, and that it was made in good faith; otherwise there is no consideration for the alleged agreement upon compromise.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 35-50; Dec. Dig. § 6*.]

4. COMPROMISE AND SETTLEMENT (§ 22*)—ACTIONS—PLEADING.

A petition in an action to recover upon an alleged contract of settlement or compromise must show some consideration for the

contract, or it will be subject to a general demurrer.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. § 90; Dec. Dig. § 22*.]

Appeal from District Court, Lancaster County; Stewart, Judge.

Action by Nettie Majors against Thomas J. Majors. From a judgment for defendant, plaintiff appeals. Affirmed.

Geo. A. Adams, of Lincoln, for appellant. T. F. Hamer, of Kearney, and F. M. Tyrrell, of Lincoln, for appellee.

SEDGWICK, J. This case was decided in the district court for Lancaster county upon a general demurrer to the plaintiff's petition, and the plaintiff has appealed.

The petition alleged that the defendant and the plaintiff's husband were formerly in partnership in the mercantile business, and that they sold and disposed of the business and took as part consideration therefor a tract of land located in Box Butte county, the title being taken in the name of the defendant, and that soon after that the plaintiff's husband died, and that the defendant took possession of the land "to wind up said business of said partnership, pay the obligations, if there were any then unpaid, reduce the assets including the above described real estate, to money, and adjust and settle up said partnership; that the matter ran along from that time until about the months of February or March, 1907 (about 11 years), the said defendant being in possession of said real estate all the time and receiving the rents, profits, and proceeds thereof, and all the time claiming he was adjusting said partnership matters;" that the plaintiff then demanded a settlement of the partnership affairs, and that the defendant account to her for herself and her children "for the interest of her said deceased husband in and to said partnership property"; that a controversy existed and had existed for some time as to the interest of the plaintiff and her children in the real estate, the plaintiff insisting for herself and children that they had an interest in the real estate, and the defendant insisting that they had no interest therein, and that it was agreed between the parties, the plaintiff and the defendant, "that this plaintiff should proceed to sell said real estate, and out of the sale of the same the said defendant was to have \$8,000, and all over and above said sum of \$8,000 was to be received by this plaintiff for the benefit of herself and the said children;" that the plaintiff found a purchaser who was ready and able and willing and offered to give \$12,000 for the real estate, which the plaintiff agreed to take, and notified the defendant, but he "refused to comply with the terms of said contract, but, upon the contrary, utterly failed and completely repudiated the same and declined

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to execute a deed to said real estate"; that there were seven children of the plaintiff and her husband, who were minors at the time of her husband's death. The allegation that the children were minors at the time of the husband's death was not, of course, an allegation that they were minors at the time of making the alleged contract, which was 11 years later, but this perhaps is not a material consideration.

[1] The defendant urges that an oral contract of this kind would not be valid because of the statute of frauds. There does not seem to be any merit in this objection because no estate or interest in the land was created or attempted to be created, granted, assigned, or surrendered or declared by the alleged contract.

[2] The alleged contract would not be within the statute providing that contracts of agency for the sale of real estate must be in writing and signed by the parties, since this was not a contract of agency, but was rather an attempt to adjust matters arising out of the relation of partnership.

[3, 4] We think, however, the petition fails to state a cause of action for other reasons. It was, of course, the duty of the surviving partner to take possession of the land, to wind up the business of the partnership, pay its obligations, to reduce the assets including the land, into money, and adjust and settle up the partnership business, as it is alleged in the petition he was at all times attempting to do. The plaintiff's husband, if living, would have no legal claim to the proceeds of the land until all this had been done. If her husband was living, he would have had such an interest in the business as would without doubt afford a basis for a contract of settlement between himself and the defendant, adjusting their mutual rights of the assets of the partnership, and it may be that this interest would be sufficient to afford a basis for a contract of the nature of the one alleged. The plaintiff, however, did not succeed directly to the rights of her husband in the assets of the partnership, since for the purpose of settlement between the parties such assets are regarded as personal property. She would have an interest in the proceeds of the land provided that, after closing the partnership business, the assets of the partnership were more than sufficient to adjust the claims against the partnership, and provided, further, that the share of the estate of the deceased partner therein was, together with the other property of the estate, more than sufficient to adjust the liabilities of the estate and pay the costs of administration. She had no legal title or claim to the assets of her husband's estate as they belonged to the administrator. She did not have any right of action against the defendant to settle or compromise. The defendant was still attempting to adjust the

partnership business, and an action for an accounting and adjusting of the partner's interest could only be maintained by the administrator of the estate of the deceased partner. If she had any interest whatever in this land, it was contingent, first, upon the value of the assets of the partnership, and, second, upon the solvency of her husband's estate. She does not allege the facts in regard to either, from which it might be found that she had any probable interest. It is not necessary to determine in this case whether the plaintiff could have alleged a cause of action of the nature here attempted. It is sufficient for the determination of this case that she has not alleged any value of the assets of the partnership, nor the liabilities thereof, nor has she alleged any settlement of the estate of her deceased husband, nor the amount of the assets or liabilities of that estate. She has not alleged in general terms that she had any title or interest, legal, equitable, or contingent, in this land. There was therefore no substantial interest or claim to compromise or settle, and consequently no consideration for the alleged agreement. In the absence of all these allegations, she has failed to allege that she had any legal interest in this land to form any basis of settlement, and the demurrer to the petition was rightly sustained.

The judgment of the district court is affirmed.

HAMER, J., not sitting.

NATIONAL ENGRAVING CO. v. QUEEN CITY LAUNDRY. (No. 16,818.)

(Supreme Court of Nebraska. Nov. 13, 1912.)

(Syllabus by the Court.)

1. TRIAL (§ 404*)—FINDINGS BY COURT—EFFECT AS VERDICT.

Where an action at law is tried in the district court without a jury, findings of fact have the same force as a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. § 404.*]

2. EVIDENCE (§ 442*)—PAROL EVIDENCE—CONTRACTS.

Where a written order for advertising matter shows on its face that it does not contain the entire contract of the parties, or a description of such matter, oral warranties made by an agent and the use of a sample exhibited by him in procuring the order may, in a proper case, be shown by parol, though the order contains a provision that the principal will not be bound by terms not embodied in the written instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1897; Dec. Dig. § 442.*]

3. SALES (§ 166*)—SALE BY SAMPLE—REFUSAL TO ACCEPT.

Independently of express contract, a purchaser by sample may refuse to receive the goods, when offered, if they fail to correspond to the sample.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 391-400, 402; Dec. Dig. § 166.*]

Appeal from District Court, Adams County; Dungan, Judge.

Action by the National Engraving Company against the Queen City Laundry. Judgment for defendant, and plaintiff appeals. Affirmed.

J. W. James, of Hastings, for appellant. Tibbets, Morey & Fuller, of Hastings, for appellee.

ROSE, J. The amount in controversy is \$41.99. At 154 Nassau street, New York, plaintiff was engaged in supplying advertising matter to merchants and others, while defendant was conducting a laundry at Hastings. This is an action to recover the agreed price of advertising matter alleged to have been furnished by plaintiff to defendant under the following contract: "It is agreed that the National Engraving Company will not be held responsible for any provisions not embodied in writing herein, and that this contract cannot be canceled without the written consent of the said company. National Engraving Company, 154 Nassau Street, New York: You are hereby authorized to furnish the undersigned one cut and reading matter weekly for our exclusive use in advertising the laundry business in the city of Hastings, State of Neb. only, for a term of not less than one year from commencement of service, and until notified in writing to discontinue same, for which we agree to pay to your order at New York the sum of seventy-five cents and postage for each cut at the end of each calendar month. Interchangeable base will be furnished free to subscriber. Dated Aug. 27, 1907. Name: Queen City Laundry. Address: R. L. Sabin, Mgr." Plaintiff's claim is composed of 53 weekly items, beginning August 30, 1907, and ending August 29, 1908, each item being: "One cut, reading matter and postage, @ 79¢," with 12 cents added to the total for extra postage. The claim was resisted on the ground that an agent for plaintiff, in procuring the order represented and warranted the advertising matter would be the work of highly skilled artists; that it would be first class and well adapted to defendant's business; that the cuts offered were cheap and inferior in quality, and did not in any respect comply with the agent's representations and warranties; that the agent in procuring the order displayed a sample of the cuts to be sent to defendant; that the work offered was inferior to the sample; that defendant canceled the order after two or three cuts had been received, returned them, and thereafter refused to accept any more. The action was commenced in the county court and dismissed. Upon appeal to the district court the case was tried without a jury. There the court found in favor of defendant on all the issues, and from a judgment of dismissal plaintiff has appealed to this court.

[1] The findings below have the same force

as a verdict. Plaintiff argues, however, that the evidence is insufficient to sustain the judgment. There is testimony tending to show that, promptly after the first cut was received, defendant wrote a letter to plaintiff, and therein objected to the character of the work and to the advertising matter furnished, intimating that it was not adapted to defendant's business, and saying, "If this is a sample of the class of cuts you are turning out, you may discontinue sending me advertising matter;" that in a reply plaintiff sent another cut, recognized the right of defendant to make objections to the advertising matter furnished, and said, "We are always ready to correct any errors on our part and, in cases where the cuts that we send are not suitable, we are always willing to send new one in its place without additional charge;" that, after receiving three or four of the cuts, defendant returned them, and by letter canceled the order, and thereafter refused to accept any more; that those afterward sent were returned by the post office authorities; that plaintiff's agent in procuring the order made the representations and warranties pleaded in the answer; that the cuts offered were not made by skilled artists but were cheap and inferior in character; that the advertising matter was not adapted to defendant's business; that all the work offered and all the cuts tendered were inferior to the sample and not suitable for the purposes for which they were intended. While the testimony adduced by defendant to establish the defenses pleaded is rather weak, and while the qualifications of an expert who testified to the character of the cuts and to the unsuitability of the advertising matter rejected by defendant are not very satisfactory, the judgment below is not without support in the evidence.

[2] To avoid the consequence of the trial court's findings, plaintiff argues that the testimony relating to the agent's warranties and sample should be disregarded, because defendant was bound by the following provision of the order: "It is agreed that the National Engraving Company will not be held responsible for any provisions not embodied in writing herein, and that this contract cannot be canceled without the written consent of the said company." The point argued does not seem to be well taken, when the order itself and the interpretation of the parties to it are considered. The order shows on its face that the cut and the reading matter are not described in the contract. What defendant ordered was "one cut and reading matter weekly for our exclusive use in advertising the laundry business" in Hastings. The sample used in procuring the order is not mentioned in the contract. In replying to the letter in which the first advertising matter was condemned by defendant as unfit for that purpose, plaintiff wrote: "We are sending you to-day a new cut and

trust that same will be to your liking. At any time that the cuts don't suit you, write to us and you will always find us ready to suit you in your demand. We can assure you, that we shall do our utmost to serve you with the best during the life of the contract." The record, therefore, shows both parties understood that all of the terms of the contract were not inserted in the written instrument. Plaintiff accepted it, and sued for the entire sum due for full performance. The sample shown by the agent and the warranties made by him were instrumentalities employed in procuring the order, and are, under the circumstances of this case, binding on the principal, notwithstanding the attempt to confine its agreement to the terms of the written instrument. *Esterly Harvesting Machine Co. v. Frolkey*, 34 Neb. 110, 51 N. W. 594.

[3] It is a well-established rule that, independently of express contract, a purchaser by sample may refuse to receive the goods when offered, if they fail to correspond to the sample. *Gill v. Kaufman*, 16 Kan. 571; *Keeler v. Paulus Mfg. Co.*, 43 Tex. Civ. App. 555, 96 S. W. 1097; *Washington Hydraulic Press Brick Co. v. Sinnott* (Sup.) 92 N. Y. Supp. 504. For the reasons given, the judgment will not be set aside for insufficiency of the evidence.

Affirmed.

KINNEY v. CHICAGO, B. & Q. R. CO.
(No. 16,812.)

(Supreme Court of Nebraska. Nov. 13, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1002*)—REVIEW—CONFLICTING EVIDENCE.

Where the evidence is conflicting as to whether a cow that was killed by a train got on the right of way through a gate negligently left open by plaintiff or by passing through a defective right of way fence and there is sufficient evidence to support the verdict, this court will not interfere, even though it might reach a different conclusion upon the same evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. TRIAL (§ 296*)—INSTRUCTIONS—CURE OF ERROR BY OTHER INSTRUCTION.

A case will not be reversed on account of the giving of an instruction which is not based upon the evidence, where the jury has been properly instructed on the point at issue at the complainant's request, and it is not apparent that prejudice has resulted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 706-713, 715, 716, 718; Dec. Dig. § 296.*]

3. RAILROADS (§ 440*)—INJURIES TO STOCK—ANSWER—ISSUES.

An answer which admits that a railway company "is now operating" the railroad, and does not specifically deny that it was the owner of or was operating the railroad at the time of the accident, is not sufficient to raise the is-

sue of its ownership of or operation of the railroad at that time.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1570-1574; Dec. Dig. § 440.*]

4. APPEAL AND ERROR (§ 959*)—REVIEW—DISCRETION OF COURT.

Whether defendant shall be permitted to amend an answer after a trial has been begun is a matter within the discretion of the district court, and, unless abuse of such discretion is shown, the action of that court will be upheld.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825-3833; Dec. Dig. § 959.*]

Appeal from District Court, Gage County; Pemberton, Judge.

Action by Samuel A. Kinney against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hazlett & Jack, of Beatrice, and Byron Clark, of Omaha, for appellant. A. D. McCandless and Samuel Rinaker, both of Beatrice, for appellee.

LETTON, J. Plaintiff recovered a verdict and judgment against the defendant upon four causes of action; the first being for the wrongful killing of a cow upon the railroad track of defendant, the others being for three separate fires in the orchard of plaintiff which it is alleged were caused by the negligence of defendant in operating its trains.

[1] 1. It is contended that there is not sufficient evidence to sustain the verdict as to the first cause of action. A large number of plaintiff's cattle were on the right of way, but only one cow was killed by the train. The evidence is conflicting as to the condition of the railroad fence. On behalf of plaintiff, there is testimony that the fence was in very bad condition; that at different places the wires were off the posts for a distance of over two rods; that in another place the highest wire was only 22 inches from the ground. At other places the wires were buried in the dirt, and at still another place the ground was washed out underneath the fence, so that a person might walk beneath. Plaintiff testifies that he examined the fence on the day the cow was killed, and saw many fresh tracks where cattle had passed over it, when the wire was down, on to the right of way.

On the part of the defendant there is testimony that the fence was in fairly good condition, although cattle could walk through at the place where the soil was washed out, but that there were no tracks there or at other points where the fence was defective. There is also proof that a gate in the fence was left open by plaintiff or his man. There is a decided conflict as to whether or not there were tracks showing that the cattle had passed through the dilapidated fence or through the gate in order to reach the right of way.

The evidence being in this condition, the question of fact was for the jury to decide.

[2] Complaint is made as to the giving and refusal of certain instructions relating to this cause of action. After stating to the jury that the law of this state required railroads to fence their tracks, and the respective claims of the plaintiff and defendant as to the manner that the cow got on the right of way, the court properly instructed the jury that, if they found she passed through the fence, the defendant was liable, but, if they believed she passed through the gate, then they should find for the defendant, unless they found that the plaintiff was entitled to recover by reason of the negligence of the engineer. He also told the jury in instruction No. 5 "that it is the duty of an engineer in charge of a train to exercise such a lookout as is consistent with his other duties to ascertain the presence of obstructions upon the track, and in this case, if such a precaution would have revealed the presence of the cow on the track in time to have avoided her injury by the use of ordinary care, the railroad company was liable for injuries inflicted upon her, although she was not actually seen until too late to avoid striking her." It is said that this instruction is erroneous because not applicable to any evidence in the case, that the evidence showed the cow came on the track from the borrow pit just before she was struck. The court, at defendant's request, fully instructed that, if they believed this to be true, there was no negligence in the handling of the train which would enable plaintiff to recover. We think no prejudice could be suffered under this condition, of facts.

Complaint is made of the giving of instruction No. 4, for the reason that by it the jury are not required to base their findings upon the evidence in the case. We think in view of the other instructions which were given by the court, some of them at defendant's request, in one of which the jury were expressly told they "should look wholly to the evidence for the facts" and in others they were told that if they "found from the evidence," etc., this complaint is without merit.

Considering the entire testimony on this cause of action, the issue seems to have been fairly submitted, and we find no error therein prejudicial to defendant.

[3] Complaint is made that the court erred in failing to submit to the jury an issue as to whether defendant in this case, the Chicago, Burlington & Quincy Railroad Company, or the Chicago, Burlington & Quincy Railway Company, was the owner of or was operating the railroad at the time stated in the petition. We think the pleadings justify the court in ignoring this so-called issue. The answer admits that the defendant is "now operating" the railroad. It pleads that the death of the cow was caused by plaintiff's negligence, and contains a general denial as

to all facts not "herein specifically admitted to be true." No specific denial of defendant's ownership of the road at the time of the accident is to be found in the answer. We think the admission that it is now operating the road carries with it in the absence of a specific denial the presumption that it was operating the road at the time the injuries were suffered.

[4] It is also assigned that the court erred in refusing to permit an amendment to be made to the answer alleging negligence on the part of plaintiff in permitting weeds to stand and rubbish to accumulate in the orchard. This amendment was proposed after the jury were impaneled for the trial. The original answer was filed on November 15, 1909. The amendment was tendered on March 3, 1910. The plaintiff's farm seems to be distant at least 15 miles from the place of trial, and any additional witnesses made necessary by the amendment would have to be summoned from that distance. Even if this amendment set up a new defense, no reason was shown why it was not tendered before the time of the trial. At such a time and under all the circumstances we think the district court was justified in refusing to permit the amendment. Some of the witnesses for the defense testify that a number of the trees which had been damaged by the fire scorching or burning the lower limbs could be restored by pruning the injured limbs. Defendant requested an instruction that the measure of damages as to such trees "is the value of the labor of trimming off such lower limbs, as to which there is no evidence except that it would be nominal, so that for such trees you could in no event award plaintiff anything but nominal damages." We think this instruction was properly refused.

It was proper for the jury to consider this testimony in arriving at their verdict as tending to mitigate the damages but we think the tendered instruction erroneous. The jury was instructed that the measure of plaintiff's damage was the difference in value of the trees injured or destroyed as they stood immediately before the fire and immediately after the fire, and this is the true rule as repeatedly decided by this court.

We find no prejudicial error in the record, and the judgment of the district court is affirmed.

WALLACE v. COX et al. (No. 17,068.)
(Supreme Court of Nebraska. Nov. 13, 1912.)

(Syllabus by the Court.)

1. REPLEVIN (§ 110*)—JUDGMENT FOR DEFENDANT—RETURN OF PROPERTY.

Where, in an action of replevin, the property in dispute is delivered to the plaintiff upon the execution of a proper bond, and the trial results in a judgment in favor of the defendant and for a return of the property to him, it is the duty of the plaintiff to return the pos-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

session of the replevied property to the defendant within a reasonable time in substantially the same condition as when taken, without deterioration in value.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 430-436; Dec. Dig. § 110.*]

2. REPLEVIN (§§ 120, 124*) — JUDGMENT FOR DEFENDANT—REDELIVERY—REFUSAL TO ACCEPT—DAMAGES.

In case the replevied property is not redelivered or tendered back within a reasonable time, and when tendered is greatly diminished in value by use while in the possession of plaintiff, the defendant may refuse to accept or receive the property and bring suit on the replevin bond. The measure of damages will be the value of the replevied property as found and adjudged in the replevin action, plus the costs therein, with interest.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 479, 487-497; Dec. Dig. §§ 120, 124.*]

Sedgwick, J., dissenting.

Appeal from District Court, Webster County; Dungan, Judge.

Action by William E. Wallace against A. W. Cox and others. Judgment for plaintiff, and defendants appeal. Affirmed on conditions.

Bernard McNeny and E. U. Overman, both of Red Cloud, for appellants. L. H. Blackledge, of Red Cloud, for appellee.

REESE, C. J. This action was instituted in the district court for Webster county. It is alleged in the petition that on the 17th day of July, 1909, the Clark Implement Company, a corporation, commenced an action in that court against the plaintiff to recover the possession of certain specific personal property, which is shown to be a threshing machine and traction engine; that an order of delivery was issued, the property of the value of \$2,000 taken, when a replevin bond in the sum of \$4,000 was duly executed by the plaintiff in the action; that upon the trial of said cause such proceedings were had as resulted in a finding in favor of the plaintiff in this action, assessing his damages at the sum of \$404.50; that the right of property and of possession were in this plaintiff, which was of the value of \$2,000; that judgment was rendered in favor of this plaintiff for the said sum of \$404.50, with costs taxed at \$121.60, and for a return of the property or in lieu of such return the value thereof, to wit, \$2,000; that "defendant has not returned, nor offered to return, said property in the same or substantially the same condition in which it was taken, and no part of said judgment has been paid"; that "an execution was issued * * * on said judgment in favor of this plaintiff, which was returned wholly unsatisfied." The action is founded on the replevin bond to recover the sum of \$2,526.10, being the value of the property, damages, interest, and the costs of the former suit.

The defendants Cox and Boyd answered,

admitting the averments of the petition as to the prior suit and the judgment rendered therein, but allege that, after the termination of said action, the property involved in the suit was all returned to plaintiff, and in better condition than when taken under the writ of replevin. All unadmitted allegations are denied. Defendant, the Clark Implement Company, filed its separate answer, but which is substantially the same as that filed by Cox and Boyd. The replies are general denials. The cause was tried to a jury; the result being a verdict and judgment in favor of plaintiff for the sum of \$2,686.33. A motion for a new trial having been made, overruled, and judgment entered, defendants appeal.

[1] Some objection is made to the above-quoted part of the petition, and it is contended that the use of the word "substantially" so militates against the other averments as to render them ineffectual as an allegation that the property had not been returned. As we view the case, the objection is not of much importance, as there is no contention that the property was not returned. While it is admitted by plaintiff that the property was returned, it is insisted that it was not returned in the same condition as when taken from him under the writ, and that he refused to accept it. The theory upon which the case was tried by plaintiff was that the property was not returned within a reasonable time, and, when it was returned, it was in so badly damaged condition as to relieve plaintiff from the duty of accepting it, and gave him the option of rejecting it and suing upon the bond for the value as found and adjudged on the trial of the replevin suit. It is contended by defendants that plaintiff has no option, but must receive the property, and could then sue for the difference in its value between what it was when taken and at the time of the return. To the extent of submitting to the jury the question of the condition of the property when returned, the court adopted plaintiff's view of the law. If the court was right in this, the language of the petition to which objection is made becomes unimportant.

The trial of the replevin case was had in November, 1909, the final judgment being rendered on the 1st day of December of that year. The action was commenced in July, 1909, the replevin bond bearing date of the 19th, at which time the property was delivered to defendant. Defendant returned the property to plaintiff on or about the 25th of February, 1910, and, when examined by plaintiff and others called by him for that purpose, he gave to defendants a notice in writing that he would not accept it. This notice is dated the 26th of February, 1910, and refers to the tender of return having been made the day before. While there is a sharp conflict in the evidence as to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

condition of both the separator and engine at the time the return was tendered to plaintiff, as compared with their condition when taken under the order of replevin, there is sufficient to sustain the finding of the jury that both were very materially injured by wear and breakage, and that their value was reduced probably one-half by reason of their impaired condition. So far as is shown by the record, they had been in the possession of defendants from the 19th day of July, 1909, until the 25th day of February, 1910, and there seems to be no doubt that they had been put to use during the threshing season while in defendants' possession.

[2] It is fundamental that, where a judgment in an action of replevin is against the plaintiff, it is his duty to return the property to the defendant within a reasonable time in substantially as good condition as when taken, and this would satisfy the judgment in so far as the return had been ordered if the property was accepted by the defendant, but it would not cancel the money judgment for damages, nor would it deprive the defendant of his action for depreciation of the value of the property while out of his possession. While this is all true, yet the duty of returning the property within a reasonable time and in substantially an unimpaired condition should be performed, and it does not lie with the plaintiff in the action after long delay to return property badly damaged by use or otherwise, compel the defendant to accept it, and then litigate the question of damages in another action. Our statute does not provide that the property shall be returned in the same condition as when taken, as in some states, but the holding is practically uniform that such a statute is not necessary, as we have in effect held. Some of the authorities sustaining these views we here cite, but without quoting from any. *Eickhoff v. Eikenbary*, 52 Neb. 332, 72 N. W. 308; *Berry v. Hoeffner*, 56 Me. 170; *Parker v. Simonds*, 8 Metc. (Mass.) 205; *Capital Lumbering Co. v. Learned*, 36 Or. 544, 59 Pac. 454, 78 Am. St. Rep. 792; *Childs v. Wilkinson*, 15 Tex. Civ. App. 687, 40 S. W. 749; *Fair v. Citizens' State Bank*, 69 Kan. 353, 76 Pac. 847, 105 Am. St. Rep. 168, 2 Ann. Cas. 960; *Douglass v. Douglass*, 21 Wall. 98, 22 L. Ed. 479; *Pittsburgh Nat. Bank of Commerce v. Hall*, 107 Pa. 583; 34 Cyc. 1551, 1552; *Cobbey, Replevin* (2d Ed.) § 1182; *Wells, Replevin* (2d Ed.) § 422; *Shinn, Replevin*, § 679. In some of the cases cited, and in the citations from *Wells* and *Shinn*, it is said that the party returning may do so, even if the property is depreciated in value, and leave the one to whom the return is made to his action on the bond for the deficiency, but we apprehend that in order to secure this right if it may be so secured, the return must be had within a reasonable time, which would be soon after the judgment. In this case

the offered return could scarcely be said to be within a reasonable time.

Where the property is not returned, the plaintiff's measure of damages is its value when taken under the writ, with legal interest thereon from the date of the wrongful taking by the plaintiff in replevin, but, in that event, the successful defendant must be content with a recovery of the value at the time it was taken from him with legal interest to the time of the trial, and he can have nothing further in the way of damages.

In *Romberg v. Hughes*, 18 Neb. 579, 26 N. W. 351, it is said; the late Judge Maxwell writing the opinion of the court: "It is only in cases where a return of the property is had that the party to whom the property is returned is entitled to damages for the detention. The rule allowing the value of the use is peculiar to replevin, and grows out of the fact that the party to whom the property is awarded seeks to recover the property itself, and not its value. In such case, when the property is returned, the party to whom the return is made is entitled to the damages awarded for the detention. If, however, a verdict is rendered for the value of the property, the action in that regard being one for damages only, the measure of damages is the value of the property as proved, together with lawful interest thereon from the date of the unlawful taking." See, also, *Aultman, Miller & Co. v. Stichler*, 21 Neb. 72, 31 N. W. 241.

Since the jury in the replevin suit found the value of the property in dispute to be \$2,000, and upon which the judgment was rendered and the same was not appealed from, that must be the limit of plaintiff's recovery, with legal interest from the time the property was taken under the writ.

The judgment of the district court will therefore be reversed, and the cause remanded, unless the plaintiff within 60 days from the rendition of the order hereby made remits from the judgment the sum of \$404.50 as of the date of the judgment in this case. If such remittitur is filed, the judgment of the district court for the sum of \$2,121.60, with interest at 7 per cent. on \$2,000 from the 19th day of July, 1909, will be affirmed, but at the costs of the appellee. The effect of the affirmance of the judgment in this case, as modified, will be a satisfaction of the judgment of December 2, 1909.

SEDGWICK, J. (dissenting). This plaintiff refused to receive a return of the property replevined. That refusal is the cause of this lawsuit. Was he justified in law in so refusing? That is the question to be answered in the opinion.

1. I think the opinion construes the statute incorrectly, as hereinafter stated, but even as the law is stated in the opinion the petition and the evidence both failed to

make a case for the plaintiff because they did not allege or prove that there is any other or different damage to the property than that which the jury allowed in their verdict in the replevin action. The allegations of the petition in this regard are only: (a) That in the replevin action "judgment was rendered for the defendant in the sum of \$404.50 damages." (b) That the property was not returned "in the same, or substantially the same, condition in which it was taken." This clearly does not state a cause of action; that is, it does not state any reason for refusing a return of the property. The allegations clearly amount to saying that because of damages which the jury in the replevin action allowed the property was not in the same, or substantially the same, condition in which it was taken. This is as plain as though the petition had alleged that the defendant recovered \$404.50 damages, and therefore his property was not in the same condition as when it was taken. The evidence is substantially the same as the petition, and therefore there is no occasion for any liberal construction of the petition. The evidence and the rulings of the trial court show plainly that the court tried the case upon the incorrect theory that this plaintiff would be justified in refusing to receive a return of the property if he could show that the property was not in the same condition when it was returned as it was when it was replevined, without regard to the fact that he had been allowed \$404.50 because of the change in the condition of the property.

2. Section 191 of the Code provides that when the property replevined has been delivered to the plaintiff, and the jury finds for the defendant, "they shall assess such damages as they think right and proper for the defendant." Similar words, as to the damages to be allowed, are also found in section 190 of the Code. Section 191a of the Code, which was enacted in 1873, uses somewhat different phraseology, but there is no reason for supposing that the Legislature intended thereby to change the law in regard to the measure of damages. If the property replevined is delivered to the plaintiff and the plaintiff has damaged the property in any way while so in his possession, there seems to be no doubt that the defendant may upon the trial of the replevin action recover such damages. If the plaintiff has a judgment against him for a return of the property, he must pay the damages which the jury has awarded against him for injuries to the property while in his possession. If he fails to return the property at once and retains it and the property is damaged in his possession while he retains it after the judgment in replevin, a different question is presented which is not involved in this case. In this case the plaintiff retained the property from the time it was replevined

in July until the trial in the following December, and upon the trial the jury assessed damages against him in the sum of \$404.50. It is stated in the verdict that this is for the use of the property while in the possession of the defendant. The defendant in replevin, who is now the plaintiff in this action, is allowed to recover these damages, and also the value of the property as it was, after it had been so damaged, and this appears to be wholly upon the ground that the plaintiff in the replevin action returned the property in a damaged condition, so it appears that the property has been damaged; that the jury has fixed the amount of the damages. The plaintiff in replevin is compelled to pay it, and was required, and, of course, was allowed, to return the property as it was, after the damages were incurred which he is required to pay. The opinion says that, "while it is admitted by plaintiff that the property was returned, it is insisted that it was not returned in the same condition as when taken from him under the writ," but, if the property is damaged while the replevin action is pending and he recovers those damages in the replevin action, he cannot refuse to receive the property because of those damages. The opinion cites numerous authorities, some of which have no relation to the law point discussed in the opinion, and others are said in the opinion itself to hold a contrary doctrine. It fails to cite *Teel v. Miles*, 51 Neb. 542, 71 N. W. 296, and other decisions of this court which are flatly overruled by this opinion.

3. Again, it is said in the opinion that the petition alleged: "Defendant has not returned, nor offered to return, said property in the same or substantially the same condition in which it was taken." The allegation is subject to criticism for duplicity. It is neither a direct allegation that the property was not returned, nor is it a direct allegation that, when returned, it was not in the same condition as when it was taken, and, if it could be construed as an allegation that it was not in the same condition as when taken, that allegation would be wholly immaterial, since it is conceded by everybody and so found by the jury in the replevin action that after it was taken it was damaged in the sum of \$404.50, and that the plaintiff in the replevin action must pay that amount to the defendant therein and return the property as it was at the time of the trial in the replevin action. In the view of the law stated (I think incorrectly) in the opinion, it should be shown at least that the property was damaged more than the amount which the plaintiff in that action was required to pay him on account of the damage and should show that that damage was not included in the verdict of the jury in the replevin action:

4. It is said in the opinion that "the offered return could scarcely be said to be

within a reasonable time." There is no allegation in the petition that the return was unreasonably delayed, and there is no attempt in the evidence to sustain the action upon that ground. It is not mentioned in the brief. The judgment was entered in December, and the property was returned in the following February, less than two months. The defendant in this action testified that the roads were bad at that season of the year, and that it was returned as soon as the roads were passable. The plaintiff also testified that the property was returned as soon as the roads were good, and never at any time made any objection on account of the delay.

I think the judgment of the district court should be reversed.

INTERNATIONAL TEXT-BOOK CO. v. MARTIN. (No. 17,382.)

(Supreme Court of Nebraska. Nov. 13, 1912.)

(Syllabus by the Court.)

1. **FORMER OPINION ADHERED TO.**
Our former opinion, reported in 82 Neb. 403, 117 N. W. 994, re-examined, and adhered to.

2. **TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.**

Instruction of the trial court considered in the opinion held erroneous, in that it is not based upon any competent testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 598-612; Dec. Dig. § 252.*]

3. **CONTRACTS (§ 350*)—ACTIONS FOR BREACH—SUFFICIENCY OF EVIDENCE.**

Evidence examined and referred to in the opinion held insufficient to sustain the judgment.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1819-1823; Dec. Dig. § 350.*]

Appeal from District Court, Lancaster County; Frost, Judge.

Action by the International Text-Book Company against William H. Martin. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

Hall & Bishop, of Lincoln, and David C. Harrington, of Scranton, Pa., for appellant. McGraw & Wilke, of Lincoln, for appellee.

FAWCETT, J. This case is before us a second time. Our opinion upon the former hearing may be found in 82 Neb. 403, 117 N. W. 994. For a statement of the controversy reference is made to that opinion. It is sufficient, for the purpose of this opinion, to state that plaintiff conducts a correspondence school; that defendant entered into a contract with it to take its course of instruction in electrical engineering, for which he was to pay \$78 in monthly payments of \$2, less 10 per cent. and plus \$1 for a transfer fee; that he continued his monthly payments until he had paid about \$50, when he ceased making such payments, and subsequently no-

tified the agent of plaintiff that he did not intend to carry out the contract. The books and papers necessary to commence his studies were sent to him by plaintiff, and we gather from his testimony that they are still in the box in which they were shipped to him. However that may be, he never entered upon the studies.

[1] Upon the former hearing we held that the district court erred in instructing the jury that, if plaintiff was entitled to a verdict, the measure of its recovery would be the loss of its profit on its contract, plus the value of the services it had rendered defendant. The reason given for our holding was: "It will be observed that plaintiff has not been in default in any particular in performing, so far as defendant would permit it to perform, the contract; that its undertaking is to continue its course of instruction until it has educated defendant to such a degree of proficiency as to entitle him to a diploma. No one can logically establish the period during which its teachers must send out questions and correct answers given by defendant in response thereto. The evidence indicates that plaintiff employs nearly 400 teachers, and the addition or loss of one student would hardly increase or diminish plaintiff's expense to any perceptible degree. The contract is entire, and, upon defendant's refusal to perform, and subsequent to the maturity of all of the monthly payments, plaintiff ought to recover the consideration defendant agreed to pay it, unless defendant can show some facts that reasonably and definitely tend to mitigate plaintiff's damages."

[2] Upon the last trial in the district court, evidently influenced by the last clause of the last sentence above quoted, the court again instructed the jury that, if they should find from the evidence that the cost to plaintiff of fulfilling its contract amounts to more than the balance due from defendant on his contract, then their verdict should be for the defendant. Construing the clause from our former opinion, to which attention has been directed, to mean what the trial court evidently construed it to mean, still this instruction should not have been given, for the reason that defendant utterly failed to show by any competent evidence any "facts that reasonably and definitely tend to mitigate plaintiff's damages."

[3] The only evidence offered upon that point is the testimony of Prof. Stout, of the University of Nebraska, and Mr. Penny, an assistant in the office of the state superintendent. Prof. Stout testified as follows: "Q. Do you know anything about the nature of the papers usually sent to correspondence schools * * * in teaching electrical engineering? A. I do not recall that I have ever seen any of the electrical engineering papers. Q. Do you know the usual papers

sent out to students, the class of paper, the style of questions asked, the amount of questions asked as a general thing in the papers sent out by correspondence to those students?

A. Taking the question on a general basis that way, I would say that I do not know. My observation is limited to comparatively few papers. Q. Do you know how long it takes a competent person to examine the answers sent to questions asked in one of those papers? A. For an unqualified answer I think I would have to answer no." On cross-examination, his testimony was: "I meet classes day after day in the higher branch of civil engineering. I have nothing to do with electrical engineering at all. My experience is based on the four-year course of instruction in engineering leading to the degree of civil engineering. I have had no experience at all in correspondence schools, never taught in one, and do not know about the expense of running such a school, except as I should estimate it in comparison with my work in the University. * * * I do not know anything about the International Text-Book Company so far as their equipment and number of instructors is concerned, nor anything about the cost with which they handle the students. I don't know anything about what it costs them to handle the students of electrical engineering. * * *

Q. The point is you don't know anything about their facilities for teaching electrical engineering? A. Putting the question that way, I think my answer would be, no, I don't. I do not know the number of instructors they have in the electrical engineering, what they pay, nor how many students an instructor can attend to." Mr. Penny, upon cross-examination, testified: "I do not know anything about the cost of instruction per student in electrical engineering at the International Text-Book Company School at Scranton, nor anything about the teaching or administrative force of that school, nor anything about the expense of operating that school per student in electrical engineering at any time. Where a school makes a business of teaching by correspondence and is organized on that basis, I have no experience as to the cost per student for electrical engineering." Counsel for plaintiff moved to strike out the testimony of these witnesses. His motion was overruled. In this ruling the district court erred. Their own testimony clearly shows their incompetency. Indeed, we are unable to see how any witness could have been found who could testify to any facts which, as stated by Judge Root, would "definitely tend to mitigate plaintiff's damages."

In 2 Sedgwick, Damages (9th Ed.) § 612, it is said: "In some cases the plaintiff may recover the whole contract price. A common case is that of a schoolmaster. If a scholar is removed from the school during the quarter,

the schoolmaster may recover the tuition fee for the whole quarter (citing cases). * * * The principle upon which these cases rest seems to be that the whole contract price is to be given, because it is impossible to show with the required certainty any pecuniary outlay which the plaintiff has been saved by the breach. The school must continue in session, with its entire corps of instructors, although a scholar is withdrawn. * * * If, in such a case, the plaintiff is put to the same expense in time and money as if he had fully performed, the contract price of the whole work is the measure of damages." This reasoning exactly fits the case at bar.

After having examined two records made by the parties in this case, we are unable to discover any theory upon which defendant can escape his liability to plaintiff for the balance due under his contract. The contract is entire. Plaintiff has at all times been ready, and is still ready and willing, to carry out its part. Defendant has shown no good reason why he should not do the same. The litigation should end. The judgment of the district court is therefore reversed, and the cause remanded, with directions to that court to enter judgment in favor of the plaintiff for \$22.50, with interest from the time of the commencement of the suit in that court.

Reversed and remanded.

MEISNER v. HILL et al. (No. 16,611.)
(Supreme Court of Nebraska. Nov. 13, 1912.)

(Syllabus by the Court.)

1. HOMESTEAD (§ 1*)—WHAT CONSTITUTES.

Our statute uses the term "homestead" in its commonly accepted meaning—the house and land where the family dwells.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. HOMESTEAD (§ 66*)—LIABILITY TO EXECUTION SALE.

The homestead is subjected to execution sale upon judgments against the holder of the title if its value exceeds \$2,000. This limitation is solely for the purpose of fixing the rights of the homestead claimants and the creditors, respectively.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 93, 96, 97; Dec. Dig. § 66.*]

3. HOMESTEAD (§ 141*)—RIGHTS OF SURVIVOR—DEATH OF OWNER.

If the legal title to the homestead is in the husband, and there are no claims of his creditors against it, upon his death the homestead vests in the widow for life, without regard to its value, and, in the absence of a will of the husband, his heirs take the homestead subject to the life estate of the widow. *Tyson v. Tyson*, 71 Neb. 438, 98 N. W. 1076, overruled.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 261-270; Dec. Dig. § 141.*]

(Additional Syllabus by Editorial Staff.)

4. "HOMESTEAD" (§ 1*)—DEFINITION.

"Homestead" is defined as the land and buildings occupied by the owner as a home for himself and family, and protected by law from

his creditors. *Bouvier's Law Dictionary* adopts the definition from the Supreme Court of New Hampshire: "The home place—the place where the home is. It is the home; the house and the adjoining land, where the head of the family dwells; the home farm."

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3327–3336; vol. 8, pp. 7679, 7680.]

Fawcett, Barnes, and Letton, JJ., dissenting.

Appeal from District Court, Buffalo County; Hostetler, Judge.

Action by Nellie F. Melsner against Dora Hill and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

E. C. Calkins, of Kearney, and H. F. Rose, of Omaha, for appellant. Fred W. Ashton, of Grand Island, and John J. Sullivan, of Omaha, for appellees.

SEDGWICK, J. George Melsner died intestate. The plaintiff is his widow and the defendants are his children by a former wife. Fourteen years before his death, he had selected the northwest quarter of a section of land in Buffalo county as his family homestead, which at the time of his death was worth about \$100 per acre, and built a residence thereon of about the value of \$9,000. At the time of his death, he owned other land adjoining the said quarter section, and other property of the value of more than a half million dollars. The plaintiff and the defendants by agreement made a division of the real estate, except the said quarter section of land. The plaintiff contended that she was entitled to the quarter section of land selected as their home and dwelling house and improvements thereon during her life. The defendants contended that, as the home property was of greater value than \$2,000, they were entitled to have it sold, and the proceeds in excess of \$2,000 divided among the heirs of the deceased. The parties then entered into an agreement to submit this question to the district court. The terms of their agreement were set out in writing at full length and signed by the parties, but afterwards for some reason the defendants declined to voluntarily submit the matter to the district court, insisting that the county court and not the district court had jurisdiction thereof, and the plaintiff then brought this action in the district court asking that court to determine that the said quarter section of land "descended to this plaintiff for and during the term of her natural life," and asking for general equitable relief. The answer admitted the facts as above stated, denied the jurisdiction of the district court, and alleged "that said property descended to these defendants subject to the homestead right of the plaintiff to the extent of \$2,000 for life." The court decreed that the plaintiff's interest in the

premises "be limited to the right to the use of \$2,000 for and during her natural life, the present value of which is the said sum of \$1,464, and that she be forever barred and restrained from claiming any further or greater homestead interest therein." The plaintiff appealed.

[1] Considering the importance and necessary discussion of the principal question involved, we conclude that the district court was the proper forum without discussion. This conclusion is justified we think by our former decisions. What is a "homestead"? Is it the present worth of the exemption which the statute allows against the claims of creditors, or is it the family home? Section 6 of the present Homestead Law (Comp. St. 1911, c. 36) requires a creditor when he seeks to subject a homestead to the payment of his claim to take an oath "that the value of the homestead exceeds the amount of the homestead exemption." This is a legislative declaration that the homestead is something more than, and different from, the \$2,000 exemption against the claims of creditors. This distinction plainly runs through all of our legislation. It is emphatically presented in substantially the same words in sections 8 and 11 of the act.

The first territorial Legislature adopted laws from the state of Iowa that fill about 100 pages of the published laws of that session. Among other subjects, it included the subject of execution and exemptions of property. After exempting public property from sale upon execution, section 478 (1 Complete Session Laws, p. 36) specifies certain articles of personal property exempt to private individuals, and section 479 provided: "If the debtor is the head of a family there is further exempt—his homestead as provided by law." That is all there is said about the homestead, and then follows specifications of other articles of personal property that shall be exempt. There was no attempt to define "homestead." The word was used in its general acceptation—the home of the family, the common-law castle of the citizen. The question of value did not enter into its description. The poor and the rich were treated alike. No one was to be deprived of his home. At the same session of the territorial Legislature an independent act was passed providing that the property of married women owned by them before marriage should be exempt from their husband's debts. 1 Complete Session Laws, p. 88. The next session of the territorial Legislature enacted a general law "respecting practice and proceedings in courts of justice." This law embraces the subject of executions and exemption from sale thereon. 1 Complete Session Laws, p. 341. It contains the same language in regard to the homestead as the former act, exempting it without regard to value. It was not necessary to define it.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Evidently the commonly accepted definition was adopted.

[4] "Homestead" was well defined at the common law. Webster's New International Dictionary defines it as "the land and buildings thereon occupied by the owner as a home for himself and his family, if any, and more or less protected by law from the claims of creditors." Bouvier's Law Dictionary adopts the definition from the supreme court of New Hampshire: "The home place—the place where the home is. It is the home; the house and the adjoining land, where the head of the family dwells; the home farm." If a tract of land is purchased by the parties for a home, and is transferred to one of them accordingly, and is by them in good faith occupied as their home residence, the land so transferred to them, and dwelling house and other improvements placed thereon, become their homestead. The Revised Statutes of 1836 treated the subject of homestead and exemption under that title. Section 525 provided: "A homestead, consisting of any quantity of land not exceeding 160 acres, and the dwelling house thereon and its appurtenances, to be selected by the owner thereof, and not included in any incorporated town, city or village, or, instead thereof, at the option of the owner, a quantity of contiguous land, not exceeding in amount two lots, being within an incorporated town, city or village, and the dwelling house thereon and its appurtenances, owned and occupied by any resident of the territory, being the head of a family, shall not be subject to attachment, levy or sale, upon execution or any other process issuing out of any court within this territory, so long as the same shall be owned and occupied by the debtor as such homestead," with the proviso that the "homestead mansion" and 20 acres of land whereon the mansion is situated, and not in any corporate town, city, or village shall be exempt, and land adjoining the mansion not exceeding \$500 should also be exempt, thus defining the homestead and exempting it absolutely. The next session of the Legislature amended the act so as to exempt the homestead "so long as the same shall be owned or occupied by the debtor as such homestead." 2 Complete Session Laws, p. 376. By Act of 1873 the homestead was made liable to sale upon the foreclosure of a mortgage "duly executed by the head or heads of the family." 2 Complete Session Laws, p. 711.

[2] By Act 1875 the exemption of the homestead was continued with a proviso that the homestead and appurtenances so exempted from forced sale "shall not exceed \$2,000 in value" (Laws 1875, p. 45, § 1), and providing in the sixth section of the act that if the homestead consists of a house and lot which will not bear division without manifest injury, and the "fair and reason-

able rent for the same" will be more than \$300 annually, such excess of rental must be paid by the debtor annually until the debt is paid. Section 19, Act Feb. 19, 1877, provides: "Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law." Laws 1877, p. 37. This is a very suggestive section. That part of the homestead which the creditor might take is clearly not considered the whole homestead, and, when one spouse dies, the other might occupy the whole homestead, unless the creditors interfere. This is the first provision for the descent of the homestead upon the death of the spouse who holds the legal title. It specifies clearly the homestead that so descends, and it is the "whole homestead," and not merely the value exempted from the claims of creditors. In 1879 our present statute was enacted. Laws 1879, p. 57. The first section of the act provides that a homestead not exceeding in value \$2,000, including the dwelling house in which the claimant resides, etc., shall be exempt from judgment liens and from execution or forced sale. This section does not attempt to define what a homestead shall be. Its object is to continue the exemption from the claims of creditors, and limit that exemption. Section 17 of the act continues the provision for the descent of the homestead. It enlarges the brief provision of section 19 of the previous act. The survivor now takes the title and possession for life, instead of the mere right of occupancy. The heirs of the deceased are declared to inherit the homestead subject to the life estate of the surviving spouse just as they would inherit other property of the deceased. The life estate of the surviving spouse and the inheritance of the heirs of the deceased are protected against "any debt or liability contracted by or existing against" the deceased spouse prior to his or her death, "except such as exists or has been created under the provisions of this chapter." This last clause, of course, refers to mechanic's lien, mortgages, and the claims of creditors. It is still the "whole homestead" that descends. Taxes, liens, mortgages, and claims of creditors, if they exist, may interfere with the enjoyment of it, but it is not measured by such claims. The distinction between the homestead and the amount of the homestead exemption is preserved all through the statute, though in some few instances the language is indefinite. This distinction as already stated is especially made manifest in our present statute. We could not consistently require a citizen to swear that the value of the homestead exceeds the homestead exemption if the two are identical. If the homestead in which the surviving spouse is to have a life estate is the present worth of the amount exempted from the claims of creditors, then

it could not be true that the homestead exceeds the exemption.

[3] The whole body of our legislation upon the subject of homestead so manifestly shows what it is intended shall be the home that descends to the surviving spouse for life that repetition may be justifiable in considering the course of the legislation. Our first legislation upon the subject recognized the existence and importance of the home as it was then identified, and preserved it for the family against all claims of creditors. The same action was taken in the next legislation upon the subject. The next legislation describes the homestead as the "homestead mansion" and 20 acres of land whereon the mansion is situated, together with adjoining land, of the value of \$500. The homestead thus defined was absolutely exempt. The next legislation limited the exemption "so long as the same shall be owned or occupied by the debtor as such homestead." The next legislation allowed the homestead to be incumbered by a mortgage "duly executed by the head or heads of a family" and made it liable to sale upon the foreclosure of such security, but otherwise left it absolutely exempt so long as owned or occupied as a home. And then in Act 1875 the \$2,000 limitation on the exemption was introduced into the law of the state, but the Legislature was careful to preserve the identity of the homestead as the family home, and provided a way by which the family might keep and occupy the home against any claims of creditors. There is reason for preventing the investment of all one has in an excessively valuable homestead for the purpose of defrauding creditors. The same reasons do not exist for taking the home away from the surviving spouse for the benefit of adult heirs, still less in the interests of minor heirs who are ordinarily more benefited by preserving the family home intact. The statute provides an elaborate method for creditors in the former case, but provides no means of dividing the homestead between the heirs and the surviving spouse. This fact of itself strongly indicates that the Legislature never contemplated such a division. This \$2,000 limitation of the exemption against the creditors has since that time been continued in our legislation, but no statute has ever declared that the limitation in favor of creditors is the full measure of the home that the surviving spouse may occupy for life, or that the present value of the use of \$2,000 for the life of the surviving spouse shall be equivalent to a home.

Next comes Act 1877, by which the surviving spouse is given the "whole homestead" for life, unless "otherwise disposed of according to law." That is, unless sold for taxes or for mortgage foreclosure or affected by the statute in regard to claims of creditors. This provision of Act 1877 is continued in the seventeenth section of the act of the

next Legislature which is our present law as already suggested.

When the whole history of our legislation upon the subject is considered, there is no ground for supposing that the Legislature intended that, when there were no debts, mortgages, or other liens, anything less than the "whole homestead" should vest in the surviving spouse for life. There has never been any legislation that would justify the conclusion that when the husband and wife had established a home and occupied it for years, and the one in whose name the legal title was placed should die, and the home should be of greater value than the present worth of the use of \$2,000 for the life of the survivor, the home must be sold and the proceeds divided among the heirs, and the surviving spouse must seek another home. Such legislation would be monstrous, and our lawmakers cannot be charged with it. Indeed, the present act itself repels such a conclusion. The first section does not define the homestead. It merely declares how much of it shall be exempt from the claims of creditors. The sixth section declares that creditors shall not interfere with the homestead without first swearing that it exceeds in value the homestead exemption, and the seventeenth section declares that the homestead shall vest in the survivor for life subject only to specified liens.

It is said that the husband holding the legal title may incumber the homestead by confessing judgment, and so compel its sale; and, also, that, when husband and wife have joined in such a conveyance, the proceeds are at the disposal of the owner of the homestead title and only \$2,000 of the proceeds is exempt from levy by creditors, but a court of equity would enjoin the sale upon a judgment fraudulently confessed, and there can be no sale of a homestead without the consent of both husband and wife, which might depend upon the proposed disposition of the proceeds. In *Tyson v. Tyson*, 71 Neb. 438, 98 N. W. 1076, it is decided that: "In a contest between the widow and the heirs at law as to the extent of her homestead in suburban lands, she is entitled to a homestead not exceeding 160 acres in area and \$2,000 in value." And in *Teske v. Dittberner*, 70 Neb. 544, 98 N. W. 57, 113 Am. St. Rep. 802, *Meek v. Lange*, 65 Neb. 783, 91 N. W. 695, and *Wardell v. Wardell*, 71 Neb. 774, 99 N. W. 674, and other cases, in some of which perhaps the precise point was not involved, similar expressions have been used. The legal profession and the people of the state are entitled to know the construction that this court intends to put upon important statutes of this nature. It is with exceeding reluctance that we refuse to follow the earlier decisions. This is particularly true when the rule announced in such earlier decisions has become the rule of property. Indeed, it is generally considered that in such cases it is better to abide by a

wrong construction, and leave the remedy with the Legislature, than to confuse the decisions of the court upon important questions. The decision in *Tyson v. Tyson*, supra, however, has not become a rule of property in the full meaning of that expression. The homestead estate which vests in the surviving spouse for life is an ephemeral estate. It dies with the holder of it, and in most cases its life is short. At the end of the life estate in the homestead, the heirs of the deceased holder of the legal title take the property precisely as they do any real estate, not of a homestead character, with the exception that it is not, in their hands, liable for debts of their ancestor, for which it could not have been liable in his or her lifetime. Therefore no permanent real estate title depends upon the homestead of the surviving spouse. The case of *Teske v. Dittberner*, supra, was three times considered by this court, and was very much discussed. The question in the case was whether the holder of the legal title could "make a testamentary disposition of the property in question, subject to the inchoate life estate therein of his wife," and it was held, after much discussion, as stated in the opinion (65 Neb. 167, 91 N. W. 181, 101 Am. St. Rep. 614), that the right to so dispose of the property "is expressly preserved to him by the statute." We have no fault to find with this conclusion. The question as to what constitutes "the inchoate life estate therein of his wife" was not discussed in any of the opinions, but was assumed, and we are now convinced erroneously, to be only that portion of the homestead which the law exempts as against the claims of creditors. Upon this vital question, then, the case is not to be deemed authoritative. In *Meek v. Lange*, 65 Neb. 783, 91 N. W. 695, the question presented as stated in the opinion was "whether or not damages for loss of the bargain can be recovered against one who, without the assent of his wife, makes an executory contract for the sale of his family homestead, which the wife subsequently refuses to carry out." It was held that no recovery could be had "for the loss of the bargain." It was said that "possibly the plaintiff is entitled to nominal damages for the absolute refusal to convey any of the premises, as they were found to be worth more than \$4,000. The homestead right evidently does not protect defendant as to more than \$2,000 worth." In this case, also, the character and quality of the family homestead as determining the life estate of the surviving spouse were not necessarily involved in the point decided, and were not necessary to the disposition of the case. The decisions of this court as affecting directly or indirectly the question here presented have not been exactly uniform. In *Teske v. Dittberner*, 70 Neb. 544, 556, 98 N. W. 57, 61 (113 Am. St. Rep. 802), it was said: "In so far as this court has heretofore expressed itself re-

garding the scope and effect of our homestead statute, its decisions have generally been favorable to a liberal construction of the act, such as would grant the fullest measure of protection to the rights and interests of the homestead claimants. * * * 'The law proceeds upon the theory that both husband and wife are entitled to the benefit of the homestead act, and this right cannot be waived except by the consent of both.' *Bonorden & Ranck v. Kriz*, 13 Neb. 121 [12 N. W. 831]; *Aultman & Taylor Co. v. Jenkins*, 19 Neb. 209 [27 N. W. 117]. It is held in *Swift v. Dewey*, 20 Neb. 107 [29 N. W. 254], that a mortgage of a tract of land, including a homestead, executed by a married man without the concurrence and signature of the wife, is invalid for the purpose of impairing, dismembering, or in any manner affecting such homestead or its appurtenances. To the same effect is *McCreery v. Schaffer*, 26 Neb. 173 [41 N. W. 996]." Many other decisions of this court, more or less inconsistent with the present contentions of the defendants, are quoted from with approval. In *Clarke v. Koenig*, 36 Neb. 572, 54 N. W. 842, *Larson v. Butts*, 22 Neb. 370, 35 N. W. 190, and subsequent cases, it is held that a contract for the sale of a homestead will not be specifically enforced unless executed by both husband and wife, and when the purchaser is willing to accept that part of the real estate which exceeds \$2,000 in value as a compliance with his contract, and this without regard to the value of the homestead.

Commenting upon the various decisions of this court upon the subject of homestead, the brief of appellant well says: "If it be true that the lands and tenements comprising the homestead, in so far as they exceed the pecuniary value of \$2,000, are not intended to be afforded any protection or privilege by the homestead act, upon what ground, then, can the court justify its previous holdings that a sale or conveyance of such lands and tenements when not signed and acknowledged by both husband and wife is absolutely void, without regard to the circumstance that the value greatly exceeds \$2,000? How, then, may the court justify its holdings that the executor or administrator upon whom the right of possession of all real estate devolves by a specific provision of the decedent act, cannot dispossess the surviving husband or wife of the land previously occupied as the homestead? How, then, may the court justify its previous holdings that the sale of the homestead property under an ordinary execution is absolutely void, notwithstanding the most formal order of approval and confirmation by the district court? If the term 'homestead,' used in the act, implies in every instance a limitation of pecuniary value of \$2,000, then, necessarily, the excess value of the land and tenements beyond that limitation cannot be afforded any measure of protection. Under such interpretation, a conveyance by deed or

mortgage of the lands and tenements comprising the family abode, which are of the admitted value of \$10,000, would not, in so far as it operated upon the excess valuation of \$8,000, affect in any manner the statutory homestead. In such case the mortgage of the owner, in which the spouse did not join, would necessarily be valid as to \$8,000, and, if the amount of the mortgage covered no more than the overplus or excess value, it would be valid and enforceable in its entirety." We conclude, therefore, that the decision in *Tyson v. Tyson*, supra, and similar expressions affecting rights between the surviving spouse and the heirs in *Teske v. Dittberner*, 70 Neb. 544, 98 N. W. 57, 113 Am. St. Rep. 802, *Meek v. Lange*, 65 Neb. 783, 91 N. W. 695, and *Wardell v. Wardell*, 71 Neb. 774, 99 N. W. 674, and other cases, ought to be overruled. This decision does not affect former holdings of this court in regard to the rights of creditors against homestead property.

The judgment of the district court is reversed and the cause remanded, with instruction to enter a decree in harmony with the views expressed in this opinion.

Reversed and remanded.

HAMER, J. (concurring). On or about the 2d day of March, 1909, George Melsner died intestate in Buffalo county, Neb., leaving a widow and the defendants, who are his children by a former marriage. At the time of his death he owned a section of land near Shelton, in that county, 36-10-13, on the N. W. $\frac{1}{4}$ of which he and his wife then resided in a dwelling house stipulated to be of the value of \$8,000. They had lived together on this particular quarter about 14 years immediately prior to his death, and this quarter and the dwelling house are claimed as the family homestead. The land, exclusive of the dwelling house, is claimed to have been worth \$100 per acre. In addition to this particular section, George Melsner owned many sections in the vicinity, and his estate was worth more than a million dollars. By a voluntary agreement the widow and the heirs made partition of all the real property belonging to said estate except the home place; that is, the N. W. $\frac{1}{4}$ of 36-10-13. The widow contended that she was entitled to the use of the dwelling for life, with so much of the land upon which it was situated as was necessary and appropriate for the reasonable enjoyment of the same as a home. The other heirs contended that the dwelling itself was of greater value than \$2,000, and that they were entitled to have the same sold, and that, after paying the widow the present value of a life estate in \$2,000, they were entitled to have the remainder divided among the heirs. Mrs. Melsner and the heirs entered into an agreement for the submission of the question in dispute to the district court and for the disposition of the said home place according to their rights as

they might be determined by said court. A suit was brought in the district court of Buffalo county, in which a judgment was rendered to the effect, that, the home place being worth more than \$2,000, the homestead right of the widow was limited to the use during her lifetime of the sum of \$2,000 in money. By the judgment the present value of Mrs. Melsner's interest was found to be \$1,464. The pleadings and an agreement made between the parties state the facts.

The district court found and decreed: "(1) That the plaintiff has a homestead interest in the premises described in the partition; but that said interest is limited to the use for life of the sum of \$2,000. (2) That the present value of the homestead interest in said property is the sum of \$1,464. It is further ordered and decreed that the plaintiff's homestead interest in the premises in the petition mentioned be limited to the right to the use of \$2,000 for and during her natural life, the present value of which is the said sum of \$1,464; and that she be forever barred and restrained from claiming any further or greater homestead interest therein." The plaintiff excepted to so much of said finding and decree as limited her homestead right to the sum of \$2,000, and appealed to this court from the judgment rendered.

Whether there is a succession to the surviving spouse implied by the word "homestead" in the present act of 1879 is the question to be determined. We will begin the consideration of the Homestead Act of 1879. Laws, 1879, p. 57. Section 17 of that act reads: "If the homestead was selected from the separate property of either husband or wife, it rests, on the death of the person from whose property it was selected, *in the survivor for life*, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same *except the life estate of the survivor by will*. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife or either of them, previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter." The foregoing denies the power of the decedent to dispose of "the life estate of the survivor." The homestead selected from the separate property of either husband or wife rests "in the survivor for life." Afterwards it vests in the heirs of the husband or wife from whose property it has been selected. The homestead coming from the separate property of either the husband or wife vests "in the survivor for life." Section 4 of the act provides: "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by *both husband and wife*."

This is substantially a reproduction of the substance of section 3 in Act 1877, hereafter referred to and discussed. Seemingly the purpose of the Legislature by the enactment of these sections was to protect the person who is once married from losing his or her home by any action of the spouse, or by any action of the creditors of the spouse. This may give a very substantial effect to the succession of the homestead right to the "survivor for life."

The first legislation on the subject of the homestead in Nebraska was in 1860, when the Legislature passed an act contained in 1 Complete Session Laws, 648. It is also in Revised Statutes 1866, § 525, p. 484. "A homestead, consisting of any quantity of land not exceeding one hundred and sixty acres, and the dwelling house thereon and its appurtenances, to be selected by the owner thereof, and not included in any incorporated town, city or village, or, instead thereof, at the option of the owner, a quantity of contiguous land, not exceeding in amount two lots, being within an incorporated town, city or village, and the dwelling house thereon and its appurtenances, owned and occupied by any resident of the territory, being the head of a family, shall not be subject to attachment, levy or sale, upon execution or any other process issuing out of any court within this territory, so long as the same shall be owned and occupied by the debtor as such homestead. This section shall be deemed and construed to exempt such homestead in the manner aforesaid during the time it shall be occupied by any one or more of the family of the debtor, or by the widow or minor child or children of any deceased person who was, when living, entitled to the benefit of this subdivision: Provided, that the homestead mansion and twenty acres of land whereon the mansion is situate, and land adjoining the same to the extent of five hundred dollars in value, all being without an incorporated town, city or village, shall be exempted, and no more." Here is a homestead exempted as against creditors for the use of the family, and the widow or minor child of any deceased person who was entitled to the benefit of the provision may occupy the land *without any limit as to time*, because the time is "the time it shall be occupied" by any one of the persons named and they are determined by the act to be the family. In *Dorrington v. Myers*, 11 Neb. 388, 9 N. W. 555, the head of the family was a widower. This court said: "When as the head of a family he entered into possession of this homestead, he became vested, so to speak, of a homestead estate therein, which was alienable only by sale or abandonment." If this be true, then, the occupant mentioned could continue indefinitely to occupy the place. This court said in the case cited: "Neither the death of the wife, nor her abandonment of her husband, nor the ar-

rival at full age and departure from the parental roof of all the sons and daughters, would have the effect of dismantling the homestead of the protection of the exemption law."

It will be noticed that the homestead provided for by section 525 of the Code of 1866 had no specific value. It was a place to live. There was a limit to the value of the land adjoining the first 20 acres on which the mansion stood, but the "homestead mansion" and the 20 acres upon which the same stood *might* be of any value. It was not in the beginning an *exemption of money*, it was an exemption of a *place to live*. In the body of the section it is said: "This section shall be deemed and construed to exempt such homestead in the manner aforesaid during the time it shall be occupied by any one or more of the family of the debtor, or by the widow or minor child or children of any deceased person who was, when living, entitled to the benefit of this subdivision." Here is the matter of occupation that is to be protected, and it applies to "any one" of the family of the debtor or to his widow or minor child or to the child or minor children of any deceased person who was, when living, entitled to the benefit of the act.

The act of 1860 was still in force on the 24th of June, 1867, when it was amended by the Legislature. The amendment made section 525 of the Code of Civil Procedure of the Revised Statutes of 1866 read: "A homestead consisting of any quantity of land not exceeding 160 acres and the dwelling house thereon and its appurtenances, to be selected by the owner thereof, and not included in any incorporated city or village, or, instead thereof, at the option of the owner, a quantity of contiguous land not exceeding two lots, being within an incorporated town, city, or village, and according to the recorded plat of such incorporated town, city, or village, or in lieu of the above, a lot or parcel of contiguous land not exceeding 20 acres, being within the limits of an incorporated town, city, or village, the said parcel or lot of land not being laid off into streets, blocks, and lots, owned and occupied by any resident of the state, being the head of a family, shall not be subject to attachment, levy, or sale, upon execution or other process issuing out of any court in the state so long as the same shall be owned and occupied by the debtor as such homestead. This section shall be deemed and construed to exempt such homestead in the manner aforesaid, as well *after* as *before* the death of the debtor, and in the event of the death of the debtor the estate in such homestead shall descend to and be vested in his heirs at law or legatees, free and divested from all claims, if (of) any creditors thereto." 2 Complete Session Laws, p. 376. The section as amended at that time refers to land and dwelling house and appurtenances being a place to

live, and *says nothing of valuation*. It contains an amendment which seems quite important. It is: "This section shall be deemed and construed to exempt such homestead in the manner aforesaid, as well after as before the death of the debtor, and in the event of the death of the debtor the estate in such homestead shall descend to and be vested in his heirs at law or legatees, free and divested from all claims if (of) any creditors thereto." This section 525 of the Code of Civil Procedure as amended still remained the law of the state at the time of the publication of the General Statutes of Nebraska of 1873. This act as amended continues the homestead exemption absolutely regardless of the value of the property exempted. The original act of 1860 refers to the dwelling house as the homestead mansion. As the law was left after it was amended June 4, 1867, the homestead was exempt without regard to its value, and it descended to the heirs divested of any claim of any creditor. The law continued in this way until the 25th of February, 1875, when a new act was passed. 2 Complete Session Laws, p. 843. It will be seen that for 15 years there was in Nebraska a homestead law for the benefit of the family which contained no provision whatever concerning the value of the property exempted. It might be \$5,000 or \$10,000 or any other sum of money.

By the act of February 25, 1875, there came into existence for the first time that provision that the homestead should not exceed \$2,000 in value. It reads as follows: "The family homestead of each head of a family, consisting of any quantity of land not exceeding one hundred and sixty acres and the dwelling house thereon and its appurtenances, shall be exempt from attachment, levy, or sale upon execution or other process issuing out of any court in the state, so long as the same shall be owned and occupied by the debtor as such homestead; Provided, that such homestead and appurtenances situated thereon, shall not exceed two thousand dollars in value; Provided, that such exemption shall not apply to homesteads which have been heretofore, or which may be hereafter mortgaged by the owners thereof." 2 Complete Session Laws, p. 843. Section 1 as above quoted was amended February 13, 1877, to read as follows: "That section one (1) of an act entitled 'An act to exempt the homestead of families from attachment, levy, or sale, upon execution or other process issuing out of any court in the state of Nebraska,' approved February 25, 1875, to be amended to read as follows: Section 1. The family homestead of each head of a family, consisting of any quantity of land not exceeding one hundred and sixty (160) acres, and the dwelling house thereon, and its appurtenances, shall be exempt from attachment, levy, or sale, upon execution or other process issuing out of any court in the state, so long as the same shall

be owned and occupied by the debtor as such homestead; Provided, that such homestead and appurtenances situated thereon shall not exceed two thousand dollars in value." On the 19th of February, 1877, the homestead law was again amended and re-enacted. 2 Complete Session Laws, p. 933.

The act of 1875, heretofore mentioned, was repealed by Act 1879 along with Act 1877, and it is Act 1879 which remains to be discussed. In all the statutes referred to in which there is a limitation upon the exemption of \$2,000 it is *against creditors*, and not against the survivor. The failure to express the same limitation upon the succession would seem to indicate that it was *not* the intention of the legislative body to impose this limitation in the matter of succession. The Legislature has very carefully provided for a means to subject the excess of the value of the homestead above \$2,000 to the payment of any judgment that may be rendered. Nothing is said about a \$2,000 homestead. It is just simply a homestead to which "the survivor for life" succeeds. If the Legislature had intended that only \$2,000 should go to the surviving husband or wife, and that any excess above that should go to the other heirs, why should it not have said so? In the event that the homestead is above \$2,000 in value, it is not saved at all as against the heirs, but \$2,000 in money is saved as a homestead exemption. It is a different homestead that is contemplated by section 17, Act 1879. That is a homestead to which the survivor succeeds when the husband or wife dies. It is to furnish the home for the family. It is to include the shelter which protects those who are members of the family. The courts should establish a beneficent rule by which the widow and the children when the husband dies will be left in the home, and, after the children are grown up, the widow should be permitted to remain in the old home where she has resided with her husband, and which she has perhaps faithfully helped to earn and save. There is no reasonable excuse for cutting down the interest of the homestead succession which should go down to the widow and provide for her a home during her declining years. The widow ought to be permitted to live in the same house which she and her husband have occupied together, and she ought not to be punished because the bread winner is dead.

Section 1, c. 49, Laws 1907, enacts that: "When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seized of an estate of inheritance * * * shall descend subject to * * * the rights of homestead." It would seem that there is no conflict between this statute covering the succession of heirs of descendants and the law of 1879 relating to homesteads. The statute is intended as a complete protection to the fam-

lly against the right of arbitrary domination by the husband or wife who happens to hold the title to the homestead estate. This is the direct provision of section 4 of Act 1879, and the same idea was fully expressed in section 3 of Act 1877. Section 4 of Act 1879 reads: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Laws 1879, p. 58. Section 3 of Act 1877 reads: "A conveyance or incumbrance by the owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument." Laws 1877, p. 34. The homestead act of 1877 protects the *homestead exemption* from the creditor to the extent of \$2,000, and it protects the *homestead itself* from the improvident act of the owner of the legal title. This record does not involve the rights of the creditors. It deals with the rights of inheritance of the heirs at law as against the widow. In *Galligher v. Smiley*, 28 Neb. 189, 44 N. W. 187, 26 Am. St. Rep. 319, Chief Justice Reese, delivering the opinion of this court, said: "In its inception a homestead is a parcel of land on which the family resides, and which is to them a home." In *Palmer v. Sawyer*, 74 Neb. 108, 103 N. W. 1088, 12 Ann. Cas. 715, the definition of Judge Reese was quoted with approval.

In *Palmer v. Sawyer*, supra, this court held that the man who had acquired a homestead estate during the subsistence of a family relationship was entitled to occupy the premises after the family relationship had been broken up by death and removal. In that case Albert Palmer purchased the land in controversy in the year 1898, and at that time was a widower with three minor children living with him upon the premises. One of the children died and two moved away, so that the father was left alone in the possession and occupancy of the premises. A judgment was rendered against him, and an execution was levied on the land, and there was a proceeding to enjoin the sale. The question to be determined was whether the plaintiff was entitled to claim the property as his homestead. The court held the "head of the family" to include "every person who has residing on the premises with him or her, and under his care and maintenance, either: (1) His or her minor child, or the minor child of his or her deceased wife or husband." This court then recites section 17, and in connection with the two provisions so recited says: "It will be noticed that the provisions of these statutes reserve the homestead right to every person who is the head of a family as defined in section 15, whether married or unmarried at the time of the acquisition. When the homestead right is acquired by a married person, it cannot be conveyed or

incumbered, unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife, under section 4." The court cites *Whitlock v. Gosson*, 35 Neb. 829, 53 N. W. 980, and says that this section of the statute was declared to make the conveyance of a homestead executed by the husband alone void, not only void as to the interest of the wife, but also as to the interest of the husband who executed it. When a homestead right is acquired, it can only be divested in the manner prescribed by statute. This principle is supported by a line of decisions of this court cited in the opinion, and has been subsequently followed in *Giles v. Miller*, 36 Neb. 346, 54 N. W. 551, 38 Am. St. Rep. 730; *Clarke v. Koenig*, 36 Neb. 572, 54 N. W. 842; *Violet v. Rose*, 39 Neb. 660, 58 N. W. 216; *Havemeyer v. Dahn*, 48 Neb. 536, 67 N. W. 489, 33 L. R. A. 332, 58 Am. St. Rep. 706. If the homestead in controversy had been selected from the lands of the deceased wife, on the death of the wife, the homestead right would have descended to the husband for life, *whether any children had been born of the marriage or not*. In *Dorrington v. Myers*, 11 Neb. 388, 9 N. W. 555, this court said: "Neither the death of the wife, nor her abandonment of her husband, nor the arrival at full age and departure from the parental roof of all the sons and daughters, would have the effect of dismantling the homestead of the protection of the exemption law." In *Galligher v. Smiley*, supra, the court held that the homestead right was beyond the right of execution. In the above case, Reese, C. J., in the body of the opinion says: "At the time this homestead right was acquired, by a compliance with the provisions of the law, the whole of the tract now in dispute was exempt from sale so long as its occupancy continued. While the judgments were liens, for the payment of which (if not allowed to become dormant) the property was pledged, yet the homestead character could not be molested for the purpose of enforcing their payment. * * * The right could not be diminished by law without the consent of defendants. *McHugh v. Smiley*, 17 Neb. 620, 626 [20 N. W. 296, 24 N. W. 277]; *De Witt v. Sewing Machine Co.*, 17 Neb. 533 [23 N. W. 506]. For 20 years perhaps, and during the whole time of the existence of the indebtedness, the right could not be questioned. The land was included within the corporate limits of the city by law, and without the consent or procurement of defendant. His rights could not be diminished thereby." *Bassett v. Messner*, 30 Tex. 604; *Nolan v. Reed*, 38 Tex. 425; *Barber v. Rorabeck*, 36 Mich. 399; *Ham v. Santa Rosa Bank*, 62 Cal. 125, 45 Am. Rep. 654. In *Galligher v. Smiley*, supra, a 70-acre tract of land occupied as a homestead was brought within the city of Omaha by the extension of the city limits, and was at-

tempted to be sold under execution. It was held that the homestead character of the land could not be changed without the consent of the occupant, and that the land could not be sold, although worth \$200,000.

Except where it is narrowed by the qualification implied by the term "exemption," the word "homestead" is used in Act 1879 in its popular sense to designate a parcel of land on which the family resides. The section under consideration enables the creditor to reach the surplus above \$2,000. That section, therefore, is for the benefit of the creditor, as well as for the benefit of the head of the family who claims the "homestead exemption." It would seem that a consideration of the entire act makes it clear that the Legislature intended the limitation of value to apply only in favor of creditors, and not to a homestead succession to the heirs or devisees. The court is authorized on the petition of the creditor to order a sale by execution only when the land "exceeds in value the amount of the homestead exemption," and prohibits the receiving of any bid "unless it exceeds the amount of the homestead exemption." *There can be no sale unless there is such excess.* By section 12 the sum to be paid the claimant, where the whole tract is actually sold, is designated as "the amount of the homestead exemption." In five subsequent sections of this same act of 1879 the limitation of pecuniary value of the homestead is six times referred to as the "homestead exemption." These references apply in favor of creditors only. These terms are not applied in connection with the words "heirs" or "devisees." Sections 4 and 17 substantially re-enact the provisions of Act 1877. Section 4 protects the homestead and the family of a married person against the domination of a husband or wife who is seized of the record title. The legislative policy implied has no necessary relation to the *separate* policy giving some measure of protection to creditors. It is entirely rational and consistent for the act to make a pecuniary limitation as to the creditors, and *no limitation as to heirs or devisees.* Because the pecuniary limitation is applied in one case is no reason whatever that it should be in the other case. The legislative policy embodied in section 4 applies with equal force seemingly to section 17. It required section 17 to completely forbid the domination of the homestead estate by the holder of the legal title. The shelter of the family becoming destroyed upon the death of the husband or wife holding the legal title, the survivor and the minor children would be subject to be dispossessed of their home, *although no rights of creditors should be involved.* There is no pecuniary limitation attaching to the provision forbidding the homestead to be conveyed or incumbered except by deed executed and acknowledged by both husband and wife, or to the provision for survivorship on the death of the person from

whose property it was selected. It is not a certain amount of money which the surviving spouse gets the use of.

The former acts were repealed, and, when the Legislature of 1879 drew up a permanent form of the Homestead Law, it used the word "homestead" in creating an absolute disqualification of the husband or wife from whose property it was selected to incumber or alienate the homestead by a voluntary deed or devise and preserved in favor of *creditors* only, the limitation as to value. In the mind of the legislator there is the protection of the "homestead exemption" and the homestead itself, and sections 4 and 17 of the act offer protection against the domination of the person from whose property the homestead is selected and *without any reference whatever to its pecuniary value*, and that means the protection of the homestead itself. There are two ideas here: (1) A place for the homestead claimant where he and his family are safe as to *everybody* if the place is not worth more than \$2,000; and (2), if it does exceed \$2,000 in value, then safe as to everybody except the creditor.

Now in this particular case there is no creditor, and therefore the homestead is a homestead as against *everybody*. Did the Legislature intend then to turn the widow out because the husband is dead and the children have gone? What Legislature would say, "We will make a law to apply to our widows when we die and to our sisters when they have become widows, and to our mothers when our fathers are dead and buried and the mothers are left alone in the old house, and we will say that these wives as they become widows are to be turned out of the homes they have occupied and in which the children have been raised, and they must find new and strange homes in which to finish their lives, so that the other heirs may each receive a few dollars more from the immediate distribution of the estate"? If no future Legislature in Nebraska would do such a thing as that, then it would seem that no Nebraska Legislature has done it. The right to dispossess the widow of the homestead selected from the property of her deceased husband is not written in the statutes.

It is contended that because this court in the case of *Tyson v. Tyson*, 71 Neb. 438, 98 N. W. 1078, rendered a decision in conflict with the doctrine announced, therefore the will of the Legislature should be ignored, and that an inadvertent mistake should bind the court in the future to a doctrine by which the surviving wife or husband is to be put out of the old homestead. In *Tyson v. Tyson*, supra, Peter Tyson died intestate in Washington county, and the plaintiff in error was the widow, and the defendant in error was the only child. The intestate died seised of a farm containing 156 $\frac{1}{4}$ acres. The petition which was filed in the county court alleged that Mary Ella Tyson claimed a homestead interest in said premises, and oc-

cupied the dwelling house and buildings under her claim that the same was the homestead of the decedent and herself during the lifetime of said decedent and at the time of his death. The petition was filed by the son, who alleged that the homestead consisting of the dwelling house and outhouses, and the said land exceeded \$2,000 in value, and that Mary Ella Tyson was only entitled to use and occupy said dwelling house and outhouses with so much land upon which the same was situated as taken together with said buildings shall equal in value the sum of \$2,000 and no more. It is also alleged that, in addition to said homestead, the said Mary Ella Tyson was entitled to dower interest in said land to the extent of one-third thereof; that, under the claim of homestead and dower, she wrongfully excluded the petitioner from said premises, and claimed the whole of said real estate as homestead and dower; that she refused to account for the rent of that portion not included in the homestead interest to which she was entitled; that said real estate was of the value of \$11,750, and exceeded the homestead in value by \$9,750. It was also alleged that Mary Ella Tyson claimed the right to receive from said estate the sum of \$35 a month as support, and that she was drawing the same. There was a prayer for the appointment of three persons to set off the homestead and dower of the plaintiff by metes and bounds; the former not to exceed \$2,000 in value. The answer of Mary Ella Tyson admitted receiving \$35 a month for her support, and claimed the exclusive right to use the land, alleged said land was the homestead of Peter Tyson and Mary Ella Tyson at the time of the death of said Peter Tyson, and that said homestead at the death of said Peter Tyson vested in his surviving wife, and that the son, Amasa F. Tyson, had no interest in the land during the lifetime of said Mary Ella Tyson. The answer also alleged that the county court had no right or power to adjudicate the title to said land. Upon the hearing, the county court found that Mary Ella Tyson had a homestead in the premises, or in so much thereof as should not exceed in value \$2,000, and was entitled to dower therein, and appointed three persons to assign her dower and homestead by metes and bounds. From the decree rendered by the county court Mary Ella Tyson prosecuted error to the district court, where the decree of the county court was affirmed, and the case was then brought to this court by petition in error.

It will be noticed that there is a difference between this case and the Tyson Case. (1) In the Tyson Case there was, in addition to the consideration of any homestead claim, the claim that "the said Mary Ella Tyson is entitled to *dower* interest in said land to the extent of one-third thereof, and is entitled to have the same set aside." This

was alleged in the petition as above quoted. It was also stated in the opinion that "the prayer is for the appointment of three persons to set off the homestead and dower of the plaintiff by metes and bounds." (2) In the instant case there is no claim of dower. The fact of *dower* and *homestead* and the support of \$35 a month were all claimed out of this estate of 156 acres no doubt tended to confuse the issues, and perhaps to cloud the minds of all connected with the case. In the Tyson Case it was said in the body of the opinion: "This court held, as we have seen, that, in order to oust the jurisdiction of the county court, the right of the applicant must be disputed by presenting an issue of fact which, if established by proof, would defeat her claim, and such issue must be one which the county court by its organization is unable to try." It would seem to be absurd that, if the law ousts the jurisdiction of the county court, there should be any contention that it presented a different question from an issue of fact ousting such jurisdiction. If the jurisdiction is ousted, that is enough.

The learned commissioner who writes the opinion follows up his first mistake with a second one. He proceeds to discuss the section relating to the exemption of \$2,000 from judgment liens, and fails to reason upon the subject. He writes: "But it will not be claimed that in a case of that kind the surviving spouse would take a life estate in the excess by virtue of the homestead act. * * * Neither are we able to see that the surviving spouse has any greater rights when the claimant of the excess is an heir of the deceased instead of a creditor." What the learned commissioner says is a mere dictum. Perhaps the language of the commissioner who wrote the opinion is derived from the fact that he may have supposed the contention made was not supported by the pleadings. One of the contentions was that a widow not owning a residence suitable to her condition in life might remain in the dwelling house of her husband so long as she remained a widow without being chargeable with rent. He held this was not supported by the pleadings. We are now met with a statement that because of this opinion this court shall continue to stand where all are agreed that it is wrong to stand.

It is urged as a reason why the mistake made in Tyson v. Tyson should stand is that it has been the accepted idea of the bar and the judges for a number of years that the \$2,000 exemption applied as well to the survivorship as to the creditor. It is said that it will make a change in the rule of property rights, and that there will be sufferers in consequence of it. The answer to that is that the woman who lives to be an old woman, and loses her husband, seldom marries again. The same is true of the man who lives to be an old man. It is the ex-

ception when he marries again. There is no reason that the heirs are likely to be crowded out because at the death of the survivor the heirs go into full possession of the property. The survivor rarely has many years to live. We are all inclined to overestimate the length of time we have to live. The pictures are hanging on the wall of most of those who have preceded us. They are gone and maintain the discussion no longer. In a few years more we shall all be gone, and there will be other occupants of our places. Perhaps no one may say with absolute certainty the number of years that the average survivor is likely to live, perhaps five, perhaps ten, not more than that. At the end of that time the heir will come into the exclusive possession of that which he has inherited from the deceased wife or husband who has gone before the survivor. The thing contemplated as dangerous to the property rights is not dangerous at all because it takes nothing permanently, and only maintains a meritorious use. In the interest of humanity this court should at once correct the mistake in *Tyson v. Tyson*, and declare the will of the Legislature as it has been expressed. The right of homestead may survive in favor of the husband on the death of the wife, even though no children of the marriage are living (*Burns v. Keas*, 21 Iowa, 257; *Ellis v. Davis*, 90 Ky. 183, 14 S. W. 74; *Roberts v. Greer*, 22 Nev. 318, 40 Pac. 6, 58 Am. St. Rep. 735), or though the children have removed from the homestead upon which he still resides (*Gray v. Patterson*, 65 Ark. 373, 48 S. W. 730, 1119, 67 Am. St. Rep. 937), or though the children have attained their majority (*In re Feas' Estate*, 30 Wash. 51, 70 Pac. 270), or though he is not a housekeeper with a family.

The present value of Mrs. Meisner's homestead interest is found to be \$1,464. She does not get this sum because it is only the use of a \$2,000 interest in the homestead that she gets, and, when she dies, the heirs of the deceased hold the property free and divested of any claim she may have once had. The interest on the present value therefore is all she may safely count on. Six per cent. on \$1,464, the present value, would give her \$87.84 per annum. The smallness of the matter is quite apparent from a consideration of the insignificance of this sum. From this it would seem that early in the history of the people of our state they passed a law which guaranteed to the "family" so long as it was needed for that purpose a homestead which shielded the young and the strong and the old and the feeble alike, and all in the interest of the home. Sections 4 and 17 of Act 1879 contain a recognition of the principle that underlies all the legislation of the state upon the subject. It is the protection of the home, when once it is established, as long as it may be needed for any surviving husband or wife. The family

is a unit of the state. The home protects it. As long as the family exists, the home should exist. This court has already said that the head of a family should be protected in the home, although the children have already grown to maturity and have left it. *Gallagher v. Smiley*, 28 Neb. 189, 44 N. W. 187, 26 Am. St. Rep. 319.

The judgment of the district court should be reversed.

FAWCETT, J. (dissenting). I am unable to concur in the majority opinion, for the following reasons:

The contest in this case is between plaintiff and the daughters of deceased by a former wife. At the time of his death Mr. Meisner was the owner of the N. W. $\frac{1}{4}$ of section 36, township 10, range 18, in Buffalo county, worth, exclusive of the buildings, \$16,000. He had erected thereon a dwelling house of the value of \$9,000. For 14 years prior to his death this dwelling and quarter section of land had been occupied by Mr. Meisner and plaintiff as their home. At the time of his death he left other lands of the agreed value of \$531,068. By an agreement entered into between plaintiff and the daughters a division of all of the lands, other than the quarter section referred to, has been agreed upon. It has also been agreed between them that plaintiff shall take the quarter section in controversy at an agreed valuation of \$25,000, and account for the same under the decision to be rendered in this case; that is to say, she is to be given credit for the value of her homestead interest as found by the court and account for all in excess thereof up to the \$25,000. The question decided by the district court, and before us for review, is the construction to be placed upon sections 1 and 17 of the act approved February 26, 1879, and in force after September 1 of that year. Laws 1879, p. 57. These two sections are as follows:

"Section 1. A homestead not exceeding in value \$2,000, consisting of the dwelling house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding 160 acres of land to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village, shall be exempt from judgment liens and from execution or forced sale, except as in this chapter provided."

"Sec. 17. If the homestead was selected from the separate property of either husband or wife, it rests, on the death of the person from whose property it was selected, in the survivor for life, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same except the life estate of the survivor by will. In either case it is not subject to the payment of any debt or liability contracted by

or existing against the husband and wife or either of them, previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter."

Succinctly stated, the question is: Does the \$2,000 limitation, expressed in section 1, apply to exemptions against creditors alone, or does it also apply to the right of succession under the provisions of section 17? It is argued with great force by counsel for plaintiff that the language used in the different sections of the act indicate that the Legislature had in mind what might be termed two homesteads—one, the actual homestead, and the other, the homestead which could be held as against creditors—and that the \$2,000 limitation applies only to the latter. The title to the act reads as follows: "An act to provide for the selection and disposition of homesteads, and to exempt the same from judgment liens, and from attachment, levy, or sale, upon execution or other process." It will be seen that the title recites that the act is "to provide for the selection and disposition of homesteads, and to exempt the same," not "the same to the extent of \$2,000," but "the same"—that is to say, the homestead, from judgment liens, etc.—indicating, I think, that the intention was to exempt the entire homestead, the selection of which the act following was to provide for, from judgment liens, etc. Section 1 of the act reads: "A homestead not exceeding in value \$2,000, consisting of the dwelling house in which the claimant resides," etc. If we read this clause of section 1 with the same punctuation appearing in the title, which would place a comma after the word "homestead," the clause would then read, "A homestead, not exceeding in value \$2,000, consisting of the dwelling house," etc. That punctuation, or reading it in that manner, would seem to indicate that the \$2,000 relates to the entire homestead, and not to a subsequently to be determined portion thereof. That this is the construction which has been placed upon this act for over 30 years cannot be questioned. Estates have been divided and lands partitioned, all over the state, under that construction.

In *Meek v. Lange*, 65 Neb. 783, 91 N. W. 695, suit was brought to recover damages for the breach of an executory contract, made by the husband without the assent of his wife, for the sale of the homestead. In the syllabus it is held that an executory contract for the sale of the family homestead, to which the wife is not a party, is invalid, and its nonperformance does not furnish a basis for recovery of damages for the loss of the bargain. On page 788 of 65 Neb., on page 697 of 91 N. W., speaking through Mr. Commissioner Hastings, it is said: "Doubtless, in case of bad faith, or where the action of defendant has caused special damages, a right of action would arise for such injury. But it would seem en-

tirely inconsistent to allow a recovery of damages for the loss of a bargain which plaintiff made in full view of evident facts with one whom those facts rendered incompetent to sell the property. As above stated, only damages for loss of the bargain were allowed in this judgment. The judgment, therefore, cannot stand. Possibly the plaintiff is entitled to nominal damages for the absolute refusal to convey any of the premises, as they were found to be worth more than \$4,000. The homestead right evidently does not protect defendant as to more than \$2,000 worth." It will be observed that that was not a case involving the question of exemptions against creditors, but that it involved the whole right of homestead, which right the court there said did not protect defendant as to more than \$2,000.

Upon the third hearing of *Teske v. Dittberner*, 70 Neb. 544, 98 N. W. 57, 113 Am. St. Rep. 802 the two last paragraphs of the syllabus read:

"(10) A parol agreement made by the husband with a third party to devise property embraced within a homestead, like an agreement to convey the reversionary estate, is in conflict with the provisions of the Homestead Act and is not specifically enforceable, even though substantial performance of the contract by the promisee may have taken place.

"(11) When such an agreement includes other land than that included within the homestead, the contract may be specifically enforced except as it affects the homestead property."

In the opinion, on page 550 of 70 Neb., on page 59 of 98 N. W. (113 Am. St. Rep. 802), it is said: "In speaking of the homestead, we wish to be understood as having reference to that part of the real estate in controversy which consists of the dwelling house, in which the promisor, Frederick Teske, and his family, at the time, resided, and its appurtenances and the land on which the same are situated, not exceeding 160 acres in area, nor \$2,000 in value." Here again this court, in a case where the question of the rights of creditors was not involved, limited the homestead to the dwelling house and its appurtenances, and the land on which the same are situated, not exceeding 160 acres in area, "nor \$2,000 in value."

In *Tyson v. Tyson*, 71 Neb. 438, 98 N. W. 1076, the third paragraph of the syllabus reads: "In a contest between the widow and the heirs at law as to the extent of her homestead in suburban lands, she is entitled to a homestead not exceeding 160 acres in area and \$2,000 in value." In the opinion, on page 448 of 71 Neb., on page 1078 of 98 N. W., it is said: "Another contention of the plaintiff is that she is entitled to hold and occupy the entire tract of land as a homestead, regardless of its value, and this contention is supported by a more plausible argument than we should have thought possible in view of the plain provisions of the

homestead act. A homestead within the meaning of that act (chapter 36, Compiled Statutes [Annotated Statutes, 6200]), is defined and limited by the first section thereof, which is as follows: [Section 1 of the act set out.] The first limitation imposed is that the homestead shall not exceed \$2,000 in value, the next, that it shall not exceed 160 acres of land not in any incorporated city or village, or, in lieu thereof, not exceeding two lots within such city or village. The head of a family might actually occupy more than 160 acres of land, not in an incorporated city or village, or more than two lots in such city or village, as a family homestead. But it will not be claimed that in a case of that kind the surviving spouse would take a life estate in the excess by virtue of the homestead act. The limitation as to value is as certainly and positively fixed by statute as the limitation as to quantity. Neither are we able to see that the surviving spouse has any greater rights when the claimant of the excess is an heir of the deceased instead of a creditor. The homestead, which vests in such survivor for life, is the identical homestead in quantity and value defined in section 1 of the act. The statute recognizes none other." It will be seen that the question under consideration in the case at bar was squarely before the court, and was considered and squarely decided in that case.

In *Wardell v. Wardell*, 71 Neb. 774, 99 N. W. 674, the third paragraph of the syllabus reads: "A homestead exemption is by the law of this state limited to the value of \$2,000, and if, upon the death of a husband, the dwelling and the tract of land adjacent thereto, selected from his estate and occupied by himself and family as a homestead, exceeds that value and are so situated that the dwelling together with the grounds upon which it stands, and not exceeding that value, cannot be set apart from the residue of the tract, no legal estate in the land, or in any part of it, passes to the widow and heirs under the homestead act, but in lieu thereof an equitable interest to the value of \$2,000 in the entire tract does pass to them thereunder." In that case the land consisted of 120 acres, including the family dwelling house, the whole being of the value of about \$14,000. Upon the trial it was found that the value of the dwelling house alone was \$3,000 and of the buildings appurtenant to it, \$3,500, and of the equitable title to the land \$7,200, and that the premises were not susceptible of division or partition, so as to permit the dwelling house and the ground upon which it was erected, of a value not exceeding \$2,000, to be set apart as a homestead. The district court thereupon decreed a sale of the entire tract and the investment of \$2,000 of the proceeds thereof at interest during the life of the widow, she to receive the interest and

income thereof until her death, the principal to then descend to the heirs at law of the decedent. The widow prosecuted error to this court. Her contention was that the provisions of the statute for appraisement and setting apart of the homestead during the lifetime of the person from whose estate it was selected, or the sale of it, in instances in which it is not susceptible of division, and the setting apart of \$2,000 of the proceeds of the sale, are not applicable after his death, and that hence the statutory restriction as to the value of the exempt property ceases with that event, "and that therefrom the entire premises occupied as a homestead, to the whole extent of the territorial limits prescribed by statute, acquire the character of exemption regardless of values." In the opinion on page 777 of 71 Neb., on page 675 of 99 N. W., it is said: "We think this reasoning is at fault in overlooking the fact that that which constitutes the homestead, and that alone, therefore, which passes to the surviving spouse, in cases of this kind, is not necessarily any defined tract of land, but only so much of a definable tract, if any, as, including the dwelling house and appurtenances, shall not exceed \$2,000 in value." The judgment of the district court was affirmed. It is said that the language quoted from the last above case is obiter dicta as applied to this case, for the reason that there the right of creditors was involved. The record in that case, however, shows that the creditors were general creditors of the decedent who had not obtained any lien upon the land prior to his death, and I am inclined to think that, if the right of succession is as contended for by the plaintiff here, it would have been good in *Wardell v. Wardell*, for the reason that, as insisted in that case, the right of succession attached prior to even the assertion of any debts against the decedent. But, whether it be dicta or not, it shows the view of the learned commissioner who wrote that opinion, concurred in by his two able associates, and approved, without dissent, by the court.

In *Jerdee v. Furbush*, 115 Wis. 277, 279, 281, 91 N. W. 661, 662, 663 (95 Am. St. Rep. 904), the court had before it the question of the rights of a grantee of a homestead under a conveyance made without the wife's signature. In the opinion the court say: "We cannot at this late day decide that as a new question. If it were otherwise, a different result of this appeal might occur than the one we have decided upon." The opinion then cites and comments upon two prior decisions of the court, and adds: "The law has thus stood for nearly a quarter of a century, and whether the court's construction of the statute was right or wrong it must now be considered the law the same as if the idea involved were literally expressed in the statute. It relates to property. It

has become, by the lapse of time, a rule of property, which, by well settled principles, can only be rightly changed by legislative enactment." In conclusion the court say: "It follows from what has been said that (naming the two cases referred to) rule this case. To try to distinguish one case from another upon the facts, where the ruling principles in one are plainly identical with those in the other, creates uncertainty and confusion in the law. That should be avoided as to any subject, but particularly in respect to titles to real property." The reasons there given for following the former decisions appeal to me as eminently sound. The ruling principles in the four former opinions of this court are plainly identical with the present case, and to attempt now to distinguish one from another upon the facts would, as stated by the Wisconsin court, "create uncertainty and confusion in the law."

Our former holdings, together with a similar and state-wide construction of the act by the district courts for more than 30 years, should set the matter at rest. I am unwilling at this late day to disturb that which for so many years has been considered settled. I therefore conclude that the limitation of \$2,000, expressed in section 1, is not restricted to exemptions against creditors, but also applies to the right of succession under the provisions of section 17, and insist that a construction of a statute, established by a line of former decisions of this court, uniformly followed by the district courts, and long acquiesced in by the bar, should not ordinarily be disturbed, even though the court, as subsequently constituted, might have placed a different construction upon such statute, if before it for the first time.

BARNES and LETTON, JJ., concur in above dissent.

WHITFORD v. KINZEL et al. (No. 16,574.)
(Supreme Court of Nebraska. Nov. 13, 1912.)

(Syllabus by the Court.)

1. HOMESTEAD (§ 161*) — ABANDONMENT — MENTAL CAPACITY OF CLAIMANT.

One whose mental faculties are so impaired that she is incapable of forming a clear intention to abandon her homestead will not be held to have done so merely because she departed therefrom and remained away for a short time, and until placed in an insane asylum.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 312-314; Dec. Dig. § 161.*]

2. HOMESTEAD (§ 181*) — ABANDONMENT — PRESUMPTIONS AND BURDEN OF PROOF.

All presumptions are in favor of the preservation of the homestead, and, when it is sought to show its abandonment, the burden of

proof rests upon the person who attacks the homestead interest.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 351-353; Dec. Dig. § 181.*]

3. HOMESTEAD (§ 70*) — WHAT CONSTITUTES — ADJOINING TRACTS.

A wife owned 80 acres of land upon which was the dwelling house and 15 acres of cultivated land. Her husband owned the adjoining 80 acres, on which 45 acres were under cultivation. The farm was operated as a whole and rented as a whole. Held, no rights of creditors being involved, that the whole 160 acres constituted the family homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 100-103; Dec. Dig. § 70.*]

4. DESCENT AND DISTRIBUTION (§ 57*) — PERSONS ENTITLED AND RESPECTIVE SHARES — RIGHTS OF WIDOW.

Where a person owning real estate dies leaving a wife surviving, it descends subject to his debts and the rights of homestead, one-half to the wife if there be no child nor the issue of any deceased child or children surviving, and, if the deceased leave relatives of his blood, the residue descends in the same manner and to the same persons as provided for the descent of real estate of deceased persons leaving no husband or wife surviving. Comp. St. 1907, c. 23, § 1.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 145, 159; Dec. Dig. § 57.*]

5. HOMESTEAD (§ 74*) — RIGHTS OF WIFE — COLLECTION OF RENTS AND PROFITS.

A wife is not, by virtue of the marriage relation alone, entitled to recover the rents and profits of a portion of the family homestead owned by the husband in fee simple, either before or after an attempted conveyance by him of the premises.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 107, 108; Dec. Dig. § 74.*]

6. HOMESTEAD (§ 181*) — ABANDONMENT — WEIGHT OF EVIDENCE.

The evidence set forth in the opinion held to be insufficient to establish the abandonment of a homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 351-353; Dec. Dig. § 181.*]

Barnes, Fawcett, and Rose, JJ., dissenting.

Appeal from District Court, Cuming County; Graves, Judge.

Action by Lonzo D. Whitford, as guardian of Frances E. Browand, insane, against Henry Kinzel and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Allen & Dowling, of Madison, and F. D. Hunker, of West Point, for appellant. A. R. Oleson, of Wisner, for appellees.

LETTON, J. The statement of facts found in the first paragraph of the former opinion (90 Neb. 573, 133 N. W. 1124), so far as it goes, is correct, and will not be repeated. It may be well to state, however, that at the time that Kinzel bought the property he was fully informed of the fact that Mrs. Browand was insane and under guardianship. It is also shown that Browand at first was offered \$4,200 for the land, presumably with a marketable title, and that upon all the facts being disclosed, and after further ne-

gotiation, the purchaser was only willing to pay the sum of \$3,700 on account of the defect in the title. The deed itself, after describing the land, contained the provision: "Subject to any and all rights and interests either legal or equitable of my wife Frances E. Browand, and to said real estate. Subject to the taxes for the year 1906. Together with all rents from and after March 1st, 1906, with all the tenements, hereditaments and appurtenances thereunto belonging. And I, the said D. C. Browand, do hereby covenant with the said Henry Kinzel, and his heirs and assigns, as follows, to wit: That I am a married man; that my wife's name is Frances E. Browand; that in the year 1886 my wife and I removed from the state of Nebraska to the state of Indiana with the intention of permanently leaving said state of Nebraska; that since the time of said removal to the said state of Indiana both of us have lived in that state and are both of us living there at the present time; that for more than fifteen years last past I have lived separate and apart from my said wife, but that we are both residents of the state of Indiana at this time and have been for over fifteen years last past; and that I am lawfully seised of said premises; that they are free from all incumbrances except as above stated," etc.

[1] It is said in the former opinion: "The evidence is insufficient to show that at the time Mrs. Browand left Nebraska she was insane, or that her mind was so unsound or unbalanced that she was not competent to understand the nature and import of what she was doing; but it is sufficient to show that she voluntarily left her husband and abandoned her home and any right of homestead that she may have had in the lands in suit, with no intention of ever returning or of ever again asserting those rights." Upon a careful re-reading of the entire testimony we are convinced that the first proposition quoted is sound and reflects the evidence, but the further conclusion that the evidence is sufficient to show a voluntary abandonment of her husband and her homestead rights we think is erroneous.

[6] It is unnecessary to set forth the testimony at length. As to Mrs. Browand's mental condition, it clearly shows that at and before the time she left Nebraska she was subject to insane delusions with respect to certain subjects, but there is nothing to show that at that time she did not understand the nature and extent of her property rights or that she was incapable of caring for herself, transacting ordinary business, or traveling alone. While there is a little uncertainty in regard to the year on the part of some of the witnesses, it seems to be established that the last time she left Nebraska was in the spring of 1886, shortly after a visit from Mr. Wright, her brother. The testimony of relatives that she visited

in Indiana is that, when she came there, she merely came upon a visit as she had done upon several occasions in previous years, that she spoke of her home in Nebraska, and that she intended to return. She tried to borrow money from her brother for that purpose. She was under a physician's care at this time. Her brother and other friends would not allow her to return to Nebraska. There is no doubt that her disease rapidly progressed after she left Nebraska, and that she gradually became more and more afflicted until it became necessary to restrain her in the asylum. For some months before she left her home she and her husband had not lived harmoniously together. He had left the family home to board at a hotel in a town near by. During the brother's visit, he returned to the family dwelling temporarily. After Mrs. Browand left, the husband rented the farm, stored the household goods in town, and went to Indiana. He visited with his own relatives there, and the year after his wife was committed to the asylum came back to Nebraska, sold the furniture which had been stored, and returned to Indiana, where he continued to reside for nearly 20 years and until his death in 1908.

[2] All the presumptions should be in favor of the homestead, and, when it is sought to show an abandonment, the burden of proof should rest upon the one who attacks the homestead interest. *Union Stockyards Nat. Bank v. Smout*, 62 Neb. 227, 87 N. W. 14; *Painter v. Steffen*, 87 Iowa, 171, 54 N. W. 229; *Benbow v. Boyer*, 89 Iowa, 494, 56 N. W. 544; *Reeseaman v. Davenport*, 96 Iowa, 380, 65 N. W. 301; *Robinson v. Charleton*, 104 Iowa, 296, 73 N. W. 616. We are satisfied this burden has not been sustained, and that Mrs. Browand did not abandon the homestead.

[3] Mrs. Browand owned in fee simple the west 80 acres of the quarter section, of which only 15 acres was cultivated. There were 45 acres in cultivation upon the 80 acres in dispute. The farm was operated as a whole and rented as a whole. Under these facts, the majority of the court are of the opinion that, regardless of value, the whole 160 acres constituted the homestead, following *Meisner v. Hill*, 138 N. W. 583.

[4] This being so, under the rule announced in *Weatherington v. Smith*, 77 Neb. 363, 109 N. W. 381, 13 L. R. A. (N. S.) 430, 124 Am. St. Rep. 855, the homestead right of Mrs. Browand was unimpaired by the removal of her husband while she was insane and the deed was void in law. Adopting this construction, what are Mrs. Browand's rights? Browand died without issue, but with brothers and sisters surviving. Section 1, c. 23, Comp. St. 1907, provides: "When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seised of an estate of inheritance

at any time during the marriage: * * * which has not been lawfully conveyed by the husband and wife while a resident of this state, or by the deceased while the husband or wife was a nonresident of this state * * * shall descend, subject to his or her debts and the rights of homestead, in the manner following: * * * Fourth. One-half to the husband or wife if there be no child, nor the issue of any deceased child or children, surviving. Fifth. If the deceased leave relatives of his or her blood, the residue of the real estate of which he or she shall die seised, in the cases above named, when not lawfully devised, shall descend subject to the rights of homestead, in the same manner and to the same persons as hereinafter provided for the descent of real estate of deceased persons leaving no husband or wife surviving." Mrs. Browand by virtue of her homestead right succeeded to a life estate in the premises upon her husband's death, and under the foregoing provisions she inherited an undivided one-half in fee.

[5] Browand, being the fee title holder and the head of the family, was entitled to the rents and profits until 1908, when he made the conveyance. If the conveyance was void, he was entitled to them until the time of his death in 1908. There being no proof that he failed to support his wife, she could make no claim to them as against him. This being the case, Mrs. Browand did not become entitled to the rents and profits until after Browand's death, and she takes the land subject to the duties imposed by law upon tenants for life. The evidence shows that Mrs. Browand's guardian filed a claim against the estate of Browand for the money derived from the sale of the land, but it is not shown whether the claim was allowed. What bearing upon the rights of the parties to this suit the collection of this money from his ward's estate would have is not before us, and we express no opinion on this point. Since a considerable interval of time has elapsed since the trial any further relevant and material facts in this connection may be brought out at another hearing. Having settled as far as we may with the evidence before us the legal relations of the parties, the cause is reversed and remanded to the district court for further proceedings.

BARNES, FAWCETT, and ROSE, JJ., dissent.

MUSSER v. MUSSER. (No. 17,041.)
(Supreme Court of Nebraska. Nov. 13, 1912.)

(Syllabus by the Court.)

1. PLEADING (§ 236*)—AMENDMENT—BILLS AND NOTES.

The original answer contained a plea of fraud, threats, and intimidation used to obtain

the note sued upon, and also pleaded that the note was given upon a condition. The court during the trial permitted an amended answer to be filed pleading the condition, but omitting the other plea. *Held*, this was within its discretion, and not erroneous.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236.*]

2. EVIDENCE (§ 444*)—PAROL EVIDENCE AFFECTING WRITINGS—EXISTENCE OF CONDITION.

In an action between the original parties to the instrument, it may be shown by parol that a promissory note was delivered upon a condition that it should only be payable upon a certain event. *Davis v. Sterns*, 85 Neb. 121, 122 N. W. 672.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929-1944, 2049; Dec. Dig. § 444.*]

3. BILLS AND NOTES (§ 94*)—CONSIDERATION—COMPROMISE OR SETTLEMENT.

A settlement of a disputed claim may constitute a good consideration for a promissory note, provided that the claim is made by the payee in good faith and on reasonable grounds, even though he may be mistaken as to the basis of his claim.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166, 212; Dec. Dig. § 94.*]

4. ALTERATION OF INSTRUMENTS (§ 27*)—NOTES—BURDEN OF PROOF.

And when the dispute was as to whether a prior promissory note which had been altered was changed before or after its execution and delivery, if the claim of alteration after delivery was made upon reasonable grounds and in good faith, it was not incumbent upon the plaintiff payee to establish as a fact that the defendant maker altered the prior note after its execution.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 230-247; Dec. Dig. § 27.*]

(Additional Syllabus by Editorial Staff.)

5. JURY (§ 97*)—CHALLENGES—GROUNDS.

Where the examination of a juror showed that the defendant was an intimate friend and plaintiff was a stranger, and the record shows that defendant's peremptory challenges were exhausted, a challenge for cause should have been allowed.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 431-437; Dec. Dig. § 97.*]

6. ALTERATION OF INSTRUMENTS (§ 27*)—PRESUMPTIONS AND BURDEN OF PROOF.

The presumption is that any alterations upon the face of a note were made before it was signed and delivered, and the burden of proving an alteration lies upon the person who asserts it.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 230-247; Dec. Dig. § 27.*]

Appeal from District Court, Sheridan County; Harrington, Judge.

Action by Jonas Michael Musser against Michael P. Musser. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

A. W. Crites, of Chadron, and J. E. E. Markley, of Mason City, for appellant. C. Patterson, of Rushville, and John J. Sullivan, of Omaha, for appellee.

LETTON, J. This is an action upon a promissory note for \$3,000, executed by the

defendant in favor of the plaintiff and due and payable one year from date at Niles, Iowa. The defendant in his original answer admitted the execution and delivery of the note, but alleged that it was without consideration and had been procured by threats, intimidation, fraud, and undue means, and further pleaded that it had been delivered upon a condition which is also set out in the amended answer.

The amended answer admitted the execution and delivery of the note, but alleged that it was made without consideration, and that it was executed under circumstances substantially as follows: That in 1899 the plaintiff and his wife executed a note to defendant for \$10,500, secured by a mortgage on land in Iowa, payable five years after date at the Citizens' Bank at Rushville, Neb.; that in 1905 defendant went to Charles City, Iowa, to collect this note; that plaintiff then asserted he had written defendant in December, 1902, to send the note and mortgage and release of the same to the bank at Charles City for payment on or before January 1, 1903, so that he could make a deed to a purchaser of the farm, and that through the negligence of defendant to forward these papers to him he had lost the sale and had been damaged in the sum of \$3,000; that it was then and there agreed that defendant should execute and deliver the note sued upon, to be held in trust by plaintiff until defendant should return to his home at Rushville, Neb., when, if he failed to find such a letter asking him to send the papers to Charles City, then plaintiff was to return to defendant the \$3,000 note. Defendant denies that plaintiff requested him to send the note and mortgage and release to Charles City, denies that he was under any obligation to do so, or that he contributed in any way to the damages claimed by plaintiff, but admits that on January 14, 1903, plaintiff requested him by letter to send him a release of the west half of the property described in the mortgage.

The reply pleads that the mortgage securing the \$10,500 note provided that, in case of the sale of the land, the whole debt should become due and payable; that about November 1, 1901, plaintiff entered into a contract of sale of a portion of the land; that he requested defendant orally and in writing to send him a release of the mortgage, so that plaintiff might pay off the same and convey the land according to his contract; that defendant orally agreed to send the release before January 1, 1903, but failed and refused to do so and to accept the money due on the mortgage; that, by reason of such failure, plaintiff lost the sale of the land, was sued by the purchaser and compelled to pay a large amount of damages; that, when defendant was in Iowa to collect the \$10,500 note, plaintiff refused to pay the same, for the reason that he had been damaged by the failure to release the mortgage,

and because the note had been fraudulently altered; that he then claimed \$3,000 damages and that the note sued upon was executed in settlement of this claim, and in consideration that he would pay the altered note without suit. It is also alleged that the \$10,500 note was originally made payable at the Citizens' National Bank at Charles City, Iowa, and that, after its execution, the defendant without his knowledge or consent altered the same so as to make it payable at the Citizens' Bank, Rushville, Neb.

The defendant is 76 years old, lives at Rushville, Neb., and plaintiff is his nephew. He testified: That he went to Iowa in March, 1905, to collect the \$10,500 note. "I gave this note to bring about the payment of another note that I held against him for damages if it were my fault that he had damages. * * * I told him I would pay him damages if it was my fault and if he paid me the note; and he said that, if he did pay me the note, he would only have my word for it, would have nothing to show; and then I said, 'I will give you my note for \$3,000, and I will pay you my note if your letters are as you state when I get home and see them.'" He also says that plaintiff and his wife accused him of committing a crime by changing the place of payment of the note, and that they had written him before this that the note had been altered. He denied specifically that the place of payment of the note was changed from "Citizens' National Bank, Charles City, Iowa," to "Citizens' Bank, Rushville, Nebraska," after its execution and delivery, and testifies that the place of payment was changed by Judge Burr, plaintiff's attorney, who wrote the note and mortgage, at his, defendant's, request, and that this was done before the note was signed. He also testifies that in the final talk at the bank in Charles City, Iowa, Mr. May, the banker, figured up the amount due on the \$10,500 note, and found it to be \$11,281.55. Eleven thousand dollars was paid, part in April and part in May, 1905, by remittance to Rushville from the proceeds of a loan made by plaintiff. This left \$281.55 still owing. No claim was made for this until this suit was brought, and no notice was sent plaintiff that defendant had found no letter until after the note was due. The testimony of the plaintiff and defendant agrees in most particulars as to the facts surrounding the execution and delivery of the \$3,000 note, with the essential difference that plaintiff testifies that the conversation as to going home and looking for the letter had no reference to the \$3,000 note, but referred to the \$281.55, balance due on the \$10,500 note, and that defendant agreed that, if such a letter was found, defendant was to let him have the \$281.55, while, if such a letter was not found, he was to pay the full sum. Both parties testify that early in 1902 defendant knew of the sale by plaintiff of a portion of the land, deed to be made January 1, 1903,

and that plaintiff desired a release of mortgage by that time, but defendant says that plaintiff was to let him know definitely in time to send it. Defendant wrote the \$3,000 note himself, and, when asked why he did not write the condition upon which he claimed it was payable into the contract, answered that it was an oversight. He also says, in substance, that he knew that, if he commenced a foreclosure action the plaintiff, his wife and his attorney would probably testify against him that the note was changed, and, if the defense was established, his note would be void, and this influenced him in making the \$3,000 note.

Sarah E. Musser, plaintiff's wife, testified that, when defendant visited the house in 1905, he was told the trouble he had caused and the damage it had been to them, and that he finally said he was willing to make it good, and that he and her husband then went to town and made a settlement. Chesta A. Musser and Mayme L. Musser, children of plaintiff, testified to the same conversation. Plaintiff testified that the place of payment of the \$10,500 note was altered; that he first learned of the change when it was sent to the bank for collection in the fall of 1905; that in his opinion the words "Rushville, Nebraska," are in defendant's handwriting. He further testified that he wrote to defendant about sending the release of mortgage about December 1, 1902; that he was unable to perform the contract of sale on account of the release not being forwarded, and that he was sued by the purchaser on this account; that afterwards the land depreciated in value so that he could not sell it; that at the time the \$3,000 note was given there was a dispute as to whether the note had been changed, and also as to whether defendant had been notified to send the papers and release; that defendant finally agreed to pay \$3,000 in settlement. He denies that there was a condition that defendant should not pay if he failed to find such a letter on his return to Nebraska, but that what defendant said was when he got home and looked his letters over, "If I find one letter that you wrote me that you sold that farm, I will give you the \$281.55;" that, if defendant failed to find the letter, he was to let plaintiff have the \$281.55 and was to notify Mr. May. If he found no letter, Mr. May was to send him the \$281.55, and, if he found the letter, Mr. May was to turn the money over to plaintiff. Mr. May testified that defendant gave him instructions to send him at Rushville \$11,000 in payment of the note and mortgage; that he asked defendant what to do with the "overplus," and that he said, "I am going home, and, if I find some letters of Peep, as we call him, I shall write you to give the money to him, if the letters are the way he says they are, and, if they are as I think they are, why the money is to come to me." He also says: "I didn't hear from M. P. Musser, so I turn-

ed the money \$281 over to the plaintiff, and remitted to M. P. Musser the \$11,000. M. P. Musser never wrote me in any way about the \$281." He further testifies that he is intimately acquainted with the handwriting of Judge Burr, and that the words "Rushville, Nebraska," in the \$10,500 note are not in his handwriting.

The jury found for defendant, and a judgment of dismissal was rendered.

[5] The first assignment of error made is that the court erred in overruling the challenge for cause of the juror David Dullaghen. We think it would have been entirely proper to have sustained the challenge to this juror, who was a director in the bank of which defendant is a director and stockholder, had known the defendant for many years, and was on intimate and friendly terms with him. The defendant was an intimate friend, and the plaintiff was a stranger. The record seems to show that defendant's peremptory challenges were exhausted before this challenge was made. While the juror seems to have been candid and honest in his replies to questions propounded, the intimate nature of his social and business relations with the defendant was such that there was a probability that, however conscientious he might be, it would be difficult for him to be entirely impartial in such a doubtful case. We think the juror should have been excused, though we would be reluctant to reverse the case, and grant a new trial, for the sole reason that this juror was retained.

[1] It is next objected that the defense in the amended answer is inconsistent with that in the original answer, and that it was such a substantial change that the court should not have permitted the same; that one who has refused to perform a contract upon an assigned ground cannot, after litigation has begun, change his defense, and base it upon some other inconsistent basis. We are unable to see such a decided difference between the two answers. It is true that the first pleads that the plaintiff obtained the \$3,000 note by fraud and by threats and intimidation. These words are general terms. There are no specifications, except that plaintiff falsely contended that he had sold the land and was unable to make the transfer because defendant had failed after notice to release the mortgage. It further pleads the condition which is set out in the amended answer. We think it was entirely within the discretion of the court to permit the amended answer, and that plaintiff suffered no prejudice thereby.

[2] The next complaint is that it was erroneous to overrule the motion of plaintiff to strike out the testimony as to the condition upon which he says the note was given, because its tendency was to impeach and add to the terms of a written instrument. This, we think, also must be disregarded. We have held that as between the original

parties a contemporaneous agreement by the terms of which a condition was established upon which the instrument became payable may be established by parol testimony. *Davis v. Sterns*, 85 Neb. 121, 122 N. W. 672; *First Nat. Bank v. Burney*, 91 Neb. 269, 136 N. W. 37.

The district court also committed no error in overruling a motion of plaintiff for a peremptory instruction to find in his favor. While the execution and delivery of the \$3,000 note was admitted, the vital issue remained whether there was a consideration for the note, and whether it was executed and delivered upon the condition that it should only be payable in the event that defendant found a letter requesting him to send the release of mortgage before January 1, 1903.

[8] Plaintiff complains of the giving of instruction No. 2. We are inclined to the view that this instruction placed an undue burden upon defendant, in that it required him to establish by a preponderance of the evidence, among other things, that the place of payment of the note was at the Citizens' Bank at Rushville, Neb. The presumption is that any alterations shown upon the face of the note were made before it was signed and delivered, and the burden of proving an alteration lies upon the person who asserts it to have been made. *Dorsey v. Conrad*, 49 Neb. 443, 68 N. W. 645; *Colby v. Foxworthy*, 80 Neb. 239, 114 N. W. 174. It is perhaps subject to criticism in some other respects, but, if error was made in giving it, it seems to us to be rather to the prejudice of defendant than plaintiff.

[3,4] We are of opinion that instructions No. 4 and No. 6 are erroneous, for the reason that they make it essential to recovery that the plaintiff prove to the satisfaction of the jury that, after the plaintiff and his wife gave the \$10,500 note, the defendant altered and changed the place of payment of same. Instruction No. 6 is as follows: "The jury are instructed that if you find from the evidence that the plaintiff refused to pay said \$10,500 by reason of damages alleged to have been sustained through the negligence of the defendant in failing to send a release of \$10,500 mortgage to a bank in Charles City, Iowa, and the plaintiff also refused to pay said \$10,500 note under the claim that the place of payment of said note had been altered and changed by the defendant, and you further find from the evidence that, after that the plaintiff and his wife gave said note of \$10,500, the defendant did alter and change the place of payment of said note, and there was a dispute between the plaintiff and defendant as to whether or not the plaintiff had sustained damages and the amount thereof, and that, under these circumstances and for the purpose of settling said matter, the defendant herein gave to the plaintiff the promissory note sued upon, then this would be a

good and valid consideration of the making of the said note, and the plaintiff would be entitled to recover." This instruction stated certain conditions which it became necessary for the evidence to establish in order to constitute a good and valid consideration for the making of the note and to entitle plaintiff to recover: (1) That the plaintiff refused to pay the \$10,500 note by reason of the damages alleged to have been sustained; (2) that he also refused to pay under the claim that the note had been altered; (3) that the defendant did alter and change the note; (4) that there was a dispute as to whether plaintiff had sustained damages; (5) that for the purpose of settling the matter the defendant gave the note sued upon. We think it was not essential for the plaintiff to establish the fact that the defendant altered and changed the \$10,500 note. If the note showed upon its face an alteration, and the evidence is such as reasonably to justify the conclusion that the plaintiff in good faith believed that the note had been changed after it was signed and delivered and there was an honest and well-founded difference between the parties as to whether such alteration had been made, this, in connection with the dispute between the parties as to the liability of defendant for damages incurred by reason of his failure to send a release of mortgage to plaintiff, if this claim was also made in good faith and on reasonable grounds, constituted such a controversy that a settlement of the same would constitute a good consideration. It is not the fact of alteration which is essential. It is whether or not there was a well-grounded reason for this assertion by the plaintiff, and that he made the same in good faith.

Complaint is made as to a number of other instructions asked by the defendant and refused. It is unnecessary to discuss each of these separately. Some of them are erroneous, in that they omit the element of good faith on the part of the plaintiff in making the charge that the note was altered and in making the claim for damages. Some of them, however, contain statements as to issues which should have been submitted to the jury, though perhaps not in the exact language of the requests.

The question whether, conceding that there was an adequate consideration, the note was delivered to plaintiff upon the condition that it should not be payable unless defendant on his return to Rushville found a letter written prior to January 1, 1903, requesting a release of the mortgage, seems not to have been submitted to the jury at all, except in the sixth paragraph of instruction No. 2, and even then in terms which were perhaps too general for the jury to extract the thought. We think that the plaintiff's side of the case should have been presented more fully.

There were really only two issues in the case: First. Was there a good consideration

for the \$3,000 note? Second. If there was such a consideration, was the note delivered upon a condition?

We think the instructions given fail to submit these issues clearly. The judgment of the district court is therefore reversed, and the cause remanded.

Reversed and remanded.

CHALUPA et al. v. TRI-STATE LAND CO. (No. 16,808.)

(Supreme Court of Nebraska. Nov. 13, 1912.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES (§ 263*)—LANDLORD AND TENANT—IRRIGATION—ACTION FOR FAILURE TO FURNISH WATER—PARTIES.

Two of the plaintiffs, being owners and holders of a water right upon which they were entitled to water from defendant's canal for irrigation, leased land to the other plaintiff and agreed to furnish him water for irrigation thereon. The tenant duly demanded that defendant furnish the water under the water right, and defendant refused, apparently contending that the water right was for some reason invalid, but made no objection that the holders of the water right had not assigned the same to their tenant or authorized him to demand and use the water thereunder. Held that, after action was brought for damages caused by refusal to furnish any water under the water right, the defendant could not defend against the claim of the tenant on the ground that his landlords had not authorized him to use the water right, and, the rent being payable in kind, the landlords and tenant were owners in common of the crops and could maintain a joint action for damages thereto.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 824; Dec. Dig. § 263.*]

2. WATERS AND WATER COURSES (§ 263*)—IRRIGATION—ACTION FOR FAILURE TO FURNISH WATER.

In such case, if the landlords and tenant have recognized the lease, and the tenant has farmed the land under it, it is not a valid defense for the water company that the lease was voidable as between the parties thereto because of informalities in its execution.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 824; Dec. Dig. § 263.*]

3. DAMAGES (§§ 6, 208*)—INJURIES TO CROPS—QUESTION FOR JURY.

In an action for damages to growing crops, the amount of damage is peculiarly a question for the jury. The difficulty of determining the value of the crops and the exact amount of damage thereto is not a sufficient reason for denying a recovery for a willful injury to the crops.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 5, 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. §§ 6, 208.*]

4. APPEAL AND ERROR (§ 216*)—INSTRUCTIONS—NECESSITY FOR REQUESTS.

The trial court should instruct the jury as to the burden of proof, but a failure to do so will not require a reversal of the judgment when no such instruction was requested by the complaining party, and no prejudice appears.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216.*]

5. APPEAL AND ERROR (§ 843*)—REVIEW—SCOPE AND EXTENT.

It is unnecessary in this case to decide whether a general demurrer to a petition, "so far as it attempted to state a cause of action in favor of one" of several joint plaintiffs, can be considered, since the question of law which defendant desires to raise by this demurrer is presented and determined under other assignments.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

Appeal from District Court, Scotts Bluff County; Grimes, Judge.

Action by Frank Chalupa and others against the Tri-State Land Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Wright & Duffie, of Scotts Bluff, for appellant. Morrow & Morrow, of Scotts Bluff, for appellees.

SEDGWICK, J. In 1907 Ernest M. Valentine and William C. Phillips were the owners of a school land lease of a tract of land in Scotts Bluff county and were in possession of the land under the lease, and in March of that year they leased the land in question to the plaintiff Frank Chalupa for one year from March 1st. The contract was that the rent should be paid in kind, and the lessors agreed, among other things, "that the first party shall furnish water for said premises as follows: Water for alfalfa and farm land if it can be secured, but the party of the first part shall not be held responsible for any damages accruing to the party of the second part by reason of shortage of water, or by reason of an overflowage thereof." Valentine and Phillips were the owners of a water right contract by which the grantor of the defendant agreed to furnish 80 inches of water for irrigation purposes. The defendant succeeded to the liability to furnish this water under the contract, and no question is made upon this point. The land in question was within the territory upon which the owners of the water contract might demand the use of the water. The plaintiff Chalupa, in the summer of 1907, had growing on the land in question crops consisting of oats, spelts, wheat, and alfalfa. The defendant refused to furnish water for these crops when demanded by Chalupa, and the crops were damaged for want of water. This action was brought by said Valentine, Phillips, and Chalupa to recover such damages. Afterwards, upon the death of Phillips, the action was revived in the name of Helen Phillips, administratrix of his estate. The judgment was in favor of the plaintiffs, and the defendant has appealed.

[5] 1. The defendant demurred to the petition "so far as it attempts to state a cause of action * * * in favor of the plaintiff Frank Chalupa." The demurrer was over-

ruled, and the defendant alleges that this was erroneous. The question whether a demurrer will lie to the cause of action of one of several joint plaintiffs is discussed in the briefs, but it is not necessary to a determination of this case. If Frank Chalupa had no cause of action against the defendant under the allegation of the petition, then he had no cause of action under the evidence, as the evidence follows the petition in that regard, and the questions discussed upon the sufficiency of the petition are also discussed and necessarily raised upon the sufficiency of the evidence. These questions then will be considered under that assignment.

[1] 2. It is contended that there was no privity of contract between the defendant and the plaintiff Chalupa—there being no evidence that the other two plaintiffs ever assigned to Chalupa any interest in the water right contract—that Chalupa's claim for damages, if he had any, was against his co-plaintiffs, and that he could not recover directly from the defendant. "Where land is leased and rent reserved in kind or share of the crops to be raised, the landlord and tenant are tenants or owners in common of the growing crops on such land during the life of the lease." *Sims v. Jones*, 54 Neb. 769, 75 N. W. 150, 69 Am. St. Rep. 749. "Tenants in common may join in an action for the possession of real estate held by one without title." *Mattis v. Boggs*, 19 Neb. 698, 28 N. W. 325. "Where land is let upon shares, the owners of crops may maintain an action against third persons for unlawful trespass upon or injury to such crops. However, one joint owner cannot alone maintain such action without joining therein the other joint owners of such property, and those refusing to join in the action as plaintiffs should be made parties defendant." 24 Cyc. 1468.

Valentine and Phillips had a valid water right which they were entitled to use upon this land. They leased the land to Chalupa and agreed with him to furnish water for the land. Chalupa demanded the water from the defendant under the contract which his landlords held. There is no evidence that his landlords used the water on any other land or demanded that water be furnished for use upon any other land. The landlords have ratified the demand of Chalupa that the water be furnished upon this land when Chalupa demanded the water. The defendant did not object that he was not entitled to use the water right, but refused to furnish water to any one under it. They cannot now change the ground of their refusal, and it does not rest with the defendant to deny that Chalupa was authorized to demand and receive the water under the contract by his lessors.

[2] 3. The lease from Valentine and Phillips to Chalupa contained the provision "that said party of the second part shall not be entitled to the possession of said premises,

nor have any interest whatever therein, until this lease is signed by him and by the president or secretary of the Lincoln Land Company and delivered to said second party." The defendant now objects that the lease was invalid, because it does not appear that it was ever signed by the president of the Lincoln Land Company. There is no merit in this objection. The evidence shows that the parties under the lease regarded it as valid; that Chalupa took possession of the land under it and farmed it in accordance with the terms of the lease; and it is immaterial to the defendant whether one of the parties to the lease might have avoided it or not, since there was no attempt to do so.

[3] 4. It is contended that the damages allowed are excessive; that the evidence will therefore not support the verdict and judgment. Several witnesses in behalf of the plaintiff, farmers and others with experience in crops and crop values, testified to the value of the growing crops before they were injured for want of water and to the value after the injury. Upon cross-examination by the defendant these witnesses were cross-interrogated as to their means of knowledge and as to their method of computing the values. In some cases it appears that their method of computing values was fanciful and unsubstantial. This fact goes to the importance and weight of the testimony. It is not sufficient ground for disregarding their testimony entirely by the court as a matter of law. It is difficult to estimate accurately the damages, as expressed in dollars and cents, to a growing crop because of lack of moisture. There are other uncertainties in regard to the result of farming and crop raising than those depending upon moisture, and it is impossible to say with certainty what would be the result if sufficient water had been furnished. The difficulty in estimating the damages, however, in such cases has never been considered sufficient ground to refuse to allow compensation for damages willfully inflicted. It presents a question peculiarly for the jury, and where the evidence is substantially conflicting, as in this case, and the law is complied with in submitting the matter to the jury, their verdict must control. The judgment in this case seems to us to be quite as much as the evidence would warrant, but it is not excessive, so that we can say, as a matter of law, that the verdict is clearly wrong.

[4] 5. It is complained that none of the instructions of the court in direct terms told the jury "that the plaintiff, in order to establish a case, must do so by a preponderance of the evidence." The court should have so instructed the jury, and no doubt would have given such an instruction if it had been presented and requested. The duties of a trial court in jury trial are quite exacting, and, if the defendant discovers such an omission as this, fair dealing requires him to call the

attention of the trial court to the matter. Not having done so, he ought not afterwards to be allowed to subject the parties to costs and vexation of another trial.

No substantial error appearing in the record, the judgment of the district court is affirmed.

ATTWOOD v. WARNER et al. (JENKINS LAND & LIVE STOCK CO., Intervener).
(No. 16,851.)

(Supreme Court of Nebraska. Nov. 13, 1912.)

(Syllabus by the Court.)

1. MORTGAGES (§ 199*)—RIGHTS AND LIABILITIES OF PARTIES—POSSESSION BY MORTGAGEE.

Where a mortgagee, without an agreement therefor, takes possession of the mortgaged premises before confirmation of a valid judicial sale, he thereby becomes liable to the mortgagor or his grantees for the amount of rents and profits which he receives, or which the land would have produced if prudently managed while he retains possession thereof.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 513-525; Dec. Dig. § 199.*]

2. MORTGAGES (§ 274*)—TRANSFER OF EQUITY OF REDEMPTION—EFFECT.

A sale and conveyance by the mortgagor or owner of the equity of redemption to a bona fide purchaser, without any reservation, vests such purchaser with the right to the rents and profits, which he may have applied upon the mortgage debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 718-724, 728; Dec. Dig. § 274.*]

3. APPEAL AND ERROR (§ 1176*)—DISPOSITION OF CAUSE—DIRECTION OF JUDGMENT.

Where, upon consideration of the evidence, it is found that the trial court failed to credit the proper amounts of rents and profits upon the mortgage debt, the Supreme Court will determine such amount and remand the cause to the district court, with directions to modify the decree accordingly.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4588-4596; Dec. Dig. § 1176.*]

Appeal from District Court, Dundy County; Orr, Judge.

Action by Garwood H. Attwood against George M. Warner and others, defendants, and the Jenkins Land & Live Stock Company, intervener. From a judgment for plaintiff, intervener appeals. Reversed and remanded, with directions.

W. S. Morlan, of McCook, Chas. A. Robins, of Lincoln, and Chas. T. Jenkins, of Haigler, for appellant. Meeker & Hines, of Imperial, and C. E. Eldred, of McCook, for appellee.

BARNES, J. This action, when it was commenced in the district court of Dundy county, was a suit in chancery for the foreclosure of a mortgage upon 474 acres of land situated in that county and known as the Warner Ranch. The mortgage was executed by the Warners, who were the owners of

the land, to the Western Farm Mortgage Trust Company, for the sum of \$2,500. It was sold and assigned by that company to one Garwood H. Attwood, who was the plaintiff in the foreclosure suit, and in which the mortgagors and others were the defendants. On the 9th day of April, 1894, the plaintiff obtained a decree of foreclosure as prayed. Thereafter there was a sale of the mortgaged premises, while there was on file a request for a stay, as provided by law. On an appeal by the Jenkins Land & Live Stock Company, which had become the owner of the equity of redemption, from an order of confirmation, the sale was set aside. Jenkins Land & Live Stock Co. v. Attwood, 80 Neb. 806, 115 N. W. 305. Meanwhile Attwood, by his agent, went into possession of the premises and collected the rents and profits thereof from the date of the decree to the 27th day of April, 1908, when the Jenkins Land & Live Stock Company filed its petition for intervention in the original foreclosure suit, praying for an accounting of the rents and profits, and an application thereof to the satisfaction of the decree of foreclosure. To this petition Attwood filed an answer, and upon a trial of the issues joined the district court found that, at the time of the trial, there was due Attwood, on his original mortgage decree, the sum of \$6,474.12; that the rents and profits, while he had been in possession of the premises as mortgagee, amounted to the sum of \$2,474, which should be applied in part satisfaction of the mortgage debt; that the balance due on the decree of foreclosure, after deducting the rents and profits, was \$3,999.12; and, from a judgment rendered upon such findings, the Jenkins Land & Live Stock Company has prosecuted this appeal.

[1] 1. It is contended by the appellant that the district court erred in his finding as to the amount of rents and profits which should have been credited on the foreclosure decree, and insists that Attwood should be charged with such an amount of rent as the land ought to or would have produced, if prudently managed; while on the other hand Attwood contends that he is only liable for the amount of rent actually obtained by him while he was in possession of the premises. This court is committed to the rule for which the appellant contends. In *White v. Atlas Lumber Co.*, 49 Neb. 82, 62 N. W. 359, it was held that a mortgagee in possession is liable for the rents and profits which he has received or which he might have received by the exercise of reasonable care. This rule was followed in *Hatch v. Falconer*, 67 Neb. 249, 93 N. W. 172, and is supported by *Huston v. Stringham*, 21 Iowa, 36. It appears that this rule was adopted by the trial court, and his conclusion on this point should be affirmed.

[2] 2. It appears that one Alma E. Jewett, who was the owner of the equity of redemption, together with her husband, conveyed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the land in question to the appellant, the Jenkins Land & Live Stock Company, by quitclaim deed, which contains the following provision: "By these presents do, for themselves, their heirs, executors, and administrators, remise, release, and forever quitclaim unto the said party of the second part, and to its heirs and assigns forever, all their right, title, interest, estate, claim and demand, both at law and in equity, of, in, and to all the southwest quarter * * * (describing the mortgaged premises). Together with all and singular the hereditaments and appurtenances thereunto belonging. To have and to hold the above described premises unto the said Jenkins Land & Live Stock Company, its heirs and assigns, so that neither we, the said Alma E. Jewett and Ed. Jewett, or any person in our name and behalf, shall or will hereafter claim or demand any right or title to the said premises or any part thereof, but they and every of them shall by these presents be excluded and forever barred." That afterwards Attwood, through the intervention of one Wilhelm, obtained from the Jewetts a purported assignment of the rents and profits in question; and it is argued that, by reason of that fact, the appellant is not entitled to have them applied on the foreclosure decree. We are of opinion, however, that by the quitclaim deed above mentioned the appellant obtained the right to the rents and profits, and that thereafter, when the Jewetts attempted to assign them to Attwood, they had no interest therein. Such was the finding of the district court upon that question, and it should be affirmed.

[3] 8. It follows that the only question which remains for our determination is the one relating to the value of the rents and profits to be applied upon the mortgage debt. Upon this question the evidence is widely conflicting. Some testimony was produced by the appellant tending to show that the reasonable rental value of the premises was from \$300 to \$500 per year. But this, in view of the existing conditions, is in our judgment quite excessive. On the other hand, some evidence was introduced by the appellee fixing the rental value at from \$75 to \$125 per year. As we view the evidence this is much less than the true rental value; and, after carefully considering all of the testimony, we find that by reasonably prudent management the ranch of 474 acres, covered by the mortgage, could have been rented for \$200 per year for the 11 years of Attwood's possession. This, with interest properly computed, amounts to \$2,872, which should have been applied in part satisfaction of the amount due Attwood on the foreclosure decree, and upon this question the judgment of the district court is reversed, but in all other things the decree appealed from is affirmed.

The cause is therefore remanded to the

district court of Dundy county, with directions to enter a decree in conformity with this opinion.

Judgment accordingly.

LEHMAN v. AMSTERDAM COFFEE CO. et al.

(Supreme Court of Wisconsin. Nov. 19, 1912.)

1. APPEAL AND ERROR (§ 1234*)—BONDS—SURETIES—REVERSAL OF JUDGMENT.

Where a judgment is reversed on appeal, and new trial ordered, unless plaintiff elect to take a judgment for \$1,000, to be rendered by the trial court, sureties on the appeal bond undertaking to pay the judgment appealed from, if affirmed in whole or in part, are not liable for the judgment of \$1,000 entered by the trial court, on election being made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4761-4777; Dec. Dig. § 1234.*]

2. INTEREST (§ 22*)—JUDGMENTS—REVERSAL.

Where, on appeal, judgment is reversed, with option to take a judgment of \$1,000, to be entered by the trial court, interest cannot be allowed on the \$1,000, on election made to take such amount.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 43-53; Dec. Dig. § 22.*]

Appeal from Circuit Court, Milwaukee County; J. C. Ludwig, Judge.

Action by Wendeline Lehman against the Amsterdam Coffee Company and others. From a judgment for plaintiff, defendants appeal. Reversed in part, and modified in part.

Lynn S. Pease and Alfred Klingelhoef, both of Milwaukee, for appellant. Hugo J. Trost, of Milwaukee (Churchill, Bennett & Churchill, of Milwaukee, of counsel), for respondent.

WINSLOW, C. J. By reference to the case of *Lehman v. Amsterdam Coffee Co.*, 146 Wis. 213, 131 N. W. 362, it will be seen that upon the first appeal in this case a judgment for damages in plaintiff's favor was reversed and a new trial ordered, unless the plaintiff elected to take a judgment for \$1,000, in which case judgment for such last-named sum was ordered to be rendered in her favor in the trial court. It now appears that upon return of the record the plaintiff duly filed her election to take judgment for \$1,000, whereupon judgment was entered, not only against the defendant Coffee Company, but also against the sureties upon the appeal bond, for the sum of \$1,000, with costs, and with interest at 6 per cent. per annum from the date of the verdict, less \$247.75, being the taxed costs in this court upon the former appeal. The defendant Coffee Company and the sureties appeal jointly from this judgment.

[1] So far as the sureties are concerned, it is very plain that the present judgment must be reversed. By their undertaking

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

they agreed simply that they would pay "all costs and damages which may be awarded against them on said appeal, not exceeding \$250, and do also undertake that if the said judgment so appealed from, or any part thereof, be affirmed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against said appellant on the said appeal." No costs or damages were awarded against them on the appeal, nor was the judgment or any part thereof affirmed. This seems too clear for argument. No part of the original judgment was left in existence after the judgment in this court upon the former appeal. The fact that another judgment might be rendered in the future by the trial court upon the exercise of a certain option by the plaintiff could not under any theory be construed as in affirmance even in part. The sureties are only held according to the language of their bond, and that language does not cover this case. They never agreed to pay a judgment rendered in the future in the trial court, but only the existing judgment, or some part thereof, in case of affirmance.

[2] The judgment was, of course, proper against the main defendant, except that interest should not have been allowed from the date of the verdict, because the plaintiff was given an option to take judgment for \$1,000 and no more. One year's interest at 6 per cent., amounting to \$60, was included, and the judgment must be reduced by that amount.

As to the appellant sureties, the judgment is reversed, with costs; as to the defendant Coffee Company, the judgment is modified, by reducing the same in the sum of \$60 as of its date, and, as so modified, is affirmed, without costs.

AHEARN v. BORNGESSER.

(Supreme Court of Wisconsin. Nov. 19, 1912.)

1. BROKERS (§ 86*)—ACTIONS FOR COMPENSATION—QUESTIONS FOR JURY.

In an action by a real estate broker for his compensation, evidence *held* to sufficiently support a verdict in his favor.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

2. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSIONS.

In an action by a real estate broker for compensation, claimed because he produced a purchaser ready, willing, and able to pay cash in accordance with the contract, testimony by the purchaser that, while he did not desire to pay cash, he was able to and would have done so, had the owner insisted, is not objectionable as a conclusion.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

Appeal from Circuit Court, Milwaukee County; F. C. Eschweiler, Judge.

Action by John Borngesser against Francis E. Ahearn. From a judgment for plaintiff, defendant appeals. Affirmed.

The complaint in this action alleged that plaintiff entered into an agreement with the defendant whereby he was to secure a purchaser for certain real estate owned by the defendant, and that he was to receive for his services all in excess of \$48,000 paid for the property; that he found a purchaser who was able, ready, and willing to pay \$50,000; that the parties were brought together, and that the proposed terms of the purchaser were accepted by the defendant, but that defendant failed and neglected to consummate the sale, and afterwards sold and conveyed the property to another person. The answer put in issue all the allegations of the complaint. The jury returned a verdict in favor of the plaintiff, and from a judgment entered on such verdict the defendant appeals.

Reukema & Lemke, of Milwaukee (W. H. Bennett, of Milwaukee, of counsel), for appellant. Thomas H. Dorr, of Milwaukee, for respondent.

BARNES, J. (after stating the facts as above). [1] Under the terms of his contract the agent was obliged to secure a purchaser who was able to pay cash. The agent produced a prospective purchaser who expressed a willingness to buy the property and pay cash therefor, but stated that he would prefer to pay part of the purchase price in cash and secure time on the remainder. The evidence tended to show that the defendant was willing to make the concessions requested by the purchaser in reference to the manner of payment, but that he stated that his sister owned a half interest in the property, and that he could not consent to sell on time until he had consulted with her, and that he would do so and advise the purchaser whether it would be necessary to pay the entire purchase price in cash. He failed to inform the purchaser of the attitude of his sister, and within a very short time sold the property to another party.

The various contentions made by the appellant are really directed to two propositions: First, the evidence was not sufficient to warrant the jury in finding that the plaintiff had produced a purchaser who was ready, able, and willing to buy the premises in question; and, second, that if there was any evidence in the case tending to support the conclusion of the jury, such evidence was improperly admitted. The prospective purchaser testified that he was ready, able, and willing to buy the premises and pay cash therefor, if the defendant insisted that the entire purchase price be paid in cash. There is nothing substan-

tial in the record to contradict this testimony. The jury was at perfect liberty to believe it, and evidently did believe it, and its conclusion cannot be set aside as not supported by the evidence.

[2] However, if this evidence was incompetent, then there was no other evidence in the case tending to show that the proposed purchaser was able to consummate the deal, and the judgment should be reversed. *Donohue v. Padden*, 93 Wis. 20, 68 N. W. 804; *Arnold v. National Bank*, 126 Wis. 362, 105 N. W. 828, 3 L. R. A. (N. S.) 580; *Riemer v. Rice*, 88 Wis. 16, 59 N. W. 450; *McCabe v. Jones*, 141 Wis. 540, 124 N. W. 486. The objection to the competency of the evidence is that the witness testified to a conclusion rather than to a fact. The question as to whether or not the purchaser was able to pay in cash was a question of fact. It was, or should have been, a fact within the knowledge of the witness. We see no more objection to his testifying to it than there would be to a witness testifying to his age, or the state of his health, or his financial worth, if these matters were relevant subjects of inquiry. The defendant had ample opportunity on cross-examination to make inquiry as to the amount of property owned by the witness, the character of the property, the amount of his indebtedness, and the extent of his ability to secure credit, as well as any other fact which would tend to break down or impeach the statement made on direct examination. For aught that appears here, the proposed purchaser might have drawn his check on the bank for the entire purchase price and have had it honored. We see no objection to permitting a party who has made an offer for property to testify that he was able to pay for it.

Judgment affirmed.

RAASCH v. MILWAUKEE ELECTRIC RY. & LIGHT CO.

(Supreme Court of Wisconsin. Nov. 19, 1912.)

1. STREET RAILROADS (§ 114*)—DEATH OF TRAVELER—GROSS NEGLIGENCE.

Where a street railway motorman sounded the gong as soon as he saw decedent's wagon crossing the track and attempted to stop the car, using both brakes and reverse, but was unable to stop before striking decedent's wagon, which was tipped over, resulting in decedent's death, such facts were insufficient to show that the motorman was guilty of gross negligence.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-250; Dec. Dig. § 114.*]

2. APPEAL AND ERROR (§ 997*)—REVIEW—DIRECTION OF VERDICT.

In an action for death of a traveler in a collision with a street car, mere negative testimony of one witness that he did not hear the bell, nor see any effort to stop the car prior to collision, was not sufficient to justify a reversal of a verdict directed by the court on the theory that gross negligence had not been proved, which was supported by the evidence of two

employees and three other disinterested witnesses.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4023, 4024; Dec. Dig. § 997.*]

Appeal from Circuit Court, Milwaukee County; F. C. Eschweiler, Judge.

Action by Ernest Raasch, as administrator, etc., against the Milwaukee Electric Railway & Light Company. Judgment for defendant, and plaintiff appeals. Affirmed.

W. H. Frawley & T. F. Frawley, of Eau Claire, for appellant. Van Dyke, Rosecrantz, Shaw & Van Dyke, of Milwaukee, for respondent.

WINSLOW, C. J. The plaintiff's intestate was driving a horse attached to a milk wagon southward on Twentieth avenue, in the city of Milwaukee, at about 6 a. m. July 1, 1908. The wagon was covered, and the intestate was standing on the westerly or right-hand step of the wagon. Just as the wagon crossed defendant's northerly track, running east and west on Greenfield avenue, one of defendant's street cars, west bound, ran into the rear of the wagon, tipping it over, and causing the death of the intestate. The plaintiff claims that the evidence was such as to justify the conclusion of gross negligence on the part of the defendant's motorman, but the trial court held to the contrary, and directed a verdict for defendant at the close of the plaintiff's evidence. It is not claimed that there is any ground of recovery save the ground of gross negligence. The question presented on this appeal is whether there was error in the direction of a verdict for defendant.

[1] The testimony as to the speed of the car varied from 6 or 7 miles to 15 or 20 miles per hour. The motorman testified that he first saw the milk wagon when his car was about the middle of the block—i. e., about 150 feet east of the wagon—that he at once put on the brakes, rang the gong, and put on the reverse current; that the brakes did not take hold well, and the wheels slipped on the rail because it was dirty in spots. Another motorman who was on the front platform of the car at the time corroborated this testimony fully. Two disinterested witnesses, who were on the sidewalk, one directly opposite the car and the other some 200 feet distant, testified positively to the ringing of the gong, and they also testified to the fact that the car slowed up at once, and that they saw the motorman putting on the brakes; while a third passer-by testified to the slackening of the speed and the putting on of the brakes. In addition to this, the weight of the evidence is to the effect that the car had nearly reached a stop before it struck the wagon.

As opposed to this mass of evidence, which entirely excludes the idea of wanton or reckless disregard of life on the part of the

motorman, there is the testimony of one witness for the plaintiff, who stood on the sidewalk some 200 feet away, and testified that he did not hear the gong nor see the motorman attempt to stop the car, and of another witness, a block further away, who thought the speed of the car was about the same all the way until the wagon was struck. If the motorman sounded the gong as soon as he saw the wagon and attempted to stop the car at once, there can be no reasonable claim of gross negligence, even if in the exercise of due care he ought to have seen the wagon earlier.

[2] The mere negative testimony of one witness who testified that he did not hear the bell nor see any effort to stop the car cannot be deemed sufficient to justify this court in reversing the decision of the trial court, especially when that decision is given the weight and deference to which it is entitled.

Judgment affirmed.

BUDNEY v. AMERICAN CANDY CO.

(Supreme Court of Wisconsin. Nov. 19, 1912.)

1. MASTER AND SERVANT (§ 154*)—MASTER'S DUTY—WARNING.

The duty of warning a servant of dangers does not apply to a servant who is familiar with the work, tools, and appliances, or when the dangers are well known to the servant, and are such as he is fully capable of appreciating.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 808, 809; Dec. Dig. § 154.*]

2. MASTER AND SERVANT (§ 278*) — ACTION FOR INJURIES—EVIDENCE—DANGERS KNOWN TO EMPLOYE.

Evidence in a servant's action for injuries from a candy machine consisting principally of two brass rollers held to show that plaintiff, a boy of 14, was fully informed of the danger therefrom.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972; Dec. Dig. § 278.*]

3. MASTER AND SERVANT (§ 278*) — ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE—INSTRUCTION AND WARNING.

Evidence in an action to recover for injuries from a candy machine held insufficient to sustain a finding that defendant negligently omitted to give plaintiff, a boy of 14, needed instruction and warning.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972; Dec. Dig. § 278.*]

Appeal from Circuit Court, Milwaukee County; Franz C. Eschweiler, Judge.

Action by John Budney, an infant, by Theodore Gaudynaki, guardian ad litem, against the American Candy Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The plaintiff suffered the loss of three fingers and the partial loss of a fourth finger on his left hand on a "cough drop" machine, while he was working for the de-

fendant, and brings this action by his guardian ad litem to recover damages for the injuries.

The cough drop machine consists principally of two brass rollers, between seven and eight inches long and four inches in diameter. There are oblong indentations on the surfaces of both rollers which meet as the rollers revolve close to one another and shape the candy as it runs between the roller into drops. The rollers are a small fraction of an inch apart, and the drops as they come from the machine are connected by a thin sheet of candy which is formed between the rollers. The rollers are held in a frame, and the gearing causing the revolution of the rollers is driven by a pulley and belt, which in the present instance were electrically propelled, and caused the rollers to revolve 60 to 80 times a minute. The machine was placed near the edge, and about the center of a wide table about 16 feet long. The hot candy is fed from the heating table up an incline and between the rollers on the side of the machine on which the rollers converge as they revolve. An air pipe ran up from the edge of the table alongside of the rollers, and from this an arm or small spout extended out over the top roller. The air from this spout, which opened about three inches above the top roller, was blown onto the roller to cool it and the candy as it came from the machine, thus preventing a sticking of the candy to the roller.

On the day before the accident the plaintiff went to work for the defendant, and was put at work with another new boy by the foreman of the defendant. Plaintiff's duty was to receive the candy as it came from the machine and with a stick break the sheet of candy so that the drops would be separated, and then to push the candy along the table to be handled by other employees. The roller could not be kept sufficiently cool, and the candy would stick to the rollers. At times grease or starch would be placed on the rollers to prevent the candy sticking to them. At other times the feeding of the hot candy would be stopped, and a board about four inches wide would be placed on the incline over which the candy was fed into the machine and held in position by a monkey-wrench, and the air spout would be so turned that the air current would strike the board and be forced between the rollers to cool them. This might happen eight or ten times a day.

The plaintiff testified that about 10:30 o'clock on the morning of September 13, 1910, the second day he was working for the defendant, the supply of candy was exhausted and he sat down near the machine, and that George Diedrich, the workman who fed the candy into the machine, while passing by, told him to turn the air on the machine; that he went to the side of the machine at which he had been working, and with his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

left hand took hold of the spout to move it as he had been directed; that the spout moved more easily than he expected; and that his hand slipped over the top of the roller, and his fingers were caught between the rollers and crushed and injured. He also stated that neither the defendant's foreman nor George Diedrich, his superior, had given him any warning or instruction as to the danger of getting his hand between the moving rollers.

George Diedrich, the candy maker, testified that he had not directed the plaintiff to turn on the air. He also testified that on the previous day he had caught the plaintiff in the morning fooling with the machine, and that he gave him instructions that he was not to touch the machine, and that he found the air turned off by a damper in the blow-pipe, and that he then told the plaintiff that he wanted the air on, and he himself opened it again. He testified that in the afternoon he caught the plaintiff running his hands on the rollers, and that just previous to the time of the accident he had adjusted the board and monkey-wrench and the air spout so as to cool both rollers.

The foreman for the defendant, who had charge of the stock candy room, and who had put the plaintiff at work when he started on the day before the accident, testified that he told both of the boys who came to work at that time that they should work for Mr. Diedrich, and do what he told them, and that he showed them at the start what they were to do. He also testified that at the time of the accident he heard a call, that he went to the plaintiff, who had just been released from the machine, took him to a sink about 20 or 25 feet away, and that the plaintiff in reply to a question of how the accident happened said in a crying way that he was playing with the wind.

The boy who went to work for the defendant at the same time as the plaintiff stated that, when they first went to work, George Diedrich told him and the plaintiff to stay away from the machine, and not to touch it, and that about an hour afterwards he heard Diedrich tell the plaintiff not to monkey with the machine.

Walter Comdohr, the person who stopped the machine and released the plaintiff, testified that he found the board and monkey-wrench on the machine at the time of the accident, adjusted as Diedrich testified he had left them. One of the girls who was working at the table with the plaintiff testified that the foreman had told the plaintiff to be careful about the rollers.

The plaintiff, called as an adverse witness, testified as follows: "Q. You have seen a clothes wringer, haven't you? A. Yes, sir. Q. And you know how they work? A. Yes, sir. Q. You knew, didn't you, that if you got your finger in between these rolls on the side where the candy was fed in that they would get drawn in there? A. Yes, sir.

Q. You could see that? A. I couldn't see it, but I knew it. Q. You knew that was what would happen? A. Yes, sir. Q. You knew from looking at the side of the machine at which you worked that the opening on the other side was exactly opposite, it was exactly opposite the place where the rolls separate. That is, the side where anything was fed in was exactly opposite the side where anything was fed out. You knew that, didn't you? A. Yes, sir."

The jury returned a special verdict finding that the danger of getting his fingers caught in the rollers was not so obvious that the plaintiff, considering his age, intelligence, and experience, should have known and appreciated it; that the defendant failed to give the plaintiff such warning or instruction before the injury as would enable a person of his age and experience, exercising due care, to appreciate such danger; that such failure was the proximate cause of the injury; that the plaintiff was directed by George Diedrich to shift the air blower just before the accident; and that no lack of ordinary care on the part of the plaintiff proximately contributed to his injuries. The court granted defendant's motion to change the answer to one of the questions of the special, by which the jury found that the plaintiff was directed by George Diedrich to shift the air blower just before the accident, and found this issue in the negative, and also granted defendant's motion to dismiss the complaint.

This is an appeal from the judgment so ordered.

W. B. Rubin, of Milwaukee (Wallace Ingalls, of Racine, and A. W. Foster, of Milwaukee, of counsel), for appellant. Harper & McMyrn and L. A. Olwell, all of Milwaukee (Burr J. Scott, of Milwaukee, of counsel), for respondent.

SIEBECKER, J. (after stating the facts as above). The jury found that the plaintiff, a boy fourteen years and seven months of age at the time of the accident, in the light of his age, intelligence, and experience, did not know or appreciate, and ought not to have known and appreciated, the danger of getting his fingers caught in the rollers, and that defendant was negligent in not warning and instructing him of this danger so as to enable him to have understood and appreciated it.

[1] The duty of warning a servant of dangers does not apply to a servant who is familiar with the work and the tools and appliances, and does not apply when the dangers are well known to the servant, and when they are such as he is fully capable of appreciating. This rule is elementary and has received numerous applications in the decisions of this court, of which the following may be cited: *Rahles v. J. Thompson & Sons Mfg. Co.*, 137 Wis. 506, 118 N. W. 350.

119 N. W. 289, 23 L. R. A. (N. S.) 296; Dahlke v. Illinois Steel Co., 100 Wis. 431, 76 N. W. 362; Wagner v. Plano Mfg. Co., 110 Wis. 48, 85 N. W. 643.

[2] In the foregoing statement, the evidentiary facts as to plaintiff's knowledge of the alleged danger and also defendant's want of care are presented. There can be but one rational inference drawn therefrom as respects these two questions, which are that the plaintiff was fully informed of the alleged danger of his employment, and hence that warning and instruction to inform him thereof so that he might appreciate the attendant hazard were not required to be given to him.

[3] A study of the facts convinces us that the evidence fails to show that the defendant was guilty of any want of care which proximately caused plaintiff's injury, and that the jury's finding that defendant negligently omitted to give plaintiff needed instruction and warning is not supported by the evidence. The evidence is within so narrow a compass and so directly to the point that discussion of it as to its probative effect and force can afford no assistance in drawing the legitimate inferences therefrom. We are constrained to hold that the evidence fails to show a cause of action against the defendant upon the grounds alleged, and the judgment dismissing the complaint must stand.

Judgment affirmed.

SAPIENZA v. WORDEN-ALLEN CO.

(Supreme Court of Wisconsin. Nov. 19, 1912.)

1. NEGLIGENCE (§ 136*)—DANGEROUS PREMISES—EVIDENCE.

Defendant, constructing an addition to the power plant of a railway company, about two weeks prior to plaintiff's injury placed certain heavy girders, so that one end rested on a wall surrounding an excavation and about eight feet of the other end rested on a pile of rubbish in the excavation. Plaintiff, an employé of the railway company, was ordered by his foreman to pick up wood and lumber from the rubbish pile, and while doing this defendant's foreman lifted a small iron girder which lay near the large ones, and removed the same. When the short girder was raised, the large girder was moved slightly, and then settled back in its former place. Plaintiff and his fellow laborers thereupon began work at the rubbish pile, and almost immediately the end of one of the girders slipped from the pile against plaintiff, causing the injuries complained of. Held, that such facts were insufficient as a matter of law to establish actionable negligence on defendant's part.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

2. NEGLIGENCE (§ 66*)—DANGEROUS PREMISES—CONTRIBUTORY NEGLIGENCE.

Plaintiff having been as fully apprised of the situation and the attendant hazards as defendant's employé, his act in returning to a place of danger on a rubbish pile was contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 86-89; Dec. Dig. § 66.*]

Appeal from Circuit Court, Milwaukee County; F. C. Eschweiler, Judge.

Action by Joseph Sapienza against the Worden-Allen Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to dismiss.

This is an action to recover damages for personal injuries sustained by the plaintiff.

The complaint alleges that the defendant, the Worden-Allen Company, was erecting under contract for the Milwaukee Electric Railway & Light Company an addition to the north side of its electric power plant located on Commerce street in the city of Milwaukee, and had piled heavy iron girders, weighing several tons each, in close proximity to a depression or excavation. On the 14th day of March, 1911, while the plaintiff, acting under orders and directions of a foreman of his employer, the Milwaukee Electric Railway & Light Company, was in the act of picking up and removing wood and lumber from a pile of rubbish in the depression or excavation, one of the heavy iron girders fell from its place and rolled down the pile of rubbish against the leg of the plaintiff, causing a fracture of his left leg. The alleged charge of negligence of the railway company in furnishing the plaintiff with an unsafe and dangerous working place in permitting the iron girders to be so insecurely piled and placed that one fell and injured the plaintiff was dismissed. The Worden-Allen Company is charged with negligence, in that it violated its duty to the plaintiff to select a proper and safe place to pile the girders and to pile them securely and to place them in such a position that they would not fall. A demurrer to the reception of any evidence under the complaint was overruled by the court.

The jury returned a special verdict finding that the defendant, within about five minutes of the accident, had raised a short piece of iron lying partly in the rubbish upon which the long iron column rested and which short piece of iron was only a few inches from the iron column; that the defendant was guilty of a want of ordinary care in so causing the short piece of iron to be raised; that the want of ordinary care on the part of the defendant was the proximate cause of the injury; and that the plaintiff was not guilty of any want of ordinary care which proximately contributed to his injury. The court refused to direct a verdict for the defendant, refused to change answers to certain questions of the verdict as requested by the defendant and to order judgment on the verdict as so changed, refused to order judgment for the defendant notwithstanding the verdict, and to set aside the verdict and grant a new trial, and granted a motion for judgment for the plaintiff on the verdict. This is an appeal from the judgment.

Flanders, Bottum, Fawsett & Bottum, of Milwaukee, for appellant. Harry M. Silber, of Milwaukee, for respondent.

SIEBECKER, J. (after stating the facts as above). [1] The evidence in the case shows that in the construction of the addition to its Commerce street plant the railway company had thrown the rubbish accumulating during the building into an excavation 5 or 6 feet deep on the opposite side of a 16-foot alley from the addition. The excavation, which was the cellar to a building which had either been removed or never constructed, was surrounded on three sides by concrete walls. The rubbish thrown into the excavation extended into the excavation for 10 or 12 feet on a level with the ground, and then gradually declined to the bottom of the excavation. About two weeks before plaintiff was injured, the Worden-Allen Company had brought three iron girders or columns, between 40 and 50 feet in length and about 12 by 12 inches, weighing several tons each, to these grounds, and had placed them so that one end of the girders rested on the wall surrounding the excavation and about 8 feet of the other end rested on the pile of rubbish in the excavation. One girder was placed on top of another, while the third lay near by. The persons who handled them testified that they were securely and safely placed. Shortly before the plaintiff was injured, he and four other laborers employed by the railway company were ordered by the foreman to pick up the wood and lumber from the rubbish pile in the excavation and to load it into a wagon. While they were working at this task, the foreman for the defendant called to them to look out, and they stood aside while a small iron girder which lay near the large girders was lifted by a derrick from the pile of rubbish. There was evidence in plaintiff's behalf that this short girder was partly embedded in the pile of rubbish, and that as it was raised by the derrick the large girder was stirred and raised a little from the rubbish, and that it then settled back into its former place. Immediately after the small girder had been raised, the five laborers resumed their work of picking up the wood from the rubbish pile, and, while the plaintiff had his back turned to the large girders, the end of the separate large girder which rested on the rubbish pile slipped from the rubbish pile against the plaintiff and caused the fracture of his left leg. There is some testimony to the effect that the slipping of the large girder occurred within three minutes after the small girder had been raised.

The appellant challenges the court's ruling to the effect that these facts furnish a basis for an inference that defendant's employes were negligent in conducting these operations; that such negligence was the proximate cause of plaintiff's injuries, and that plaintiff was free from any contributory neg-

ligence. It is obvious from the evidence that the girders rested safely on the rubbish heap up to the time that the defendant's servants and the plaintiff and his fellow workmen came there to proceed with their respective tasks; that is, to raise the short iron beam or girder and to pick up wood near the foot of the pile of rubbish in the excavation. So far as the facts disclose, all parties were rightfully there and each had knowledge of what the others were doing. Can it be said that the defendant's employes were guilty of a want of care in performing the act of raising the short piece of iron, which the jury found proximately caused plaintiff's injury? The facts in evidence do not warrant such an inference. The claim that this operation caused the end of the girder that fell from the rubbish to rise and fall back and immediately thereafter to slide from the rubbish is based on very vague and uncertain evidentiary facts. The facts tending to support such an inference are wanting in probative force. The evidence fails to show that the girder which injured plaintiff was at all disturbed by raising of the small iron. Nor does it appear that the operation in any way could cause it to slip from the rubbish pile. The jury's finding that it did so is a mere conjecture, and is not supported by facts or by legitimate inferences therefrom. So far as disclosed, it can be asserted with equal force that the removal of rubbish by the plaintiff and others working with him disturbed the safety of the girder and caused it to slip from its resting place. What caused the girder to fall on plaintiff is shrouded in uncertainty and speculation, and there is no reasonable ground of certainty that it was the result of the acts of the defendant's employes. Furthermore, there is nothing in the record to warrant an inference that the falling of the girder was to be anticipated by any one. It appears to have been one of those unusual events which are purely accidental and unconnected with anything the plaintiff or the defendant's employes did. Under such circumstances and conditions, the plaintiff has wholly failed to meet the legal burden of establishing by evidence the necessary facts tending to show any negligence of the defendant which proximately caused his injuries.

[2] The record is reasonably clear that the plaintiff was informed of what defendant was doing in hoisting the iron, and that he stepped aside from his place near the girder during the initial steps in the operation, and that he then resumed his place near it shortly before the girder fell. Every consideration of the situation suggests that he was as fully apprised of the situation and condition of things and their attendant hazards as were the defendant's employes, and knowledge of any danger from the girder slipping must be attributed to the plaintiff as well as to any of the defendant's servants. In such

a view of the facts and circumstances, his act in returning to the place of danger would be inexcusable under the rule of ordinary care, and would make him guilty of voluntarily exposing himself to it and the risk of injury therefrom. We are persuaded that the evidence does not warrant the inference that the defendant's servants were guilty of a want of care which caused plaintiff's injuries, and that he has failed to meet the burden cast upon him of showing a liability. The case should not have been submitted to a jury, under the rule of Hyer v. City of Janesville, 101 Wis. 371, 77 N. W. 729; Schell v. Chicago & N. W. R. Co., 184 Wis. 142, 118 N. W. 687; Chybowski v. Bucyrus Co., 127 Wis. 332, 106 N. W. 833, 7 L. R. A. (N. S.) 357.

The defendant's motion for judgment should have been granted.

Judgment reversed and the cause remanded, with directions to award judgment dismissing the complaint.

BERTULIS v. ILLINOIS STEEL CO.

(Supreme Court of Wisconsin. Nov. 19, 1912.)

1. MASTER AND SERVANT (§ 103*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—DUTY TO INSPECT.

The duty to inspect appliances connected with a crane used to unload steel billets rested on the master, and could not be delegated to an operative as a mere detail of the work, so as to relieve defendant from liability for negligence in failing to properly inspect and provide safe tongs, whereby a common laborer assisting in the unloading was injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]

2. MASTER AND SERVANT (§ 235*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where plaintiff, a common laborer, was injured by the fall of a steel billet as it was being unloaded from a car by a crane because of the defective condition of the tongs by which the billets were held, and it was the duty of the foremen under the superintendent's direction to inspect the tongs, plaintiff was under no obligation to know the condition of the tongs, and his failure to do so did not constitute contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. § 235.*]

3. MASTER AND SERVANT (§ 235*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—CHANGE.

Where plaintiff, a common laborer, was injured by the fall of a billet due to the defective character of tongs by which the billets were being unloaded from a car by means of a crane, and it appeared that the tongs were changed only on orders of the gang foremen or the superintendent, the failure of plaintiff and his fellow servants to make a substitution of the tongs without an order from the foremen or superintendent was not negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. § 235.*]

4. DAMAGES (§ 182*)—PERSONAL INJURIES—EXCESSIVENESS.

The leg of plaintiff, a common laborer, was broken and so crushed that the bones overlapped at the point of fracture, leaving the leg crooked and about two inches shorter than the other. He was taken to the hospital, where he remained three months, and then was in bed for three months more. He was compelled to use crutches, and testified that he suffered pain day and night. His physician testified that the bones were not so strong as they should be, that any heavy force was likely to displace them, and that plaintiff would probably need crutches all his life. Held, that a verdict awarding plaintiff \$7,500, which the court reduced to \$6,000, was not so excessive as to require reversal on appeal.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Appeal from Circuit Court, Milwaukee County; J. C. Ludwig, Judge.

Action by Peter Bertulis against the Illinois Steel Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action to recover damages for personal injuries suffered by the plaintiff while employed by the defendant. The plaintiff at the time of the injury, July 20, 1909, was a common laborer, earning about 16 cents per hour. He was a Lithuanian, about 50 years of age, and had been in this country for 27 years. The defendant conducts a steel plant and rolling mill at Bay View, in the city of Milwaukee. The plaintiff was injured about 8 o'clock in the evening, while working with a gang of men in unloading and piling steel billets in the billet yard. The positive testimony is that the billets, which were being handled by the gang with which the plaintiff was working, were 5½ by 6 inches and 10 feet, 2 or 3 inches in length, weighing 1,065 pounds. The billets were unloaded from the cars by means of cranes. Two men on the car placed three billets side by side, and adjusted the tongs, lowered from the boom of the crane, about the center of the billets. Upon a signal being given, the engineer raised the cable to which the tongs were attached, and the billets, held by the tongs, were raised from the car. The boom was then swung around so that the billets were suspended over the place where they were to be piled. As the billets were lowered, two men on the ground caught hold of them, one at each end, and guided them into the place where they were to remain. When these men had the billets in proper position, a further lowering of the cable would allow the tongs to open automatically, and they would then be raised and moved back to the car, where another load had been prepared by the two men in the car. While waiting for another load the men on the ground would adjust the billets in the pile. The tongs used in this work are shaped like ice tongs. Those used in this case came in to contact with the sides of the billets by two sharp edges about three inches long.

At the time the plaintiff was injured, he and his fellow workman on the ground were just reaching up to grasp the billets in the tongs, when the load fell from the tongs. Two of the billets fell upon the pile at which the plaintiff was working, and the other fell upon the plaintiff's leg, breaking both bones. While the plaintiff lay on the ground under the billet, he had the engineer lower the tongs for his examination. He testifies that the tongs were dull, and that one of the edges which came in contact with the billets had been broken off about a quarter of an inch for a length of about $1\frac{1}{2}$ inches. The plaintiff was taken to the hospital, and was there for three months. Thereafter he remained for three months in bed at his home. He cannot stand on the injured leg, and is compelled to use crutches. He testified that he suffered pain all the time, day and night. The physician testified that the bones of the injured leg overlap at the points where they were fractured; that the leg is not normal, in that it is not straight and is about two inches shorter than the other; that the bones are no so strong as they should be, and that any heavy force is likely to displace them; and that the plaintiff will probably need crutches all his life.

In unloading billets of various sizes and weights the defendant uses tongs of different sizes. The chief steel inspector for the defendant, who was superintendent of the billet docks at the time the plaintiff was injured, testified that it was the duty of the superintendent of the docks to see that the proper tongs were used by the men in unloading billets from the cars. He also testified: "The men working there * * * get their orders as to what kind of tongs are to be used from the foreman." He stated that the foremen were to see that the tongs were all right before they started to work; that it was their duty "to see that the tongs are not dull, or they are not broken. If the tongs get too dull, or the edges completely worn off, they need sharpening. When the hooks become dulled they will slip. * * * If they are defective, it is our duty to see that they are put proper in any shape." The day foreman testified: "I and Mr. Wheatley (the superintendent of the billet docks), we inspect the tongs. Q. It was your duty, was it not, to see that the hooks used were sharp and the edges were all right? That was part of your duty, wasn't it? A. Sure." The night foreman testified: "To see that the hooks put on the crane is in good condition is the first thing I do when I start working with the people. * * * I went to work that night at 6 o'clock. I looked on the hook."

The jury returned a special verdict finding that the plaintiff was injured by the billet falling before the tongs were relaxed by the billets striking the pile; that the tongs were not in a reasonably safe and sufficient condition for the purpose of car-

rying the billets because the tongs were dull and the lip or edge of one of the tongs was partly broken; that the unsafe condition of the tongs was the proximate cause of the injury; that the defect had existed for such a length of time that the defendant in the exercise of ordinary care ought to have known thereof in time to have prevented the injury; that the plaintiff ought not in the exercise of ordinary care to have known, prior to the injury and in time to have avoided the same, that the tongs were not reasonably safe; and that no failure on the part of the plaintiff to exercise ordinary care proximately contributed to the injury. The court ordered judgment for the plaintiff for \$6,000, on condition that he remit \$1,500 from the sum of \$7,500, the damages found by the jury. This is an appeal from the judgment awarding the plaintiff \$6,000 as compensation for his injuries.

Van Dyke, Rosecrantz, Shaw & Van Dyke, of Milwaukee, for appellant. Harry M. Silber, of Milwaukee, for respondent.

SIEBECKER, J. (after stating the facts as above). [1] The first contention of the appellant raises the question whether, under the facts and circumstances of the case, the duty to inspect the tongs rested on the defendant, or whether it had been committed as an operative detail of the work to the men engaged in operating the crane and to those unloading the billets from the car and piling them in the yard. The foregoing statement of the facts describes, as shown by the evidence in the case, the procedure and the way in which this work was performed. The evidence discloses that, under the regulations for conducting this work, it was the billet yard superintendent's duty to see to it that safe and proper tongs were supplied for lifting the billets from the cars to the places where they were to be piled in the yard. It also appears that the foremen of the gangs of men doing this work were charged, under the superintendent's direction, with the duty of inspecting the tongs every morning and evening before starting the different shifts of men to work, and of giving orders to the men as to what tongs they should use. The evidence is clear that the defendant, through its billet yard superintendent and the foremen in charge of the work of unloading and piling the billets in the yard, was charged with the duty of inspecting the tongs as to their sharpness and fitness for the work regularly every morning and evening, and that such inspection was not treated as an operative detail of the work which every one engaged thereabout was to perform. Furthermore, it is established by the evidence that the service of inspection was not under the circumstances of so ordinary a nature that any one could perform it. The evidence on the litigated issue as to what constituted a sharp and sufficient tongs clearly shows that

it required special knowledge and experience to determine when the gripping edges of the tongs were in proper condition to prevent the billets from falling out of the tongs while they were held suspended. A mechanical device for lifting three such billets of 1,065 pounds each, placed side by side, by means of the friction of the grip on the mouth of these tongs and the flat surfaces of the billets, is not so simple and ordinary a mechanical device and the operation is not so simple and ordinary that any one of ordinary intelligence can be held to understand them, and be able to judge of the fitness of the tongs to safely conduct the work. The operation was somewhat unusual in its character, and knowledge of the fitness and safety of the tongs required special knowledge and information not possessed by the ordinary laborer working on the ground piling billets. This condition was fully recognized by the defendant, and hence it made it the duty of the superintendent and the foremen to select the tongs to be used and it required them to inspect them at least twice daily as to their sharpness and condition of repair to ascertain their fitness and safety for the operation. These facts and circumstances present a case wherein it was the master's duty to inspect the tongs as to their condition. The evidence abundantly shows that the defendant regarded this as its duty, and that it imposed it on the superintendent and foremen in charge of the work, and required of them that they see to it that the tongs used were in a reasonably safe and proper condition for the purpose of carrying the billets in the operation of unloading them from cars and piling them in the yard. The jury has found that the tongs used to carry the billets at the time in question were not reasonably safe for the purpose on account of their dullness and because of a break in one of the lips, that such defects were the proximate cause of the plaintiff's injury, and that the defendant ought, in the exercise of reasonable care, to have discovered these unfit conditions of the tongs in time to have prevented the injury. The facts of the case differentiate it from those of which *Grams v. C. Reiss Coal Co.*, 125 Wis. 1, 102 N. W. 588, is an example, wherein the defect in the appliance complained of pertains to an incidental repair of appliances to be made by the injured servant or one of his fellow servants, and the case comes within the well-established rule that the inspection of appliances is the employer's duty, and, if he does not exercise ordinary care in this regard, he is liable for the damage caused thereby.

[2] It is contended that the evidence shows that the plaintiff and his fellow servants were in a position to readily observe the condition of the tongs as to sharpness and fitness for the operation, and that they were supplied with another pair of tongs to be substituted by them in the usual course of

the operation of the business. This claim is not as to the facts in accord with the evidence. The finding of the jury that the plaintiff cannot be held, in the exercise of ordinary care, to have known of the defective condition of the tongs, and that no want of ordinary care on plaintiff's part contributed to the injury, also negatives this contention. These findings are well supported by the evidence, and free the plaintiff from fault.

[3] The claim that he and those working with him changed the tongs as part of their duty, whenever those in use became unsafe, is not what the evidence shows, for it appears that he and the other employees working on the ground were required to make such a substitution of tongs only when the foremen or the superintendent ordered this to be done in the course of their duty of inspection. This state of facts harmonizes with the findings of the jury on this question. These considerations negative all of the propositions advanced by the appellant against the correctness of the rulings of the court in denying its motion for judgment in its favor.

We find no errors in the charge of the court to the jury. It correctly states the law applicable to the case, and sufficiently informed the jury of the law governing the rights of the parties to enable them to resolve the litigated issues submitted to them.

[4] The claim that the damages awarded by the judgment are so excessive as to call for a reversal thereof cannot be sustained. The jury fixed the sum at \$7,500. The trial court found upon consideration that this exceeded the amount shown by the evidence and awarded judgment for \$6,000. We do not consider this to be so excessive as to warrant interference therewith on appeal, and the judgment must stand.

The judgment appealed from is affirmed.

FAUBEL et al. v. ECKHART et al.

(Supreme Court of Wisconsin. Nov. 19, 1912.)

1. INSURANCE (§ 784*)—MUTUAL BENEFIT INSURANCE—CHANGE OF BENEFICIARY.

Either the insurer or the beneficiary of a mutual benefit certificate has the right to insist that a change of beneficiary be made conformable to the stipulations of a policy and the rules of the association.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1950-1954; Dec. Dig. § 784.*]

2. INSURANCE (§ 784*)—MUTUAL BENEFIT INSURANCE—CHANGE IN BENEFICIARY.

A mutual benefit insurance association, while having the right to insist that a change in beneficiary be made according to its rules, may waive compliance by issuing a new certificate, naming the new or substituted beneficiary, but it does not waive compliance with its rules by interpleading the contesting claimants, and paying the money into court.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1950-1954; Dec. Dig. § 784.*]

3. INSURANCE (§ 784*)—MUTUAL BENEFIT INSURANCE—CHANGE IN BENEFICIARY.

The holder of a certificate in a fraternal insurance association which was payable part

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to his sister, part to a friend, and part to his estate agreed on a compromise of the claims for alimony of his divorced wife to name his minor children as beneficiaries. St. 1898, § 1955c, as amended by Laws 1899, c. 101, provides that any member of a mutual benefit association may change the beneficiary, without consent of his beneficiary, by complying with the laws of the society. The by-laws of the instant society required a member desiring to change the beneficiary to return his certificate with a request for the change indorsed thereon, but no act was done by the insured. *Held*, that while a parol gift inter vivos unaccompanied by the delivery of a life insurance policy, payable to the estate of the insured, is effective as against the administrator of the insured's estate, both the beneficiary and the insurance association having the right to require changes to be made conformably to its by-laws, and the insured having no ownership in the fund to be paid after his death, the agreement as to the beneficiaries is binding only as to that part of the benefit payable to the insured's estate.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1950-1954; Dec. Dig. § 784.*]

Appeal from Circuit Court, Milwaukee County; W. J. Turner, Judge.

Interpleader by the Central Unterstuetzungs Gesellschaft Germania against Barbara Faubel and another against Theodore W. Eckhart and others. From a judgment for the latter, the former appeals. Reversed and remanded, with directions.

Friedrich, Teall & Hackbarth, of Milwaukee, for appellant. Schwefel & Knoell and A. J. Hedding, all of Milwaukee (A. G. Schwefel, of Milwaukee, of counsel), for respondents.

TIMLIN, J. Ernst Eckhart held a certificate of membership in a fraternal association known as the Central Verein der Gegenseitige Unterstuetzungs Gesellschaft Germania. He died on March 27, 1910, a member in good standing in said organization, and his certificate entitled the beneficiary therein named to the sum of \$2,000. This membership began on or about August 18, 1888, and in the certificate then issued Caroline Eckhart, his wife, was named as beneficiary. Thereafter a suit for divorce by her was pending against him, and he was adjudged guilty of contempt for failing to pay suit money and alimony and committed to prison, from which he was released in April, 1909. On May 20, 1909, deceased surrendered to the association the certificate in which his wife was beneficiary, and obtained from it a new certificate, in which Barbara Faubel, a sister of deceased, was named beneficiary in the sum of \$1,000, Louis Cords, a friend of deceased, a beneficiary in the sum of \$500, and the estate of deceased beneficiary in the sum of \$500. This sister and friend of deceased and the executors of the last will and testament of deceased are the plaintiffs and appellants in this action, and the widow and children of deceased are the defendants and respondents herein. The benefit association named paid the \$2,000 in

question into court, and interpleaded the parties to this action, and was itself discharged therefrom. At the time of the issuing of the certificate in question in August, 1888, and from thence until the death of Ernst Eckhart on March 27, 1910, there existed a by-law of the association regularly adopted and in force reading as follows: "A member who desires to change the person or persons named in the certificate as beneficiaries can, if he is in good standing, return his certificate and he shall receive a new certificate payable to such persons as he may desire on payment of one dollar. The request for the change of certificate must be endorsed on the back of the old certificate signed by the party and sent to the secretary of the central society." The divorce case was carried to judgment, and on September 20, 1909, the wife had judgment of divorce from her said husband, which further provided that he pay her \$50 for her use and benefit and the costs of the action specified, "which sums shall be and are a full and final division of the estate of the defendant and are in lieu of alimony herein." The circuit court found that on and prior to September 11, 1909, there was a large sum of money due from said deceased to his wife upon the order for alimony in the divorce suit, and that, on the date mentioned at a place specified, "it was mutually agreed verbally between said Caroline Eckhart and the said deceased that the said deceased would make his minor children Caroline Kannenberg, Hilda Eckhart, Alfred Eckhart, Edwin Eckhart and Henry Eckhart beneficiaries of the said insurance and therein provide them with the full sum of \$2,000 upon condition that the said Caroline Eckhart would release him from all claims for alimony and other claims and demands arising out of their relations as husband and wife, and properly for consideration in said divorce action, upon the payment to her of the sum of \$50 and the costs and disbursements of the action; that said agreement was carried out by the said Caroline Eckhart and thereafter judgment for divorce duly obtained and entered in said circuit court." Upon this state of the record, the circuit court concluded that the minor children under this agreement were entitled to the \$2,000 as against the beneficiaries named in the benefit certificate and the executors of the will of the assured. It is not claimed that the will contained any gift of this insurance money.

The statute provides: "Any member may change the beneficiary named in his certificate or policy without the consent of such beneficiary by complying with the by-laws of the society order or association which issued the same." Section 1955c, Stats. 1898, amended by chapter 101, Laws 1899. The cases decided are to the like effect. In Mc-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Gowan v. Independent Order, etc., 104 Wis. 173, 80 N. W. 603, it is said to be well-settled that one insured in a mutual benefit association who wishes to change the beneficiary named in his certificate or policy must do so in the manner required by his policy and the rules of the association. The case of *Supreme Conclave v. Cappella* (C. C.) 41 Fed. 1, is cited with apparent approval, and the comprehensiveness of such rule is accentuated by specifying three recognized exceptions to the rule, no one of which is applicable here. In *Berg v. Damkoehler*, 112 Wis. 587, 88 N. W. 606, in a contest between interpleaded claimants of a fund paid into court by the association, it was decided that a written instrument signed by the insured purporting to change the beneficiary was insufficient for that purpose when the policy required in addition an acknowledgment, and this was not acknowledged. This case purports to follow, and applies to such facts the rule of *McGowan v. Independent Order*, etc., supra. In *Thomas v. Covert*, 128 Wis. 593, 105 N. W. 922, 3 L. R. A. (N. S.) 904, 5 Ann. Cas. 456, in a contest between interpleaded claimants, it is ruled that a provision in the constitution of the benefit association made part of the contract with the insured to the effect that the change of beneficiary could not be made by will was binding on the certificate holder, and prevented the appointment of a beneficiary by will. In *Armstrong v. Modern Woodmen*, 136 N. W. 145, it is held that, in the absence of such stipulation in the contract of insurance or in the by-laws of the insurer, the insured may designate by will the beneficiary provided he designates some person competent under the rules of the association to be a beneficiary.

[1] There is in all these cases a recognition of the right on the part of either the insurer or the beneficiary to insist that, in order to be valid, the change of beneficiary must ordinarily be made conformably to the stipulations of the policy and the rules of the association, except in the three instances mentioned in *McGowan v. Independent Order*, etc., supra. This is in accord with the weight of authority. 1 Bacon on Benefit Societies, etc. (3d Ed.) § 307.

[2] The association may waive compliance by issuing a new certificate naming the new or substituted beneficiary or some equivalent act, but it does not waive compliance with its rules by interpleading the contesting claimants, and paying the money into court. *Berg v. Damkoehler*, supra; *Opitz v. Karel*, 118 Wis. 527, 95 N. W. 948, 62 L. R. A. 982, 99 Am. St. Rep. 1004; *Ballou v. Gile*, 50 Wis. 614, 7 N. W. 561; *Keener v. Grand Lodge*, etc., 38 Mo. App. 543; *Sofge v. Supreme Lodge*, etc., 98 Tenn. 446, 39 S. W. 853.

[3] On the other hand, there is the case of *Opitz v. Karel*, 118 Wis. 527, 95 N. W. 948,

62 L. R. A. 982, 99 Am. St. Rep. 1004, where a parol gift inter vivos accompanied with delivery of a life insurance policy payable to the estate of the insured was held effective against the administrator of insured, although without notice to or knowledge of the insurer, and the policy provided that, if the policy were assigned, the assignment must be in writing and a duplicate filed with the insurer. It is said that the right to select a beneficiary secured to the insured either by the policy or the charter or the by-laws of the insurer is in the nature of a power, and must therefore be exercised in compliance with the terms of the contract granting the power, while the right of the holder to transfer a policy on his own life and in his possession and control has been upheld as a legal right attaching to the contract. This distinction, it is said, between the right to transfer a policy and to change beneficiaries, has not at all times been carefully observed. In *Stoll v. Mutual Benefit Life Ins. Co.*, 115 Wis. 558, 92 N. W. 277, this distinction between a transfer of the policy for value and a mere change of beneficiaries is observed, and it is said that, while all assignees are beneficiaries, a mere beneficiary is not an assignee. After a transfer for value, the insured could not displace the transferee by designating other beneficiaries. This was a policy originally payable to the estate of the insured. In the two last cases it is worthy of notice that the policies were originally payable to the estate or administrator of the insured.

Thus far the cases would seem to approve of a rule that while the insured must ordinarily, omitting now the three excepted instances, in order to effectively accomplish a mere change of beneficiary comply with the stipulations of his policy and the binding regulations of the insurer, still he may where there is no beneficiary named, and the fund is payable to his estate, make an effectual gift or assignment, and a fortiori, a sale and transfer without complying with such regulations, at least where there is no express regulation forbidding such form of transfer, or avoiding the policy upon such transfer. We here encounter the case of *Hutson v. Jensen*, 110 Wis. 28, 85 N. W. 689, wherein it is said with reference to these certificates of membership in a mutual benefit association that the insured has no title ownership or property in the fund agreed to be paid to another after his death. He has a mere power of appointment of a beneficiary during his lifetime, and in that power the beneficiary has no vested interest. This case is also in line with the weight of authority. 1 Bacon, Ben. Soc. (3d Ed.) §§ 236, 237, 289.

We have in this case a situation falling in part within one of the foregoing rules and in part within the other. The rule of law which requires, outside of the exceptions noted in *McGowan v. Independent Order*,

etc., supra, the change of beneficiary to be made conformably to the requirements of the policy and the by-laws and constitution of the benefit association is simple, consistent and easily understood and applied. It will diminish the occasions for family quarrels and the temptation to perjury in making proof of oral and comparatively secret agreements to change beneficiaries. The equities in the instant case, as is well remarked by the learned circuit judge, are with the respondents. But equity follows the law in such case, and wisdom, we think, forbids the ingrafting of subtle and numerous exceptions upon the rule that, generally speaking, the power to change the beneficiary must be exercised conformably to the regulations of the insurer. There was in this case no change of beneficiary shown, only an agreement based upon a consideration to transfer the policy or to make such change. So far as the beneficial interest of Faubel and Cords is concerned, there was no transfer for the sufficient reason that the member had no interest which he could transfer. *Hutson v. Jensen*, supra. So far as these interests are concerned, he could only bind himself by contract to execute a power, and he made no attempt to execute it. To now regard it as done would evade the rule that the change of beneficiary must be made conformably to the binding regulations of the association and would in effect nullify that rule. But as to that part of the fund payable to the estate of the insured the latter did have a substantial and salable interest therein within the rule of *Opitz v. Karel*, supra, and *Stoll v. Mutual Ben. Life Ins. Co.*, supra. By the contract between the insured and his wife found by the court and supported by a valuable consideration made for the benefit of the defendants, who were then infants, this interest passed to such defendants. It therefore follows that the judgment appealed from should be reversed, and judgment ordered that the sum paid into court be divided between the contesting parties in the proportion of one-half to Barbara Faubel, one-fourth to Louis Cords and one-fourth to the respondents, who were infant children of the insured and his wife Caroline on September 11, 1909, costs to be in the discretion of the trial court.

It is so ordered. Costs of this court to appellant.

JONES v. FIREMEN RELIEF ASS'N OF CITY OF MILWAUKEE et al.

(Supreme Court of Wisconsin. Nov. 19, 1912.)

1. INSURANCE (§ 770*)—FIREMEN RELIEF ASSOCIATION—POWERS AND BENEFICIARIES.

A firemen's relief association organized pursuant to Laws 1885, c. 176 (St. 1898, §§ 1987, 1988), and acts amendatory thereof, in

which it is provided that such associations may be organized for the purpose of giving relief to the persons dependent upon the deceased members thereof, but to no others," had power to designate the class from which a beneficiary could be selected in harmony with such statutes.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1933-1937; Dec. Dig. § 770.*]

2. INSURANCE (§ 771*)—BENEFICIARIES—MEMBER OF FAMILY—STEPMOTHER—"MOTHER."

Where the constitution of a firemen's relief association organized pursuant to Laws 1885, c. 176 (St. 1898, §§ 1987, 1988), and acts amendatory thereof, providing for the organization of such associations, and designating that they may be organized for the purpose of giving relief to persons dependent upon the deceased members, but no others, stated the object of such association to be to give relief to families of deceased members, and provided that an insured could designate his mother or certain others as his beneficiary, a designation by an insured of his stepmother as beneficiary was valid, where he was a single man living with her as a member of the same family at the time of his death; the term "mother" in this connection not being limited in meaning merely to a mother by blood, though used with such meaning in a subsequent provision of the association's constitution which specified the heirs to whom relief money should be paid in case no beneficiary be designated by the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1935-1937; Dec. Dig. § 771.*]

For other definitions, see Words and Phrases, vol. 5, p. 4609.]

Appeal from Circuit Court, Milwaukee County; F. C. Eschweiler, Judge.

Action by Margaret Jones against the Firemen Relief Association of the City of Milwaukee, and Mary Mangan and others interpleaded. From a judgment for plaintiff, defendants appeal. Affirmed.

This is a controversy to determine the ownership of the proceeds of a benefit certificate in the Firemen Relief Association of the city of Milwaukee, defendant. The money was paid into court, and the question is whether it belongs to the plaintiff or the interpleaded defendants. The insured, Richard J. Burke, deceased, was never married. In his application for membership in the defendant association he designated plaintiff as "mother." The principal points raised by the assignments of error are (1) that the court erred in finding deceased at the time of his death was a member of plaintiff's family; (2) that the court erred in holding that the plaintiff was such person as could be lawfully named as beneficiary; (3) in holding that the plaintiff was entitled to judgment against the interpleaded defendant for said death benefit, and that the same be paid over by the clerk of the court, and that she recover costs from the interpleaded defendants; and (4) in holding that the interpleaded defendants are not entitled to said fund.

The defendant association was organized

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pursuant to chapter 176, Laws of 1885, and sections 1987 and 1988, Stats., the material parts of which are as follows: Chapter 176, Laws of 1885, § 1: "The members of the paid fire department of the city of Milwaukee shall, on or before the first day of June, A. D. 1885, form an association and shall organize, under the provisions of sections 1987 and 1988 of the Revised Statutes, and shall adopt by-laws and regulations for the government thereof, and when so organized, and the officers thereof shall have been duly elected and shall have qualified according to the by-laws of such corporation or association, the city treasurer of the city of Milwaukee, shall upon receiving written notice of such organization, and of the election and qualification of the officers of such association, pay over to the treasurer thereof the whole amount of the fund in his hands as city treasurer, known as the 'Firemen's Relief Fund,' created and held by virtue of chapter 37 of the Laws of 1878; and thereafter, such funds shall be the property of such corporation or association, and shall be held, enjoyed and disposed of by it subject to its by-laws and regulations." Section 1987: "The members of the paid fire or police department in any city heretofore or hereafter organized, who comply with the constitution and by-laws of such organization, are constituted a body corporate in such city under the name of 'The Firemen Relief Association of the city of _____,' * * * as the case may be, for the purpose of giving relief to the sick and disabled members of such association and their families and to the persons dependent upon the deceased members thereof, but no others. * * * Powers. Every such association shall have all the usual powers of a corporation necessary and proper for the purposes of its organization, and may take by gift, grant, or purchase real and personal estate, and hold, enjoy, lease, convey and dispose of the same, subject to its by-laws and regulations; and all such property and the rents, issues and profits thereof shall be devoted solely to the purposes and objects of such corporation."

The provisions of the constitution of the association relating to the purpose of the same and to beneficiaries are as follows:

"Article III, Section 1. The object of this association shall be to provide and accumulate a fund from initiation fees and dues, and other sources of income, for the purpose of giving relief to the families of deceased members, and in furtherance of this object, each member shall pay fifteen dollars (\$15) annually, in advance, toward the creation and support of such fund."

"Article IX, Section 1. On evidence satisfactory to the Board of Trustees, of the death of a member who was in good standing at the time of his death, the sum of fifteen hundred dollars (\$1,500) shall be paid to the beneficiary or beneficiaries named in

his application and membership certificate; provided that such beneficiary be either widow, child or children, mother or father, sister or brother, niece or nephew, of such deceased member. Any member shall have the right to change the name of the beneficiary or beneficiaries named in the certificate by giving written directions to the president and secretary of the board of trustees to have such change made, but his signature to such written direction shall be witnessed by at least two subscribing witnesses, who must subscribe their names as such. The secretary shall notify the board of trustees at the next meeting of such change being made, and provided, that such change shall be limited to the class of beneficiaries above mentioned. No change shall be made in the name of the beneficiary except as herein mentioned, and such written direction shall be recorded on the books of the association before the same shall be effective, and a new certificate of membership shall be issued and delivered in lieu of the original, and the original destroyed. No payments shall be made by the association to any persons other than the one named in the certificate of membership at the time of the death of the member, and if none of the beneficiaries hereinbefore named exist at the time of the decease of a member in good standing, no payment whatever shall be made, nor shall there be any liability whatsoever on the part of said association to any person or persons whomsoever. In case no beneficiary shall have been named by a deceased member in the manner herein provided, and he shall at the time of his death be a member in good standing and his family or heirs entitled to relief, such relief money shall be paid to his heirs in the following order: First. If there be a widow, to the widow: Second. If no widow, to his child; or if there be more than one child, to his children in equal shares: Third. If there be no widow or children, to his mother: Fourth. If there be no widow, child or children, or mother, to his father: Fifth. If there be no widow, child or children, mother or father, to his sister; and if there be more than one sister, to all of them in equal shares: Sixth. If there be no widow, child or children, mother or father, or sister, to his brother, or brothers in equal shares. Seventh. If there be no widow, child or children, mother or father, sister or brother, to his niece, or nieces in equal shares: Eighth. If there be no widow, child or children, mother or father, sister or brother, or niece, to his nephew, or nephews in equal shares."

"Article XIX, Section 1. This association is organized under and pursuant to the provisions of sections 1987 and 1988 of the Revised Statutes of Wisconsin and the acts amendatory thereof, and chapter 176 of the Laws of Wisconsin for the year 1885."

The court found, among other things, the

organization of the defendant; that Richard J. Burke had on January 10, 1910, nominated as beneficiary to whom the fund in question should be paid upon his death the plaintiff; that on March 24, 1911, said Burke lost his life in a fire while a member of defendant association in good standing; that said Richard J. Burke was never married, left no widow, child, or children, and that his father had died before the death of said Richard J. Burke; that the above interpleaded defendants all survive him, and are related to him as follows: Mary Mangan, Alice Burke, Agnes Burke, and Anna Eberle are his sisters of the full blood, and the interpleaded defendant Clara Burke is his sister of the half blood, and that the mother by blood of the said Richard J. Burke died before the death of the said Richard J. Burke; that after the death of the mother of said Richard J. Burke his father married the plaintiff, said Richard being then only about five years of age and living with his father; that the plaintiff entered upon her duties as wife of his father and as the housewife in charge of the home of the said father of Richard J. Burke; that after the death of the father of said Richard J. Burke plaintiff married one John O. Jones, of whom she is now the lawful wife, and with whom she has continued to reside as his wife to the present time, and by whom she has since been and now is being supported; that at the time of his death said Richard J. Burke resided in and was a member of the household and family of said plaintiff.

The court concluded that the plaintiff was a person who could be lawfully named as beneficiary, and that she is lawfully entitled to the fund and to judgment against the defendants for said fund, and that she have her costs.

Judgment was entered accordingly, from which this appeal was taken.

Ernst von Briesen and Roethke & Affeldt, all of Milwaukee, for appellants. William B. Rubin, of Milwaukee (Horace B. Walmsley, of Milwaukee, of counsel), for respondent.

KERWIN, J. Under the articles of incorporation of the defendant upon the death of a member in good standing, the sum of \$1,600 shall be paid to the beneficiary or beneficiaries named in his application and membership certificate, provided such beneficiary be either widow, child or children, mother or father, sister or brother, niece or nephew, of such deceased member. The statute set out in the statement of facts (section 1987 as amended) provides that "the members of the paid fire or police department in any city heretofore or hereafter organized, who comply with the constitution and by-laws of such organization, are constituted a body corporate in such city under the name of 'The Firemen Relief Association' * * * for the purpose of giving relief to

the sick and disabled members of such association and their families and to the persons dependent upon the deceased members thereof, but no others. * * *

[1] Article 19 of the constitution of defendant provides that the association is organized under the statutes (sections 1987 and 1988) and acts amendatory thereof, and chapter 176 of the Laws of Wisconsin for the year 1885. There can be no doubt but that the association had the power to designate the class from which a beneficiary could be selected in harmony with the statutes referred to. 29 Oyc. 109; *Tepper v. Supreme Council of the Royal Arcanum et al.*, 59 N. J. Eq. 321, 45 Atl. 111.

[2] Section 1, art. 3, of the constitution heretofore set out provides for the relief of families of deceased members, and section 1 of article 9 designates the class, and in this class "mother" is designated as a beneficiary. Richard J. Burke, a member of defendant association, named the plaintiff, his stepmother, as beneficiary in his application, and the question arises whether she comes within the class designated as beneficiaries. The question has given us some trouble, and we do not regard it easy of solution. On the part of the appellant it is argued with much force that the word "mother" in the articles of association means mother by blood, therefore stepmother is excluded, and that this is the only construction that will harmonize all parts of the articles of association where the word "mother" is used, and that it is the natural and logical construction, and the one which should be adopted, therefore the appointment of plaintiff as beneficiary was void, because she could not take as beneficiary; consequently the interpleaded defendants, heirs of deceased, take the fund under the provisions of the articles to the effect that the heirs take in the absence of an appointment by the member.

On the part of the respondent it is insisted that the plaintiff takes as a member of the family of deceased; therefore she was properly named as beneficiary. As appears from the statement of facts, the court found that at the time of his death Richard J. Burke resided in and was a member of the household and family of the plaintiff, and that plaintiff was properly named as beneficiary of deceased and so remained as such. Manifestly upon the established facts plaintiff, stepmother of deceased Richard J. Burke, was a member of his family. 3 Words & Phrases, pp. 2673-2688, and notes; *Carmichael v. Northwestern M. B. Ass'n*, 51 Mich. 494, 16 N. W. 871; *Hosmer v. Welch*, 107 Mich. 470, 65 N. W. 280, 67 N. W. 504. But it is argued by counsel for appellant that the word "family" should have a narrow construction in view of other provisions of the articles of association, and should be limited to those only who take under the statute of distribution. This contention is

grounded upon the fact that article 9 specifically provides who the beneficiaries shall be, "mother" being one, and that in case no beneficiary shall have been named in the manner provided, and deceased at the time of his death be a member in good standing and his family or heirs entitled to relief, such relief money shall be paid to his heirs in the following order: "First. If there be a widow, to the widow. Second. If no widow, to his child; or if there be more than one child, to his children in equal shares. Third. If there be no widow or children, to his mother. * * *" Now, under this second classification, it is argued that the mother must be an heir, and that the word "mother" according to proper rules of construction should have the same meaning in each classification of article 9 of the constitution; therefore, mother mentioned in the first class under article 9 must be a mother by blood and capable of inheriting, since the second class where no beneficiary is named gives the property to heirs only in the same order and in the identical language as to beneficiaries as the first class. The conclusion of appellant's counsel is that, since a stepmother cannot take under the statutes of distribution, she is not a mother within the meaning of the articles of association. The court, however, has arrived at the conclusion that the construction contended for by counsel for appellant is too narrow in view of the purpose of the statute and the articles of incorporation, namely, the relief of families of deceased members. We think that a mother who can be named includes a mother by affinity, who is a member of the family. Without going into any extended discussion of the reason of the rule, it is obvious that in many cases the stepmother may have strong claims upon the child whom she cares for during minority, and no reason appears to us why such child should not have the right under the articles of association in this case to make the stepmother the object of his bounty. The following authorities bear upon the question: *Renner v. Supreme Lodge of Bohemian Slavonian B. S. of the U. S.*, 89 Wis. 401, 62 N. W. 80; *Simcoke v. Grand Lodge A. O. U. W.*, etc., 84 Iowa, 383, 51 N. W. 8, 15 L. R. A. 114. Nor do we think that the word "mother" must necessarily have the same meaning in the first and second classes named in article 9. In the first class there is no restriction, either express or implied, but, on the contrary, in view of the construction which should be given the articles of association to carry out the manifest corporate purpose of the defendant association, a mother by affinity, who is a member of the family, may be named. In the second class the right to take the benefit seems by words to be limited to heirs. But it is only in case of failure to name a beneficiary that this classification providing that the fund shall

go to the heirs is operative. There is no restriction where the member names a beneficiary only that he keep within the class specified. True, as argued by counsel, the word "mother" is used in each classification, but we cannot think that the proper rule of construction requires that the word "mother" in the first class must necessarily mean mother by blood, capable of taking under the statutes of distribution of this state. Appellant places reliance upon *Koerts v. Grand Lodge of Wisconsin of the Order of Hermann's Sons*, 119 Wis. 520, 97 N. W. 163, which holds that the same meaning must be given the same word in different sections. There the question was as to the meaning of the word "survivors" when used to designate the "survivors" of a member in a benefit society, and, of course, the meaning of the word was necessarily the same when used in the same connection in various sections. But there is no rule of construction requiring the same meaning to be given to the same word, used in different connections.

Whether a mother by affinity and a member of the family, though not named, could take under the designation of "heirs" as used in the second class, we need not, and do not, decide. Nor do we decide whether the word "heirs" in that connection was used to indicate that those only who took under the statutes of distribution could take the fund in case of failure by the member to name a beneficiary.

The judgment of the court below is affirmed.

CHAIN BELT CO. v. CITY OF MILWAUKEE.

(Supreme Court of Wisconsin. Nov. 19, 1912.)

1. LICENSES (§ 6*)—DELEGATION OF POWER.

The extraordinary power given to a city of licensing conduct, business or transactions for the purpose of regulating the same, is not to be presumed but must be plainly conferred.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 5, 6, 19; Dec. Dig. § 6.*]

2. LICENSES (§ 6*)—STATUTES—CONSTRUCTION.

A statute giving power to license must be strictly construed; and doubts or ambiguities arising out of the language employed must be resolved in favor of the public.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 5, 6, 19; Dec. Dig. § 6.*]

3. LICENSES (§ 6*)—DELEGATION OF POWER—IMPLIED POWER.

Licenses for the purpose of regulation, granted under an exercise of the police power, must have special legislative authorization, at least to the extent of conferring on the city authority to regulate the particular or dangerous callings which the ordinance undertakes to license.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 5, 6, 19; Dec. Dig. § 6.*]

4. LICENSES (§ 6*)—DELEGATION OF POWER—ORDINANCES—WELFARE CLAUSE.

Under the charter of Milwaukee, c. 4, § 3, permitting the passage of ordinances under the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

so-called "general welfare clause," and which then in 64 subdivisions enumerates the subjects which may be licensed, none of which refer to the licensing of elevator operators, the power to license and regulate elevator operators will not be implied; there being no general statute relating to such power.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 5, 6, 19; Dec. Dig. § 6.*]

Error to Municipal Court of Milwaukee; O. T. Williams, Judge.

The Chain Belt Company was convicted of violating a city ordinance, and it brings writ of error. Reversed and remanded, with directions to dismiss prosecution.

Glicksman, Gold & Corrigan, of Milwaukee, for plaintiff in error. Daniel W. Hoan, City Atty., and E. L. McIntyre, Asst. City Atty., both of Milwaukee, for defendant in error.

TIMLIN, J. On December 5, 1910, the city of Milwaukee, by amendment of section 11 of an ordinance relating to elevators, forbade the operation of any elevator in the city of Milwaukee except by a person duly licensed for that purpose, and provided for the payment of a fee and issue of a license to persons possessing the qualifications of sobriety, industry, and efficiency. The plaintiff in error was convicted of having violated this ordinance. This writ of error to the judgment of the municipal court challenges the power of the city to enact such an ordinance on the ground that it is not within any ordinance power delegated by the Legislature to the city. Section 3 of chapter 4 of the city charter, containing what is popularly known as the "general welfare clause," provides that the common council shall have power to enact, etc., all such ordinances, etc., as they shall deem expedient for the government and good conduct of the city for the benefit of the trade, commerce, and health thereof, for the suppression of vice, for the prevention of crime, and for carrying into effect the powers vested in said common council. "For these purposes the common council shall have authority—anything in a general law of this state to the contrary notwithstanding—by ordinances, resolutions, by-laws, rules or regulations" (1) to regulate groceries, etc.; (2) to license, tax, regulate, suppress, and prohibit billiard tables, etc.; (3) to license, tax, regulate, suppress, or prohibit all exhibitions of common showmen, etc.; (4) to restrain or prohibit all descriptions of gaming, etc.; and so on in this form for 64 subsections covering a variety of subjects, none of which includes the licensing of elevator operators by any stretch of construction unless it be subsection 62, which reads: "To control and regulate the construction of buildings, chimneys and stacks, and to prevent and prohibit the erection or maintenance of any insecure or unsafe buildings, stack, wall or chimney, in said city, and to declare them to be nuisances, and to provide for their summary abatement"—or

subsection 63, which authorizes the common council to declare by ordinance that it shall be unlawful for any hall, theater, opera house, church, schoolhouse, or building of any kind whatsoever to be used for the assemblage of people or for any building exceeding three stories in height to be used as a manufactory, hotel, or boarding house or for any other purpose unless the same is provided with ample means for the safe and speedy egress of the persons therein assembled in case of alarm, and may require and regulate the erection of ladders, fire escapes, standpipes, or other appliances for the escape of persons from such buildings. In chapter 14 of the charter, relating to the fire department, authority is given to the common council to prevent the dangerous construction and condition of chimneys, fire places, hearths, stoves, stovepipes, ovens, boilers, and apparatus used in and about any building, and to cause the same to be removed or placed in a safe and secure condition when considered dangerous. Also to compel the owners and occupants of buildings to have scuttles in the roofs and stairs or ladders leading to the same; also to authorize the mayor, aldermen, and other officers of the city to keep away from the vicinity of any fire all idle and suspected persons, and to compel all bystanders to aid in the extinguishment of fires and in the preservation of property exposed to danger thereat; and generally to establish such regulations for the prevention and extinguishment of fires and for the safety and protection of persons from injury thereby as the common council may deem expedient. No other provision of the charter or of any general law of the state under which this power to license elevator operators is claimed has been brought to our attention.

General statutes of the state relative to elevators are section 1636—5, being section 2, c. 349, Laws of 1901, which provides that the inside walls or casings of every elevator used for the conveyance of passengers to and from the upper stories of certain described buildings shall be constructed of fireproof material throughout; chapter 523, Laws of 1907, which prohibits any person, firm, or corporation from employing or permitting any child under 16 years of age to have the care, custody, management, or operation of any elevator; chapter 338, Laws of 1909, to the same effect. By chapter 112, Laws of 1907, being section 1021h of 1898 St., it is made the duty of an officer of the bureau of labor and industrial statistics to examine freight and passenger elevators and condemn those found to be defective and unsafe by serving written notice on the person for whom it is being operated, or on his agent, or by posting such notice on the walls or in the cab of any elevator found to be in an unsafe condition. If after such condemnation the owner or person for whom

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the elevator is being operated shall continue the use thereof, without making such repairs as will place it in a safe condition, he will be liable, civilly and criminally, for any physical injury caused by such use, whether such injury results in the death of the person injured or not.

[1] One of the most effective modes of regulation is to declare the acts, conduct, business, or transaction in question unlawful unless licensed, and then provide rules for the granting or revocation of such license. But this extraordinary power is liable to be used oppressively, and the possession of such power is not readily presumed. The Legislature may be willing to give this power to the city in its full extent so as to enable the city to license practically all callings or to a limited extent so as to enable the city to license dangerous callings, or it may not be willing to delegate this power at all, or only with limitations and restrictions. "Even the right to license must be plainly conferred or it will be held not to exist. Thus power to make by-laws relative to hucksters', grocers', and victuallers' shops does not authorize the corporation to exact a license from persons carrying on such business. Nor does the general power to pass prudential by-laws not inconsistent with the laws of the state confer authority to demand a license. If the charter or statute enumerates the occupations or businesses which may be regulated and licensed, the enumeration, if on the whole such appears to be the legislative intent, is exclusive, and the municipality has no power to license or regulate occupations or businesses not embraced in the enumeration." 2 Dillon, Mun. Corp. (5th Ed.) § 667; *Wis. Telephone Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828.

The power of a municipal corporation to impose license taxes on persons engaged in the pursuit of a particular occupation must be conferred by the state expressly or by necessary implication. *Com'rs of Cambridge v. Cambridge*, etc., 99 Md. 501, 58 Atl. 442, 2 Ann. Cas. 311. To the same effect, *Wilkie v. City of Chicago*, 188 Ill. 444, 58 N. E. 1004, 80 Am. St. Rep. 182; *Gray v. City of Wilmington*, 2 Marvel (Del.) 257, 43 Atl. 94; *State v. Smith*, 67 Conn. 541, 35 Atl. 506, 52 Am. St. Rep. 301. An ordinance requiring a license for carrying on a jewelry business in the town declaring a fine for carrying it on without a license is ultra vires where the power to pass it is not expressly or impliedly granted the town. *Town of Mena v. Smith*, 64 Ark. 303, 42 S. W. 831.

[2] A statute giving power to license must be strictly construed, and doubt or ambiguity arising out of the language employed must be resolved in favor of the public. *Matthews v. Jensen*, 21 Utah, 207, 61 Pac. 303. The authority of a city to impose a tax on

the use of its streets by enumerated vehicles must be conferred, either expressly or by necessary implication, and is subject to strict construction. *City of Terre Haute v. Kersey*, 159 Ind. 300, 64 N. E. 469, 95 Am. St. Rep. 298.

[3] Licenses for the purposes of regulation granted under an exercise of the police power must also have special legislative authorization, at least to the extent of conferring upon the city authority to regulate the particular or dangerous callings which the ordinance undertakes to license.

[4] There is, in the charter and statutes above referred to, no express grant to the city of Milwaukee of power to license elevators or elevator operators. No such power can be implied from the "general welfare clause" or from the specific provisions relating to other and different subjects. The enumeration of subjects which may be regulated by license also tends somewhat to indicate a legislative intention that the city should not exercise that power over other subjects. This court cannot grant that power to the city. If the Legislature has not in some way given the city that power, the city does not possess it. We are satisfied that upon no fair and ingenuous construction of the charter and other relevant statute provisions can there be found any indication that the Legislature intended to confer this power upon the city. If we apply the rule of strict construction upheld by the great weight of authority in such cases, this lack of authority on the part of the city is still more obvious.

The judgment of the municipal court is reversed, and the cause remanded, with directions to dismiss the prosecution.

RELIANCE LAUNDRY & CLEANING CO. v. CITY OF MILWAUKEE

(Supreme Court of Wisconsin. Nov. 19, 1912.)

Error to Municipal Court of Milwaukee; Orren T. Williams, Judge.

The Reliance Laundry & Cleaning Company was convicted of violating a city ordinance, and it brings writ of error. Reversed and remanded, with directions to dismiss prosecution.

Glicksman, Gold & Corrigan, of Milwaukee, for plaintiff in error. Daniel W. Hoan, City Atty., and E. L. McIntyre, Special Asst. City Atty., both of Milwaukee, for defendant in error.

TIMLIN, J. This case presents the same questions as *Chain Belt Co. v. City of Milwaukee*, 138 N. W. 621, immediately preceding, and is ruled by that case. There was no authority on the part of the city to enact the ordinance under which the defendant was prosecuted and convicted, hence the ordinance is invalid, and the judgment should be reversed.

Judgment reversed, and the cause remanded with directions to dismiss the prosecution.

MANUFACTURERS' & MERCHANTS' INSPECTION BUREAU v. EVERWEAR HOSIERY CO.

(Supreme Court of Wisconsin. Nov. 19, 1912.)

1. JUSTICES OF THE PEACE (§ 141*)—APPEAL TO CIRCUIT COURTS—JURISDICTION—WAIVER OF OBJECTIONS.

A circuit court had jurisdiction of an action at law on a contract appealed from a civil court, though the appeal was defective where the parties thereafter, without any motion to dismiss or other objection to the jurisdiction, appeared generally and tried the case de novo, as jurisdiction of the parties was thereby conferred, and the circuit court has jurisdiction of the subject-matter of actions at law on contracts.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 467-476; Dec. Dig. § 141.*]

2. EVIDENCE (§ 441*)—PAROL TO VARY TERMS OF WRITTEN INSTRUMENT.

Where a letter purported to confirm a "verbal arrangement" for the installation of an industrial and economic expert in the factory of the company to whom it was written and who accepted and acquiesced in it, parol evidence of the verbal arrangement which it superseded to alter or vary its terms is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719-1845, 2030-2047; Dec. Dig. § 441.*]

3. CONTRACTS (§ 22*)—BINDING EFFECT—ACCEPTANCE OF OFFER IN WRITING.

An offer in writing to supply services was accepted by receiving the services tendered with silent acquiescence in the agreement as framed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 67-93, 104-108; Dec. Dig. § 22.*]

4. TRIAL (§ 45*)—EVIDENCE—PRELIMINARY PROOF—RETENTION OF REPORTS—NECESSITY OF FIXING TIME.

In an action on a contract to supply an expert to investigate industrial and economic conditions in a factory, a refusal to permit an official of the defendant to answer questions as to whether he retained reports received thereunder, and whether he ever complained to the plaintiff regarding the nature of these reports, was proper, where no time was fixed with reference to any of the questions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 110-114; Dec. Dig. § 45.*]

5. CONTRACTS (§ 28*) — EVIDENCE — RETENTION OF REPORTS.

Such evidence was also inadmissible on the ground that objections to the nature of the reports could not affect the question of the defendant's acceptance of the contract embodied in a letter written to the defendant at a time before the reports were made, which was the matter in issue.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 133-140, 1755, 1782-1784, 1785½, 1820, 1821; Dec. Dig. § 28.*]

6. CONTRACTS (§ 270*)—AGREEMENT FOR SERVICES — RESCISSION — RETURN OF REPORTS MADE—TIME OF RETURN.

A return of reports made under a contract for the services of an industrial expert would not affect the liability of the company to whom the services were rendered upon the contract, where any return was after the receipt of a bill for such services.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1189, 1200; Dec. Dig. § 270.*]

7. APPEAL AND ERROR (§ 901*)—ASSIGNMENT OF ERRORS—BURDEN OF SHOWING.

One who assigns error must affirmatively show such error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3670; Dec. Dig. § 901.*]

8. EVIDENCE (§ 437*)—PAROL—VARIED TERMS OF WRITTEN INSTRUMENT.

Parol evidence is competent to show that a writing prima facie valid is mere cover for an illegal transaction.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2025-2029; Dec. Dig. § 437.*]

9. CONTRACTS (§ 129*)—INVALIDITY—PROCURING EVIDENCE.

A contract employing private detectives to enter a factory, and as employees procure evidence of larceny and embezzlement of goods, compensation to depend upon the apprehension and reporting of guilty persons, is void for its tendency to induce the making of charges or the trafficking with guilty persons to the private profit of the employer, in order that the compensation provided for may be earned.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 616-632; Dec. Dig. § 129.*]

Appeal from Circuit Court, Milwaukee County; Lawrence W. Halsey, Judge.

Action by the Manufacturers' & Merchants' Inspection Bureau against the Everwear Hosiery Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

A. M. Newald, of Milwaukee, for appellant. B. F. Saltzstein, of Milwaukee, for respondent.

TIMLIN, J. This action at law upon contract was commenced and tried in the civil court for Milwaukee county, appealed to the circuit court, where a new trial was had without objection or motion to dismiss the appeal from the civil court. The plaintiff recovered judgment in consequence of a directed verdict, and the appellant appeals, assigning error (1) that the circuit court acquired no jurisdiction because the notice of appeal was not served upon the judge of the civil court; (2) the circuit court erred in excluding evidence in support of the averments in the answer.

[1] With reference to the first error assigned, it is sufficient to say that the parties after the defective appeal from the civil court without any motion to dismiss that appeal or other objection to the jurisdiction appeared generally and tried the case de novo in the circuit court. This conferred jurisdiction of the parties in any event and of the subject-matter of actions at law on contracts the circuit court always had jurisdiction. Bull v. Christenson, 61 Wis. 576, 21 N. W. 521; Givans v. Searle, 136 Wis. 608, 118 N. W. 202.

[2] On June 29, 1910, plaintiff wrote to defendant: "Confirming our verbal arrangement of June 27th, I will say that we will place an industrial and economic expert in your plant for the purpose of checking the

general industrial conditions therein at the rate of \$150 per month. This operative is to be placed upon your pay roll at the same rate of wages that other workmen of his class are receiving. Whatever wages are to be paid to this man are to be deducted from the above mentioned sum, except wages earned by this operative by working over time or on Sunday and holidays, and also any wages earned by him in excess of \$3 per day, will not be deducted. It is further understood that this contract can be terminated by either party at their option, however, a weeks notice is desired. We take this opportunity of thanking you for the business and assure you that the same is appreciated." The "verbal arrangement" referred to in this letter occurred on June 27, 1910, and on this day one of the employes of the plaintiff began work for defendant. The defendant received the letter of June 29th on or about the day of its date, but did not answer it. It continued to accept the services of this man and of other subordinates of the plaintiff who came afterward, and the plaintiff began on June 29th making daily reports in writing to defendant, and continued this until September 8, 1910. The defendant received all these reports. The vice president of the defendant, who had general management of its factory and who claims to have had the "verbal arrangement" with plaintiff, testified: "After receiving this letter, * * * the operatives of the plaintiff company were placed in the employ of our company. There were several of them. Part of the time I placed them at their respective duties myself; and that was after the receipt of this letter. On each occasion when the plaintiff would send in one of its operators, it would send him with a letter of introduction to me. I would read the letter and then place the employe. I received several of these letters of introduction after the letter of June 29th, and placed those men upon those introductions. Services were rendered by the plaintiff's employes at the plant of the defendant between these dates, June 27th and September 6th. They did hosiery work, and submitted written and verbal reports each day. I received all these written and verbal reports and the first of the written reports was June 29th and the last was September 8th." It also appeared that on August 31, 1910, the plaintiff sent and defendant received a statement of account showing a balance due from defendant to plaintiff of \$92.20, also one on September 10, 1910, showing a like balance of \$234.45, and the vice president of the defendant testified that this last was a correct statement of the services rendered at the rate of \$150 a month less deductions for wages paid to the men by defendant; in other words, corresponding with the quoted letter of June 29th.

The foregoing testimony was given while the witness was being examined on the part

of the plaintiff as an adverse witness pursuant to section 4068, Stats. The defendant's counsel undertook what is called a cross-examination of this witness, in the course of which he asked the witness to state the terms of the oral contract or "verbal arrangement" referred to. The evidence was excluded, and this ruling is the principal ground of complaint on this appeal. So far as the ruling was based upon the ground that the terms of the letter of June 29, 1910, could not be varied or altered by parol evidence of a precedent valid oral agreement varying from the written agreement, the ruling was correct. There was ample proof of the acceptance of and acquiescence in the terms of the letter of June 29th for more than two months by acceptance of daily service thereunder. The letter in question does not by reference to the "verbal arrangement" make that a part of the writing, but it purports to give in writing the true version of the precedent oral contract.

[3] If the defendant had signed its acquiescence at the foot of the letter in question, there could be little doubt that parol evidence of a prior oral understanding varying this writing would be inadmissible. But assent by acceptance of the letter, acceptance of the services tendered after June 29th with silent acquiescence in this version of the "verbal arrangement," is quite as potent to close a contract as a written declaration to that effect. Bills of sale, promissory notes, deeds, and many other writings are signed by one of the contracting parties and delivered to another who receives the same and orally or by conduct acquiesces therein. This party cannot afterwards be heard to alter or modify the writing by proof of some antecedent oral agreement which has become represented by and merged in the writing. *Hooker v. Hyde*, 61 Wis. 204, 21 N. W. 52, and cases cited in op.

[4, 5] The witness was then asked whether he retained the reports received after June 29th from the plaintiff, whether he ever complained to the plaintiff regarding the nature of these reports, and whether he made any objection to the nature of these reports. Objections to these questions were sustained. There was no error in this ruling because no time was fixed with reference to any of the questions, and objections to the nature of the reports were not relevant to the question of defendant's acceptance of the contract embodied in the letter of June 29th.

[6] Neither could it affect this question if the defendant returned all the reports after it received plaintiff's bill.

[7] He who assigns error must affirmatively show error.

[8] After the plaintiff rested, the defendant recalled its vice president as a witness in its behalf, and offered evidence, whereupon the court made substantially the same rulings. The witness then further testified

that after June 29, 1910, he had conversations with a representative of the plaintiff relative to the contract in question. Being asked what the conversations were, counsel for plaintiff interposed an objection on the ground that the testimony sought to be elicited was incompetent, etc., and tended to vary the contract. Although this ruling was correct so far as the evidence attempted to merely vary the writing by proving a different valid and controlling oral contract, there is another ground upon which the evidence first above ruled out might have been admissible. Parol evidence is competent to show that a writing apparently good on its face is a mere cover for an illegal transaction; in other words, to show illegality. *Twentieth Century Co. v. Quilling*, 130 Wis. 318, 110 N. W. 174.

[9] "Contracts to pay for collecting and procuring testimony to be used in evidence coupled with the condition that the contractee's right to compensation depends upon the character of the testimony produced or upon the result of the suit in which it is to be used have been universally condemned by the courts as contrary to public policy, for the reason that such agreements hold out an inducement to commit fraud, or procure persons to commit perjury." Note to *Hughes v. Mullins*, 13 Ann. Cas. 209, 213; *Sherman v. Burton*, 165 Mich. 293, 130 N. W. 667, 33 L. R. A. (N. S.) 87, and note; *Goodrich v. Tenney*, 144 Ill. 422, 33 N. E. 44, 19 L. R. A. 371, and cases in note, 36 Am. St. Rep. 459; *Neece v. Joseph*, 95 Ark. 552, 129 S. W. 797, 30 L. R. A. (N. S.) 278, and cases in note, Ann. Cas. 1912A, 655; *Quirk v. Muller*, 14 Mont. 467, 36 Pac. 1077, 25 L. R. A. 87, 43 Am. St. Rep. 647.

Stanley v. Jones, 20 Eng. Com. Law, 165, 7 Bingham, 369, presented a case where the promisor believed he had been defrauded, and that the promisee was in possession of evidence to make this manifest, and to prove that the promisor was entitled to recover considerable sums of money from the persons who defrauded him, so he agreed to pay the promisee one-eighth part of the clear amount of such sum as he might thereafter recover through the means of the promisee. This contract was held illegal, and it was thought that it amounted to the offense of champerty. It is also said that, if there was any difference between this contract and champerty, the difference was strongly against the legality of the contract, because "the bargain to furnish and to procure evidence for the consideration of a money payment in proportion to the effect produced by such evidence has a direct and manifest tendency to pervert the course of justice."

Thomas v. Caulkett, 57 Mich. 392, 24 N. W. 154, 58 Am. Rep. 369, was where no litigation was pending or apparently contemplated, but the promisor considered that he had a cause of action arising out of injuries

in a railroad accident, and procured the promisee, who was a physician, to go with him and lay the facts relative to the extent of his disability before the railroad company's counsel and medical advisers in consideration of a contingent fee. The physician did so, a settlement was reached, and the physician sued for his contingent fee, but it was held that such contract was illegal, and recovery was not allowed.

In *Neece v. Joseph*, 95 Ark. 552, 129 S. W. 797, 30 L. R. A. (N. S.) 278, Ann. Cas. 1912A, 655, it was held that a contract to secure evidence of a given state of facts which will permit the winning of a lawsuit is void as against public policy. It is said: "A contract is void as against public policy if by it one of the parties agrees to secure such testimony as will enable the other to win an existing or contemplated suit. It is not necessary that the contract should contemplate the production of perjured testimony. It is void because its tendency is to promote unlawful acts."

In *Gillett v. Logan County*, 67 Ill. 256, where the county authorities contracted with one McNeal to hunt up and prepare testimony for the county for a fee in part contingent upon the outcome of the case in which the testimony was to be used, the contract was held illegal. On account of its corrupting tendency it was considered against public policy.

In *Casserleigh v. Wood*, 119 Fed. 308, 56 C. C. A. 212, the contract is set out in the statement of facts preceding the opinion of the court, and it provides a contingent compensation to the promisee for disclosing evidence theretofore collected by him and then in his possession. The court said: "While such contracts may at times result in the enforcement of rights that would otherwise be lost, yet we are persuaded that as a general rule they tend to disturb the peace of society and occasion suits that otherwise would not have been brought, and which ought not to have been brought. * * * We are also of opinion that, even if an action at law could be maintained for a breach of the contract, yet it is so far meretricious and tainted with illegality that a court of equity ought not to enforce it specifically."

In *Lyon v. Hussey*, 82 Hun, 15, 31 N. Y. Supp. 281, no litigation was pending, but the contract sued on was one to furnish evidence to establish the claim of the plaintiff in a litigation to be commenced. The court said: "It is clear that such a contract is against public policy." See, also, *Langdon v. Conlin*, 67 Neb. 243, 93 N. W. 389, 60 L. R. A. 429, 108 Am. St. Rep. 643, 2 Ann. Cas. 834, where the contract was between an attorney and another person by which the latter agreed to assist in looking after and procuring witnesses whose testimony was to be used in cases and to secure the employment of the attorney in such cases.

es, all in consideration of a share of the fees which the attorney should receive for his services. *Holland v. Sheehan*, 108 Minn. 362, 122 N. W. 1, 23 L. R. A. (N. S.) 510, 17 Ann. Cas. 687.

Hughes v. Mullins, 36 Mont. 267, 92 Pac. 758, 13 Ann. Cas. 209, presented the case of a written contract to procure evidence relating to a specified subject. The compensation was contingent, but to be paid whether the evidence was used in court or not, and the evidence was of a nature tending to show that fraud had been perpetrated by a third person upon the party agreeing to pay the contingent compensation. Quoting from *Quirk v. Muller*, 14 Mont. 467, 36 Pac. 1077, 25 L. R. A. 87, 43 Am. St. Rep. 647, the court said: "We do not hold the contract void because it was an agreement to procure perjury, or because it did procure perjury; but the contract had the tendency and opened a very strong temptation to the procurement of perjury." The word "perjury" does not exhaust or limit the mischievous possibilities of such contracts. If the contract is promotive of false charges which must in the end be supported by perjury, or make the accuser liable, or even if it is only promotive of litigation by one having no interest in the litigation, it is against public policy. *Cowles v. Rochester, etc., Co.*, 81 App. Div. 414, 80 N. Y. Supp. 811; *Reynell v. Sprye*, 1 De G. M. & G. 660; *Rees v. De Barnardy*, 2 Ch. (1896) 437.

Wilmoth v. Hensel, 151 Pa. 200, 25 Atl. 86, 31 Am. St. Rep. 738, is the only case we find somewhat to the contrary where a speaker at a political meeting declared that he would pay \$1,000 for the conviction of any person guilty of any violation of the election laws, and also referred to a handbill offering a like reward signed by him as chairman of a committee. The plaintiff, who was a railroad policeman hearing of it, obtained from one Howard, a tax collector, a tax receipt running to a fictitious person, and also a number of tax receipts in blank for which the plaintiff paid the other officer. These tax receipts were for the purpose of qualifying fictitious or unqualified real persons as voters. Plaintiff then caused the arrest of the tax collector, who pleaded guilty, the judge suspended sentence, and plaintiff brought action against defendant, who set up various defenses, including that of illegality. The contract was held valid, but the decision smacks more of politics than of law, and the jury was permitted to pass upon the motives of the parties. So that in any event it is not conclusive of the instant case which has not been submitted to the jury.

The exact contract to which the oral evidence is directed we must presume to be that pleaded in the answer. This is stated as follows: "It was agreed that the plaintiff should render secret service to the de-

fendant in and about the plant of said defendant, * * * for the purpose of detecting acts of larceny and embezzlement of the goods in the factory of said defendant, to apprehend the person or persons guilty thereof, to report the same to the defendant, and to produce to this defendant or its officers the person or persons guilty of such acts with the stolen goods in their possession." The contingency was as follows: If the plaintiff should be successful in its investigation by in fact detecting such acts of larceny and embezzlement as aforesaid, and apprehending the person or persons guilty thereof, and reporting the same to this defendant, and producing them before this defendant with the stolen goods in their possession, in such case the defendant should pay, etc. To "apprehend the persons guilty" must be either to arrest them by regular process of law or privately. To produce to the defendant or its officers the person guilty, with the stolen goods in his possession, could only be done by inducing some person to make confession and appear before the defendant's officers or to forcibly take persons there. The whole tendency of the contract is to induce the promisee in order to earn his money to make charges against and fasten upon other persons charges of larceny and embezzlement, and then, in addition to this, to assume the character of public officers, and apprehend such persons, and bring them before the officers of the defendant with the stolen goods, not on their person, but in their possession. We cannot assume the defendant was making this contract for the purpose of satisfying idle curiosity. It had some serious motive. If the plaintiff performed as required by the contract, it became the public duty of the defendant to make complaint and institute a public prosecution, and to give in the name of defendant or its employees as witnesses. It might, on the other hand, have intended to settle privately with the guilty person and suppress the public prosecution, but in either case the tendency of the contract is to the commission of unlawful acts on the part of the parties to it, either a contract to procure evidence to produce a certain result or to induce the making of charges by the plaintiff in order to earn his fee, or to provide for traffic by plaintiff and defendant with persons guilty of larceny to the private profit of defendant. Further evidence may relieve this contract of its illegal features or confirm its illegality, but sufficient appears in the pleading to admit oral proof of the real consideration of the contract and to permit the introduction of the defense of illegality.

It is not necessary that the contingency upon which the compensation of the promisee rests should be the winning of a lawsuit. Any other contingency that would have the same effect in instigating false charges, or in inducing the promisee to stretch his evi-

dence up to a given mark in order to get his pay, would be the same in principle. Here the service is to be secret, the act discovered must constitute larceny or embezzlement, the person accused must be apprehended and brought before the officers of the defendant, and there must be proof that the stolen goods are in his possession. If there were no fee contingent upon success, but a regular compensation, there could be no illegality about it. It is the contingent nature of the compensation, and its tendency to induce false charges and all the fraud and trickery of the private detective business that prima facie stamps this contract with illegality.

It follows that the judgment should be reversed, and the cause remanded for a new trial. It is so ordered.

STATE ex rel. MILLER et al. v. THOMPSON.
(Supreme Court of Wisconsin. Nov. 19, 1912.)

1. TAXATION (§ 348*)—ASSESSMENT—VALUATION.

The value of real property for assessment purposes was the full value which could ordinarily be obtained for it at private sale, and hence was not affected by the fact that the property was not on a paying basis as managed, by the value of the buildings if they should be torn down, nor by the fact that a 99-year lease and new buildings would produce more revenue.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 584-589; Dec. Dig. § 348.*]

2. TAXATION (§ 496*)—ASSESSMENT—REVIEW—SCOPE.

On certiorari to review the confirmation of an assessment by the board of review, only jurisdictional matters can be reached, and the board's action cannot be disturbed where there is reasonable ground for belief that it was the result of honest judgment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 890-910; Dec. Dig. § 496.*]

3. TAXATION (§ 485*)—ASSESSOR'S VALUATION—PRESUMPTION OF VALIDITY.

An assessor's valuation laid before a board of review is presumptively correct.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 861-864; Dec. Dig. § 485.*]

4. TAXATION (§ 490*)—VALUATION—DECISION OF BOARD OF REVIEW—PRESUMPTION.

A decision of the board of review as to an assessor's valuation is presumptively correct.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 872, 873; Dec. Dig. § 490.*]

Appeal from Circuit Court, Milwaukee County; L. W. Halsey, Judge.

Certiorari by the State, on the relation of George P. Miller and another, against Carl D. Thompson, to review the action of the board of review in confirming an assessment. From a judgment for plaintiffs, defendant appeals. Reversed and remanded, with directions,

Daniel W. Hoan, City Atty., of Milwaukee, for appellant. Miller, Mack & Fairchild, of Milwaukee, for respondent.

KERWIN, J. This is a proceeding to review a judgment of the circuit court for Milwaukee county declaring illegal and void the action of the board of review in confirming the assessor's assessment of respondent's property, and setting aside the assessment and action of the board of review. The matter was brought to a hearing upon the return of the appellant, Carl D. Thompson, city clerk of the city of Milwaukee, and as such clerk of the board of review. The errors assigned involve the following propositions: (1) That the assessment of \$2,800,000 on the real estate and improvements was improper, arbitrary, illegal, and without jurisdiction; (2) that the assessed valuation of said property for the year 1911 should have been fixed by the board of review at the sum of \$2,600,000 apportioned as follows: \$2,600,000 as the assessed valuation of real estate, exclusive of buildings and improvements thereon, and no dollars as the assessed valuation of the buildings and improvements on said real estate. The real controversy on this appeal is whether the board of review was justified in affirming the assessment. The property involved is the Plankinton House property in the city of Milwaukee. The assessment had been entered upon the assessment roll, and delivered to the city clerk of the city of Milwaukee. The judgment of the circuit court reversed the action of the board of review and set aside the assessment. The writ of certiorari was issued at the instance of H. A. J. Upham and George P. Miller, as trustees of the estate of John Plankinton. The assessment placed upon the property by the assessor was itemized between the real estate and improvements on the real estate as follows: Real estate \$2,600,000, improvements \$300,000. On the hearing it was conceded for the purpose of the hearing at least that the real estate exclusive of buildings was worth \$2,600,000, but objection to the assessment of the additional \$300,000 on account of buildings and improvements on the real estate was pressed. George P. Miller, one of the trustees of the Plankinton estate, testified before the board of review that he was familiar with the land in controversy, giving a description of it; that the property had been rented at best available prices, and that in the course of the last few years the taxes and rents have increased; that the assessment of \$2,600,000 for the ground is about right, or at least he did not desire to make any particular objection to it; that considering the real estate worth \$2,600,000 the improvements thereon are only worth the wreckage, because with an assessment of \$2,600,000, estimating taxes at 17 mills, the taxes upon the property would be in the neighborhood of \$50,000, and if the hotel business situate upon the property did not make money the rent from the property after payment of expenses and repairs would not pay the taxes; that in order to make the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

property earn the taxes it has to be improved, and to run the property in the present state with the present improvements with taxes increasing would mean confiscation, as the taxes would take all the income; that the trustees have been trying for three years to rent the property for a period of 99 years and have negotiated to that effect; that a 99-year lease would secure an average annual rental of about \$125,000; that the property was further menaced because the buildings, especially including the Plankinton House Hotel, are old and not in accord with what people expect in a first-class hotel, therefore, the lessee intends to tear down the buildings and construct a new hotel, hence the improvements, including the buildings, furniture, fixtures, etc., are largely sacrificed; that, even if the estate had not been leased and the buildings used, every year they use them they are running behind, and the buildings have no market value, because in case of the removal of these and the erection of new buildings the old buildings are worth only wreckage; that the real estate is so valuable it has to be improved in order to make it earn anything or the taxes will eat it up, and, if it is necessary to improve it in order to make the taxes, you cannot say the improvements are worth a cent; that the 99-year lease is in effect subject to the approval of the court; that insurance policies are out on these buildings for at least \$300,000; that the total rentals in 1909 were between \$70,000 and \$71,000.

The foregoing is, in substance, the material part of the evidence given by Mr. Miller, and no other evidence was offered on the part of the trustees. The question, therefore, arises whether the board of review was within its jurisdiction in affirming the valuation made by the assessor.

[1] The fact that the property is not on a paying basis as presently managed does not establish its value, nor does the value of the buildings, if torn down, establish their value as a going concern. So far as the evidence shows, the buildings may be the main source of revenue, and without any buildings there would be no revenue from the property. Nor does the fact that a 99-year lease and new buildings will produce more revenue from the property establish that the present improvements on the ground are not worth the assessed valuation. Real estate should be valued by the assessor at the full value which could ordinarily be obtained therefor at private sale. Sections 1035, 1052, Stats.; *State ex rel. Foster L. Co. v. Williams*, 123 Wis. 61, 100 N. W. 1048; *Salschelder v. Ft. Howard*, 45 Wis. 519. The evidence of Mr. Miller was not evidence of the market value of the property, or what price could ordinarily be obtained for it at private sale.

[2] In review upon certiorari only juris-

ditional matters can be reached, and the action of the board of review cannot be disturbed if there be reasonable ground for belief that it was the result of honest judgment. *State ex rel. Foster L. Co. v. Williams*, supra; *State ex rel. Hanna D. Co. v. Willcuts*, 143 Wis. 449, 128 N. W. 97; *State ex rel. City of Augusta v. Losby et al.*, 115 Wis. 57, 90 N. W. 188; *State ex rel. Manitowoc v. Clerk*, etc., 59 Wis. 15, 16 N. W. 617; *State ex rel. Lake Nebagamon L. Co. v. McPhee*, 149 Wis. 76, 135 N. W. 470, and cases cited.

[3] An assessor's valuation laid before a board of review is presumed in the absence of evidence to impeach it to be correct. *State ex rel. Vilas v. Wharton*, 117 Wis. 558, 94 N. W. 359.

[4] The presumption is that the decision of the board of review as to valuation is correct. *State ex rel. Davis & S. L. Co. v. Pors*, 107 Wis. 420, 83 N. W. 706, 51 L. R. A. 917; *State ex rel. Giroux v. Lien*, 108 Wis. 316, 84 N. W. 422; *State ex rel. Stearns L. Co. v. Fisher*, 124 Wis. 271, 102 N. W. 566; *State ex rel. Heller v. Lawler*, 103 Wis. 460, 79 N. W. 777; *State ex rel. Ellis v. Thorne*, 112 Wis. 81, 87 N. W. 797, 55 L. R. A. 956.

The judicial review of action of the board of review on certiorari only extends to the correction of jurisdictional errors. *State ex rel. Foster L. Co. v. Williams*, 123 Wis. 61, 100 N. W. 1048; *State ex rel. Hines L. Co. v. Fisher*, 129 Wis. 57, 108 N. W. 206. We are convinced that there was no jurisdictional error in the decision of the board of review in affirming the valuation of the assessor. Therefore the court below was in error in disturbing the decision of the board.

The judgment of the court below is reversed, and the cause remanded, with directions to affirm the decision of the board of review.

FLINT et al. v. WISCONSIN TRUST CO. et al.

(Supreme Court of Wisconsin. Nov. 19, 1912.)

1. WILLS (§ 441*)—CONSTRUCTION—INTENT.

In construing a will, the vital thing is to ascertain what the testator meant, and his intention must be gathered from the instrument as a whole, read in the light of the circumstances which surrounded him when it was made.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 958; Dec. Dig. § 441.*]

2. WILLS (§ 506*)—CONSTRUCTION—"HEIRS."

The word "heirs" in a will primarily is used in its legal or technical sense, and, unless the context shows a contrary intention, must be construed as meaning all those who in case of intestacy would be entitled by law to inherit on the death of the testator or ancestor named.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1090-1099; Dec. Dig. § 506.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3241-3265; vol. 8, pp. 7677-7678.]

3. WILLS (§ 506*)—CONSTRUCTION—HEIRS.

Before a court can say that the word "heirs," as used in a will, is not used in its primary, technical meaning, it should clearly appear that the testator did not use the word advisedly, and that he intended to say something different from what he did say.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1090-1099; Dec. Dig. § 506.*]

4. WILLS (§ 629*)—CONSTRUCTION—VESTED AND CONTINGENT ESTATE.

The rule of law which favors vested estates rather than contingent ones is practically a rule of construction that may have controlling weight in a doubtful case, but cannot defeat the intent of the testator where that intent is reasonably clear.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462; Dec. Dig. § 629.*]

5. WILLS (§ 506*)—CONSTRUCTION—"HEIRS."

Where a testator bequeathed to his sister a city lot and directed that a building be erected thereon, rents to go to the sister, the lot to be held for life, remainder to her heirs in fee, the word "heirs" will be construed technically to mean those who would be entitled by law to inherit on the death of the testator; there being nothing in the will to show an intention that the word "heirs" should mean "children."

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1090-1099; Dec. Dig. § 506.*]

Appeal from Circuit Court, Milwaukee County; Lawrence W. Halsey, Judge.

Action by Wyman K. Flint and others against the Wisconsin Trust Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

This is an action of ejectment. Plaintiffs and defendants claim title from a common source, to wit, the will of M. B. Kneeland, who died July 1, 1875, seised in fee simple of the premises involved in this suit. The will, omitting purely formal parts, is as follows: "First. I direct that as soon as is convenient after my decease all my just debts be paid. Second. I will and direct that as soon as it can be conveniently done after my decease, my executor erect upon the lots in Forest Home Cemetery, of which my father died seised, a family monument and that he otherwise improve said lots to and at a cost not less than two thousand dollars nor more than three thousand and in such manner as to my said executor consulting with my sisters shall see fit. Third. I will and direct that as soon after my decease as my personal estate will reasonably admit my said executor erect upon the west fifty-five feet of lot No. twelve in block No. fifty-eight in the fourth ward of the city of Milwaukee, on the northeast corner of Spring and West Water streets, a brick block to be called "Kneeland's Block," covering the whole of my ground there, and to have the name of the block set in front in cut stone, the said block to cost not less than fifteen nor more than twenty thousand dollars. If my personal estate shall not be sufficient thereto at the time my estate shall be settled or ready for settlement, other than touching (?) the above direction, then I direct that the same

be put at interest until it with the rents of such lot and such sum as my sister, Sarah O. Chandler, shall see fit to add thereto, shall be sufficient to erect such block. Fourth. I give and bequeath the said west fifty-five feet of said lot No. twelve in block No. fifty-eight, in the said fourth ward, corner of Spring and West Water streets, subject to the accumulation of rents aforesaid, to my sister Sarah O. Chandler, for life remainder to her heirs in fee. Fifth. I give and bequeath to my sister Ellen C. Sexton all my interest in and to lots Nos. five and six, in block No. twenty-two (22) in the seventh ward of the city of Milwaukee, to have and to hold to herself, her heirs and assigns forever. Sixth. I give and bequeath to my sister Frances Flint all my interest in section sixteen in township No. seven north, of range twenty-two (22) east, to have and to hold to herself, her heirs and assigns forever. Seventh. I will and direct that my executor convert all the rest and residue of my real estate of which I shall die seised into money, selling the same at such time and in such manner as to him shall seem fit and proper, and upon such terms of sale as to him shall seem fit and if he sell upon credit then such credits to be divided as hereinafter provided. After my said executor shall have converted all my real estate into money, paid my debts and constructed and erected such monument, then I will and direct that he divide the proceeds thereof equally between my said sisters, their heirs and legal representatives, share and share alike. Eighth. I will and direct that all the rest and residue of my personal estate to which resort is first to be had to erect said monument and which shall remain after the erection of said block shall be divided equally among my sisters aforesaid and their legal representatives, the heirs and representatives taking the share which would have gone to their ancestor. Ninth. I appoint my brother-in-law, Walter S. Chandler, executor of this my last will and testament."

This will was executed on July 23, 1874, and Kneeland died July 1, 1875, childless. At the time the will was executed, one of the sisters of the testator was the wife of Walter S. Chandler of Waukesha, and also the mother of two children, Ralph Chandler, born July 16, 1861, and B. K. Chandler, born October 22, 1872. Both of these children were living when the will was made and when the testator died. Walter S. Chandler, the husband of Sarah, died on December 27, 1896. Ralph Chandler died August 12, 1904, leaving no issue, but leaving a widow surviving him, as well as his mother and one brother, B. K. Chandler. B. K. Chandler died June 17, 1907, unmarried and childless, leaving his mother surviving him. The mother, Sarah O. Chandler, died August 4, 1911. In 1891 Sarah O. Chandler, Ralph

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Chandler, and B. K. Chandler, an infant, by W. S. Chandler his special guardian, contracted to sell the property in question here to Fred Pabst for the sum of \$150,000; \$50,000 of which amount was to be paid in cash, and the balance of said sum in deferred payments.

The plaintiffs in the present suit are the nephews and nieces of Sarah O. Chandler, deceased, and the controversy arises over the fourth paragraph of the will; the plaintiffs claiming that Sarah O. Chandler took a life estate only in the property, and that the remainder over descends to them as her heirs at law. The defendants, on the contrary, assert that it was the intention of the testator to give a life estate in the property to Sarah O. Chandler, with the remainder to her then living children, and that the word "heirs," as used in said paragraph four, means "heirs apparent" or children. The trial court awarded judgment in favor of the plaintiffs, and from such judgment the defendants appeal.

Van Dyke, Rosecrantz, Shaw & Van Dyke, of Milwaukee (Geo. D. Van Dyke, of Milwaukee, of counsel), for appellants. Miller, Mack & Fairchild, of Milwaukee, and Woodward & Lees, of La Crosse, for respondents.

BARNES, J. (after stating the facts as above). [1] In construing a will, the vital thing is to ascertain what the testator meant, and his intention must be gathered from the instrument as a whole, read in the light of the circumstances which surrounded him when it was made. *Allen v. Boomer*, 82 Wis. 364, 52 N. W. 426; *Becker v. Chester*, 115 Wis. 90, 91 N. W. 87, 650; *In re Donges' Estate*, 103 Wis. 497, 79 N. W. 786, 74 Am. St. Rep. 885; *Davies v. Davies*, 109 Wis. 129, 85 N. W. 201; *Will of Kavanaugh*, 143 Wis. 90, 126 N. W. 672, 28 L. R. A. (N. S.) 470; *Ohse v. Miller*, 137 Wis. 474, 119 N. W. 93. But construction of a will does not begin "until uncertainty of sense is pretty clearly apparent." *Holmes v. Walter*, 118 Wis. 409, 413, 95 N. W. 380, 381 (62 L. R. A. 986). "We must have ambiguity before we can enter upon the field of interpretation or construction." *In re Moran's Will*, 118 Wis. 177, 196, 96 N. W. 367, 373. While adjudicated cases may be and sometimes are helpful in aiding in the construction to be placed on wills, it is seldom that the language used and the surrounding circumstances are so much alike in the case of two wills that the decision in reference to one establishes a precedent which controls the decision as to the other. *In re Albiston's Estate*, 117 Wis. 272, 94 N. W. 169; *Becker v. Chester*, 115 Wis. 90, 118, 91 N. W. 87, 650; *Otjen v. Frohbach*, 148 Wis. 301, 309, 134 N. W. 832.

[2] If the word "heirs," used in the fourth paragraph of the will, is to be given its technical and correct meaning, then it refers to those persons who would be entitled to in-

herit Mrs. Chandler's real estate upon her death under the law of descent. This is conceded. In the case of *In re Cowley's Will*, 120 Wis. 263, 266, 97 N. W. 930, 931, it is said that the words "my lawful heirs" are not ambiguous, and that the authorities overwhelmingly "support the rule that reference in a will to heirs or legal heirs of the testator means the persons who at his death are by law entitled to inherit the realty; that such significance can be overcome only by clear and conclusive evidence of a different intent or meaning." "The word 'heirs' in a will primarily is used in its legal or technical sense, and, unless the context shows a contrary intention, must be construed as meaning all those who, in case of intestacy, would be entitled by law to inherit on the death of the testator or ancestor named." 40 Cyc. 1459. The following authorities are to the same effect: 2 *Underhill on Wills* (1900 Ed.) § 607; *Page on Wills*, § 556; *MacLean v. Williams*, 116 Ga. 257, 42 S. E. 485, 59 L. R. A. 125; *Cushman v. Horton*, 59 N. Y. 149; *Hoover v. Smith*, 96 Md. 393, 54 Atl. 102; *Jarboe v. Hey*, 122 Mo. 341, 353, 28 S. W. 968; *Appeal of Dodge*, 106 Pa. 216, 220, 51 Am. Rep. 519; *McCarthy v. Marsh*, 5 N. Y. 263, 275; *Phillips v. Carpenter*, 79 Iowa, 600, 44 N. W. 898; *Oroom v. Herring*, 11 N. C. 393; *Barclay v. Cameron*, 25 Tex. 232, 242; *Brooks v. Evetts*, 33 Tex. 732, 742; *Lavery v. Egan*, 143 Mass. 389, 9 N. E. 747; *In re Donahue's Estate*, 36 Cal. 329, 332; *Ewing v. Barnes*, 156 Ill. 61, 40 N. E. 325, 327; *Howell v. Gifford*, 64 N. J. Eq. 180, 53 Atl. 1074, 1077; *Dukes v. Faulk*, 37 S. C. 255, 16 S. E. 122, 127, 34 Am. St. Rep. 745; *Gauch v. Insurance Co.*, 88 Ill. 251, 30 Am. Rep. 554; *Cook v. First Universalist Church*, 23 R. I. 62, 49 Atl. 389, 390; *Nye v. Grand Lodge, etc.*, 9 Ind. App. 131, 36 N. E. 429, 436; *Lincoln v. Perry*, 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 215; *Olney v. Lovering*, 167 Mass. 446, 45 N. E. 766; *Merrill v. Preston*, 135 Mass. 451, 457; *Lawton v. Corlies*, 127 N. Y. 100, 27 N. E. 847, 848; *Proctor v. Clark*, 154 Mass. 45, 27 N. E. 673, 12 L. R. A. 721, 724; *Alexander v. Wallace*, 76 Tenn. (8 Lea) 569, 570; *Kelley v. Vigas*, 112 Ill. 242, 245, 54 Am. Rep. 235; *Shaw v. Robinson*, 42 S. C. 342, 20 S. E. 161.

[3] That a case might arise where the word "heirs" would be construed to mean "children" or "heirs apparent" may be admitted. But before a court should say that the word should not have its accurate and legal meaning, it should clearly appear that the testator did not use the word advisedly, and that he intended to say something different from what he did say. Appellants' contentions are that the word "heirs" is used in a popular sense to denote "heirs apparent," as well as in a technical sense; that it is not accurate to speak of heirs of a living person if it is the intention to use

the word in a technical sense, while it is if the word is used as meaning heirs apparent or children; that in articles 5 and 6 of the will the testator used the word "heirs" in its technical sense, and in articles 7 and 8 he used the word in its popular sense, showing that he used the word in its popular as well as in its technical sense; that the language of the fourth article of the will imports an immediate and absolute gift of the remainder to the heirs of a person recognized in and by the will as then living; that conditions were such, when the will was made, that the testator evidently intended to make a devise of a life estate to Mrs. Chandler and vest the remainder in her children; and, finally, that the law favors vested rather than contingent remainders, and, where there is reasonable doubt as to which a testator intended to create, the doubt should be resolved in favor of the vested remainder. None of these reasons, considered singly, is very persuasive, and all of them combined are not very convincing. A large number of cases are cited by appellants wherein the word "heirs," when used in the deed or will under consideration, was held to mean "children." In some of those cases the court held that, taking the instrument as a whole, and construing it in the light of the circumstances which surrounded the party who made it, it was manifest that the word "heirs" was intended to mean "children." In many of them such a construction was necessary in order to hold the grant or devise valid. In some of the cases relied on, there was perhaps fair room for doubt as to what the intention of the testator or grantor was.

Starting with the propositions established in this court, that the meaning of the word "heirs" when used in a will is not ambiguous, and that the evidence must be clear and conclusive to show that the testator made an inaccurate use of the word, there is little to indicate that the trial court did not correctly construe the fourth article of the will. The obvious impression which a reading of the will conveys to the mind is that the testator intended that Mrs. Chandler should have a life estate in the property, and that, after she was through with it, it should go to those who would inherit any real estate she might own if she died intestate. It is not accurate to speak of a designated person as the heir of another person who is living, although it is customary enough to do so. It is accurate to speak of the heirs of a living person when reference is intended to be made to those unknown persons entitled to inherit his real property at his death under the laws of descent. Neither are we impressed with the contention

that the word "heirs" is used in its popular, rather than in its technical, sense in articles 7 and 8 of the will, or that it purports to make an immediate gift of the remainder.

[4] The rule of law which favors vested estates rather than contingent ones at the present time is practically a rule of construction that may have controlling weight in a close or doubtful case, but cannot be invoked to defeat the intent of the testator where that intent is reasonably clear. The fact of the matter is the will appears to be a pretty plain and easily understood document, about the intent and meaning of which there is not very much doubt. Perhaps able counsel, in view of what has transpired, could use more apt and less ambiguous language than that used, but the draftsman, without the benefit of hindsight, managed to draw a document which is far from being cryptic in character.

[5] By giving the word "heirs" its technical legal meaning, we have a will that makes an entirely sane and reasonable disposition of the property. The testator wanted to specially provide for his sister, Mrs. Chandler, probably because her husband was not as well off as were the husbands of his other sisters. He took care of her by giving her a life estate in the property, and by providing that a building should be erected thereon from which she should draw the rents. If she left children surviving her, they would of course take the fee; if not, then the estate was to go to Mrs. Chandler's heirs, who, as it turned out, would also be the lawful heirs of the testator had he died without leaving a widow or issue at the time Mrs. Chandler died. It is true that, under the construction which we adopt, a contingency might have arisen whereby the property would have gone to Mrs. Chandler's husband, and it may be said that the testator desired to have his property go to his own blood relations. This contingency, however, would be just as likely to happen under the construction contended for by appellants.

Although the case is important, we deem it unnecessary to prolong the discussion. The case involves practically a single question. If the testator used the word "heirs" when he meant "children," the judgment should be reversed, otherwise it should stand. The plain import of the language used is that the testator did not mean "children." If its ordinary and usual sense is given to the language used, the circuit court reached a correct conclusion. To our minds the case is quite barren of circumstances which would logically lead to the conclusion that the testator meant "children" when he used the word "heirs" in the fourth article of his will. Judgment affirmed.

STATE ex rel. SCHOOL DIST. NO. 1 OF
TOWN OF MILWAUKEE et al.
v. SCHRINER et al.

(Supreme Court of Wisconsin. Nov. 19, 1912.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 33*)—
ANNEXATION OF DISTRICT—JOINT DISTRICT.

St. 1898, § 422, as amended by Laws 1901, c. 304, relating to the way in which joint school districts may be altered or extinguished, and providing that no new joint district embracing a part of any city shall be thereafter formed, was enacted to preserve uniformity of the school governments of all schools lying within the corporate limits of the city, and prohibits the formation of a joint school district embracing part of any city either by direct action or operation of law, and thereunder annexation by city of part of the territory of a school district of a town creates no joint district, but leaves the part of the district remaining in the town a separate district, and the part annexed an integral part of the city's school system.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 55; Dec. Dig. § 33.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 33*)—
DIVISION OF TOWN—JOINT DISTRICTS.

St. 1898, § 415, which provides that school districts become joint on the division of a town without other action, relates only to cases where a town is divided and each division thereof remains under a town government, and has no application to a case where a part of a town is annexed to, and becomes merged in, a city government.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 55; Dec. Dig. § 33.*]

3. MUNICIPAL CORPORATIONS (§ 36*) — AN-
NEXATION — PROPERTY AND FUNDS — STAT-
UTE.

St. 1898, § 944, which provides that the territory detached from any school district shall receive from the portion thereof remaining its just share of the credits, and shall be liable to such remaining portion for the excess of such share of the school property as is situated within it, applies to a case where the part of the town school district annexed to a city does not continue as a separate district or municipality, as well as to a case where each part of the divided district remains a distinct municipal entity; and thereunder the title to a schoolhouse located on the detached or annexed portion becomes by operation of law vested, together with its custody and control, in such detached portion, subject to the duty to pay the remaining portion its just share of the value thereof, while the school officers of the remaining district have title and control of the other property until a division is made as provided by the statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 105-111; Dec. Dig. § 36.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 41*)—
DIVISION OR ANNEXATION—ADJUSTMENT OF
PROPERTY RIGHTS.

It is within the power of the Legislature to provide for a fair and equitable disposition or division of public property in the case of the division or annexation of territory.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 71-80; Dec. Dig. § 41.*]

5. MANDAMUS (§ 151*)—ACTION BY SCHOOL
DISTRICT—PARTIES.

In mandamus by the part of a school district remaining in the town after annexation of a part to the city, asking adjudication that no

joint school district was formed between the annexed portion and the remaining portion, which adjudication was necessary for disposition of the case, the city was interested in and affected thereby, and was therefore a proper party defendant.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 291, 292; Dec. Dig. § 151.*]

Appeal from Circuit Court, Milwaukee County; J. C. Ludwig, Judge.

Mandamus by the State, on the relation of School District No. 1 of the Town of Milwaukee and others, against Nick Schrinier and others. Alternative writ quashed and action dismissed, and relators appeal. Reversed and remanded.

Mandamus. The following facts appear from the petition: In September, 1910, the city of Milwaukee annexed a part of the territory of school district No. 1 of the town of Milwaukee. The schoolhouse of the district is situated on the parcel so annexed. Prior to the time of the annexation, the defendants Harry Stock, Nick Schrinier, and Robert Milbrath were resident electors in, and the duly elected, qualified, and acting officers of, said school district. All of said officers now reside in the territory annexed to the city of Milwaukee. Since the annexation aforesaid the relators were duly elected, qualified, and have acted as the officers of that portion of the school district remaining in the town of Milwaukee. They bring this action to recover possession of all moneys, amounting to \$1,375.24, papers, deeds, records, books, and other property belonging to said district now in the hands of the defendants, and pray that the relators be given the care, keeping, and control of the schoolhouse located in the annexed territory, and, further, that they have a judgment or order that the annexation of part of said school district to the city of Milwaukee did not constitute such annexed portion a joint school district with the remaining territory. The petition also asks that the defendants be commanded to refrain from claiming a division of the property and money of said school district No. 1, and for such other judgment or order in the premises as may be proper. It appears that the defendants refused to turn over to the relators the property in question, and the care, custody, and control of the schoolhouse, on the ground that, by virtue of the annexation of a part of the district to the city of Milwaukee, such part forms and constitutes a joint school district with the remaining territory of the district, and that the defendants constitute the legal board of directors of such joint school district, and therefore have a right to the care and keeping of the schoolhouse and other property of the joint district. No division of property or adjustment of credits and liabilities has been had as provided for in section 944, Stats. (1898). An alternative writ of mandamus was issued. The defendants moved to quash

the writ, for the reason that neither the petition nor the writ stated facts showing that the relators were entitled to a writ of mandamus. From an order quashing the alternative writ and dismissing the action the relators appealed.

Lenicheck, Robinson, Fairchild & Boesel, of Milwaukee, for appellants. Daniel W. Hoan, City Atty., and Mark A. Kline, Asst. City Atty., both of Milwaukee, for respondents.

VINJE, J. (after stating the facts as above). [1] It is obvious that, if that part of the school district of the town of Milwaukee annexed to the city became a joint school district with the unannexed part, then the relators have no standing in court, for they were elected after the annexation by a vote of only that part of the district not annexed to the city; and it is equally obvious that the defendants, except the city of Milwaukee, who were the directors elected before the annexation, would be lawfully entitled to the possession and control of the school property. On the other hand, if no joint school district was formed, the defendants, who are not residents of the school district, but reside in the city of Milwaukee, are not qualified to hold school district offices in the town of Milwaukee. Section 431, Stats. (1898). The primary question for determination, therefore, is: Did the annexation result in forming a joint school district between the parcel annexed and the portion of the district remaining in the town of Milwaukee? Section 422, Stats. (1898), as amended by Laws 1901, c. 304, and now applicable, provides how joint school districts may be altered or extinguished. The concluding sentence thereof is as follows: "But no new joint district embracing a part of any city shall be hereafter formed." Defendants contend that this applies only to districts formed by the direct action of two independent districts, and does not apply to a district formed by operation of law upon the divisions of towns or the annexation of part of a school district to a city. The purpose of section 422, as expressed in *State ex rel. Joint School District No. 2 v. Sweeney*, 108 Wis. 404, 79 N. W. 420, in prohibiting portions of a city from becoming part of a joint school district with an adjacent town, was to preserve uniformity in the school government of all the schools lying within the corporate limits of the city, and to put them under one school government. In that case it was held that the change from a village government to a city government ipso facto extinguished the joint school district which had previously existed between the village and an adjoining town. If by force of section 422 an existing joint school district is dissolved by reason of a portion thereof being incorporated as a city, it is difficult to perceive how a joint district is formed by the annexation of a portion of a single dis-

trict to a city. It follows from the decision in the *Sweeney* Case that the statute prohibits the formation of a joint school district embracing the part of any city, either by direct action or by operation of law. The disadvantages of and objections to such a school district are equally great, whether the district is created by direct action of school boards or by operation of law. Hence it must be held that no joint school district was created by the annexation. That portion of the district which remained in the town of Milwaukee constituted a separate district. That portion annexed to the city of Milwaukee became an integral part of the school system of such city.

[2] Defendants also claim that section 415, Stats. (1898), which provides that districts become joint upon the division of a town without other action, applies to the case at bar; their argument being that the town of Milwaukee was divided by the annexation of the parcel in question to the city of Milwaukee, and therefore a joint district was created pursuant to such section. This claim is deemed untenable. The annexation of a portion of the town of Milwaukee to the city was not a division of the town within the meaning of that section. That relates only to cases where a town is divided, and each division thereof remains under a town government. It has no application to a case where a portion of a town is annexed to, and becomes merged in, a city government.

[3, 4] The further contention is made by the defendants that, even if a joint school district was not formed, the relators cannot maintain an action of mandamus because the property of the district had not been apportioned between the parts thereof pursuant to section 944, Stats. (1898). Since the detached part of the district became subject to the general school government of the city of Milwaukee, the relators are the lawfully elected, qualified, and acting officers of school district No. 1 of the town of Milwaukee, and, as such, are entitled to the custody and control of the school property which belonged to said district, the title to which was not changed by the annexation, until a proper division is made according to law. Except as to the real estate, the legal title to the school property was not affected by the annexation, and the officers of the district are entitled to the control and custody of such property until a division is made as provided for in section 944, Stats. (1898).

The claim of the relators that section 944 does not apply to the case at bar because the portion annexed to the city did not continue as a separate school district or municipal entity, and that it applies only to cases where each part of the divided political division remains a distinct municipal entity, is not well taken. There is nothing

in the statute to warrant such a construction. On the other hand, it clearly by its language applies to a case where territory of one municipality is annexed to another, and it contemplates a division of property and adjustment of credits and liabilities in such a case as well as in a case where one municipal entity is divided into two distinct municipal entities.

The relators claim the title to, and right of possession of, the schoolhouse, which is located in the portion of the district annexed to the city of Milwaukee, founding their claim upon the cases of *Town of Milwaukee v. City of Milwaukee*, 12 Wis. 93, and *Town of Depere v. Town of Bellevue*, 31 Wis. 120, 11 Am. Rep. 602. Those cases were decided before the Legislature had made any provision for the adjustment of credits and liabilities for property owned by a divided municipality. The portion of section 944, Stats., first enacted, was chapter 128 of the Laws of 1876, providing for the apportionment of bonded indebtedness of any territory divided after the issuance of the bonds. This act was amended by section 2 of chapter 334 of the Laws of 1885, which provided for the adjustment of credits, liabilities, and indebtedness when territory was divided. This act, however, said nothing in express terms about division of property owned by a divided municipality, and, as pointed out in the case of *Ashland v. Ashland*, 87 Wis. 533, 58 N. W. 377, made no provision whereby the old district was entitled to reimbursement for the value of property located in the new district, or for credits belonging thereto. This defect in the statute was remedied by the revision of 1898, which provides that the detached territory shall be liable to the remaining portion thereof "for the excess of such share of the municipal property as is situated within it." The doctrine announced in the cases cited can have no application to a case where the Legislature has made provision as to the division of credits, liabilities, and property owned by the territory divided. The power of the Legislature to provide for a fair and equitable disposition or division of public property in the case of the division or annexation of territory is unquestioned. *Town of Milwaukee v. City of Milwaukee*, 12 Wis. 93; *State ex rel. Town of Princeton v. Maik*, 113 Wis. 239, 89 N. W. 183, and cases cited.

It is evident from the provisions of section 944 added by the revisors in 1898, to the effect that the territory detached from any municipality shall be liable to the remaining portion for the excess of such share of the municipal property as is situated within it, that it contemplated the transfer

of the title to such property to the detached portion, and required it to pay to the remaining portion its just share of the value thereof. It is unreasonable to suppose that it would require the detached portion to pay to the remaining portion its just share of the value of property situated within the detached portion if it did not intend to vest the title to such property in the detached portion. So it must be held that the title to the schoolhouse which is located in the detached portion became by operation of law vested in such detached portion subject to the duty to pay the remaining portion its just share of the value thereof. The title to the schoolhouse in question having become vested in the detached portion by operation of law at the time of annexation, such detached portion is entitled to the possession and control of the schoolhouse. The relators, therefore, have neither the title to, nor the right of possession of, the schoolhouse, and as to that the writ must fail. The only right they can enforce as to the schoolhouse is their right to receive their just share of the value thereof when the property of the district is divided according to law.

[5] The objections of the defendants that the city of Milwaukee is not a proper party are not well taken. It is true the petition does not ask that it turn over any of the property in question, but it does ask for an adjudication that no joint school district was formed between the annexed parcel and the remaining portion of the school district, and such adjudication was absolutely necessary to a disposition of the case. The city of Milwaukee was interested in, and affected by, the adjudication of such question, and was therefore a proper party defendant.

It follows from this opinion that the relators are entitled to a writ of mandamus requiring the defendants Harry Stock, Nick Schriner, and Robert Milbrath to turn over to the relators the care, keeping, possession, and control of the moneys, papers, deeds, records, books, and other personal property belonging to school district No. 1 remaining in the hands of said defendants, and adjudging that said defendants refrain from acting as the board of school directors of school district No. 1 of the town of Milwaukee, and that the relators have judgment against said defendants, and the defendant the city of Milwaukee, that the annexed parcel does not constitute a joint school district with the remaining territory of school district No. 1 of the town of Milwaukee.

Order reversed and cause remanded for further proceedings in accordance with this opinion.

MAURER v. NORTHWESTERN IRON CO.
et al.

(Supreme Court of Wisconsin. Nov. 19, 1912.)

1. MASTER AND SERVANT (§ 252*)—ACTION FOR INJURIES—NOTICE OF INJURY—LIMITATION.

The notice of injury required by St. 1898, § 4222, to be served on defendant in the manner required for the service of summons in courts of record, is not a condition precedent to a cause of action, but a condition precedent to the maintenance of an action for damages, and while not a statute of limitations in the technical sense, it is a statute of that nature, though in special circumstances akin to fraud, preventing compliance with or inducing a failure to comply with it, the statute is so far different from a statute of limitations that a person may estop himself from having the benefit thereof, and, as such, the right to insist upon a mere irregularity in the manner of giving the notice may also be waived by failure to properly object thereto.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 806; Dec. Dig. § 252.*]

2. MASTER AND SERVANT (§ 262*)—ACTION FOR INJURIES—LIMITATIONS—PLEADING—DEFENSE.

Where St. 1898, § 4222, requiring notice of injury to be served in the manner required for the service of summons in courts of record, is treated as a statute of limitations, the defense of a failure to give such notice should be raised by answer or special demurrer where the fact appears upon the face of the complaint, or by answer where it does not.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 855-859; Dec. Dig. § 262.*]

3. MASTER AND SERVANT (§ 256*)—NOTICE OF INJURY—WAIVER—PLEADING.

In an action for personal injuries, allegation of the date of the injury, that thereafter, within proper time, plaintiff mailed to defendant, on whose breach of duty such injury happened, a signed notice thereof, and that it was received and responded to in writing by an employers' liability company, and by a visit of defendant's attorney and agent to plaintiff, inquiring into the nature of his injuries, and informing him that further notice of injury was not necessary, were good as against a demurrer on the ground that notice of the injury was not properly served.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 809-812, 815; Dec. Dig. § 256.*]

Appeal from Circuit Court, Milwaukee County; J. C. Ludwig, Judge.

Action by Michael Maurer against the Northwestern Iron Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Action to recover compensation for an injury. In respect to the notice required by section 4222, Stats., the pleader stated this: The injury occurred December 7, 1908. January 30th thereafter, plaintiff mailed to defendant, in whose service and by whose breach of duty such injury happened, a signed notice. It was received and responded to in writing, through the Employers' Liability Assurance Corporation. In April, 1909, defendants' attorney and agent visited plaintiff and inquired into the nature of

his injuries; then informing him that further notice of the injury was not necessary. Plaintiff relied thereon, believing his claim would be settled without suit, and no further proceedings on his part would be required. The action was commenced October 13, 1910. A copy of the notice and response were made part of the complaint. The former, it was conceded on the argument, as the fact is, contained the essentials required by the statute, and satisfied the calls thereof, except as to manner of service. The response informed plaintiff his claim was in the hands of the insurance company for adjustment and would be taken up for settlement and indemnity through its general agent.

Defendant demurred to the complaint for insufficiency, and, specially, because the notice of injury was not properly served. The demurrer was overruled.

Quarles, Spence & Quarles, of Milwaukee (Irving A. Fish, of Milwaukee, of counsel), for appellants. Carroll & Carroll, of Milwaukee, for respondent.

MARSHALL, J. (after stating the facts as above). [1, 2] Section 4222, Stats., prescribes the manner of serving a notice of injury in the circumstances of this case. "Such notice shall be served in the manner required for the service of summons in courts of record" are the words of the statute. The giving of the notice is the material thing. It is made a condition precedent to the maintenance of an action to recover damages. It is not a condition of the existence of a cause of action but one of limitation upon opportunity to judicially enforce an existing such cause. While not a statute of limitation, in the technical sense, it is so near akin thereto as to be classed therewith and called "a statute in the nature of a statute of limitation." *Meisenheimer v. Kellogg*, 106 Wis. 30, 81 N. W. 1033; *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475, 80 Am. St. Rep. 1; *Malloy v. C. & N. W. Ry. Co.*, 109 Wis. 29, 85 N. W. 130. So classed, the doctrine as to waiver of the right to insist upon the benefit of the statute by failure to raise the question by answer or special demurrer, in case of the fact appearing upon the face of the complaint, or by answer where it does not, has been adopted in respect thereto, though the court has, in special circumstances akin to fraud preventing compliance with or inducing failure to comply with it, held that the statute is so far different from an ordinary one of limitations, that a person may estop himself from having the benefit thereof. *Gulle v. La Crosse Gas & El. Co.*, 145 Wis. 157, 130 N. W. 224.

We will say, in passing, that counsel erred in supposing that *Arp v. Allis-Chalmers Co.*, 130 Wis. 454, 110 N. W. 386, 8 L. R. A. (N. S.) 997, 118 Am. St. Rep. 1036, modifies or adds to *Troschansky v. M. E. R. & L. Co.*, 110 Wis. 570, 86 N. W. 156, or that *Uhlen-*

berg v. Mil. Gas Light Co., 138 Wis. 148, 119 N. W. 810, overruled either. The latter is perfectly consistent with the doctrine that the statute is one of limitations and extinguishes a right upon which it operates the same as other such statutes; and, at the same time, that the point cannot be insisted upon, except by answer or demurrer. A limitation right, though one which supersedes another upon which it acts, is waivable under some circumstances. By the policy of our statutes and practice it is waived by not insisting thereon by special demurrer or by answer.

So it is plain, that the statutory right created by section 4222, Stats., may be lost by estoppel, as in *Gulle v. La Crosse G. & E. Co.*, supra, or waived in the action by failure to properly raise the question.

It would seem to follow, necessarily, that any mere detail of giving the notice, not affecting the real purpose of the statute, such as the particular manner of service, so long as another way is substituted whereby the requisite information is furnished and acted upon is waivable; that if a distinct purpose to shall appear, either expressly or inferentially, it will be effective, regardless of any element of estoppel, in the technical sense. As to whether a mere irregularity in the manner of giving the notice may be waived, is one thing, failure to give any notice at all is quite a different thing. The former, it is considered, on elementary principles of natural justice, is subject to waiver. A person may waive most any statutory right provided for his protection. There are some limitations upon that on grounds of public policy. So, regardless of the rule as to whether a vested right created by the expiration of the period prescribed by an ordinary statute of limitation, may be lost by waiver or estoppel, except by failure to seasonably take advantage of it by pleading, the rule cannot be logically extended to details of complying with the statute involved here.

[3] There being no question as to the power to waive the statutory manner of challenging attention of the person liable for damages, as in this case, that a waiver is amply pleaded here seems likewise plain. No clearer case of waiver could be made than by receipt of and action upon an irregularly served notice characterizing such conduct by an assurance that no further notice would be required to secure adjustment of the claim.

Judgment affirmed.

SCHENCK et al. v. STERLING ENGINEERING & CONST. CO.

(Supreme Court of Wisconsin. Nov. 19, 1912.)

1. ACTION (§ 57*) — CONSOLIDATION OF ACTIONS—ACTIONS WHICH MAY BE CONSOLIDATED.

Under St. 1898, § 2792, authorizing the consolidation of actions pending in the same

court which might have been joined, actions by different brokers each claiming a commission on the same sale cannot be consolidated, since they could not have been joined.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 632-675; Dec. Dig. § 57.*]

2. INTERPLEADER (§ 11*)—GROUNDS OF RELIEF—CLAIMS BY RIVAL BROKERS.

Under St. 1898, § 2610, providing that a defendant in an action on a contract may on proof that a person not a party makes a demand for the same debt apply for an order substituting such person in his place and discharging him from liability to either party by depositing the amount of the debt in court, a seller of property from whom two brokers each claim a commission on the sale may interplead them, provided he admits liability to some one for the amount claimed.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 13-34; Dec. Dig. § 11.*]

3. PARTIES (§ 51*)—NEW PARTIES—CLAIMS BY RIVAL BROKERS—"CONTOVERSY."

A person sued for broker's commissions cannot have another broker claiming commissions on the same sale under a separate contract brought in and the rights of both brokers determined in one action under St. 1898, § 2610, providing that the court may determine any controversy between the parties when it can be done without prejudice to the rights of others, but, when a complete determination of the controversy cannot be had without the presence of other parties, it shall order them to be brought in, since "controversy" means dispute, and the dispute, whether defendant employed plaintiff, whether plaintiff procured a purchaser, and the amount of his compensation, may be determined without prejudice to the rights of the other broker, and a complete determination of the controversy may be had without his presence, defendant having the right to show without making him a party that the purchaser was procured by the other broker (citing 2 Words & Phrases, 1553).

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 77-82; Dec. Dig. § 51.*]

For other definitions, see Words and Phrases, vol. 8, p. 7617.]

4. PARTIES (§ 51*)—NEW PARTIES—CLAIMS BY RIVAL BROKERS—"TRANSACTION."

A person sued for broker's commissions cannot have another broker, claiming commissions on the same sale under a different contract, brought in, and his rights determined in that action under St. 1898, § 2656a, providing that a defendant may have affirmative relief against a person not a party upon his being brought in, but that such relief must involve or affect the contract, transaction, or property which is the subject-matter of the action, the relief sought not affecting the contract or transaction involved, since "transaction" means whatever may be done by one person which affects another's rights and out of which a cause of action may arise, and in this case means the making of the contract sued on, but, if held to include its performance, it would not be affected by the relief sought, since defendant can show without the presence of the other broker that the purchaser was procured by him.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 77-82; Dec. Dig. § 51.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7060-7062.]

Winslow, C. J., and Siebecker, J., dissenting.

Appeal from Circuit Court, Milwaukee County; F. C. Eschweiler, Judge.

Action by O. J. Schenck and another against the Sterling Engineering & Construction Company. From an order refusing to

bring in an additional defendant, the defendant appeals. Affirmed.

The complaint sets forth two causes of action—one on express contract and one on quantum meruit. In the cause of action on express contract, the plaintiffs allege an agreement on the part of the defendant to pay them as commission for procuring a purchaser for certain described premises all said property sold for over and above \$54,000. Plaintiffs allege that they did procure purchasers in the persons of Morris Miller and Max Routt, who bought the property for \$58,800, and that under the agreement there is due them as commission the sum of \$4,800. In the second cause of action it is alleged that the plaintiffs were employed by the defendant as brokers to procure a purchaser for the property described; that the plaintiffs did procure purchasers in the persons of Miller and Routt, and rendered other services in connection with the sale; and that the services so rendered were reasonably worth \$2,270, according to the rule of the real estate board of the city of Milwaukee. Judgment is demanded for \$4,800 or such other sum as may be found due plaintiffs. To this complaint the defendant interposed an answer, consisting in part of a general denial of the allegations of the complaint. The defendant denied having employed the plaintiffs, and denied that the plaintiffs rendered it any services or procured any purchaser for its property. The answer then sets up that one Franklin H. Feasley had commenced an action in the circuit court of Milwaukee county against the defendant, in which he sought to recover from it the sum of \$2,175 for procuring the purchasers for the real estate hereinbefore referred to, and that said Feasley alleged in his complaint that he had in fact secured said Miller and Routt to buy the property in question from the defendant. It appears clearly enough from the pleadings that the plaintiffs in this action, Schenck and Hayward, claimed to have secured Miller and Routt as purchasers for the defendant's property, and that Franklin H. Feasley, the plaintiff in the other action, claimed that he procured Miller and Routt as purchasers for the same property, and that there is a dispute between the rival real estate agents as to which is entitled to the commission on the sale, if either of them is entitled thereto. The defendant also denied liability in the action which Feasley brought. The answer prayed that Feasley be enjoined from prosecuting his action until the case brought by Schenck and Hayward was determined; that Feasley be made either a party plaintiff or a party defendant in said action, and be compelled to litigate therein the issues between himself and the defendant; and that a single final judgment determine the rights of all three of the parties in the premises. The defendant proceeded by order to show

cause, and on a hearing of such order the court held that the relief asked could not be granted for the reason that the statutes did not authorize the court to bring Feasley as a party defendant in the action we are considering, and neither did the common law of the state authorize any such proceeding. From an order denying the defendant's application, this appeal is taken.

G. J. Davelaar, of Milwaukee, for appellant. H. L. Kellogg, of Milwaukee, for respondent Schenck. Perry, Morton & Kroesling, of Milwaukee, for respondent Feasley.

BARNES, J. (after stating the facts as above). The appellant is in a somewhat embarrassing situation. Two parties are claiming full compensation from it for performing the same service. Each claims to have secured the purchasers, and neither admits that the other is entitled to any part of the compensation alleged to be due for the services rendered. Separate trials of the two actions may result in two judgments which will obligate the defendant to pay twice for the same service. To relieve itself from this dilemma, the defendant sought to enjoin the prosecution of one of the actions, and to bring all of the parties before the court in the other, so that the plaintiffs in both actions would be bound by the judgment in the one first rendered.

[1] Both cases are straight actions at law on contract. We must look to the Code to see whether or not the remedy here pursued is permissible. Obviously a situation is presented where it might be proper enough to consolidate the two actions. It is just as obvious that the general consolidation statute (section 2792) does not help the defendant, because it provides for the consolidation of only such actions as might originally have been properly joined. These two actions could not have been joined. *Winninghoff v. Wittig et al.*, 64 Wis. 180, 183, 24 N. W. 912; *Peck v. School Dist.*, 21 Wis. 517.

[2] Had the defendant admitted liability to some one for the amount claimed, its remedy would be simple enough, because section 2610, Stats., provides for an interpleader in such a case.

[3] Sections 2610 and 2656a are relied on in support of the practice here pursued. Sections 2420, 2600, 2656, and 2657 are also cited, but we see no room for the contention that any of the four sections last referred to authorize the practice which the defendant attempted to pursue. The first question presented by the appeal is: Does section 2610, Stats., authorize the bringing in of Feasley as a party to this action? The following is the only portion of section 2610 which has any application to the situation: "The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others or by

saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, or any persons not parties to the action have such interests in the subject-matter of the controversy as require them to be made parties for their due protection, the court shall order them to be brought in." "Controversy" means dispute. 1 Bouv. Law Dict., Rawle's Rev., 431; 2 Words & Phrases, 1553.

The controversy between the plaintiffs and the defendant in this action arises over these questions: (1) Did the defendant employ the plaintiffs to procure a purchaser for its real estate? (2) If so, did plaintiffs procure such a purchaser? (3) If they did, what compensation should they receive? It is very plain that it is not necessary to bring any third party before the court for his protection while these three disputed questions of fact which form the subject of controversy between plaintiffs and defendant are being litigated. It is not claimed that any other person was a party to the contract between plaintiffs and defendant. One asserts that a contract was made. The other denies it. One asserts that, acting under the contract, a purchaser was found and compensation was earned. The other denies this also. The settlement of these mooted questions cannot prejudice the right of a person not a party to the action to claim under another and an entirely different contract. So it seems clear that the controversy between these parties can be settled without "prejudice to the rights of others," and that the first clause of the quoted portion of the statute does not help the defendant. The "others" therein referred to, of course, means persons who are not parties to the action. If the court has a correct conception of what the controversy between the parties is, then it is patent that a full and "complete determination" of that controversy can be had without the presence of any other party, and that no person who is not a party has any interest therein which requires that he be made a party for his protection. Every defense is available to the defendant that it would have if Feasley were before the court. It may show that it made no contract such as is claimed by the plaintiffs, and, further, that, if such a contract was made, the plaintiffs earned nothing under it, because the purchasers were not found by the plaintiffs, but were found by another party.

[4] The material part of section 2656a is as follows: "A defendant or a person interpleaded or intervening may have affirmative relief against a codefendant, or a codefendant and plaintiff, or part of plaintiffs, or a codefendant and a person not a party, or against such person alone, upon his being brought in; but in all such cases such relief must involve or in some manner affect the contract, transaction or property which is the subject-matter of the action." The ma-

terial part of the portion of the statute quoted might be condensed so as to read as follows: "A defendant * * * may have affirmative relief against * * * a person not a party * * * upon his being brought in; but * * * such relief must involve or in some manner affect the contract, transaction or property which is the subject-matter of the action." We think this statute does not apply because the defendant is not entitled to any affirmative relief in this action against Feasley. It is true it attempts to set up an equitable counterclaim, but that counterclaim states no cause of action against the plaintiffs or against Feasley.

Furthermore, the relief sought does not affect the contract involved in this case. It does not even assist in determining whether or not that contract was made. It is perfectly competent for the defendant to show that Feasley claims to have procured or did procure the purchasers, without bringing Feasley in as a party. So the relief sought would neither assist in determining whether a contract had in fact been made, or whether the plaintiffs had earned the money claimed thereunder if one was made. Does the relief asked affect the transaction which is "the subject-matter of the action"? A "transaction" means whatever may be done by one person which affects another's rights and out of which a cause of action may arise. *McArthur v. Moffet*, 143 Wis. 564, 128 N. W. 445, 33 L. R. A. (N. S.) 264. The making of the contract alleged in the complaint was the transaction out of which the cause of action arose in the instant case. We fail to see how the relief sought affects that transaction. Bringing Feasley before the court in the present case would not tend to show that an agreement such as is relied on was not made, as has been heretofore stated. If the term "transaction" be held to include, not only the making of the contract, but also performance on the part of the plaintiffs, the result would not be different. Offering proof to the court and jury that another party besides the plaintiffs in fact produced the purchasers would tend to show that plaintiffs should not recover. But the defendant can call Feasley and the purchasers in the trial of the present action, and examine them fully without Feasley being a party to the action. So it is not apparent how the relief sought affects the transaction which is the subject-matter of the action. The action is not brought in reference to property, so the use of that word in the statute does not affect the question under consideration.

The proceeding arises out of a fear on the part of the defendant that the juries impaneled in the actions may find for the plaintiffs in both of them, whereas, if all the plaintiffs were before the court, but a single recovery could be had. The situation presented is somewhat novel, and one for which the law-making power has apparently made no provi-

sion that would warrant the practice here followed. This court has no power to make a new statute or to amend an existing one so as to reach a case of supposed hardship, or for any other reason for that matter.

The order appealed from is affirmed.

WINSLOW, C. J., and SIEBECKER, J., dissent. See 138 N. W. 769.

MARINE CO. v. CITY OF MILWAUKEE.

(Supreme Court of Wisconsin. Nov. 19, 1912.)

1. MUNICIPAL CORPORATIONS (§ 523*) — SPECIAL ASSESSMENTS—ATTACK—"TAX."

St. 1898, § 1164, providing that any person aggrieved by the levy and collection of any unlawful tax by any town, city, or village may maintain an action for the recovery of all money so collected, and in case any such town, city, or village shall pay a judgment recovered after having paid over to the county treasurer the state and county tax levy collected as part of such unlawful tax, it shall be credited by the county treasurer with the amount so paid on the tax for the ensuing year, is found under the subhead of "miscellaneous provisions" among statutes relating to "the assessment and collection of special taxes." *Held* that, as the statute as first enacted did not include the words "city" and "village," but merely provided for an action against towns, and as the word "tax," while generically broad enough to include special assessments, appears to relate only to general assessments, no action may be maintained under this statute to recover a special assessment for public improvement paid to the city and by it paid to the contractor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1232-1236; Dec. Dig. § 523.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6867-6886.]

2. MUNICIPAL CORPORATIONS (§ 523*) — SPECIAL ASSESSMENTS — RECOVERY BACK — RIGHT OF ACTION.

The basis of a common-law action for money had and received being the inequity of allowing one person to be enriched at the expense of another and not the loss which one may have suffered, no action for money had and received can be maintained against a municipality to recover back the amount of a special assessment for a public improvement illegally levied and collected, where it has been paid by the municipality to the contractor who performed the work in question.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1232-1236; Dec. Dig. § 523.*]

Appeal from Circuit Court, Milwaukee County; O. T. Williams, Judge.

Action by the Marine Company against the City of Milwaukee. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions to dismiss.

Action under section 1164, Stats. 1898, to recover the sum of \$286.11 paid the defendant city, under protest, for a special assessment against plaintiff's property, which assessment it is claimed was void for certain irregularities therein not here necessary to specify. Section 1164, Stats., is as follows: "Any person aggrieved by the levy and col-

lection of any unlawful tax assessed against him in any town, city or village may have and maintain an action against such town, city or village for the recovery of all money so unlawfully levied and collected of him. And every such action to recover back any such money hereafter paid shall be brought within one year after such payment and not thereafter; and in case any such town, city or village shall have paid a judgment recovered in any such action, after having paid over to the county treasurer the state and county tax levied and collected as part of such unlawful tax, such town, city or village shall be credited by the county treasurer, on the settlement with the proper treasurer for the taxes of the ensuing year, the whole amount of such state and county tax so paid into the county treasury; and the county treasurer shall also be allowed by the state treasurer the amount of state tax so illegally collected and paid in his settlement with the state treasurer next after the recovery of such judgment and collection thereof; and if any part of such unlawful tax shall have been paid over to any school district before the payment of such judgment such town shall charge the same to such district, and the town clerk shall add the same to the taxes of such school district in the next annual tax; provided, however, that no action shall be maintained under the provisions of this section unless it shall be made to appear to the court that the plaintiff has paid more than his equitable share of such taxes."

A special assessment certificate was issued to the contractor pursuant to section 13 of chapter 7 of the city charter. Said section provides that the certificate may be paid to the city treasurer; that the city treasurer shall receive the amounts paid on such certificates and hold the same for the benefit of the owners thereof, and such owners shall be entitled thereto on producing and surrendering the certificate to be canceled. Plaintiff paid the sum in question on the 29th day of January, 1910. On the 17th day of February of the same year, the city treasurer paid the amount to the holder of the certificate, who delivered it up to be canceled pursuant to the charter provision. This action was begun January 11, 1911. At the close of the plaintiff's case, the defendant moved, alternately, for a nonsuit, or, if the court was of the opinion that the defendant was not entitled to a nonsuit, and that the tax and the assessment upon which the tax was paid were either of them void for a reassessment under the provisions of section 1210d, e, f, and g, of the Stats. The motions were denied by the court. The defendant offered no evidence, and the court, after making certain findings of fact relative to the assessment, held (1) that the defendant altered and changed the grade of the street

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in question without legal authority, and assessed the sum of \$286.11 against the real estate of the plaintiff for the work done in consequence of such change of grade, without legal authority so to do; and (2) that plaintiff is entitled to judgment against the city for said sum of \$286.11, with interest, together with the costs of the action. From a judgment entered accordingly, the defendant appealed.

Daniel W. Hoan, City Atty., and Clifton Williams, Special Asst. City Atty., both of Milwaukee, for appellant. Frank B. Van Valkenburgh, of Milwaukee, for respondent.

VINJE, J. (after stating the facts as above). [1] This action is brought under section 1164, Stats. 1898, to recover money paid to the city, under protest, for a special paying tax assessed on plaintiff's lot. It is claimed that the sum, or at least a portion thereof, so paid was really assessed and collected for an illegal change in the grade of the street, and not for paving the same. The question arises, Does the statute apply to special improvement taxes? The word "tax" is generally broad enough to include special assessments, and whether or not it does so in a statute must be gathered from its context and the legislative intent, as ascertained from the general scheme of the act and the cognate acts of which it is designed to become a part. This statute appears under the subhead of "miscellaneous provisions" in that part of chapter 49 relating to the assessment and collection of general taxes. It is followed by the subhead "the assessment and collection of special taxes." It will be observed that the section provides that in case any town, city, or village shall have paid a judgment recovered in any such action, after having paid over to the county treasurer the state and county tax levied and collected as part of such unlawful tax, such town, city, or village shall be credited by the county treasurer, on the settlement with the proper treasurer for the taxes of the ensuing year, the whole amount of such state and county tax so paid into the county treasury. It also provides for a credit to the county treasurer by the state treasurer of the amount of state tax so collected and paid over to the state treasurer, and, if any part of the unlawful tax shall have been paid to any school district before the payment of the judgment, such town shall charge the same to such district, and the town clerk shall add the same to the tax of such school district in the next annual tax. It seems apparent from these provisions that the word "tax" used in this statute relates only to general taxes, and not to special assessments, for careful provision is made enabling the town, city, or village to reimburse itself for any money it may have paid in case it shall be determined in the action

that the plaintiff has been compelled to pay a greater tax than in justice and equity he should have paid. That the word "tax," as used in section 1164, relates to a general tax only, and not to special assessments, is made practically certain by section 1164a, which provides that, if upon the trial of an action under the preceding section it shall appear that the assessment upon which the taxes were so paid is void, the court, before entering judgment, shall continue the action for a sufficient time to permit a reassessment. It further prescribes that the validity of the reassessment provided for may be attacked and determined, and subsequent reassessments may be had as provided by section 1210b, provided that such reassessment shall in all cases be made by the assessor of the assessment district wherein the property to be reassessed is situated. Section 1210b applies only to the reassessment of general taxes, and the fact that the assessor is to make the reassessment in case plaintiff prevails in the action shows conclusively that the statute applies to general taxes only, for confessedly the Legislature could not have intended that the assessor of the assessment district should make a reassessment of special improvement taxes. Our statutes relating to the reassessment of special assessments provide that the proper authorities empowered to make the original assessment shall also make the reassessment. No case has come to our notice where it is the duty of the assessor to make special assessments.

Section 1164, as first enacted in chapter 88 of the Laws of 1870, did not include the words "city" and "village." The act provided: "Any person aggrieved by the levy and collection of any unlawful tax assessed against him in any town may have and maintain his action against such town for the recovery of all moneys so unlawfully levied and collected from him." It is obvious that the word "tax," as here used, could relate only to general taxes, for towns do not levy special assessments against property within their borders. The words "city" and "village" first appeared in chapter 334 of the Laws of 1878, but there is nothing in that chapter to indicate any intention to broaden or extend the meaning of the term "tax," as previously used. All actions heretofore brought under section 1164, so far as we have been able to ascertain, have related to general taxes. See *Keystone Lumber Co. v. Pederson*, 93 Wis. 466, 67 N. W. 696; *Day v. Town of Pelican*, 94 Wis. 503, 69 N. W. 368; *Wells v. Western Paving & Supply Co.*, 96 Wis. 121, 70 N. W. 1071; *Bonnin v. Zuehlke*, 122 Wis. 128, 134, 99 N. W. 445. It is evident, therefore, from the section in question, and from the cognate statutes of which it forms a part, that the word "tax," as used therein, does not include or

relate to special assessments, and that no action under the statute can be maintained to recover money paid for such assessments.

[2] Under many special assessment statutes, as in the present case, the money is collected for the owner of the improvement certificate and is required to be paid over to him upon the presentation thereof to the treasurer of the municipality in which the special assessment tax is levied. It could not have been within the contemplation of the Legislature that a taxpayer could maintain an action against a municipality after it had paid the amount of the tax collected to the person entitled to receive the same without any provision for reimbursing itself. In the present case the city treasurer had collected and paid over the money to the holder of the certificate before the action was commenced. Since the city treasurer had paid over to the person entitled thereto the whole of the tax collected, no common-law action for money had and received can be maintained against the city. Such action is founded upon the theory that the defendant has the money which is sought to be recovered, or that he has been enriched by the transaction, so that in equity and good conscience he should be compelled to turn over to plaintiff a portion or the whole of the amount in controversy. The basis of a common-law action for money had and received is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same. 27 Cyc. 869; *Limited Investment Ass'n v. Glendale Investment Ass'n*, 99 Wis. 54, 74 N. W. 633; *Johnston v. Charles Abresch Co.*, 109 Wis. 182, 85 N. W. 348; *Glendale Investment Ass'n v. Harvey Land Co.*, 114 Wis. 408, 90 N. W. 456; *Douglas County v. Sommer*, 120 Wis. 424, 98 N. W. 249; *J. V. Le Clair Co. v. Rogers-Ruger Co.*, 124 Wis. 44, 102 N. W. 346. It follows, therefore, that neither an action under the statute nor a common-law action for money had and received lies against the city, and that the court should have granted the motion for a nonsuit.

Judgment reversed and cause remanded, with directions to dismiss the complaint on the merits.

WISCONSIN REAL ESTATE CO. v. CITY OF MILWAUKEE et al.

(Supreme Court of Wisconsin. Nov. 19, 1912.)

1. APPEAL AND ERROR (§ 23*)—QUESTIONS PRESENTED FOR REVIEW.

Since the Supreme Court acquires no jurisdiction of appeal from an order unless it be appealable, that question is always involved though not raised by the parties.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 99; Dec. Dig. § 23.*]

2. APPEAL AND ERROR (§ 97*)—DECISIONS REVIEWABLE—ORDER GRANTING PROVISIONAL REMEDY.

An order requiring the deposit of the amount of a special assessment as a condition precedent to the maintenance of an action to enjoin the collection thereof, while not affecting the substantial rights of the parties, operates as a provisional remedy because giving the defendant municipality security for payment, and hence is appealable under St. 1898, § 3069, subd. 3.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 655-658; Dec. Dig. § 97.*]

3. MUNICIPAL CORPORATIONS (§ 537*)—SPECIAL ASSESSMENTS—INJUNCTION—CONDITIONS PRECEDENT—"TAX."

Laws of 1909, c. 295, which added sections 1210h-1, 1210h-2, 1210h-3, 1210h-4, is under the subhead entitled, "general taxes; reassessment when assessment void"; the first section providing that, whenever any action is commenced to set aside any sale of lands for the nonpayment of taxes or to cancel any tax certificate or restrain the issuing of bonds, the plaintiff shall, as a condition precedent, deposit the amount of the taxes, interest, and charges thereof. *Held* that, while there is a distinction between a tax and a general assessment, yet the word "tax" is broad enough to include a special assessment; and as the added sections are general in their nature, and as section 1210h mentions both general taxes and special assessments, the deposit must be made in case of an attack on a special assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1253; Dec. Dig. § 537.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 6867-6886.]

4. MUNICIPAL CORPORATIONS (§ 537*)—SPECIAL ASSESSMENTS—LEVY—VALIDITY.

As Milwaukee City Charter, c. 8, gives the council jurisdiction over the subject of laying drains, an assessment for the making of drains, though not in compliance with the statutes, is not void for want of jurisdiction; and hence, in an action to enjoin the collection of the same, the amount of the assessment must be deposited under St. 1898, § 1210h-1, providing that, whenever any action is commenced to cancel any tax certificate for any error or defect going to the validity of the assessment, the plaintiff must deposit the amount of the same.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1253; Dec. Dig. § 537.*]

5. CONSTITUTIONAL LAW (§§ 233, 321*)—MUNICIPAL CORPORATIONS (§ 526*)—EQUAL PROTECTION OF LAWS—REMEDIES.

St. 1898, § 1210h-1, enacted in Acts of 1909, c. 295, providing that, to maintain an action to enjoin the collection of an assessment, the plaintiff must deposit the amount of the same with the proper officer, applying only to cases where there is a defect in the tax proceeding, and not to cases where there is absolute want of power to tax, is not in violation of Const. U. S. Amend. 14, § 1, and Const. Wis. art. 1, §§ 1, 9, respectively, inhibiting the denial of equal protection of the laws and providing that every person shall be entitled to a remedy in the law for all injuries he may receive.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 686, 950, 952-955; Dec. Dig. §§ 233, 321.*; *Municipal Corporations*, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 526.*]

Appeal from Circuit Court, Milwaukee County; Orren T. Williams, Judge.

Action by the Wisconsin Real Estate Company against the City of Milwaukee and oth-

ers to restrain the collection of a special assessment. From an order requiring the deposit of the amount of the tax as a condition precedent to the maintenance of the action, plaintiff appeals. Order affirmed.

Plaintiff brought action to restrain the defendants from collecting a special assessment of \$7,173.12 levied against plaintiff's property, consisting of a great many lots, for the construction of house drains, claiming that the assessment was void because of the following, among other, irregularities in the proceedings had therefor: (1) The drains were ordered laid before the streets were ordered to be paved or repaired, contrary to section 17 of chapter 8 of the city charter; (2) as to a portion of one street, no notice was given the property owners to construct the drains, or to the contractors for the construction of the same, as provided for in said section; and (3) upon information and belief it is alleged that no gas mains, water mains, nor sewers had been laid on parts of the streets. By order of the court the plaintiff was required, pursuant to the provisions of section 1210h—1, Stats., to deposit the amount of the tax as a condition for maintaining the action. That section provides: "Whenever any action or special proceeding is hereafter commenced to set aside any sale of lands for the nonpayment of taxes, or to cancel any tax certificate, or to restrain the issuing of any tax certificate or tax deed, or to set aside any tax, for any error or defect going to the validity of the assessment and affecting the groundwork of such tax, within twenty days after the commencement of such action the plaintiff in such action, or special proceeding shall pay or cause to be paid to the county, town, city, or village officer entitled to receive the same, the amount of taxes, interest and charges levied against the said lands involved in such action, as a condition of maintaining said action." Section 1210h—2 provides that, if a reassessment is ordered, the court shall upon completion thereof determine the amount which, according to the reassessment, the plaintiff ought justly to have paid upon the lands involved in the action or special proceeding. Section 1210h—3 provides the plaintiff shall be entitled to recover judgment for the amount, if any, he so paid in excess of the amount the court shall finally determine he ought to have paid on the land involved in the action, with interest from the date of such payment. From the order requiring the deposit of the amount of the tax as a condition precedent to the maintenance of the action, the plaintiff appealed.

Miller, Mack & Fairchild and W. F. Adams, all of Milwaukee, for appellant. Daniel W. Hoan, City Atty., and Clifton Williams, Special Asst. City Atty., both of Milwaukee, for respondents.

VINJE, J. (after stating the facts as above). [1] Is the order appealable? Neither party has raised the question; but, since this court acquires no jurisdiction to consider the merits unless it is appealable, the question of the appealability of an order is always involved in a consideration of its merits. Hyde v. German National Bank of Oshkosh, 96 Wis. 406, 71 N. W. 659; In re Minnesota & Wis. R. Co., 103 Wis. 191, 78 N. W. 753; Sioux Land Co. v. Ewing, 148 Wis. 600, 135 N. W. 130.

[2] Confessedly it is not an order affecting a substantial right made in an action which in effect determines it and prevents a judgment from which an appeal might be taken; neither is it an order affecting a substantial right made in special proceedings. It is made in an action and, in that respect at least, partakes of the nature of a provisional remedy. The effect of this order is to impound the money in dispute and hold it for the use of defendant if plaintiff fails in the action. To that extent it grants a provisional remedy to defendants in this class of actions not enjoyed by defendants in actions generally, and therefore must be held to be appealable under subdivision 3 of section 3069, Stats. 1898, as an order granting a provisional remedy.

[3] Plaintiff contends that the order was improperly made for three reasons: (1) Because chapter 295 of the Laws of 1909 has no application to special assessments; (2) because, even if it does apply to them, it does not affect the instant case, where the proceedings taken by the municipal authorities are void ab initio; and (3) that, if it does apply, it is unconstitutional. While it is true that generally there is a clear distinction between taxes and special assessments and between statutes relating to taxes and statutes relating to special assessments, yet the word "tax" has often been held to be broad enough to include a special assessment. Yates v. City of Milwaukee, 92 Wis. 352, 66 N. W. 248; Sheboygan County v. City of Sheboygan, 54 Wis. 415, 11 N. W. 598; Dalrymple v. City of Milwaukee, 53 Wis. 178, 10 N. W. 141. Whether or not the word "tax" in a statute includes a special assessment must generally be gathered from the context of the particular statute, the intent of the Legislature as ascertained from the general scope of the act, and of the related acts of which it is designed to become a part. Marine Co. v. City of Milwaukee, 138 N. W. 640, decided herewith.

It is urged that since section 1210h—1 refers only to taxes, tax certificates, and tax deeds, and does not anywhere mention special assessments, they are not included within its provisions. It should be borne in mind, however, that, when tax proceedings have reached the stage of a tax sale, tax certificate, or tax deed, there is no longer any need to discriminate between general taxes

and special assessments. Both are included in the sale, certificate, and deed. Were it intended to exclude either, express mention of such exclusion would be made, otherwise the natural construction of the language is to apply it to whatever may be included in the sale, certificate or deed; namely, to both special assessments and general taxes. In Milwaukee the tax sale is for both general and special taxes, and both are included in the same certificate, and the same deed is based on the sale of both. See sections 15, 19, 24, 24a, and 27, of chapter 18 of the city charter. Attention is also called to the fact that the subhead of the statute under which section 1210h—1 falls is entitled, "general taxes; reassessment when assessment void." But under such subhead, which begins with section 1210b and ends with section 1210j, fall sections 1210d, 1210e, 1210f, and 1210h, which relate to or mention special assessments. So the title of the subhead furnishes no safe or satisfactory criterion for determining whether or not the word "tax" in section 1210h—1 includes or excludes special assessments.

The further argument is made that, since section 1210h mentions both general taxes and special assessments, section 1210h—1, which does not mention special assessments, should be construed not to apply to them. Section 1210h—1 was created by chapter 295 of the Laws of 1909. The chapter was entitled, "an act to create sections 1210h—1, 1210h—3 and 1210h—4 of the statutes relating to actions to set aside the sale of lands for taxes," and section 1 thereof begins: "There are added to the statutes four new sections, to read," etc. The act seems to be general in its nature, and in view of the fact that special assessments are included in the amount for which lands are sold for taxes, and in the tax certificates and tax deeds issued pursuant to such sales, no good reason is perceived why the section is to be construed to be limited only to actions seeking to set aside general taxes. In *Dalrymple v. City of Milwaukee*, 53 Wis. 178, 10 N. W. 141, the court construed section 7 of chapter 334 of the Laws of 1878 to apply to special assessments as well as general taxes. That section provided: "Every action or proceeding to set aside any sale of lands for the nonpayment of taxes, or to cancel any tax certificate or to restrain or prevent the issuing of any tax deed or any tax certificate, or to set aside and cancel a tax deed, should be commenced within nine months after the making of such sale, date of such certificate or recording of such tax deed." Such construction was based chiefly upon the ground that since special assessments go into the tax levy, and in case of the nonpayment of the same, and of the general taxes, the land charged is sold for the aggregate amount of the special assessments and general taxes, and but one certificate issued on such sale, it was not reasonable to suppose that the

Legislature would thus blend and intermingle the two levies or charges upon the land and provide different statutes of limitation as to each. So here in the instant case it is not reasonable to suppose that, since lands are sold for nonpayment of general taxes as well as special assessments, and the same are mingled in the tax sale, the tax certificate, and tax deed, the Legislature would require, as a condition precedent to the maintenance of an action relating to general taxes, a deposit, and not require one in the case of an action seeking to set aside a special assessment. The new sections added must be held to be general in their nature, and not to be limited by the language used in the previous section. No doubt the legislative idea was that, as an earnest of good faith and as a guarantee that plaintiff believed in the justice of his cause, he should be required to deposit the amount in controversy as a condition precedent to the maintenance of the action. No reason, so far as we can perceive, exists why such a deposit should be required in the case of an attack upon general taxes any more than in the case of an attack upon special assessments.

[4] Plaintiff contends that the assessment in the instant case was void ab initio because the city council acquired no jurisdiction to make it, and reliance is placed upon the cases of *Chicago & N. W. R. Co. v. Arnold*, 114 Wis. 434, 90 N. W. 434, and *Smith v. Sherry*, 54 Wis. 114, 11 N. W. 465, to sustain the contention. In the first case the lands were exempt from taxes; in the second case they lay outside of the taxing district. Hence the taxing officers did not have, and never could acquire, jurisdiction to tax the lands there in question. The tax was void, not on account of any irregularity in the proceedings, such as a failure to perform a condition precedent, or to give proper notice, but because of an absolute want of power to tax in any manner at any time. There is a wide distinction between a case where no tax can in any event be levied upon property because it is exempt or lies outside of the taxing district and a case where the property lies within the taxing district and is subject to taxation, but the statutory or charter provisions have not been complied with in its levy. The former is void ab initio and can never be rendered valid. The latter is voidable because of irregularities in the proceedings leading up to its levy. *Pratt v. City of Milwaukee*, 93 Wis. 658, 68 N. W. 392; *Schintgen v. City of La Crosse*, 117 Wis. 158, 94 N. W. 84; *Hamar v. Lelhy*, 124 Wis. 265, 102 N. W. 568. In the instant case the council of Milwaukee had jurisdiction over the subject of laying drains. Chapter 8 of City Charter. The lands in question were within its taxing district. The council, therefore, had jurisdiction to impose the tax and of the lands sought to be taxed. It,

however, did not proceed according to the provisions of the charter in that it passed a resolution ordering drains to be laid before it passed a resolution ordering the streets to be paved, and in that, as to one street, it failed to give notice to the lot owners to construct the drains. These were errors in procedure that affected the groundwork of the tax. It will be noted that the law requiring a deposit to be made is limited to an action to set aside a tax for any error or defect going to the validity of the assessment or affecting the groundwork of such tax. This relates to an error or defect in the proceedings which affects the groundwork of the tax, and it excludes a case where there is no jurisdiction to act, either because the council has no power to impose the tax, or because the lands sought to be affected lie outside of the taxing district or are exempt. In *Schintgen v. La Crosse*, 117 Wis. 158, 94 N. W. 84, it was held that section 1210h, Stats. 1898, providing for a reassessment when the assessment was made "without authority of law," was to be construed to apply to an irregularity in the proceedings and not to an absolute want of power. So the statute under consideration relates to a case where, but for the error or defect going to the validity of the assessment and affecting the groundwork of the tax, a valid tax could be assessed. The subsequent sections, which provide for a refund of such portion of the tax as may be held to be void, sustain this view. The case presented by the complaint is one in which the municipal authorities were empowered to impose a drain tax upon plaintiff's lots; but, owing to irregularities in the proceedings, they failed to follow the charter directions for so doing. There was no absolute want of power to levy the tax.

[5] Since section 1210h—1 is construed to apply only to cases where there is a defect or error in the tax proceedings, and not to cases where there is an absolute want of power to tax, the contention that it violates section 1 of the fourteenth amendment to the Constitution of the United States, and article 5 of the amendments to the Constitution of the United States, and sections 1 and 9 of article 1 of the Constitution of this state, falls. The question of the constitutionality of the section is ruled by the decision in *Lombard v. McMillan*, 95 Wis. 627, 70 N. W. 673.

Order affirmed.

**BREY v. FORRESTAL et al.
SELLERS v. SAME.**

(Supreme Court of Wisconsin. Nov. 19, 1912.)

1. MASTER AND SERVANT (§ 264*)—ACTION FOR INJURIES—INSTRUCTIONS—PLEADINGS AND ISSUES.

In actions for the wrongful death of an engineer and for injuries to a fireman tried to-

gether, the first question in the first action was whether the boiler which exploded was unsafe and dangerous owing to any improper design or construction of the fire flue, and the first question in the other action was whether the boiler was negligently kept by defendant in a dangerous and unsafe condition at and before the explosion, and on this question the court instructed that if by reason of the construction and maintenance of the fire flue it was in a dangerous and unsafe condition, or if by reason of closing the globe valve prior to the accident the defendant made the boiler dangerous and unsafe, to find that it was dangerous and unsafe at the time of the accident. Held that, notwithstanding the difference in the questions in the two actions, the question of a defect in the design and construction of the fire flue was made an issue, and was passed upon by the jury in both cases, and formed one of the grounds of actionable negligence upon which the conclusion of defendant's liability was based.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

2. MASTER AND SERVANT (§ 258*)—ACTION FOR INJURIES—COMPLAINT—DEFECTS IN MACHINERY.

Complaints in actions against a master for death of an engineer and for personal injuries to a fireman that defendant negligently permitted a boiler and steam gauge to be out of repair and dangerous and unfit for use, that he negligently used ditch water in the boiler, causing it to burn and become dangerous, that he negligently allowed the safety valve to become plugged up and defective, that the fireman, who was inexperienced, was not warned of such danger, in consequence of which the explosion causing the injuries occurred, do not charge any defect in the original design or construction of the boiler.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

3. MASTER AND SERVANT (§ 264*)—AMENDMENT TO COMPLAINT—NECESSITY.

The existence of a certain defect not alleged in the complaint can become a proper subject of investigation and determination in the case only by an amendment to the complaint during the trial or at its close.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

4. PLEADING (§ 430*)—WAIVER OF DEFECT IN COMPLAINT—LITIGATION BY CONSENT.

The existence of a certain defect not alleged in the complaint may be litigated by consent of parties without formal amendment of the complaint.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1438-1441; Dec. Dig. § 430.*]

5. MASTER AND SERVANT (§ 264*)—ACTION FOR INJURIES—PLEADINGS AND ISSUES.

Where plaintiffs, in an action for the death of an engineer and for personal injuries to a fireman from the explosion of a boiler, did not allege any defect in the original design or construction of the boiler, and claimed that the explosion was caused by steam pressure which the boiler in its weakened condition, with a closed escape valve, could not stand, and defendants' theory was that the explosion resulted because the fireman allowed the water in the boiler to become low, testimony of an expert for plaintiffs that the boiler was of a dangerous and obsolete type was properly stricken out as not within the pleadings and issues.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

6. MASTER AND SERVANT (§ 264*)—ACTION FOR INJURIES—ISSUES UNDER PLEADINGS AND EVIDENCE.

Where an expert witness for plaintiff gave his opinion that a boiler explosion was the result of excess steam pressure, his further testimony, without questions, after objection by defendant and after the statement of plaintiff's counsel that the idea was to point out facts supporting such opinion, would not make testimony admissible for that purpose admissible for the purpose of proving an independent ground of liability not set forth in the pleadings, since defendant's counsel without further objection was entitled to rely on the assurance that his testimony was only in support of his opinion.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

7. EVIDENCE (§ 558*)—EXPERT TESTIMONY—CROSS-EXAMINATION—KNOWLEDGE AND COMPETENCY OF WITNESS.

An expert witness for plaintiff who gives his opinion that the cause of a boiler explosion was an excess of steam pressure, and his reasons in support of such opinion, may be subjected to fairly exhaustive cross-examination on subjects which legitimately throw light on his qualifications, such as his education, the extent of his experience, the extent of his observation outside of his own work, as well as other cognate matters bearing directly on his ability as an expert.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2377, 2379; Dec. Dig. § 558.*]

8. EVIDENCE (§ 558*)—ACTION FOR INJURIES—PLEADINGS AND ISSUES.

Where a witness for plaintiffs, in an action for death and for personal injuries from a boiler explosion, gave his opinion that the explosion resulted from excess steam pressure and his reasons in support thereof, defendant's objection to his testimony as to a cause of the explosion not alleged by the complaint was not waived by a cross-examination as to the knowledge and competency of the expert, and such cross-examination does not open the door to testimony as to that cause.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2377, 2379; Dec. Dig. § 558.*]

9. TRIAL (§ 412*)—OBJECTIONS TO EVIDENCE—WAIVER.

Persistent objections to evidence subsequently admitted are not waived by a subsequent cross-examination of the witness.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 974-977; Dec. Dig. § 412.*]

10. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE ON ISSUE NOT WITHIN THE PLEADINGS.

In an action for personal injuries from a boiler explosion, the admission of expert testimony as to a cause of the explosion not alleged by the complaint is a prejudice to defendant's substantial right to know what charge of negligence is made against him in time to prepare to meet it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

11. STIPULATIONS (§ 14*)—EFFECT—STIPULATIONS AS TO PLEADINGS.

Where two actions for negligence are tried together, and the testimony objected to is taken in one action only and exception reserved in that case only, a stipulation by which such testimony is to be considered in the other case as if repeated in that case will be regard-

ed as preserving the exception in the other case.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24-37; Dec. Dig. § 14.*]

Timlin, J., dissenting.

Appeal from Circuit Court, Milwaukee County; F. O. Eschweiler, Judge.

Actions by William Brey and by Emma Sellers, administratrix of the estate of one Sellers, deceased, against Charles M. Forrestal and others. Judgments for plaintiffs, and defendants appeal. Reversed in each case, and remanded for a new trial.

These are two actions in tort which were tried together before the same jury and on the same evidence. The defendants owned and operated, by means of employes, a dredging outfit for the digging of drainage ditches through swamp lands. The outfit consisted of a scow, 75 feet long and 18 feet wide, on the rear end of which was placed a boiler and near the front end an engine, together with drums controlled by levers which operated the dipper. The ditch was made by the dipper at the front as the scow proceeded forward, the same being floated in the ditch thus made, and the work continued night and day. The work required two shifts of three men each—an engineer or "runner," so called because he ran the drums and the dipper by the pulling of levers, a fireman, and a roustabout. On one shift one Kane was the engineer, and on the other shift Sellers (the plaintiff Emma Seller's intestate) was engineer, and the plaintiff Brey was fireman.

On the morning of May 29, 1909, at about 5 o'clock, while Seller's shift was operating the dredge near Dancy, Wis., the boiler exploded without warning, killing Sellers and seriously injuring Brey, and these actions are the result of that explosion.

The charges of negligence in the complaint in the Brey case are as follows: "Second. That on said day, and for some time prior thereto, plaintiff alleges on information and belief the defendants had carelessly, recklessly, and negligently suffered, permitted, and caused the said boiler, the steam gauge, and safety valves attached thereto to become and be out of repair, worn, weakened, dangerous, and unfit for use; that said defendants carelessly and negligently permitted and caused water taken from said ditch, which water was filled with sediment and dirt, to be taken into and used in said boiler, thereby causing parts of said boiler to burn, bake, and foam and otherwise rendering its use and that of the steam gauge unreliable and dangerous; that on said day and prior thereto said defendants had and did carelessly and negligently suffer, permit, and cause the safety valve upon said boiler, a device used to automatically permit of the discharge of steam, thereby relieving the strain or pressure upon the boil-

er before the same became dangerous, to become and be defective, plugged up, out of repair and useless, thereby and by reason of the weakened and defective condition of said boiler and the causes aforesaid defendants carelessly and negligently caused, suffered, and permitted the place upon said scow or dredge boat and in the vicinity of said steam engine and boiler to become and be unsafe and extremely hazardous and dangerous to this plaintiff and other servants of the defendants there employed; that owing to the said defective, weakened, and dangerous condition of said boiler, and the failure of said safety valve and steam gauge to properly work, owing to their plugged and defective condition as aforesaid, the said boiler on said day, when subjected to strain and pressure in an attempt to generate the steam necessary to operate said dredge, exploded with great force and violence, thereby killing one person and injuring others of the defendant's servants there employed, and among them this plaintiff was then and there seriously and permanently injured as hereinbefore more fully appears; that plaintiff, to the knowledge of defendants, was wholly inexperienced in and about the proper care, control, and operation of steam engines and boilers, and was wholly unaware of the danger and likelihood of said boiler exploding because of its said defective condition and uses, and the defective condition of said steam gauge and safety valve, and was wholly unaware of the said engineer's incompetency, lack of experience, knowledge, and capacity necessary to safely and properly discharge the said duties of an engineer; that though plaintiff was thus ignorant and uninformed, and wholly ignorant of the danger to which plaintiff's service for defendant subjected plaintiff, defendant negligently and carelessly set plaintiff to work in said dangerous place and at said dangerous work upon said scow or dredge boat, and near to said steam engine and boiler, without giving plaintiff any warning, caution, or information concerning same, or of the great risk and peril to which plaintiff was thereby subjected; that while thus employed and while ignorant of said danger and peril and of said dangerous conditions on said day, and without fault or negligence on his part, but solely through the fault and negligence of said defendant, the said boiler exploded with great force and violence, thereby seriously and permanently injuring plaintiff more specifically as hereinafter stated."

In the Sellers' case the charges of negligence were substantially the same as in the Brey case, except that it was not alleged that Sellers was inexperienced in the operation of steam engines and boilers.

In the Brey case the following special verdict was returned:

"(1) Was the boiler in question negligently kept by defendants in a dangerous and un-

safe condition at and prior to the time of the accident? Answer: Yes.

"(2) If you answer No. 1, 'Yes,' then answer: Did the defendants know of such dangerous and unsafe condition prior to the accident? Answer: Yes.

"(3) If you answer No. 1, 'Yes,' and No. 2, 'No,' then answer this question: Ought the defendants in the exercise of ordinary care to have known of such condition? Answer: —."

"(4) If you answer question No. 1, 'Yes,' then was such dangerous and unsafe condition of the boiler a proximate cause of plaintiff's injuries? Answer: Yes.

"(5) Was the use of the closed globe valve a proximate cause of the boiler explosion? Answer: Yes.

"(6) If you answer question No. 1, 'Yes,' then did defendants instruct or warn the plaintiff of such condition? Answer: No.

"(7) If you answer No. 1, 'Yes,' and No. 6, 'No,' then answer this: Ought plaintiff in the exercise of ordinary care to have known of such dangerous and unsafe condition? Answer: No.

"(8) If you answer No. 6 'No,' then answer this: Were the defendants guilty of a want of ordinary care in failing to inform the plaintiff prior to his injuries of the likelihood of the boiler exploding? Answer: Yes.

"(9) Ought the plaintiff in the exercise of ordinary care to have appreciated the likelihood of the boiler exploding? Answer: No.

"(10) If you answer question No. 6, 'No,' then answer this: Was such failure to inform the plaintiff of the likelihood of the boiler exploding a proximate cause of plaintiff's injuries? Answer: Yes.

"(11) Was plaintiff guilty of a want of ordinary care which proximately contributed to his injuries? Answer: No.

"(12) At what sum do you assess plaintiff's damages? Answer: \$7,000."

In the Sellers case the following special verdict was returned:

"(1) Was the boiler in question unsafe and dangerous at and prior to the accident, owing to any improper design or construction of the fire flue? Answer: Yes.

"(2) If you answer question 1, 'Yes,' then answer: Did the defendants know prior to the accident of such unsafe and dangerous design and construction of the fire flue? Answer: No.

"(3) If you answer No. 1, 'Yes,' and No. 2, 'No,' then answer: Ought the defendants in the exercise of ordinary care to have known of such unsafe and dangerous design and construction of the fire flue? Answer: Yes.

"(4) Was the boiler unsafe and dangerous prior to the accident owing to the use of the closed globe valve under the pop valve? Answer: Yes.

"(5) If you answer No. 4, 'Yes,' then did defendants know prior to the accident of such unsafe and dangerous use of the closed globe valve? Answer: Yes.

"(6) If you answer 4, 'Yes,' and 5, 'No,' then answer: Ought the defendants in the exercise of ordinary care to have known of such unsafe and dangerous use of said closed globe valve? Answer: ———.

"(7) If you answer question 1 and 4' or either of them, 'Yes,' then answer this: Were the defendants guilty of negligence in the use of such unsafe and dangerous boiler? Answer: Yes.

"(8) If you should answer the seventh question, 'Yes,' then was such negligence the proximate cause of the injury and death of Sellers? Answer: Yes.

"(9) If you answer either or both 1 and 4, 'Yes,' then answer: Ought the deceased Joseph Sellers in the exercise of ordinary care to have known of such danger? Answer: No.

"(10) Was the deceased, Joseph Sellers, guilty of a want of ordinary care which proximately contributed to his injuries? Answer: No.

"(11) At what sum do you assess plaintiffs' damages? Answer: \$2,500."

Judgment for the plaintiff was rendered in each case, and the defendants appeal.

John J. Maher, of Milwaukee (Thos. H. Gill, of Milwaukee, of counsel), for appellants. D. D. Conway, of Grand Rapids (P. H. Martin, of Green Bay, of counsel), for respondents.

WINSLOW, O. J. (after stating the facts as above). The most serious and important claim made by the appellants in these cases is that without amendment of the complaints and against the defendants' specific objection the plaintiffs were allowed to prove, and the jury to find, that the boiler was defective in the design and construction of its fire flue, whereas the defects charged in the complaints were defects and weaknesses resulting from wear and tear, improper use, and improper plugging of the safety valve.

[1] It is very certain that this issue was litigated and passed upon by the jury in the Sellers Case. The first question of the special verdict in that case submits this precise issue, and the jury answered it in the plaintiff's favor; also by their answers to questions 7 and 8 in that case they found the use of the boiler with such defective design and construction to be negligence which was the proximate cause of Seller's death. In the Brey Case there is no direct question submitted to the jury as to defective design or construction, but it seems certain that by the first question of the verdict, taken in connection with the charge of the court, the jury necessarily passed upon it. That question, as will be seen by reference to the statement of facts, was as follows: "Was the boiler in question negligently kept by defendants in a dangerous and unsafe condition at and prior to the time of the accident?" The instruction with reference to this question was in part as follows: "As to

this question, you are instructed that if you are all satisfied to a reasonable certainty by a fair preponderance of the evidence that, by reason of the construction and maintenance of the fire flue in that boiler, the defendants negligently kept the boiler in a dangerous and unsafe condition; or if you are all satisfied to a reasonable certainty by a fair preponderance of the evidence that by reason of the keeping of the globe valve, of which you have heard, in a closed condition prior to the accident, the defendants thereby negligently kept that boiler in a dangerous and unsafe condition, then and in either event you will answer this question, 'Yes,' otherwise you must answer it, 'No.'" By this question the attention of the jury was specifically called to the inquiry whether the boiler was unsafe and dangerous by reason of "construction and maintenance of the fire flue," and they were, in substance, told that, if it was, the defendants were guilty of negligence. It seems that a jurymen who believed that the fire flue was improperly constructed or designed was obliged to answer this question in the affirmative under the instructions, whatever might be his conclusion with reference to the condition of the globe valve. We conclude, therefore, notwithstanding the difference in the form of the questions, that the question of a defect in the design and construction of the fire flue was submitted to and passed upon by the jury in both cases, and forms one of the grounds of actionable negligence upon which the conclusion of legal liability is based. It is true that in the Brey Case the jury found as a separate ground of negligence failure to warn the plaintiff of the likelihood of the boiler exploding by reason of its dangerous condition; but here, again, it seems inevitable that, if a jurymen concluded that the boiler was unsafe by reason of the defective construction of the fire flue which the defendants ought to have known, the jurymen must further have concluded that the failure to warn of this danger was the negligent failure to warn upon which liability rests in the Brey Case, and thus the question of the defective construction of the fire flue forms an inseparable part of the ground upon which liability is based under both verdicts. We therefore proceed to the question whether this question was properly in the case.

[2] It is very clear to our minds from a mere inspection of the complaints that they do not charge any defect in the original design or construction of the boiler. We might consume considerable space perhaps in discussing this subject, but we should gain nothing thereby. If it appears to any mind that under any ordinary rule of construction such a defect is charged in the complaints, we should not expect to be able to convince that mind to the contrary.

[3, 4] This conclusion logically brings us to the question whether by reason of anything

occurring on the trial of the case the question whether such a defect existed has become a proper subject of investigation and determination in the cases. It seems that this could only be by reason of an amendment to the complaint made during the trial or at its close, or by reason of the fact that evidence bearing on the question was introduced without objection, and thus the issue was litigated by consent of the parties without formal amendment of the pleadings. It is not claimed that there was any amendment of the complaints here, but that the defendants first introduced evidence affirmatively bearing on the question of design and construction, and thus opened the door, and consented that the issue should be litigated.

In order to understand the basis of this claim, it will be necessary to state some additional facts as well as some details of the trial. The dredging outfit was purchased by the defendants from a steam shovel company in the early part of the year 1907, and had been in use two seasons and up to May 29, 1909. The boiler was horizontal, round, about 10 feet in length and 54 inches in diameter, having a round fire flue, which served as the furnace, 29 inches in diameter, extending from the front of the boiler about 8 feet to the rear, and terminating in a combustion chamber which was separated from the rear end sheet of the boiler by a space of 4 or 5 inches, the combustion chamber being considerably larger than the fire flue. Fifty-four fire tubes or flues, 2½ inches in diameter, extended from the combustion chamber above and at the sides of the fire flue or furnace forward to the front of the boiler, thus bringing the smoke back to the smoke stack. The fire flue and combustion chamber were completely surrounded by water when the boiler was properly operated. About midway in the length of the boiler was the steam dome, and out of it projected a 2½-inch steam pipe carrying steam to the engine, also a 1½-inch safety valve pipe extending through the roof, and intended to be furnished with the ordinary pop valve for safety purposes. There was a water glass and a steam gauge, and the pressure ordinarily carried was from 100 to 115 pounds. If the pressure went below 95 pounds, the dredge would not operate as well as it should. For some reason—probably owing to the vibration of the scow—the pop valve or safety valve on the end of the last named pipe was apt to become loose, and three or four such valves had been blown off by the pressure, and became lost in the marsh, allowing all the steam to escape from the boiler and necessitating in each case a shutdown of several hours in order to get up steam pressure again. There is testimony that Sellers inserted a plug in the pipe after one of the pop valves blew off, thus closing it entirely. The last pop valve put on was arranged to go off at 95

pounds pressure, and at or before the time it was put on a globe valve was put on just below it, with the apparent idea that, if the pop valve blew off, the globe valve could be at once turned, and thus prevent the boiler from being emptied of steam. It seems that Sellers or Kane put on the globe valve, but there is a dispute as to which did it. There is no doubt, however, that both knew of it. Either of them had authority to purchase such incidental repairs as were necessary and place them in position. For some days before the explosion the globe valve had been closed, and it was found closed after the explosion. Brey testified that he did not know the globe valve was there, or that it was closed. He also testified that on the morning of the explosion he had raised the steam pressure to about 95 pounds, that he had a good fire on and he proceeded to oil the machinery for about five or ten minutes, when the explosion took place. No one knows the pressure at the time of the explosion. The boiler was shot out of the scow by the force of the explosion, and landed in the marsh some 500 feet distant.

[5] The plaintiffs claimed that the explosion was caused by pressure of steam which the boiler in its weakened condition, with a closed escape valve could not stand, while the defendants' theory was that the explosion resulted because the water was allowed to become too low in the boiler by the fireman, Brey. The plaintiffs placed upon the witness stand two witnesses, Mr. Henry J. Mistle and Prof. Mortimer Cooley, to give expert testimony as to the cause of the explosion after examination of the boiler. Both witnesses, after qualifying themselves to testify as expert engineers, testified that in their judgment the explosion was caused by excess of steam pressure, and that there was no evidence that it was caused by low water. Both witnesses based their conclusion principally upon the fact that the fire flue collapsed inward, indicating that the flue was compressed by the pressure of steam in the boiler around it. In the course of Mr. Mistle's direct examination, he was asked, "You may state what the fact is with reference to the strength of this type of fire flue as compared with the ones now in general use," and replied, "They are not fit for the high pressure they are carrying." At this point the defendants' counsel objected to the question on the ground that there was no issue in the pleadings as to the original construction of the boiler. Upon this objection argument was heard, and in course of the argument defendants' counsel moved to strike out the answer which had been made. The court ruled with the defendants, and thereupon the plaintiffs moved for leave to amend the complaints, so as to charge that the boiler was defective in type. On this motion being made, the defendants claimed that they were not ready to meet such an issue, and that the cases would have to go over the term if the amend-

ment were made. This statement was apparently received by court and counsel as sufficient without affidavit, and thereupon plaintiffs' counsel concluded that there was sufficient in the pleadings as they stood and he would not press the motion to amend. Mr. Mistle had stated without objection just before the question above referred to was put that the boiler was of an obsolete type, and the defendants' attorney now moved to strike out all testimony as to the original condition or the type of the boiler, which motion was granted. These rulings we regard as strictly correct, and, if the matter had stopped here, the question before us never would have arisen.

[6] On Mr. Cooley's examination, however, the situation changed somewhat. He stated his conclusion that the cause of the explosion was excess of pressure, and not low water, and was then asked to point out to the jury what there was about the boiler which tended to support his conclusion, he being allowed to use some rough sketches which he had made to make the answers more clear. On objection being made to this form of examination because of the ease with which incompetent testimony might come in without opportunity for making objection, plaintiffs' counsel said that the idea was to point out why the witness concluded that the explosion was due to high pressure and not to low water, and the court overruled the objection, saying that the witness was subject to interruption at any time if improper testimony appeared. The witness then proceeded without questions to explain the construction of the boiler at length, the character of the joints, the nature of the fractures made by the explosion, and generally all facts which he observed about the boiler, and which he thought tended to support the conclusion that pressure of steam on the fire flue caused the explosion. In the course of his testimony the witness was asked whether there were any rings or other devices to reinforce the fire flue, and replied in the negative, and further said that the flue was made of a single sheet. He had previously testified that the fire flue was constructed with lap joints which have but seven-tenths of the strength of butt joints, and all of these facts were apparently considered by the witness as facts tending to support his expert opinion that the explosion was the result of pressure of steam. Probably this testimony was admissible for the purpose for which it was offered, but because admissible for that purpose it cannot necessarily be considered as admissible for the purpose of proving an independent ground of liability not set forth in the pleadings, especially after the court had definitely ruled on that subject and the offer of the testimony was accompanied by the express statement that it was intended for the purpose of showing why the witness reached the conclusion that the explosion was due to steam pressure. We

think that defendants' counsel was entitled to rest upon the assurance that the testimony was offered and received for the one purpose stated, and not for the purpose of injecting into the case a new ground of liability to which he had so recently successfully objected.

[7] The testimony being properly received, the defendants certainly had full right to cross-examine on all matters gone into by the plaintiffs without forfeiting their right to have the action confined to the cause of action pleaded. It was expert testimony, and its weight depended upon the qualifications of the expert, and it is well settled that an expert may be subjected to fairly exhaustive cross-examination upon subjects which legitimately throw light on his qualifications, such as his education, the extent of his experience in practical application of his art or science, the extent of his observation outside of his own work, as well as other cognate matters bearing directly on his ability as an expert. It was doubtless in reliance upon this principle that the defendants' attorney upon cross-examination asked the witness questions concerning the supposed weakness in the construction of the fire flue, and particularly whether it was of unusual length, whether he ever saw a single sheet fire flue of that length before, whether he considered it weak in construction, and, if so, how he would have constructed it in order to make it of greater strength.

[8] All this seems to us to have been clearly legitimate cross-examination, and not to have been examination upon a new subject, thus opening the door to an inquiry as to a new ground of liability not covered by the pleadings. Nevertheless, when plaintiffs' counsel took the witness upon redirect examination, counsel for the plaintiff proceeded to ask the witness whether such fire flues were in general use and how long since they had been in general use for the purpose of showing that the type had been obsolete for thirty years. Upon objection to this testimony, the court ruled that by his cross-examination the defendants' counsel had opened the door to testimony upon the general subject of the safe construction of such flues, and the witness was allowed to answer the questions and did answer them in effect as desired by the plaintiffs. Thus the question of defective original construction of the fire flue was allowed to be brought into the case, and thereafter, as we have seen, the question was submitted to the jury and the finding of the existence of such defect forms an inherent part of the ground of recovery in both actions which cannot be separated from the other grounds of liability found.

[9] This court has gone as far as any court, we believe, in disregarding mere defects of form in pleadings and in endeavoring to administer justice, even when technical requirements of pleading have not been followed, providing no substantial prejudice

has resulted therefrom to the complaining party. *McHolm v. P. & R. Co.*, 147 Wis. 381, 132 N. W. 585. This is especially true where evidence has come in without objection. *Hemenway v. Beecher*, 139 Wis. 399, 121 N. W. 150; *Swanby v. Northern State Bank*, 137 N. W. 763, present term. In the present case, however, there was timely and persistent objection to the introduction of any evidence concerning defects in original construction of the fire flue, as we have already seen. That objection was not waived by the cross-examination of the witness Cooley, and there is no room for holding that this question was ever tried by consent. It is very evident that the question of defects in original construction is a very important one. The defendants could not be expected to meet that question in a day or perhaps in weeks. Counsel would not be justified in going to trial on that issue without considerable investigation, necessitating certainly the testimony of experts and perhaps the taking of depositions in other states.

[10] It seems apparent to us that the fundamental error which was committed by the court in allowing this new ground of liability to be litigated and submitted to the jury without amendment of the pleadings and without consent, either express or implied, must reverse the case. It must be considered to have affected the defendants' substantial rights, namely, the right to know what charge of negligence is made against him in time to make due preparations to meet it.

[11] Although the testimony was taken and the objections and exceptions reserved in the *Brey* case alone, we regard the stipulation by which that testimony was to be considered in the *Sellers* case with the same force and effect as if repeated in the latter case, as preserving the objections and exceptions in the *Sellers* case. Some other questions are raised, but, as there must doubtless be amendment of the complaint and perhaps a considerable change in the issues presented, we do not feel obliged to discuss them now. For the reasons stated, there must be new trials in both cases.

Judgment reversed in each case, and action remanded for a new trial.

TIMLIN, J. (dissenting). I think the judgment in this case should have been affirmed. The case as decided seems to support a conclusion that if the boiler was defective from two causes, one of which was charged in the pleadings and the other not, and evidence properly admitted to establish the former defect, but evidence erroneously admitted to establish the latter defect, a judgment based on a verdict finding defendant negligent in failing to warn plaintiff of any danger should be reversed. I do not think this is correct or in conformity with precedent. It is a very old rule often acted upon by this court that surplusage in a verdict, pleading or other record

does not annul or avoid that which is aside from the surplusage sufficient. This rule was applied even in the most technical stage of the common law, and it should not be departed from now when none but prejudicial errors are cause for reversals.

LALLY v. LALLY.

(Supreme Court of Wisconsin. Nov. 19, 1912.
Dissenting Opinion Nov. 25, 1912.)

1. DIVORCE (§ 243*)—PERMANENT "ALIMONY"—DIVISION OF PROPERTY.

Under St. 1898, § 2364, authorizing judgments for alimony in divorce actions, or, in lieu thereof, judgments finally dividing and distributing the estate of the husband, and transferring the title of any thereof to the wife, and section 2369, authorizing the court to revise and alter judgments for alimony, but providing that where a judgment of final division is made no other provision for the wife shall thereafter be made, a judgment requiring a husband, having an income of \$10,000 a year, to pay the wife \$300 a month, and providing that on the remarriage of the wife the payments shall cease, and that upon neglect or refusal to pay the wife may apply for an order for the enforcement of such payment, is a judgment for "alimony," and not a judgment of final division, although the judgment itself provides that such payments shall be accepted as a full, absolute, and final division of the estate, and provides for payment by the husband, "his heirs, executors, and administrators," since it does not divide or distribute or transfer the title of any property, and cannot be made a judgment of final division by merely calling it such.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 684-686; Dec. Dig. § 243.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 307-311; vol. 8, pp. 7571-7572.]

2. DIVORCE (§ 247*)—PERMANENT ALIMONY—NATURE AND TERMINATION.

A judgment for alimony is not a charge on the husband's general estate, and ceases upon his death.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 689, 697-700, 733, 736; Dec. Dig. § 247.*]

3. DIVORCE (§ 254*)—ALLOWANCES—DIVISION OF PROPERTY.

While a judgment in a divorce action, dividing the husband's property, may provide for the payment of the wife's portion to her in any reasonable number of payments running through a series of years, the number of payments, time of commencement and termination, must be fixed by the judgment, and cannot rest upon any contingency, nor be made defeasible by remarriage.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 718-721; Dec. Dig. § 254.*]

4. DIVORCE (§ 231*)—PERMANENT "ALIMONY"—DIVISION OF PROPERTY.

Payments for support of a wife, whether in a gross sum or at stated intervals, must be regarded as "alimony," and not as a final division of the husband's property.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 658-661, 665; Dec. Dig. § 231.*]

5. DIVORCE (§ 245*)—ALIMONY—MODIFICATION OF JUDGMENT.

A judgment for alimony cannot be changed into one for final division of the husband's estate, or a modification thereof prevented, by a stipulation of the parties that such alimony

will be accepted as full, absolute, and final division of the husband's estate.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 691-695; Dec. Dig. § 245.*]

Kerwin, Siebecker, and Timlin, JJ., dissenting.

Appeal from Circuit Court, Milwaukee County; Warren D. Tarrant, Judge.

Action for divorce by Maria B. Lally against Frederick E. Lally. From an order dismissing a petition for modification of the final judgment, plaintiff appeals. Reversed and remanded.

In 1906 plaintiff and defendant were divorced by a decree entered by the circuit court for Milwaukee county. The judge who tried the action found as facts "that the defendant receives an income of at least \$10,000 per annum, and that the plaintiff is without means of her own; that the sum of \$300 per month, to be paid to the plaintiff by the defendant during her lifetime, or so long as she shall remain single, is a reasonable sum to be paid to her by defendant as a full, absolute, and final division of the estate of the parties hereto, provided, however, that on the remarriage of said plaintiff such payments by said defendant at once cease. In making this finding as to the division of the estate of said parties, I have taken into consideration, with other things, the fact that the parties hereto, by their attorneys, have stipulated and agreed in open court that the above sum be paid and accepted as an absolute, full, and final division of the estate of the above-named parties. I further find that such division and distribution of defendant's property and estate as above found, and as stipulated and agreed to between the parties above named, is a just and equitable division and distribution of the estate of said parties." The judgment, among other things, decreed "that the defendant, his heirs, executors, and administrators, pay, or cause to be paid, to the plaintiff during her natural life, or until she shall remarry, the sum of \$3,600 per year, payable in equal monthly installments of \$300 on the 1st day of each and every month during such term, said payments to be made and accepted as a full, absolute, and final division of the estate of said parties, in accordance with the findings of fact and conclusions of law herein on file, provided, however, that on the remarriage of said plaintiff said payments herein provided for shall at once cease; * * * that upon the neglect or the refusal of the defendant to make such payments as are hereby adjudged, the plaintiff, upon filing an affidavit showing such failure or refusal, may apply to the court for an order for the enforcement of the same in such manner as to the court may seem proper."

On the 15th day of September, 1911, the plaintiff filed in said court her petition for a revision and alteration of said judgment

respecting the amount of alimony therein provided, as she claims, and for other relief, which it is not necessary to enumerate. The court entered an order dismissing the petition for want of jurisdiction, on the ground that the judgment of divorce provided in terms for a final division of the estate, and should be so construed, and therefore could not be revised after the term at which it was entered. From such order the plaintiff appealed.

Quarles, Spence & Quarles, of Milwaukee (Wm. A. Vincent, of Chicago, Ill., of counsel), for appellant. Flanders, Bottum, Fawcett & Bottum and F. L. McNamara, all of Milwaukee, for respondent.

VINJE, J. (after stating the facts as above). [1] The plaintiff claims the judgment entered was for alimony; the defendant that it was a final division of his estate. If it was a judgment for alimony, then it may be modified at any time upon the application of either party. Section 2369, Stats. 1898; Campbell v. Campbell, 37 Wis. 206; Thomas v. Thomas, 41 Wis. 229. If it was a judgment decreeing a final division of defendant's estate, then the court has no power to modify it after the term. Section 2369, Stats.; Bacon v. Bacon, 43 Wis. 197, 206; Kistler v. Kistler, 141 Wis. 491, 124 N. W. 1028. It cannot be both. Von Trott v. Von Trott, 118 Wis. 29, 94 N. W. 798; Kistler v. Kistler, 141 Wis. 491, 124 N. W. 1028.

Section 2364, Stats. 1898, provides that in lieu of alimony the court may "finally divide and distribute the estate, both real and personal, of the husband * * * between the parties and divest and transfer the title of any thereof accordingly." Was such a division, distribution, and transfer made by the judgment in the present case? True the trial court said so in the judgment when it was rendered, and it said so when the order dismissing the petition was entered. In cases of doubt great weight should be accorded the recitals in the judgment, but they cannot be permitted to override the plain commands of the statute; nor can they change the inherent qualities of the judgment rendered. If the judgment in fact makes no final division of the husband's estate, it is not a judgment of final division, though so named therein. The label may be useful in ascertaining what kind of judgment is rendered; but it is not conclusive. If the judgment rendered bears all the characteristics of a judgment for alimony, and contains none of the essential requisites of a judgment of final division, then it is of little importance what name it gives itself. The judgment rendered provides (1) for the payment, monthly, by the husband, his heirs, executors, and administrators, of \$300 to the wife; (2) that such payments are to cease upon the death or remarriage of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

wife; and (3) that upon a refusal or neglect of the husband to make the adjudged payments the plaintiff may apply to the court for an order for the enforcement of the same. These are all the provisions the judgment makes in respect to the husband's estate. Tested by the statutes and decisions, they are all essential characteristics of a judgment of alimony, to wit, monthly payments, ceasing upon death or remarriage, and enforceable by further application to the court.

[2] It is true the provision for payment by his heirs, executors, and administrators does not harmonize with the idea of alimony; for that ceases upon the death of the husband. *Campbell v. Campbell*, 37 Wis. 206; *Maxwell v. Sawyer*, 90 Wis. 352, 63 N. W. 283. But in view of the failure of the judgment to meet the requirements of the statute relating to a final division of the husband's estate, that cannot be considered very significant. It was probably the result of inadvertence, perhaps of habit; for the words "his heirs, executors, and administrators" are customarily linked with the name of an obligor. In any event, it is a nullity; for alimony is not a charge upon the husband's general estate. *Campbell v. Campbell*, 37 Wis. 206. It may be made a charge upon specific real estate owned by him. Section 2367, Stats. 1898. The judgment fails to comply with the statute, because (1) it does not divide the estate between the parties; (2) it does not distribute it between them; and (3) it does not divest and transfer the title of any thereof to the wife. She is given no estate that she can own, control, mortgage, sell, or bequeath. For, confessedly, monthly payments ceasing upon either of two such uncertain contingencies as marriage and death are not very valuable assets to offer in the financial market, and are not subjects of a bequest in a will, as they cease upon the death of the testator. It was held in *Kempster v. Evans*, 81 Wis. 247, 51 N. W. 327, 15 L. R. A. 391, that an installment of alimony to be paid the wife was not assignable before due. The same rule might, perhaps, be applicable to the payments provided for in this judgment, even if it were held to be a division of property, on the ground that each payment is no more than necessary for the support of the wife and child until the next one falls due. The statute contemplates that when a wife is given a portion of her husband's estate as a final division of his property that such portion should by the judgment be transferred and set over to her, to be and become her separate estate, subject to her control and dominion, and capable of being disposed of by her by will or otherwise.

[3] It is true the wife's portion may be required by the court to be paid to her in any reasonable number of payments running through a series of years, because of the hardship upon the husband to pay it in one

or several payments within a short time. But the number of payments, their time of commencement and termination, must be fixed by the judgment. They cannot rest upon any contingency, nor be made defeasible by remarriage. Such provisions for a number of payments, however, do not prevent the wife from ascertaining, when the judgment is rendered, just how much of the estate she gets, or when she is to receive it. Nor do they prevent her from mortgaging, selling, or bequeathing her portion. Such judgment is a division, within the statute, and, like an ordinary money judgment, becomes a lien upon the husband's estate, and may be enforced like any money judgment—not by an application to the court for a further order, in his discretion, as is provided for in the judgment in question.

Assuming, but not deciding, that the court could, as a final division of property, require the wife to take an annuity, still the payments provided for in the judgment cannot be regarded as an annuity, within the meaning of the statute relating to a final division of the husband's estate. It ceases upon remarriage. No final division of property under the statute can be made, so that the wife's share reverts to the husband upon her remarriage. Whatever is given her as her share of the property remains hers forever. She cannot be made to forfeit it by remarriage—not even if she remarries her former husband. *Kistler v. Kistler*, 141 Wis. 491, 124 N. W. 1028. The statute requires a final division, distribution, or transfer of title. Nothing less will satisfy it. *Kempster v. Evans*, 81 Wis. 247, 51 N. W. 327, 15 L. R. A. 391.

[4] The findings show that the husband had an income of at least \$10,000 a year, and the wife none. The custody of one child was awarded to the wife, and the custody of the other child to the husband. In view of his income and station in life, a monthly allowance of \$300 to the wife would seem to be only an adequate amount for her support and for the maintenance and education of the child whose custody was awarded to her. Payments made for support, whether in a gross sum or at stated intervals, must be regarded as alimony. *Brenger v. Brenger*, 142 Wis. 26, 125 N. W. 109, 26 L. R. A. (N. S.) 387, 135 Am. St. Rep. 1050, 19 Ann. Cas. 1136.

If it be urged and conceded that a final division of property in the form of monthly payments during life or widowhood is more advantageous to the wife than the receipt of a gross estate at once, the answer is that the statute does not contemplate or permit such a judgment; and no judgment of final division, not within the statute, can lawfully be made. *Bacon v. Bacon*, 43 Wis. 197; *Brenger v. Brenger*, 142 Wis. 26, 125 N. W. 109, 26 L. R. A. (N. S.) 387, 135 Am. St. Rep. 1050, 19 Ann. Cas. 1136.

[5] If the judgment be one for alimony,

then the stipulation of the parties, recited by the trial court, that the sum of \$3,600 per year be accepted as an absolute, full, and final division of the estate is not a bar to the modification of the judgment. In *Blake v. Blake*, 68 Wis. 303, 32 N. W. 48, the wife stipulated to receive \$2,000 in full of alimony and for a full share of her claim in and to any property of which the husband had been seised during coverture. But it was held such stipulation did not preclude the court from afterwards modifying the judgment, which was construed to be for alimony. See, also, *Blake v. Blake*, 75 Wis. 339, 43 N. W. 144.

That the legal effect of the judgment must govern, and not the mere language used therein, was decided as early as *Bacon v. Bacon*, 43 Wis. 197. In that case the judgment awarded "as further allowance and alimony to the plaintiff" the sum of \$2,750 in money out of the husband's estate. Chief Justice Ryan, in speaking of this part of the judgment, says: "It is quite apparent that the original judgment of the court below was framed upon a different theory, and regards both the real and personal estate assigned to the wife as alimony. Indeed, it expressly so calls them. But this is a patent and mere misuse of the word, not affecting the legal construction of the judgment. The words 'alimony' and 'allowance' used in it are superfluous. The judgment must be taken according to its legal effect as judgment for division and distribution between the parties of the husband's estate, real and personal." So, also, in *Kempster v. Evans*, 81 Wis. 247, 51 N. W. 327, 15 L. R. A. 391, the judgment awarded to the wife \$1,000 annually "as alimony for her personal support and maintenance," payable as designated during her natural life in case she remain unmarried. It further declared that such judgment for alimony should "be and stand as a final division of property between the plaintiff and the defendant." The court held that this was not a final division of the husband's estate, because the payment or allowance was liable to be terminated at any time by marriage, and, further, because it did not undertake to make the final division and distribution of the husband's estate contemplated by the statute, so as to vest in the wife an absolute and irrevocable right, title, or interest in any portion of such estate, or to vest the title thereof absolutely and irrevocably in the husband, so as to preclude the court from thereafter modifying said judgment and making other provision for the wife. In *Von Trott v. Von Trott*, 118 Wis. 29, 94 N. W. 798, the judgment decreed "that the said defendant pay to the said plaintiff the sum of \$3,900 out of said defendant's estate as alimony, support, and maintenance, and as a full and final division, partition, and distribution of said estate." It was held that the judgment was one of final division, and

not of alimony. In *Kistler v. Kistler*, 141 Wis. 491, 124 N. W. 1028, a judgment reciting that it was for "permanent alimony and division of property" was construed to be a judgment of final division. So it will be observed that, whether the recitals in the judgment as to what kind of a judgment it is are consistent or inconsistent with themselves, the court must look to the legal effect of the decree and determine from such effect what was in fact the judgment rendered. Tested by this rule, it seems clear that the legal effect of the judgment under consideration was the granting of alimony, and not the division and distribution of the husband's estate. The court therefore erred in dismissing the petition, on the ground that it had no jurisdiction to alter or modify the judgment after the term at which it was rendered.

Order reversed, and cause remanded for further proceedings according to law.

KERWIN, J. (dissenting). There is no question but what the court below intended to and did make, in express terms, a judgment of final division and distribution of the property and estate of the parties to the action. Therefore, unless the court was without jurisdiction to render the judgment, it is conclusive here and cannot be modified. Section 2369, Stats., provides that after judgment for alimony the court may from time to time on petition of either party, revise and alter such judgment respecting the amount of alimony and payment thereof, etc. "But when a final division of the property shall have been made under the provisions of section 2364 no other provisions shall be thereafter made for the wife." The findings of fact made by the court include the following:

"(5) That the defendant receives an income of at least ten thousand (\$10,000) dollars per annum, and that the plaintiff is without means of her own.

"(6) I further find that the sum of \$300 per month, to be paid to the plaintiff by the defendant during her lifetime, or so long as she shall remain single, is a reasonable sum to be paid to her by the defendant as a full, absolute, and final division of the estate of the parties hereto, provided, however, that on the remarriage of said plaintiff such payments by said defendant at once cease. In making this finding as to the division of the estate of said parties, I have taken into consideration, with other things, the fact that the parties hereto, by their attorneys, have stipulated and agreed in open court that the above sum be paid and accepted as an absolute, full, and final division of the estate of the above-named parties.

"And I further find that such division and distribution of the defendant's property and estate as above found, and as stipulated and agreed to between the parties above named,

is a just and equitable division and distribution of the estate of said parties."

The conclusions of law contained the following: "(3) That the defendant, his heirs, executors, and administrators, pay, or cause to be paid, to the plaintiff during her natural life, or until she shall remarry, the sum of \$3,600 per year, payable in equal monthly installments of \$300 on the 1st day of each and every month during said term, said payments to be made and accepted as an absolute, full, and final division of the estate of the parties hereto; and in making said allowance as herein provided the court has had due regard to the legal and equitable rights of each of the parties hereto, the ability of the husband, the lack of special estate in the wife, the character and situation of the parties, and the stipulation entered into in open court on the trial of this action between the parties hereto, as well as other facts and circumstances developed during said trial. That the parties hereto are prohibited from marrying within one year from the date hereof, except to remarry each other with the consent of this court."

The decretal part of the judgment is as follows: " * * * (2) That the defendant, his heirs, executors, and administrators, pay, or cause to be paid, to the plaintiff during her natural life, or until she shall remarry, the sum of \$3,600 per year, payable in equal monthly installments of \$300 on the 1st day of each and every month during said term, said payments to be made and accepted as a full, absolute, and final division of the estate of said parties, in accordance with the findings of fact and conclusions of law herein on file, provided, however, that on the remarriage of said plaintiff said payments herein provided for shall at once cease."

Under all the authorities, this judgment is a judgment of final division and distribution of the property of the parties, and not a judgment for alimony, if the court had power to make the division by awarding an annuity in lieu of a gross sum.

Section 2364, Stats., provides that the court may adjudge to the wife alimony out of the estate of the husband for her support and maintenance and make allowance for the support, maintenance, and education of the minor children committed to her care and custody, "or the court may finally divide and distribute the estate, both real and personal, of the husband and so much of the estate of the wife as shall have been derived from the husband, between the parties and divest and transfer the title of any thereof accordingly, having always due regard to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, the character and situation of the parties and all the circumstances of the case. * * *"

This statute confers upon the court in the broadest terms the power to finally divide

and distribute the estate, both real and personal between the parties. There being no limitation upon the power of the court in making the division, it necessarily follows that it has power to determine what the division shall be and how it shall be paid. Jurisdiction is the right to hear and determine the controversy and render judgment; and the right to make final division includes the right to determine what is a final division. Jurisdiction does not depend upon the correctness of the decision made, but upon the right to hear and determine the case. If the court erred in making the final division, it was an error within its jurisdiction, not a want of jurisdiction. The only limitation upon the power of the court in making final division under the statute is that it shall not violate the express mandate of the statute. *Brenger v. Brenger*, 142 Wis. 26, 125 N. W. 109, 26 L. R. A. (N. S.) 387, 135 Am. St. Rep. 1050, 19 Ann. Cas. 1136.

This court has held that a gross sum may be awarded on final division. Can there be any doubt of the power of the court to award the payment of such sum in installments covering a period of years? It seems not. Clearly there is no restriction in the statute as to how the final division shall be made, or how the portion awarded to the wife shall be paid. The matter, by the express terms of the statute, is left to the court; and the court, following strictly the language of the statute, made the final division. Not only the letter, but the spirit, of the statute sanctions the right to make an annuity a final division. It is obvious that in many cases the awarding of an annuity would be the best possible final division that could be made. So far as the record discloses, the defendant's means consisted of a \$10,000 annual income. The plaintiff stipulated to take \$3,600 per annum, payable monthly. Undoubtedly it was the best possible division that could be made for her. It secured her for life or widowhood annually what was equivalent to 4 per cent. on \$90,000, and the judgment was made binding on the defendant, his heirs, executors, and administrators. It could not be changed, even if the faculties of the defendant changed. The judgment in this case carved out of the defendant's property or estate a life estate in the plaintiff, subject to be defeated on her remarriage. This annuity was an estate and a proper final division, where so declared in the judgment. *Campbell v. Campbell*, 37 Wis. 206.

In *Bacon v. Bacon*, 43 Wis. 197, at page 208, the court said: "The husband's estate, of which division and distribution may be made, may be real or personal, or both. When judgment of divorce awards personalty only to the wife, whether payable like an annuity or in a gross sum, it is prima facie for alimony; and if it be intended to operate as a division and distribution of estate the

judgment must so declare. Then only will it be final. *Hopkins v. Hopkins* [40 Wis. 462]; *Thomas v. Thomas*, supra. But if judgment of divorce divest the husband of his title to realty, transferring it to the wife, it is necessarily division and distribution of estate. * * *

In *Blake v. Blake*, 68 Wis. 303, at page 308, 32 N. W. 48, at page 50, the court said: "These cases have discussed the question involved in this appeal in all its aspects, and the law in this state must be considered as settled that every provision made for the support of a wife in a divorce case, whether it be a gross sum or payments to be made annually or otherwise, or if it be personal property to be delivered, is presumed to be for alimony, whether so expressly stated or not, and that the court may afterwards, under changed circumstances, modify such judgment as may be just to the parties; and no such judgment will be construed to be a division and partition of the estate of the husband, under the statutes, unless it be so expressly declared by the judgment of the court. This being so, and considering the findings of fact and conclusions of law a part of the judgment, there is nothing in this case which shows that there was any division of the estate of the husband under the statute; and so the judgment is subject to be modified by the court."

In *Maxwell v. Sawyer*, 90 Wis. 352, at page 354, 63 N. W. 283, at page 284, the court said: "It is very clear that the allowance made to the wife by the decree of divorce was alimony pure and simple. It is so denominated in the judgment. It consists of an allotment of sums, payable at regular intervals from year to year, and it is not declared to be a division of the estate; hence it must be construed as alimony. *Blake v. Blake*, 68 Wis. 303 [32 N. W. 48]. The general principle is well established, also, that alimony continues only during the joint lives of the parties. It ends when the husband dies."

I think what is perfectly plain from the language of the statute is also clearly inferable from the language of the decisions above quoted from, namely, that an annuity is a final division, when so declared in the judgment. It is true, as said in numerous cases in this court, that every provision made for support of the wife, whether in gross sum or annually, or otherwise, is treated as alimony, whether expressly stated to be such or not, unless it be declared in the judgment to be a division of the estate; and some of the cases turn on whether the language of the judgment is sufficient to constitute final division.

There is no doubt about the intention of the court in the instant case, because the same judge who rendered the judgment denied the petition in this proceeding to mod-

ify it, on the ground that it was a final division of property, and the judgment upon its face is as plainly a judgment of final division as language can make it. Therefore, under all the decisions of this court, the judgment is a final division and distribution of the property and estate of the defendant, and not a judgment for alimony. I shall refer to the decisions later.

In the majority opinion it is said that the label of the judgment is not conclusive. I agree with that. You cannot make fish flesh by a label; neither can you make the judgment here a judgment for alimony by a label. The majority opinion also says that the judgment fails to comply with the statute, because (1) it does not divide the estate between the parties; (2) it does not distribute it between them; and (3) it does not divest and transfer the title of any thereof to the wife. True the statute provides that the court may divest title and transfer property, but this is not made essential under the statute to a final division; nor is it necessary under the decisions of this court. On the contrary, this court has expressly ruled that an award in a judgment of a gross sum is a final division, if awarded as such. *Bacon v. Bacon*, 43 Wis. 197; *Von Trott v. Von Trott*, 118 Wis. 29, 94 N. W. 798; *Kistler v. Kistler*, 141 Wis. 491, 124 N. W. 1028; *Thomas v. Thomas*, 41 Wis. 229; *Blake v. Blake*, 68 Wis. 303, 32 N. W. 48.

Nor can it be justly said that an annuity for life, dependent upon the act of the wife to terminate it by remarriage, is not a valuable asset. In view of the fact, which we have a right to assume from the findings and the judgment, that the only substantial property which the defendant had was an income, it may well be that an annuity of \$3,600 a year during the life or widowhood of the wife was a far better settlement and division for her, and would net her a much larger amount, than any gross sum, on final division, which could have been awarded, in view of the defendant's faculties at the time the judgment was rendered. But the question whether the annuity was a valuable asset or not, or whether the proper final division were made or not, is quite unimportant. The question, and the only question, before us is whether the court had power to make a final division by awarding an annuity as it did, and whether it in fact, by the terms of the judgment, did so. Nor is it any objection to the judgment as a final division and distribution that it provides that payments should cease upon remarriage. This was stipulated to by the parties; and, while the judgment did not rest solely upon the stipulation, that was taken into account, among other things, in connection with other facts and circumstances developed upon the trial. The plaintiff was awarded by the final division a life estate in the nature of

an annuity, which could only be terminated by her own act. There was no reverter of any portion of the estate to the husband upon remarriage of the wife, as indicated in the opinion of the court. She was not made to forfeit anything. The duration of the estate was measured by two events, remarriage or death, either of which terminated it.

I shall briefly consider the cases cited in the opinion of the court, and some others. *Bacon v. Bacon*, 43 Wis. 197, *Blake v. Blake*, 68 Wis. 303, 32 N. W. 48, and *Maxwell v. Sawyer*, 90 Wis. 352, 68 N. W. 283, have already been considered. *Campbell v. Campbell*, 37 Wis. 206, provided for payment to the wife of \$100 per year for three years, for support. Clearly an allowance of alimony for support. In that case *Ryan, C. J.*, discusses the meaning of the word "estate," and holds that it includes a term for years, and is sufficiently comprehensive to embrace property of every description, and discusses alimony, which was the particular matter under consideration; the court remarking that they were not considering division of estate, but alimony.

Thomas v. Thomas, 41 Wis. 229, following *Hopkins v. Hopkins*, 40 Wis. 462, holds that a gross sum awarded to the wife on divorce is not a final division of property, *unless so stated in the judgment to be*.

In *Kistler v. Kistler*, 141 Wis. 491, 124 N. W. 1028, it was adjudged that the defendant pay to the plaintiff \$1,000 "as and for her permanent alimony and division of property"; and it was held that the judgment was "confused and inaccurate," because it described the sum *as and for permanent alimony and division of property*, whereas it could not be both, and that it must be construed as a division of property.

In *Von Trott v. Von Trott*, 118 Wis. 29, 94 N. W. 798, the language of the decree as to property matters is this: "It is ordered, adjudged, and decreed that the said defendant pay to the said plaintiff the sum of \$3,900 out of said defendant's estate *as alimony, support, and maintenance, and as a full and final division, partition, and distribution of said estate*." (Italics are mine.) It is said in the opinion that this language using the word "alimony" is very inappropriate for the purpose, but that, taking the language as a whole, the judgment was held to be one for division of property, not alimony.

In *Kempster v. Evans*, 81 Wis. 247, 51 N. W. 327, 15 L. R. A. 391, the court by a judgment awarded \$1,000 annually to the wife "as alimony for her personal support and maintenance," payable, as designated, during her natural life in case she remained unmarried, but provided that in event of her marriage such alimony should at once terminate. It was further declared in the judgment that such judgment for alimony should "be and stand as a final division of

property between the plaintiff and defendant." The judgment was held one for alimony, and not final division of property.

In *Brenger v. Brenger*, 142 Wis. 26, 125 N. W. 109, 26 L. R. A. (N. S.) 387, 135 Am. St. Rep. 1050, 19 Ann. Cas. 1136, it was held that every provision for support in a judgment in a divorce action, whether it requires payment of money at intervals or in gross, is to be regarded as alimony, whether so expressly stated or not. The conclusion of law upon which the judgment was based is rested upon the finding "that the plaintiff is entitled to an allowance for support of \$25 per month" as long as "he shall live"; and it is said that the allowance has all the characteristics of alimony and none of division of property.

In *Palica v. Palica*, 114 Wis. 236, 90 N. W. 165, it was held that the judgment was not intended as a final division of the estate; hence does not come within the limitations of section 2364, Stats.

The above case shows that the mere divesting of title does not of itself make a final division of property, but rather the adjudication in the judgment to that effect. *Hopkins v. Hopkins*, 40 Wis. 462; *Coad v. Coad*, 41 Wis. 23; *Thomas v. Thomas*, 41 Wis. 229. There the judgment divested each party of all interest in the property of the other, and the title of each was confirmed in the property in his or her name, and \$180 ordered paid by defendant annually to plaintiff, and the household furniture was also by the judgment awarded to the wife.

As will be observed from the foregoing cases, the difficulty which has arisen in determining whether the judgment in each case was one for alimony or final division resulted from the terms of the judgment; and in all cases where the language was clear that the court intended to make a final division the judgment has been held to be such. As was said of the judgment in *Kistler v. Kistler*, 141 Wis. 491, 124 N. W. 1028, there is confusion in the cases because of language used which would appear to support either kind of a judgment. *Kempster v. Evans*, 81 Wis. 247, 51 N. W. 327, 15 L. R. A. 391, is strongly relied upon in the opinion of the court, and is the strongest case cited in support of the opinion. But from the language of the judgment in that case it was not clear whether the court intended to award alimony or make a final division of the property of defendant. The language of the judgment was ambiguous, because the annual payment was awarded as alimony for personal support and maintenance and also a *final division of property*. So this court was called upon to determine, in view of the fact that the judgment could not be both, which was intended. Moreover, in the *Kempster Case* there is nothing in the judgment showing that the payments were to continue aft-

er the death of the husband, as in the instant case.

True there is some confusion and lack of harmony in the decisions of this court upon the subject under consideration. I regret to say, however, that in my opinion the decision of the instant case will materially add to the confusion heretofore existing.

I think the order appealed from is right, and should be affirmed.

I am authorized to say that Mr. Justice SIEBECKER and Mr. Justice TIMLIN concur in this dissent.

GORETSKI v. AU SABLE & N. W. RY. CO.
(Supreme Court of Michigan. Nov. 8, 1912.)

1. RAILROADS (§ 446*)—STOCK—JURY QUESTION—WIDTH OF HIGHWAY.

In an action for killing a horse at a public highway crossing in which plaintiff claimed that the right of way fence did not extend to the line of the highway, which was opened in 1873, the width of the highway, depending upon user and nonuser, *held* a jury question.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.*]

2. RAILROADS (§ 446*)—INJURIES TO STOCK—JURY QUESTION—LOCATION OF CATTLE GUARDS.

In an action for killing a horse at a public highway crossing, whether the railroad cattle guards were properly located as required by law with reference to the highway and were as near the highway as practicable *held* a jury question.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.*]

3. RAILROADS (§ 447*)—INJURY TO STOCK—INSTRUCTIONS.

In an action for killing a horse at a public highway crossing, the court instructed that plaintiff claimed that the railroad fence and cattle guards were not properly located, that the statute required the fence to be erected upon the line of the highway up to that point where the line of the highway and the line of the railroad meet, and contemplated that the tracks should not be unfenced except within the limits of the highway, and that the company need fence only to the highway line, and, if the fences and the cattle guards were on the highway line, defendant was not liable. *Held*, that the instruction properly submitted the question of the railroad company's duty as to the fence and cattle guards at the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1642-1650; Dec. Dig. § 447.*]

4. RAILROADS (§ 446*)—INJURIES TO STOCK—JURY QUESTION—LOCATION OF ANIMAL.

In an action against a railroad company for the killing of a horse on the track at a public highway, whether the horse was in the highway when struck by the train *held* a jury question.

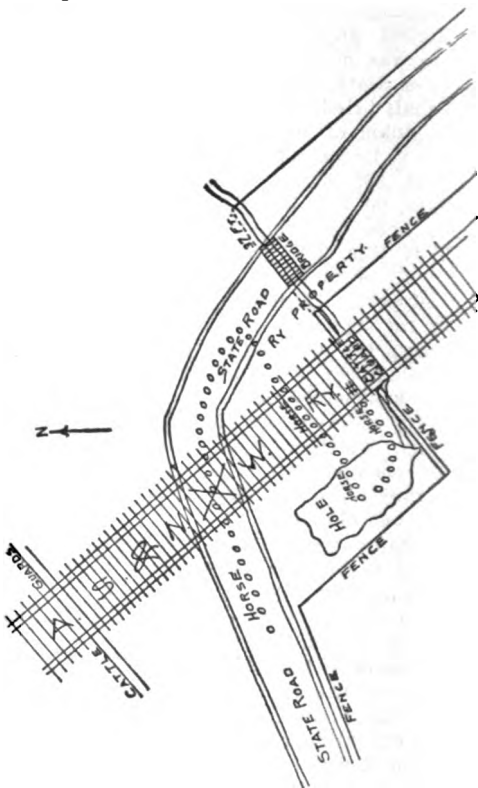
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.*]

Error to Circuit Court, Alcona County; Main J. Connine, Judge.

Action by John M. Goretski against the Au Sable & Northwestern Railway Company.

Judgment for plaintiff, and defendant brings error. Affirmed.

The following is the map referred to in the opinion:



Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OS-TRANDER, and BIRD, JJ.

Henry, Henry & Henry, of Alpena, for appellant. Albert W. Black, of East Tawas City, for appellee.

STONE, J. This is an action on the case to recover the value of a horse belonging to the plaintiff which was killed at a place where the defendant's railroad crosses a highway in Curtis township, Alcona county, on August 3, 1909. Upon the trial it was conceded by the defendant that the horse was owned by the plaintiff, and that it was killed by being run over by a train operated by the defendant. The plaintiff recovered a verdict and judgment of \$100, and the case is here for review upon errors alleged in the trial, and in the refusal to grant a new trial.

We have found some difficulty in understanding the testimony as to the location of the railroad and highway for want of a proper map. The appended sketch produced from Exhibit B, which was received in evidence without objection, on the trial, will aid somewhat in understanding the situation. The repeated letters "o o o o o" are sup-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

posed to indicate the course taken by the horse to the point where he was killed upon the track.

The alleged negligence upon which the action is based is that the defendant neglected to fence its right of way as provided by the statute. There is no claim that the fences and cattle guard were not in good condition. The negligence alleged is that they were not properly located. At the point in question the railroad does not cross the highway at right angles, but diagonally. The cattle guard in question was southerly of a point where the railroad crossed the traveled portion of the highway, a distance of about 114 or 115 feet. There was considerable conflict in the testimony as to the actual width of the highway and the highway lines. On the part of the plaintiff the testimony tended to show that the point where the railroad crossed the state road was 115 feet from the center of the road to the cattle guard on the south; that there was no fence for that distance between the state road property and the cattle guard; that the land on each side of the railroad for that distance was open on both sides to the public; that on the south side it was uneven, and on the north side it was more level; that the railroad track could have been fenced out to the state road crossing; that the highway at that point for a little distance ran almost parallel with the right of way of the railroad; that the highway was about 30 feet wide; that the northeast end of the south cattle guard came pretty near to the highway; that it was about 20 feet from the nearest end to the center of the state road—that is if a line were drawn at right angles with the railroad track from the nearest end of the cattle guard, it would be about 20 feet—that after crossing the railroad track the state road bends around southerly, and for some distance runs parallel with the railroad.

One of plaintiff's witnesses on cross-examination testified as follows: "Q. Isn't it a fact that the east end of the cattle guard in question runs out to the highway—the old state road? A. The east end; yes. It runs right to where it is fenced. As far as it is fenced in. Q. And isn't it a fact that it is fenced right to the edge of the highway? A. The highway is fenced right to that cattle guard, and stops right at the cattle guard. Q. What I say is—isn't that fence or cattle guard right to the edge of the highway, the old state road? Here is your railroad running along here and the highway running along here, isn't it a fact that that cattle guard runs right to the highway? A. Yes."

One of the plaintiff's witnesses described the killing of the horse as follows: "I saw Goretzki's horse killed. I was working below the railroad in my field when I heard the log train whistle for the crossing. * * * I looked up, and saw this horse standing across the state road with his head south. When I looked again, he was standing right

across the middle of the track still facing south, about halfway between the state road crossing and the cattle guard. From there the horse went down into a depression or hole as we called it, on the south side of the railroad, and, when the engine came down, the engineer blew his whistle twice, and then I saw the horse start up the bank, and saw the engine run into it. When the horse was struck by the train, it was as near as it could be to the cattle guard, and not behind the guard." A stream runs under the track right north of the south cattle guard. It was here conceded that it was about 114½ feet from the crossing proper to the cattle guard. On cross-examination this witness testified that the horse was not over 8 or 10 feet away from the cattle guard when it was struck; that right where the horse was standing when he first saw it, from fence to fence the highway was quite wide. It took in that hole or deep depression. The state road and the railroad and all of it was mixed in together. He does not know if there is any legal width for a state road. It was an old trail, he understood, that had been cut there for years for a tote road. Witness had been there about 17 years, and this road has always been just as it was when he moved there. On redirect examination he testified that the used part of the old state road was wide enough for two wagons; that there was just one wagon track right there, and it was the track that was used by people in driving up and down that road; that there was a narrow strip of land between the railroad track, the rails and ties of the track, between that and the used portion of the road, between the road and the railroad track; that there was no fence or guard or protection on either side of the railroad track to keep cattle from getting on this point of land, and on the railroad track for the distance of 115 feet back to the cattle guard; that there was a field fence that set away back, belonging to a farmer there, that made a kind of a bag there—several rods from the railroad; that it was between the railroad track and this fence that this hole or depression was—between the two fences. Evidence was also produced by the plaintiff that considering these two lines inclosing the traveled part of the state road and these two lines, the railroad track, it would not inconvenience the public travel along this road for some distance if the fence and cattle guard were moved to a point nearer the crossing proper; that the fence and cattle guard could be moved some closer to the crossing, probably 30 or 40 feet; that, if that were done, the nearest end of the cattle guard would be pretty close to the highway, within four or five feet.

On the part of the defendant there was evidence tending to show that at the point in question the state road runs on the railroad right of way over 200 or 300 feet; that

at the point opposite the cattle guard the highway was 37 feet wide; that the fenced line of the right of way—that is, the fenced line between the highway and the railroad track—runs right up to and is attached to the cattle guard; that, if the cattle guard were moved closer to the crossing, it would be on the main traveled highway; that from where the fence and cattle guard meet to center of the highway is 19 feet. It would leave about 15 feet between the cattle guard and the edge of the road in question. There is land there that is not used for driving or track purposes. To the west of the railroad track and to the north of the cattle guard there is a depression. The fence along the railroad track is the railroad fence, and the other is a private fence. As a matter of fact cattle getting in this triangular piece of land from the highway and the state road in question could not get out again except by crossing the railroad track or going out along the fence line to the state road. The state road, as it was called, was put in there in 1873, and the railroad was built in 1891. "The cattle guard is 14 feet wide, the pit, and they put the cattle guard in here. The section crew in building that cattle guard had this fence come by and alongside the state road, and they measured over the two rods over to that point. Most highways are four rods wide. This is an old state road, and is especially narrower than any other legal road in the state now. They first took this line to where it comes in here, and they put that cattle guard in there because they did not want to encroach on the highway. If they had put it closer, they would have had a very narrow road here, and no team would have had a chance to pass another. The section crew in building that cattle guard put it there because they did not want to encroach on the highway."

The roadmaster of the defendant testified to the same in substance. On cross-examination he testified as follows: "Q. You own some property along the railroad track, here on this side of the track? A. I expect so. Q. Now, then, why could not the fence be built along your line between that right of way and the highway? A. It is built just about to the nearest point that I built fences then. Q. The railroad owns some of this land between the crossing proper, and the place where the cattle guard now stands. Why could not the railroad company build the fence along its own land there, and up to a point nearer to this crossing? A. You might build nearer the grade, but you would have a regular pen there."

The defendant requested the court to charge the jury as follows:

"(1) I charge you as a matter of law that if you find that the so-called south cattle guard extends up to the south line or boundary of the highway that your verdict shall be no cause of action.

"(2) I charge you that the facts showing that the so-called south cattle guard does not extend up to the south line or boundary of the highway or state road, so called, are undisputed, and that you are to find such to be the facts.

"(3) I charge you as a matter of law that the undisputed facts show the defendant to have complied with section 6294 of the Compiled Laws of 1897, and therefore your verdict shall be no cause of action."

The above requests were refused, except as covered by the general charge.

The court charged the jury, among other things, as follows:

"Now, the defendant railroad company claims in this case that it has complied with the statutory requirements in regard to the fences and cattle guards. That is their defense—that they have complied with the statutes substantially, and that they had there that day erected and in good order fences and cattle guards that met fully the requirements of the statute. They claim that they had built fences both on the easterly and westerly sides of this railroad, and built a cattle guard at the north side of this highway, and one at the south side of the highway, and proper connecting fences. That is their claim."

"Now, there is no claim here that the fences as built, or the cattle guards as built, were not sufficient. The claim of the plaintiff is that they were not properly located and extended. The claim of the plaintiff is that the railroad fences did not cover the entire right of way outside of the highway. So you see the complaint is not on account of the kind of fence that had been erected there, or the kind of cattle guard, but the complaint is of the location of the fences and the cattle guard."

"Now, this statute requires the fences to be erected at highway crossings up to the line of the highway, to that point where the line of the highway and the line of the railroad right of way meet. It contemplates that railroad tracks shall not be exposed except within the limits of the highway, that outside of the highway they shall be fenced, and that part of the railroad track which is unfenced shall consist only of that part of it which lies within the boundaries of the lines of the highway."

"As I told you before, highways must be left open their full width by everybody, railroads included. So this defendant, the railroad company, need not have fenced into the highway, nor upon any part of the highway, but only up to the line of the highway. So you see it is important for you to determine from the evidence where the line of the highway was, and where the line of the railroad right of way was, and the defendant was required to fence up to that point where those two lines met, but not beyond that."

"So, gentlemen of the jury, if this defend-

ant, the railroad company, fenced up to the line between its own right of way and the highway line, then it has done its full duty, and there can be no recovery in this case. In other words, if the place where this horse was killed was a part of the highway and within the highway lines, there can be no recovery in this case. If the fences and the cattle guards were on the highway line, then the defendant is not liable, and your verdict would be in favor of the defendant, no cause of action. On the other hand, if the defendant, the railroad company, exposed and left unfenced any material or substantial part of its right of way outside of the highway, then it increased the exposure which the public would be liable to, and if it left unfenced any part of its right of way outside of the highway, and if by reason of that the horse was killed, then the defendant would be liable. And it is the duty of the plaintiff to trace the killing of the horse to the neglect to fence. In other words, the killing of the horse must be, in a degree, and to a certain extent, the consequence of the neglect to fence, if there was any such neglect. The mere fact that the horse was killed there does not of itself give any right of action. The question is, Did the defendant neglect in its duty to fence, and by reason of that was the horse killed? The neglect of duty must be shown upon the part of the defendant. Was the killing of this horse due to the defendant's failure to fence this right of way at the point where it was its duty to fence it, viz.: at the point outside of the highway? If not, there can be no recovery, but if so there may be a recovery."

The defendant made a motion for a new trial for the reasons that the verdict was contrary to law and the evidence; that the question was one of law to be decided by the court, and that the verdict should have been directed for the defendant; that the undisputed evidence established the fact that the cattle guard was built in accordance with the statute, at the junction of the railroad right of way and the public highway, because the undisputed evidence showed the highway to be 37 feet wide at the point where the cattle guard had been constructed, because the undisputed evidence showed that the cattle guard in question had been built up to, and adjoining the highway itself; that the highway is fenced to and runs to the cattle guard; that the cattle guard could not be nearer to the highway without being on, or encroaching on the highway, because the highway was shown to be a state road, and to have been laid out and constructed more than twenty years ago, because the undisputed evidence established the fact that the boundaries of the highway were the fences along either side, because upon the evidence the width of the highway was a matter of law for the court, and because the railroad company could not be compelled to construct its cattle guard on a highway, or encroach on the highway with

its right of way. In its reasons for denying the motion for a new trial the court said in part: "Much time was spent by counsel in showing the location of the southerly cattle guard, and its relation to, and distance from, the fence and the highway on the easterly side of the railroad track. I did not regard this as so material and controlling as the distance this guard was from the crossing, and the location and distance of this guard from the fence on the westerly side of the track, and how much territory was left unfenced and exposed there, because the horse got to the point on the right of way, and upon the track where it was struck, immediately from the westerly side of the track. There was no showing, on either side, how far it was from the outer edge of this guard to the fence along the westerly side of the track; nor whether that fence could have been brought nearer to the railroad track; nor whether the connecting fence on the west side could have been brought nearer to the crossing proper, all without encroaching upon the highway. The horse was killed by reason of the unfenced space on the west of the track, and not by reason of the space left on the east. As the proofs did not show the dimensions of this unfenced space on the west, and as it appeared that the cattle guard was 114½ feet from the crossing, I think it was an open question whether defendant had extended its westerly line of fence, and its cattle guard up to the highway line, on the westerly side of the track, whether defendant had, on the westerly side of the track, at this point, left uninclosed territory not part of the highway, that should have been inclosed by fences; in other words, whether defendant had on the west constructed its fences upon the highway lines."

Exceptions were duly filed to the refusal to grant a new trial, and the record contains 21 assignments of error. These assignments of error are grouped by counsel for appellant, and urged in the following positions:

(1) That the highway or state road, so called, was as a matter of law a legal highway, with its west boundary line, the fence, running between the right of way and highway, and joining with the cattle guard.

(2) As matter of law, if the cattle guard was constructed so that the east end of such guard ran up to the highway and was connected with the fence along the highway, the railroad company had done its duty so far as concerns the location of the guard, and cannot be held liable for the killing of the horse.

(3) Assuming, but not conceding, the rule to be that, in the case of a diagonal crossing, the railroad should construct its cattle guard along the line of highway, it is contended that in this case the railroad could not be held to do this as a matter of law, because the highway and railroad were so located as to make it geographically impossible, and

because of the impracticability and inconvenience attendant upon such construction.

(4) The court in its charge so submitted the case to the jury as to convey to them an erroneous impression as to the facts for their consideration, and the application of the rules of law upon which they acted in arriving at a verdict in favor of the plaintiff.

(5) The evidence showed the horse to be in the highway at the time it was struck by the train.

1. No time need be spent upon the question whether this state road, so called, was a legal highway. It is conceded to have been such by the plaintiff, but it is claimed that its width was a question for the jury.

[1] There was evidence tending to show that it was at one time an old trail that had been cut out and used for years as a tote road, and that it was opened about 1873. We think that its width, depending upon the user and nonuser, was a question for the jury. In the case of *Coleman v. Flint & P. M. R. Co.*, 64 Mich. 160, 31 N. W. 47, it was held that a highway can be partially discontinued by nonuser, and stands, as against long (adverse) possession, no better than any other property, and a highway by nonuser only is measured as to its width by such use. In that case, as here, counsel cited the statute—the present section 4061, *Compiled Laws*—and the fact was noted by the court that the clause in that statute making such roads 4 rods wide, was adopted in 1881, after the highway in question had become a public road by user. We think, therefore, that the question of the width of the road was one for the jury, and that the court did not err in submitting the question to them.

[2, 3] 2. Was the cattle guard properly located? This, we think, was also a question for the jury, and was properly submitted by the court in its charge to them. It would seem that the court must have had in mind the case of *Parker v. Railway Co.*, 93 Mich. 607, 53 N. W. 834. This was a highway crossing case, and the question presented was similar to the one we are considering. After referring to the statute providing for railway fences, Chief Justice McGrath, speaking for the court, said: "This statute evidently contemplates that railway tracks shall be exposed within the limits of the highway only. By exposing its right of way and tracks beyond the limits of the highway, the defendant had increased the danger, and rendered itself liable for damage occasioned thereby. *Andre v. Railroad Co.*, 30 Iowa, 107; *Railroad Co. v. Newbrander*, 40 Ohio St. 15; *Railroad Co. v. Morgan*, 38 Ind. 190; *Railroad Co. v. Herbold*, 99 Ind. 91." There is evidence in the record that the cattle guard in question was laid at right angles with the railroad track, and was back about 115 feet from the crossing proper, and that no fence was maintained on the west side of the track for the entire distance of 115 feet,

and that the only fence referred to was a private fence, several rods away from the railroad track, between the cattle guard and the highway proper, thus forming a pocket on what was, by plaintiff, claimed to be land belonging to the railroad company, no part of which was highway, unfenced and unguarded, into which the plaintiff's horse entered, and from which it came upon the track and was killed. We think it was a question of fact for the jury to determine where the boundary lines of the highway were.

3. Was the guard as near the highway as practicable? We think this was also a question for the jury and was properly submitted to them.

4. Should the court have directed a verdict? We cannot agree with appellant's counsel that only a question of law was presented. We think, as we have already said, that a question of fact was presented, and was properly submitted to the jury.

[4] 5. Was the horse in the highway when it was struck by the train? It is very evident that the horse was upon the railroad track when it was struck and killed by the train. Whether it was within the boundary of the highway proper was a question for the jury, and was answered by their verdict.

We find no reversible error in the record, and the judgment below is affirmed.

PEOPLE v. SWIFT.

(Supreme Court of Michigan. Nov. 8, 1912.)

1. CRIMINAL LAW (§§ 121, 1150*)—CHANGE OF VENUE—DISCRETION OF COURT.

Under Pub. Acts 1909, No. 67, rulings changing the venue are largely within the court's discretion and will only be reviewed in case of a clear abuse of discretion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 241, 3044; Dec. Dig. §§ 121, 1150.*]

2. CRIMINAL LAW (§§ 115, 1150*)—CHANGE OF VENUE—DISCRETION OF COURT.

While accused must ordinarily be tried in the county where the offense was committed, the court may, under proper conditions, change the venue; but, in absence of mandatory statute, its ruling on a motion to change the venue will not be disturbed unless there is a palpable abuse of discretion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 235, 3044; Dec. Dig. §§ 115, 1150.*]

3. JURY (§ 103*)—COMPETENCY—OPINIONS FROM NEWSPAPER REPORT.

A juror is not disqualified because of having formed an opinion from reading newspaper reports of the case, if he states that he has no prejudice and can try the case impartially according to the evidence.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 461-479, 497; Dec. Dig. § 103.*]

4. CRIMINAL LAW (§ 126*)—CHANGE OF VENUE—LOCAL PREJUDICE.

In ruling on a motion for a change of venue on account of local prejudice, the trial court could consider the fact that the motion was passed upon more than a year after the case was on the calendar for a second trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 243; Dec. Dig. § 126.*]

5. CRIMINAL LAW (§ 134*)—CHANGE OF VENUE—LOCAL PREJUDICE.

In ruling on a change of venue because of local prejudice, the court may act in part on its personal knowledge of the alleged prejudice existing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 243, 251, 252; Dec. Dig. § 134.*]

6. CRIMINAL LAW (§ 137*)—VENUE—MOTION FOR CHANGE—TIME OF CONSIDERATION.

The trial court properly deferred final determination of a motion to change the venue until after the examination of the jurors as to their qualifications.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 253; Dec. Dig. § 137.*]

7. CRIMINAL LAW (§ 126*)—VENUE—CHANGE—PREJUDICE.

If a fair and impartial jury could in fact be obtained, a motion for change of venue because of local prejudice could be properly denied, even though prejudice in the community was in fact shown to exist.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 243; Dec. Dig. § 126.*]

8. CRIMINAL LAW (§ 1114*) — APPEAL — BRIEFS.

An explanation of statements in the prosecuting attorney's opening statement cannot be considered when embodied in the briefs if not contained in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2918, 2921; Dec. Dig. § 1114.*]

9. CRIMINAL LAW (§ 730*)—APPEAL — HARMLESS ERROR.

A remark by the prosecuting attorney in his opening statement that he expected to prove that accused exercised hypnotic powers over a certain person was not reversible error, though he failed to prove that fact, where the judge cautioned the jury to disregard such fact; it not being assumed that the statement was made in bad faith.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

10. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES—SEXUAL CRIMES.

Prosecutions involving sexual offenses constitute an exception to the rule that evidence of distinct offenses of the same kind is not admissible, so that in a prosecution for committing an act of gross indecency with a boy, evidence of similar prior acts with the boy was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

11. CRIMINAL LAW (§ 364*)—RES GESTÆ.

In a prosecution for committing an act of gross indecency with a boy, evidence that immediately after the completion of one of the acts accused committed indecencies with a dog was admissible; being a part of the res gestæ in the transaction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 805, 808-810, 813, 816-818; Dec. Dig. § 364.*]

12. CRIMINAL LAW (§ 699*)—TRIAL—SCOPE OF ARGUMENT—DISCRETION OF COURT.

Discretionary control rests with the trial judge in determining the scope of the argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1655, 1656; Dec. Dig. § 699.*]

13. SODOMY (§ 1*)—PROOF—TIME OF OFFENSE.

Time is not of the essence of the offense defined by Pub. Acts 1903, No. 198, providing that any male who commits any act of gross

indecency with another male person shall be deemed guilty of a felony.

[Ed. Note.—For other cases, see Sodomy, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

14. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REQUESTS—ALIBI.

In a prosecution for committing an act of gross indecency with a boy, in which accused claimed that he was in another part of the state at the time alleged in the information, the court instructed that it was not necessary for the people to allege the identical day on which the offense was committed; that it was charged as being on the 23d of November; and that if the jury find that the act took place as claimed, but not on the 23d but on some other day prior thereto during November, it was sufficient; and further instructed that an alibi meant that defendant was not there at the time and place testified to by the prosecuting witness, but was somewhere else in the southern part of the state; that an alibi was as legitimately a defense as any other, and was a conclusive defense since accused must have been at the place, and in the very room testified to by the state's witness, when he committed the act, and the question was whether it occurred as claimed by the prosecuting witness, if it occurred at all. *Held*, that the instruction sufficiently presented the defense of alibi, so that a requested charge was properly refused that, if the evidence offered to show that accused was in the southern part of the state at the time the people claimed the offense was committed, raised a reasonable doubt as to whether he was present at the place the prosecution alleged the offense to have been committed, the jury should not convict, since the defense of alibi was as legitimate as any other defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

15. CRIMINAL LAW (§ 783*)—INSTRUCTIONS—PREVIOUS OFFENSES.

In a prosecution for committing an act of gross indecency with a boy, in which evidence of previous similar acts by accused was admitted, the court instructed that, even though the jury believed such previous offenses had been committed, they could not find accused guilty unless satisfied beyond a reasonable doubt that he had committed the specific offense charged, and the others could be considered as bearing upon the relationship existing between accused and the boy, in so far as it might throw light upon the circumstances proven in connection with the offense charged, so that the jury should determine accused's guilt solely with relation to the offense charged. *Held*, that the instruction sufficiently presented the purpose for which proof of the previous acts could be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1734, 1735, 1872-1876; Dec. Dig. § 783.*]

16. CRIMINAL LAW (§ 957*)—VERDICT—IMPEACHMENT BY AFFIDAVIT OF JURORS.

Affidavits of jurors cannot be received to impeach a criminal verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2392-2395; Dec. Dig. § 957.*]

17. CRIMINAL LAW (§ 1156*)—APPEAL—CONCLUSIVENESS OF FINDINGS—CREDIBILITY.

In reviewing an order denying a motion for a new trial, based on the ground that the verdict was against the weight of the evidence, the appellate court can only determine whether there was a manifest abuse of discretion in denying the motion, and cannot pass upon the credibility of witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.*]

Exceptions from Circuit Court, Charlevoix County; Frederick W. Mayne, Judge.

Hermion L. Swift was convicted of committing an act of gross indecency with a boy in violation of statute, and excepts. Affirmed.

Argued before MOORE, O. J., and STEERE, MCALVAY, STONE, and OS-TRANDER, JJ.

E. N. Clink, of East Jordan (Philip H. Travis, of Grand Rapids, and W. L. Carpenter, of Detroit, of counsel), for defendant, Franz O. Kuhn, Atty. Gen., Dwight H. Fitch, Pros. Atty., of Jordan, and A. B. Nicholas, Asst. Pros. Atty., of East Jordan, for the People.

STEERE, J. In December, 1910, respondent was convicted by the verdict of a jury in the circuit court of Charlevoix county under an information charging him with having, on November 23, 1909, committed an act of gross indecency with a boy named Merrill Griffin, in violation of Act No. 198 of the Public Acts of 1903, which provides: "That any male person who in public or private commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be deemed guilty of a felony," etc. The offense is charged to have been committed at the "Beulah Land Farm for Boys," located near Boyne City in Charlevoix county, an institution promoted and conducted by respondent and of which said Merrill Griffin, a lad about 11 years of age, was an inmate. The place was commonly called the "Beulah Home." It was advertised and conducted as a farm home for the detention, care, and training of wayward boys. It was supported by contributions from charitably inclined persons in various parts of the state, payments made by parents and guardians of boys detained there, and the products of the farm upon which the boys were required to work. At the time of the alleged offense there were some 25 or 30 boys at the Home, whose ages ranged from 8 to 15 years.

It is sufficient, without going into the unsavory details, to say that the information clearly stated facts which constitute the offense charged under the statute, and the boy Griffin positively testified to such facts. The act complained of is claimed to have been committed secretly in respondent's room in the Beulah Home; there being no witnesses to such conduct but the two participants. Respondent's denial was by a plea of not guilty. The substantive case necessarily rested on the evidence of Merrill Griffin, the only direct witness who testified. The testimony introduced by the defense was an attack upon the credibility of the witness Griffin, and in support of a claim of alibi and a conspiracy against respondent to depose him from management and control of the Beulah Home.

The bill of exceptions presents for our consideration 127 allegations of error claimed to have been made by the circuit court during the trial of the cause. While they have all been examined and considered, many of them call for no comment beyond crediting defendant with saving all possible questions for review. It would be a remarkably versatile court which could freight with that many errors a case in which the controlling issue was a question of the veracity of one small boy.

After sorting over these allegations with a view to classifying them, they seem to condense into the questions of whether there was prejudicial error in the court denying defendant's motion for a change of venue; in a statement made by the prosecuting attorney in his opening as to hypnotic powers possessed by respondent, which was not later substantiated by testimony; in the admission and rejection of certain testimony, as to similar previous acts between the parties and an alleged conspiracy against respondent; in certain remarks made by the prosecutor in his argument to the jury; in the charge of the court; and in its refusal to grant a new trial. The case had been previously tried, resulting in a disagreement of the jury. When it was again called up for consideration, before the second trial began respondent moved for a change of venue, presenting lengthy affidavits by himself, his attorneys, bondsmen, and others, together with various newspaper clippings and other matters which occupy 68 pages of the printed record.

The motion was based on a claim that respondent could not obtain a fair and impartial trial in Charlevoix county because of local prejudice against him arising from several sources. It was claimed that on his previous trial the language and conduct of the court officers were prejudicial; that a civil suit in chancery was pending against him instituted by the purported trustees for the Beulah Land Farm by reason of which they indulged in talk derogatory to his character; and that the newspapers of the county had published false and defamatory statements against him touching said chancery suit and the criminal case then about to be tried—all of which tended to prejudice and disqualify people of the county who otherwise would be competent to act as jurors on the trial. After argument said motion was denied; the court saying: "At the time of selecting the jury, if it appears that the jurors have not the qualifications that they should possess, then a change of venue can be ordered, but at this time the motion is denied." After the case was called for trial and some time had been consumed in examining jurors as to their qualifications, and respondent had exhausted his peremptory challenges, the motion for a change of venue was renewed; respondent presenting in connection with such renewal further newspaper clippings, the most pertinent of which

read as follows: "The jury has been called back next Tuesday when the Swift Case will be taken up in circuit court. Judge Mayne has recently held that Mr. Swift is sole owner of the Beulah Home and all of the funds derived from subscriptions and donations valued at \$10,000.—Charlevoix County Herald, Dec. 24, 1910." "This paper does not wish to do Mr. Swift an injustice. It does not wish to prejudice his case nor to prejudice him. It is confident he will get a fair trial. We have seen some signs, however, that various means were being used to create public sentiment favorable to him; trying to create the impression that he was a martyr. Frankly we think Mr. Swift has been guilty of trying to 'work' the papers.—Boyne City Evening Journal, Dec. 23, 1910." The motion was again denied and a jury subsequently obtained. The time occupied in obtaining the jury is stated by counsel for the respective sides at from a little over a day to a day and a half. In his reasons for denying the change of venue, given by the court when deciding respondent's motion for a new trial, he said: "That the decision upon the motion was without prejudice is shown by the examination of the jurors as made upon the trial of the cause when challenged as to their competency to sit as jurors. In no important criminal case within my experience has the absence of prejudice in those examined as jurors been more marked. That the overruling of this motion did not result in injury to the respondent is shown by the fact that none of the examination of the jurors is set forth in the bill of exceptions submitted and now under consideration by me. From this I assume that, in the opinion of counsel, no error could be predicated upon the answers of jurors upon their voir dire examination."

[1] Act No. 67 of the Public Acts of 1909 provides: "Each of said courts, upon good cause shown, may change the venue in any case pending therein," etc. It is only "on good cause shown" that the court has any power to act, and then he may grant the change in his discretion. In the early case of *Greeley v. Stilson*, 27 Mich. 153, it was said: "A motion for change of venue is, unless where otherwise provided by law, a matter which rests in discretion and is not a subject for review." It is, however, now recognized that where rulings on such motions are a clear abuse of discretion, manifestly subversive of justice, they may be reviewed and corrected on writ of error.

[2] It is an elementary general rule that in criminal cases the respondent must be tried in the county where the crime is charged to have been committed; but the court may, in exceptional cases, where a special showing makes it plain that the ends of justice so demand, or where statutory provisions expressly so provide, change the venue to another county. Where there are no mandatory, statutory provisions, it is now settled beyond question that the court's ac-

tion in ordering such a change or refusing it is discretionary, and not to be disturbed on review, unless there clearly appears a palpable abuse of discretion. 12 Cyc. 243, and cases cited.

A considerable portion of the newspaper clippings presented with the motion for a change of venue relates to the chancery suit over the Beulah Home. The result of that suit is stated in the clipping of December 24, 1909, from the Charlevoix County Herald, presented when the motion was renewed at the trial. By that clipping the public was advised that respondent had been vindicated and found to be in the right in his suit with the purported trustees of the Home, who he claimed had slandered him, and it would also appear in that connection that the judge who heard that suit, and who was presiding in the criminal case, could and would fairly and impartially dispose of matters coming before him in which respondent was interested. The clippings, taken as a whole, seem to be such as are often found in local newspapers in relation to somewhat sensational events and criminal proceedings thought to be of general interest. They purport to report the charges against defendant and events as they took place in that connection, in court and out. With one possible exception, no positive opinion was offered as to the guilt or innocence of the respondent. On the whole, they are of that class of publications usually appearing in the public press when such matters arise and with which all newspaper readers are more or less familiar.

[3] "Newspaper reports are ordinarily regarded as too unreliable to influence a fair-minded man when called upon to pass upon the merits of a case in the light of evidence given under oath, and it is now a well-settled rule that a juror, although he may have formed an opinion from reading such reports, is competent if he states that he is without prejudice and can try the case impartially according to the evidence, and the court is satisfied he will do so." 24 Cyc. 298.

[4] This offense is charged to have been committed in November, 1909. The motion for a change of venue was passed upon over a year later, when the case was on the calendar for a second trial. The lapse of time which intervened was a matter proper for the court to take into consideration; it being well known that, even in cases where adverse public sentiment and prejudice are aroused at the time, public feeling and interest soon abate. This is so well recognized that counsel for defendants in criminal cases are prone to seek delay.

[5] It has been held that the court is not precluded from acting in part on personal knowledge possessed by it. *Giese v. Schultz*, 60 Wis. 449, 19 N. W. 447. This is particularly applicable to certain charges in the affidavit of counsel for respondent relative to

prejudicial conduct of other members of the bar and officers of the court in connection with the case. The warrant was issued in this case on complaint of the marshal of Boyne City after an investigation made by city and county officials. Some of the official misconduct complained of is charged to have occurred during the progress of the first trial, in and around the courtroom. Charlevoix county is large geographically, with a population in the neighborhood of 20,000. The judge had presided at the trial of this case once before in that county at a time less remote from the date when the offense was charged to have been committed, had officially acquired knowledge of the prevailing sentiment amongst those called as jurors at that time, and knew something of what would be encountered in passing upon jurors' qualifications at the second trial.

[6, 7] It was proper and lawful for him to defer final determination of the motion until after the examination of the jurors in the case as to their qualifications, and if a fair and impartial jury could be obtained, as appears to have been the result, it is held that this may justify denying the motion, even though other facts apparently entitling the accused to its being granted may have been shown, for the actuality of the main fact "demonstrates the possibility of its existence." 12 Cyc. 249, and cases cited. It has even been held that a failure, or delay, or difficulty in obtaining impartial jurors is not conclusive in such a case. But that does not seem to have occurred here. The length of time spent in getting a jury, or the fact that respondent exhausted his peremptory challenges, is not of controlling significance. Under the dilatory system of examining and selecting jurors which often prevails, days, and sometimes weeks, are spent in such examinations in sensational cases, and, if that could be made a controlling ground for change of venue, it would offer special inducement for counsel to exhaust their peremptory challenges and delay the case to the limit when examining jurors. We are not advised how many jurors were excused in this case, or the nature of their preliminary examinations, except as the judge, who has been upon the bench for many years, states: "In no important criminal case within my experience has the absence of prejudice in those summoned as jurors been more marked." It is difficult, and often impossible, for appellate courts to see matters as they actually existed and appeared on the trial to the presiding judge, and that should not be overlooked in passing upon a question of the proper exercise of discretion. We are not prepared to say that there was an abuse of discretion in this instance.

[8, 9] After concluding his opening statement, the prosecuting attorney asked permission of the court to make a further opening, which being granted, against objection, he

stated to the jury that the prosecution expected to be able to prove that respondent practiced hypnotism, and that the witness Merrill Griffin was subject to hypnotic suggestion exercised over him by respondent. No proof on that subject was introduced or offered during the trial. In his charge the court commented on this failure and said to the jury: "Nothing has been said or done, no evidence has been introduced up to this time of any hypnotic power, if such a thing exists, and I do not say whether it does or not, and it is quite immaterial whether it does or not on the part of the respondent. So you will not consider this phase of the case at all."

It is asserted by the prosecution that this statement was made in the utmost good faith, and an explanation was offered, which does not appear in the record and should not appear in their briefs. All this court can consider is that in his opening the prosecuting attorney stated he expected to be able to prove certain things relative to the exercise by respondent of hypnotic powers over the witness; that he failed to do so; that the judge cautioned the jury to disregard the subject—and then determine whether or not those incidents embody prejudicial error. We cannot assume that the statement was made in bad faith. It is asserted that it was not. "It is true that counsel referred to some matters not established by the testimony. In the opening of a case some latitude must be allowed counsel in stating what they expect to prove. That on the trial they may not be able to show all that they claimed is not necessarily an indication that the statement was not made in good faith." *State v. Grafton*, 89 Iowa, 109, 56 N. W. 257. Failure to prove what it was stated to the jury the prosecution expected to be able to prove can well be urged as more disconcerting and, at least, as prejudicial to the prosecution as to the defense, and it would open the door to the defense for a caustic argument to the jury, which is not usually overlooked when such opportunities present themselves. The judge in his charge emphasized the failure of the prosecution in that particular and did what he could to eliminate the subject from the deliberation of the jury. "A failure to prove all that the prosecuting attorney in his opening to the jury in good faith stated he expected to prove is not ground for reversal." *People v. Ecarus*, 124 Mich. 616, 83 N. W. 628.

[10] The prosecution was permitted to introduce testimony of two previous acts of misconduct between the same parties similar to the one relied on for conviction, in one of which a small dog figured as an interested spectator and to a limited degree as a participant. This is strenuously urged to have been prejudicial error under the well-settled rule that the prosecution may not prove another and distinct offense of the same kind for the purpose of rendering it more probable that he committed the offense for which he

is on trial. To this rule there are numerous exceptions, one of which, long recognized and well established, is in prosecutions involving sexual offenses. The reasoning in support of that exception is significantly applicable to cases like the one before us. Here peculiar secret criminal relations are involved and testified to which, unconnected with anything leading up to them, would appear in a marked degree unnatural and incredible. The facts preceding and inducing this transaction are most essential to an understanding of the situation. Where previous acts of intercourse between the same parties are shown, it is something more than merely proving the commission of similar offenses—it is rather proving a repetition of the same offense between the same parties, identical in its criminal features. The following language in an early case, by Judge Christianity, in which the admission of such testimony was upheld, is particularly applicable here: "In the order of nature, facts do not occur single and independent, isolated from all others, but each is connected with some antecedent fact, or combination of facts, from which the fact in question follows as an effect from a cause. Torn from this necessary connection, and exhibited alone, many real occurrences would appear under the guise of falsehood, and truth itself would be made to lie. To permit the evidence, therefore, of an isolated transaction, which could only be made to appear probable by exhibiting the antecedent facts which induced it, and yet to exclude from the investigation all such antecedent facts, would be to set at defiance the order of nature and the laws of truth which God has stamped upon the human mind." The principles there laid down have more than once been cited with approval and followed. *People v. Clark*, 33 Mich. 112; *People v. Burns*, 67 Mich. 537, 35 N. W. 154; *People v. Hendrickson*, 53 Mich. 525, 19 N. W. 169; *People v. Skutt*, 96 Mich. 450, 56 N. W. 11; *Matthews v. Detroit Journal Co.*, 123 Mich. 608, 82 N. W. 243; *People v. Nichols*, 159 Mich. 355, 124 N. W. 25; *Wigmore on Ev.* §§ 216, 357, 360, 398.

[11] We think the testimony objected to comes within the exception and was admissible under the above authorities. The so-called "dog incident" complained of was a pertinent part of the "things done" in one of those transactions—a concomitant of the act. "The proper inquiry, when the circumstance is offered, is, Does it fairly tend to raise an inference in favor of the existence of the fact proposed to be proved? If it does, it is admissible whether such fact or circumstance be innocent or criminal in its nature. It does not lie with the prisoner to object that the fact proposed as a circumstance is so heinous in its nature and so prejudicial to his character that it shall not be used against him, if it bears upon the fact in issue. The atrocity of the act cannot be used as a shield under such circumstances, or as a bar to its legitimate use by the prosecu-

tion." *People v. Wood*, 3 Parker Cr. B. (N. Y.) 681.

It was claimed by respondent that his prosecution was the result of a conspiracy, instigated by one of the older boys named Mack and a hired hand on the farm named Jones, in which some of the younger boys were induced to participate; the purpose being to depose respondent from control and secure his position for Jones, after which Mack and the other boys would have easier times and, with Jones' acquiescence, might ultimately escape from the farm. In the early stages of this inquiry, various questions propounded by counsel for the defense, relating particularly to Jones' words and acts, were objected to and sustained, but later in the trial the court said to defendant's counsel: "I will say that there were some questions excluded yesterday that I think might be material, considering the testimony that was later introduced connecting Mr. Jones and the other party. I did state then that if later Mr. Jones was sufficiently connected with the transaction I would let the statement be considered. So you may cover that point if you wish—that is present them—and I will pass upon them again." After this statement by the court, further testimony relative to a conspiracy, including what Jones said and did, was introduced. That subject was quite fully gone into, and we think ample opportunity was given defendant to present all legitimate testimony offered.

[12] It is urged that the case should be reversed on account of certain unfair and prejudicial remarks of the prosecuting attorney in his argument to the jury. We have no hesitation in concluding that some of them are perfectly legitimate argument; others, in the fragmentary and manifestly incomplete form they appear in the record, without context or that to which it might be implied they are a reply, seem intemperate and perhaps prejudicial. In his reasons for denying a motion for a new trial, the court said: "These remarks, if prejudicial, which I do not so consider, were in direct answer to allegations of fact made by respondent's counsel in his argument that respondent personally and other witnesses had testified to certain facts. This statement by counsel was incorrect. If the prosecuting attorney were to deny these assertions of fact by counsel for the defense at all, he must use either the exact language which he employed or other language of the same import. He cannot, in justice to the people's cause, allow these statements to go unchallenged." Respondent was not sworn, and of course did not personally testify.

We are unable to say from the record that these remarks were not justified by the arguments of opposing counsel or warranted by the evidence, or that the court did not properly exercise the discretionary control which we have held rested with him. *People v. Tubbs*, 147 Mich. 1, 110 N. W. 132; *People v. Peck*, 147 Mich. 84, 110 N. W. 495;

People v. Davis, 137 N. W. 61; People v. Neely, 137 N. W. 150.

Numerous errors are assigned on refusal of the court to give defendant's requests to charge and on the charge as given. Twenty-two requests were presented. While none of them was given in the language of the request, and they were all marked "refused," the material substance of many was given and the subjects they presented covered beyond the possibility of being seriously questioned. Counsel particularly complain of failure to give seven enumerated requests relating to the alibi feature of the defense, which it is stated were intended specifically to call attention to that subject "in such a way as to get the proper benefit and advantage of the same in case the jury found the facts involved therein in his favor, or in case they were not able to agree on adverse findings as to such facts." Three requests are pointed out as unquestionably entitled to be given under People v. Hare, 57 Mich. 518, 24 N. W. 849. They are as follows: "(10) I charge you that if the evidence offered on the part of the defendant, to the effect that the said Hermon L. Swift was in the southern part of the state at the time the people claim the offense was committed, raises a reasonable doubt in your minds as to whether he was present at the Beulah Land Farm at Boyne City at the time the evidence of the people alleges the offense to have been committed, then you should not convict the respondent." "(12) The defense of an alibi, as it is called, is as legitimate a defense as any other defense, and you are to give the same credit to witnesses who testified concerning it as to those who testified to anything else, and, if you believe it to have been established, then you are bound to acquit the defendant. (13) I further charge you that you must all be of one mind as to whether the defendant, Hermon L. Swift, was at home at the time the evidence in this case alleges the act to have been committed, and you are not at liberty to convict the defendant, part of you believing that he was in the southern part of the state at that time and part of you believing that he was at home, and if you cannot all agree that the defendant, Swift, was at home at that time you should not convict the defendant." No. 12 is copied from request No. 17 in the Hare Case, and No. 13 here closely follows No. 21 in that case. Hare was charged with the murder of one McCrone on a certain date. McCrone might have been murdered by others on that date in Hare's absence. A witness named Billington gave evidence that he was present and saw Hare commit the deed; testifying positively as to the place, particular day, and time of the day. His was the only testimony as to time, and from his testimony McCrone could not have been killed at any other time. Under such testimony it was held certain specific requests as to alibi should be given. In this case the offense

is charged under a *videlicet* as occurring "heretofore, to wit, on the 23d day of November, A. D. 1909."

[13] Time was not of the essence of this offense. It could be stated in the information as one time, and the proof might show another; evidence could be given of such an act within the jurisdiction of the court and the statute of limitations, and the act indicated by the evidence could thenceforth be deemed the act charged. The boy Griffin was unable to give the exact date, by month and number. The prosecution appears to have early recognized that he could not clearly do so. Counsel stated to the court that he relied on a specific act committed a week or two before the date set up in the information, "on or to wit, on or about that date, it might have been a week or two weeks before that." Griffin testified to three distinct transactions—one in the summer, in August, in "Willis Roberts' room," one before that in the "guest room," and the one on which the prosecution relied for conviction in respondent's room. "A little before Thanksgiving Day the last act was committed—about a week or two before." "About a week before I went to Rowan's," "when I went up in his room the last time he gave me one-half dozen postal cards. * * * He had a whole lot of them packed in his suit case. The suit case was open the time I saw it. This last act of indecency occurred before he went away and that was in November." "I have no means of remembering except the post cards." In answer to suggestive questions as to dates, his testimony was inharmonious and unsatisfactory. His best knowledge of the time was manifestly by its relation to the season of the year and other events which would naturally interest a young boy. It appeared from other testimony that respondent was away from the Home on a trip of 10 or 12 days, returning on the evening of November 24th. Griffin testified to his going on that trip, though unable to give dates, and consistently maintained the act took place shortly before.

[14] So far as the principles involved in the requests quoted apply to the facts in issue in this case, we think the instructions given were sufficient. On that branch of the case the court said in part: "Now, as to the time of committing this offense, * * * I will say it is not necessary for the people to allege the identical day of the month upon which the offense was committed. It is charged as being on the 23d day of November. If you find that this act took place as claimed by the people, but that it was not on the 23d but on some other day prior thereto during the month of November, that is sufficient. * * * The defendant in this case asserts an alibi. Now an alibi means that this defendant was not there at the particular time and place testified to by Merrill Griffin; that he was somewhere else, in the southern part of the state. Now an

alibi is as legitimate a defense as any other; in fact, it is a perfect and conclusive defense. Mr. Swift could not commit this offense if he was in the southern part of the state; he must have been at Beulah Home and in that room of the Home with Merrill Griffin when he committed it. Now some testimony has been admitted as to a trip that Mr. Swift made. This offense, if committed at all, must have been committed prior to his making that trip; it could not have occurred during his absence. Of course you need no law to tell you that, gentlemen. The question is, Did it occur as claimed by the boy? And it must have occurred before taking that trip if it did occur at all." On the questions of reasonable doubt, and the jurors all being of one mind before they could convict, we think the court charged fully and correctly, in language as plain and easy for the jury to understand, as that contained in the request presented by counsel.

[15] We think the court also sufficiently instructed the jury as to the manner in which proof of the previous offenses should be considered by them. He stated to them that, even though they should believe such previous offenses had been committed, they could not find respondent guilty unless they were satisfied beyond reasonable doubt that he committed the third specific offense, on which the prosecution relied; that the others could only be considered as bearing upon the relationship which existed between Merrill Griffin and respondent, in so far as that relationship might throw light upon the facts and circumstances proven in connection with the offense specifically charged; concluding: "So you will determine in this case the guilt of respondent solely with relation to the offense charged." As to the individual responsibility of jurors, the court said: "There are 12 of you jurors, each one of you having individual responsibility equal to that of each and every juror in the case. You are to take the testimony and harmonize it; it is your duty to harmonize it, if possible with the innocence of the accused, because under our law it is the duty of jurors in every criminal case to enter upon the trial of the case with the presumption of innocence and harmonize all the testimony in the case in accordance with the presumption that he is innocent." Without referring further to the exceptions taken to the charge of the court, we are satisfied that the case was fully and fairly submitted to the jury by a charge which covered all material issues involved, advising the jurors of the nature of the case and their duties in that connection. The issue of fact for them to decide was well defined and simple. The rules of law for them to follow in deciding the facts were elementary. If once clearly stated to them in plain language, technical elaboration in varying phraseology, with delicate distinctions over which counsel themselves might, and often do, disagree, would seldom aid and often bewilder.

After the verdict, respondent's counsel made a motion for a new trial, basing his application on the court's denial of a change of venue and various other errors alleged to have arisen in the case. This motion was denied and later renewed; counsel alleging that the verdict was against the weight of evidence and that certain jurors convicted respondent against their inclination, claiming to have misapprehended the charge of the court and to have been improperly influenced by the persuasions of other jurors. In support of the latter proposition the affidavits of certain jurors were presented.

[16] No question of extraneous influence was raised, and it is well settled that the affidavits of jurors cannot be received to impeach their verdict. *People v. Stewart*, 163 Mich. 1, 127 N. W. 816, in which the court said: "This motion is based upon the affidavits of two jurors to the effect that the jury considered the failure of respondent to take the stand as a witness in her own behalf and consented to the verdict of conviction largely for this reason. As we have heretofore held, the affidavits of jurors are not receivable to impeach their verdict." This question is fully discussed and authorities cited by Judge Montgomery in *Re Merriam's Appeal*, 108 Mich. 454, 66 N. W. 372.

It is most strenuously urged in support of the motion for a new trial that the verdict is manifestly against the weight of evidence and a gross injustice which should be righted by this court. To sustain this contention, the testimony and character of the witness Griffin are reviewed and vigorously attacked. It is urged that his testimony is so full of contradictions, inconsistencies, and omissions as to be wholly unworthy of belief. We are told in counsel's brief "that Merrill Griffin, at the time these charges were made and this trial was had, was still an unmitigated liar is so clearly shown by the record in this case that no one can fairly question it." That there are contradictions in his testimony is apparent; that he was a mauvais sujet, a wayward boy, and intrusted to respondent's care for that reason is undisputed. All his shortcomings and the inconsistencies of his story were thoroughly sifted and emphasized before the jury. When he was on the witness stand, skilled counsel, equipped with the testimony he had twice previously given, before the justice and on the former trial, subjected him to a grueling cross-examination which laid bare all the shortcomings of his short life and disclosed from every angle the weak points in his testimony. He was a boy 11 years old, evidently of immature intellect, in no sense competent to hold his own in such an endurance run, or by cunning to either meet or evade the searching quiz of respondent's attorneys. He was before the eyes of the jury to be observed and studied; they saw and heard the worst. His story was undisputed, except by its alleged self-contradictions.

tions and the impeachment of his character and veracity. Apparently he was not altogether bad if respondent's measure of him is to be credited. About the time these troubles arose, in a letter to the boy's father dated November 10, 1909, respondent wrote: "I am glad to report that he is doing fine in school and everywhere, and in fact we have not been able to find any fault with him whatever; he is O. K." We are asked to set aside this verdict, against the judgment of the jury and the trial judge, on the ground that the testimony was a malicious falsehood, instigated by Jones, the hired man, and some of the boys on the farm, in a conspiracy to compass respondent's ruin and get rid of him, to which the public officials were a party, either knowingly and maliciously or as ignorant and misled tools. Their conduct and motives are questioned and impugned.

In reviewing that proposition we can with propriety consider somewhat the nature and history of this case as disclosed, not only by the testimony taken at the trial, but the record as a whole. It is a criminal prosecution, instituted in the name of the people of this state, presumably in the public interest, for the suppression of crime and protection of society. While such is the presumption in all criminal proceedings, it is not always the fact. In this case matters were taken charge of by public officers; the complaint was made by the city marshal after an investigation of conditions at the institution had been made both by city and county officials. The matter was first called to their attention by one George Snell, a contractor and builder of many years' residence in Boyne City, who happened to be working at the Beulah Home. He is not shown to have had any interest or motive beyond that of any other citizen, and testifies that he has not. He says that he first learned of such conditions from Jones, who told him something of certain talk among the boys; that he himself then interviewed the boys and got the facts from them; that in such interviews he particularly admonished them to tell nothing but the truth; and, after talking with them, he later, accompanied by Jones, laid the matter before the officers. Jones, when called as a witness, frankly corroborates this; states that he overheard the boys talking among themselves; that he told Snell of it, who questioned the boys and said it should be reported to the officers. He emphatically denies that he had any thought of a conspiracy or any motive of personal interest, or made any attempt to influence the boys in any way. He denies that he ever even talked with the witness Griffin about the matter. To set aside this verdict is to find that this young boy, under the circumstances which the history of this case discloses, was able with a fabricated story to fool and deceive Snell, the city and county officials, the jury who

heard the case, and the judge who denied the motion now under consideration, all of whom were on the ground, with opportunities to hear and see and judge the facts not available to one with only the printed record before him.

[17] It is to be borne in mind that in the trial of criminal cases the special prerogative of the jury is to judge the facts and in that connection pass upon the credibility of witnesses, to be confronted by whom, in the presence of the court, is the constitutional right of the accused when put upon trial—a provision of law which emphasizes the importance of those who are to judge hearing and seeing the witnesses—thus in effect making hearing and seeing part of the evidence. In reviewing the decision of the trial court denying a motion for a new trial, based upon the claim that the verdict was against the weight of evidence, the appellate court does not pass upon the facts in the case further than to determine whether or not there was manifest abuse of discretion. We are unable to conclude that such was the case here. Comp. St. § 11963, provides: "Section 1. The court in which the trial of any indictment shall be had, may, at the same term, or at the next term thereafter, on the motion in writing of the defendant, grant a new trial, for any cause, for which by law a new trial may be granted, or when it shall appear to the court that justice has not been done, and on such terms or conditions as the court shall direct."

This case was tried in December, 1910. The first motion for a new trial is dated April 26, 1911, and the second September 5, 1911. The official designation of times for holding terms of the circuit court in Charlevoix county shows that a February term intervened before the first motion was made. Counsel for respondent, with commendable professional candor, advert to this and say: "Unless the failure of the prosecuting attorney to raise this point in either the circuit or the Supreme Court is a waiver of the right of the people to insist upon the time limit for making a motion for a new trial, the court may feel that, under former decisions, the motion was made too late"—citing *Frazer v. Judge of Recorder's Court*, 112 Mich. 469. 70 N. W. 1042.

In view of the facts that counsel for the prosecution have remained silent upon the subject, while counsel for the defense have so frankly called attention to it, and that both sides have fully briefed the motion, we have thought it best to treat the same as though the point was waived, although not satisfied under the case above cited that this can be done.

For the reasons heretofore stated, the conviction is affirmed.

BLAIR, J., being ill, took no part in the decision.

STATE ex rel. VILLAGE OF DELANO v.
GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota. Nov. 22, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1097*)—REVIEW—SUCCESSIVE DECISIONS.

The former decision in this case (114 Minn. 293, 131 N. W. 330), the evidence on both trials being in point of substance the same, followed and applied as the law of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427; Dec. Dig. § 1097.*]

Appeal from District Court, Wright County; Arthur E. Giddings, Judge.

Mandamus by the State, on the relation of the Village of Delano, against the Great Northern Railway Company. From a judgment for the relator, defendant appeals. Reversed.

Cobb, Wheelwright & Dille, of Minneapolis, for appellant. F. E. Latham, of Howard Lake, and Henry Spindler, of Buffalo, for respondent.

PER CURIAM. This cause was before us on a former appeal (114 Minn. 293, 131 N. W. 330), where we held that the evidence then before the court was insufficient to justify a finding that the street in question became established as a public highway over and across defendant's right of way by dedication or user, and for certain errors appearing from the record the cause was remanded for a new trial. The question of dedication appears to have been the sole issue on the second trial. The trial court found the question in relator's favor, and ordered judgment for the relief demanded in the complaint. Judgment was entered accordingly, and defendant appealed.

A careful examination of the evidence presented on this appeal discloses no difference in point of substance from that presented on the former trial, and we sustain the contention of appellant that the former decision becomes the law of the case. Additional evidence was offered by both parties on the last trial, but it was merely cumulative of that on the first trial, and in no proper view changes the situation as respects the issue involved. The evidence, taken as a whole, presents a case substantially like *Benson v. Railway Co.*, 73 Minn. 481, 76 N. W. 261, where the court held as a matter of law that no dedication of a street over the railroad right of way was shown, and the findings of the court to the contrary were set aside. In these substantial facts the two cases cannot be distinguished. We therefore follow and apply the former decision in the case at bar as the law of the case. If there be any urgent necessity for a crossing at this point, proceedings to extend the street would seem the most appropriate remedy. State ex rel. v. Railway Co., 98 Minn. 380, 108 N. W. 261.

28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581, 8 Ann. Cas. 1047.

Judgment reversed.

BRANTMAN v. CITY OF CANBY.

(Supreme Court of Minnesota. Nov. 22, 1912.)

(Syllabus by the Court.)

1. GAS (§ 20*)—EXPLOSION—ACTIONS FOR INJURIES—QUESTION FOR JURY.

Plaintiff suffered injuries from a gas explosion in his cellar. The evidence presented a question of fact for the jury as to whether or not such gas had escaped from a leak in the pipe supplying a street lamp.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 16, 17; Dec. Dig. § 20.*]

2. MUNICIPAL CORPORATIONS (§ 733*)—TORTS—PERFORMANCE OF GOVERNMENTAL FUNCTIONS.

Where a city undertakes to serve both public and private convenience by maintaining a municipal lighting plant to light its streets and also furnish gas to private consumers, it is not exercising a governmental function, so as to escape responsibility for negligence in the management of such plant, whereby an injury has been caused to the person or property of an individual.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1547-1549; Dec. Dig. § 733.*]

Appeal from District Court, Yellow Medicine County; Gorham Powers, Judge.

Action by Peter Brantman against the City of Canby. From an order granting a new trial, after direction of verdict for defendant, it appeals. Affirmed.

Johnson & Lende, of Canby, for appellant. Tom Davis, Ernest A. Michel, and D. L. Kennedy, all of Marshall, and John I. Davis, of Benson, for respondent.

HOLT, J. The city of Canby, Minn., maintains a municipal gas plant to light its streets and also to sell gas to private consumers. Plaintiff was occupying a building fronting on the main street in the city. In front of the building and across the sidewalk was a street lamp. The gas from this lamp was supplied by a pipe leading from the gas main in the street, and was laid some two feet below the surface, entering into the lamp post at a somewhat greater depth through a "goose neck" or bent pipe of lead, designed to prevent breaks when frost would heave the ground. Nearly parallel with the pipe leading to the street lamp, and some 12 or 18 inches from it, was a consumers' service pipe extending under the sidewalk and leading to within three feet of the cellar stone wall of the building occupied by plaintiff, then up to the surface and through the floor, which extended about 4 feet over the cellar wall, thus entering the restaurant conducted by plaintiff. Plaintiff was injured by a gas explosion when, having occasion to go to the cellar, he struck a match therein. He claims

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the defendant negligently permitted a leak to occur in the pipe which supplied the street lamp, where such pipe was attached to the goose neck, that the gas from such leak followed along the service pipe, the ground there being loose and porous, and permeated the ground and wall into the cellar. When the testimony was all in, the court directed a verdict for defendant, but afterwards granted a new trial. Defendant now appeals.

[1] The appellant claims that there was proof of a leak in that part of the service pipe over which defendant had no control, and therefore a verdict in plaintiff's favor could rest on no better foundation than a mere guess as to whether the gas in the cellar came from the leak near the goose neck, or came from that part of the service pipe under plaintiff's exclusive control. From an examination of the testimony we are of opinion that, had the jury found that the gas escaped from that part of the equipment over which defendant exercised sole dominion, it could not have been said that the finding was without support.

[2] The main contention of appellant is: assuming that the gas came from the leak at the connection with the street lamp, and that the leak was due to defendant's negligence, the city is nevertheless not liable to the individual injured in respect to the operation of its lighting system, because the negligence occurred in the performance of a governmental function, namely, lighting its streets for the public good; in any event, that it was not a leak in that part of the plant which had any connection with the service to private consumers. At the trial such was the view taken by the court, who concluded that the case was ruled by *Miller v. City of Minneapolis*, 75 Minn. 131, 77 N. W. 788. There plaintiff sued the city, claiming that it had negligently permitted the hydrant of its water system to become choked or clogged, so that the fire department could not obtain water to extinguish the fire that consumed plaintiff's property. A demurrer to the complaint was there sustained on the ground that, although the city was not compelled to maintain a water system, still it was discharging a governmental duty in maintaining a fire department, and "for the purposes of protection from fire, the water plant and service must be regarded as a part of the fire department."

In the instant case the gas-lighting plant was maintained by the city, not only for lighting the street, but also to supply private consumers. Lighting its streets is not a governmental duty placed on the city. *Miller v. City of St. Paul*, 38 Minn. 134, 36 N. W. 271. It has the privilege and power to undertake the burden; but it may refuse, or may grant a franchise therefor to others. We apprehend that if a franchise had been

granted by the city to construct and operate this plant, and gas had escaped therefrom causing injury, an action would lie against the one who held the franchise. *Gould v. Winona Gas Co.*, 100 Minn. 258, 111 N. W. 254, 10 L. R. A. (N. S.) 889. The city here conducted its plant precisely as would one to whom it might have granted a franchise, with perhaps this difference: that a municipality does not expect much profit, if any at all, from its ventures to serve the public and private convenience. The facts in this case do not sustain the contention that the city, in operating this lighting plant, was performing a purely governmental function, even if it be conceded that a distinction may here be made between that part of the equipment which served the public and that which served private consumers. Such a separation or distinction we regard unimportant. In this state a city, in maintaining a board of health, a police or a fire department, discharges a governmental function pure and simple, and we believe, as to these or similar functions, it has no power to escape the burden imposed by granting a franchise to any one to perform in its place. But as to furnishing water, light, etc., for private consumers and public purposes combined, the furnishing of which is not imposed by law as a governmental duty, the city, if it undertakes so to do, assumes a position to those injured through its negligence therein which is not different from what would be the position of one to whom it had granted the right to furnish water or light.

Snider v. City of St. Paul, 51 Minn. 463, 53 N. W. 763, 18 L. R. A. 151, contains some observations indicating that this defendant may not claim immunity from the consequences of negligence, because it was performing a governmental duty in operating this plant. In this day, when the doctrine of public ownership by municipalities of public utilities is rapidly gaining ground, so that nearly all public utilities, so called, which have heretofore been supplied by those who have been granted franchises therefor, are now overtaken by the municipalities themselves, it occurs to us that private rights may be jeopardized unless it be held that in overtaking such utilities the municipality must exercise the same care towards the person and property of the individual that was required of one having obtained a franchise to maintain the same utility. The conclusion herein arrived at is supported by able opinions in *Dickinson v. Boston*, 188 Mass. 595, 75 N. E. 68, 1 L. R. A. (N. S.) 664, and *Esberg Cigar Co. v. Portland*, 34 Or. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651. It may also be stated that in *Hodgins v. Bay City*, 156 Mich. 687, 121 N. W. 274, 132 Am. St. Rep. 546, the language relied on to support appellant's position in this case was obiter.

Order affirmed.

JUNTTI v. OLIVER IRON MINING CO.
(Supreme Court of Minnesota. Dec. 6, 1912.)

(Syllabus by the Court.)

EXPLOSIVES (§ 7*)—DANGEROUS PREMISES — COMPLAINT—SUFFICIENCY.

The complaint alleges in effect that the defendant left unguarded large quantities of carbide, a dangerous substance and attractive to children of tender years, on its premises near a public street, knowing that such children were accustomed to pick up the carbide, pour water upon it, whereby gas was generated, and then explode it by applying a light; that the plaintiff's son, five years old, secured some of the carbide so left by defendant, put it in a can, poured water on it, and in attempting to light the gas an explosion followed, whereby he was seriously injured. *Held*, that the complaint states facts sufficient to constitute a cause of action.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 3; Dec. Dig. § 7*.]

Appeal from District Court, St. Louis County; Herbert A. Dancer, Judge.

Action by Abraham Juntti, for his minor son, Arne Juntti, against the Oliver Iron Mining Company. From an order overruling defendant's demurrer to the complaint, defendant appeals. Affirmed.

Paul H. Welch, of Duluth, for appellant. Wm. E. Culkin and John E. Samuelson, both of Duluth, for respondent.

START, C. J. This is an appeal from an order of the district court of the county of St. Louis overruling the defendant's demurrer to the complaint. The action was brought by the plaintiff, for the benefit of his minor son, who, at the time of his injury by the alleged negligence of the defendant, was between 5 and 6 years old. The complaint, so far as here material, alleges in substance that at the times therein stated the defendant was engaged in the mining of iron ore at the city of Eveleth, this state, and used for the purpose of artificial lighting a substance known as carbide, which, when used in connection with water, produces vapors and gases of a highly inflammable character, and, when brought in contact with fire in any way, will explode, and is a highly and extremely dangerous substance. It is also, by reason of the gases and vapors that form from it when coming in contact with water, and the fact that, when fire is communicated to such gases in any way, it will burn and explode, highly attractive, alluring, and tempting to children of tender years, and extremely dangerous to them. Such children were in the habit of picking up the carbide so left exposed and unguarded, which they would place in cans and pour water upon it for the purpose of producing gases, to the end that fire might be communicated to it whereby explosions would be created, all of which was well known to the defendant prior to the injury of the plaintiff's minor son. On and prior to October 6,

1911, the defendant carelessly and negligently allowed large quantities of carbide to be thrown and left by its employees upon its premises, and also in, upon, and near a public street of the city, wholly exposed and accessible to children of tender years, without guard of any kind, which was easily observed by them when in the street for play. On October 6, 1911, the plaintiff's minor son and a comrade of about his own age were playing in the street, and picked up a sheet iron can, which they there found, placed therein a quantity of the carbide, so left exposed and unguarded by the defendant, and poured water into the can. As the water came in contact with the carbide, gases and vapors were generated, and, for the purpose of seeing the flame that would be produced, and of hearing the noise from the explosion which would be produced, by igniting such vapors and gases, and by reason of the youth and inexperience and want of judgment of plaintiff's minor son, he lit a match and attempted to light the gases, when suddenly a terrific explosion followed, throwing him into the air, burning his head, face, hands, and body, and otherwise injuring him.

The defendant here urges in support of its demurrer that the complaint fails to show any negligence on the part of the defendant, or any act on its part which was the proximate cause of the injury of plaintiff's son, and, further, that the complaint affirmatively shows that the plaintiff was guilty of contributory negligence. It is claimed in this connection, in effect, that the defendant's alleged acts in allowing large quantities of carbide to be thrown and left exposed and unguarded upon the premises, and on and near the public street, were neither negligent, nor the proximate cause of the injury to the child, because it appears from the allegations of the complaint that carbide is only dangerous when gases are formed by the action of water thereon, and when brought in contact with flame, and that the proximate cause of the injury was not any act of the defendant, but that of the child in pouring water upon the carbide and attempting to light the gases thereby generated.

This claim must be considered in connection with the allegation of the complaint to the effect that the defendant knew, prior to the accident, that children were accustomed to pick up the exposed carbide, pour water upon it, and explode the gas by lighting it. It is quite obvious that the defendant was guilty of negligence, if the allegations of the complaint be true, in leaving large quantities of carbide exposed and unguarded, for it is clear from such allegations that it ought, in the exercise of ordinary care, to have anticipated that children of tender years were liable to be injured thereby, especially so in view of its actual knowledge in the premises. We are unable to discern any difference in principle between the case made by the

allegations of the complaint herein and the cases of *Mattson v. Railway Co.*, 95 Minn. 477, 104 N. W. 443, 70 L. R. A. 508, 111 Am. St. Rep. 483, 5 Ann. Cas. 498, and *Vills v. City of Cloquet*, 138 N. W. 83. In the last case cited the defendant was charged with negligence in storing explosive fuse caps, without taking sufficient precautions to prevent children from getting possession of them. The plaintiff's son, a child of tender years, got possession of one of the caps and proceeded to hammer it with a stone to flatten it out, when it exploded and injured him. It was held that the alleged negligence of the defendant and the proximate cause of the child's injuries were questions for the jury. See, also, *McDowell v. Preston*, 104 Minn. 263, 116 N. W. 470, 18 L. R. A. (N. S.) 190, and *Froberg v. Smith*, 106 Minn. 72, 118 N. W. 57.

It is obvious that the complaint in this action does not show, as a matter of law, that the plaintiff or his child was guilty of contributory negligence. It follows that the complaint states facts sufficient to constitute a cause of action.

Order affirmed.

JUNTTI v. OLIVER IRON MINING CO. (Supreme Court of Minnesota. Dec. 6, 1912.)

Appeal from District Court, St. Louis County; Herbert A. Dancer, Judge.

Action by Abraham Juntti against the Oliver Iron Mining Company. From an order overruling a demurrer to the complaint, defendant appeals. Affirmed.

Paul H. Welch, of Duluth, for appellant. Wm. E. Culkin and John E. Samuelson, both of Duluth, for respondent.

PER CURIAM. Held, following *Abraham Juntti*, for the Benefit of His Minor Son, v. *Oliver Iron Mining Co.*, 138 N. W. 673, in which the opinion is filed herewith, that the complaint states a cause of action.

Order affirmed.

SIVERTSON v. CITY OF MOORHEAD. (Supreme Court of Minnesota. Nov. 29, 1912.)

(Syllabus by the Court.)

1. PERSONAL INJURY ACTION—ADMISSION OF EVIDENCE—INSTRUCTIONS—NEW TRIAL.

In this, a personal injury action, it is held that no reversible errors were made in the admission of evidence or in the instructions to the jury, nor did the trial court abuse its discretion in denying plaintiff's motion for a new trial on the ground that the verdict was not justified by the evidence, and also on the ground of newly discovered evidence.

(Additional Syllabus by Editorial Staff.)

2. APPEAL AND ERROR (§ 1053*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of evidence, in an action for injuries to an employé from a defective boiler, that the man who sold the boiler told the defendant city's superintendent of water and light department that it had been subject-

ed to a test, does not require a reversal, where the court instructed that it was the duty of the defendant, before operating the boiler, to have it inspected by a duly appointed boiler inspector of the state.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.*]

3. NEGLIGENCE (§ 140*)—ACTIONS—INSTRUCTIONS—"DIRECT"—"PROXIMATE"—"IMMEDIATE."

In instructions as to the causal connection between defendant's negligence and plaintiff's injury, the use of the word "direct," instead of the word "proximate," is not error; the word "proximate" being synonymous with "direct" and "immediate."

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 378-381; Dec. Dig. § 140.*]

For other definitions, see Words and Phrases, vol. 8, pp. 2069-2070; vol. 8, p. 7637; vol. 4, pp. 3393-3394; vol. 8, p. 7681; vol. 6, p. 5753.]

4. NEW TRIAL (§ 105*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—ORAL EVIDENCE.

Newly discovered impeaching evidence is not a ground for new trial, except in extraordinary cases.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 183, 221-223, 229; Dec. Dig. § 105.*]

Appeal from District Court, Clay County; C. A. Nye, Judge.

Action by Sivert Sivertson against the City of Moorhead. From an order denying a new trial, plaintiff appeals. Affirmed.

Peterson & Adams, of Moorhead, and McEnroe & Wood, of Fargo, N. D., for appellant. Morton Barrows, of St. Paul, and Garfield H. Rustad, of Moorhead, for respondent.

START, C. J. On May 8, 1911, the defendant city was maintaining and operating an artesian well to supply water for the residents of the city and for public purposes. The plaintiff was then an employé of the city as a common laborer in and about such enterprise. This is an action to recover for personal injuries claimed to have been sustained by the plaintiff while engaged in such work. He alleged in his complaint that the defendant negligently furnished for such work an old, defective, and dangerous steam boiler, and that by reason thereof the packing was blown therefrom and the steam escaped with such force, without warning to him, that he was seriously injured thereby. These allegations were put in issue by the answer, and the issues submitted to the jury. A verdict was returned for the defendant. The plaintiff made a motion for a new trial on the grounds of error of law occurring at the trial, newly discovered evidence, and that the verdict was not justified by the evidence. The motion was denied, and the plaintiff appealed from the order denying it.

[1, 2] 1. The first group of alleged errors assigned relates to the rulings of the trial

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

court as to the admission of evidence. The defendant's superintendent of its water and light department, who purchased the boiler in question, was permitted, over the plaintiff's objection, to testify, after answering certain preliminary questions, as follows: "I asked Mr. Sykes, the man who I purchased the boiler of, if the boiler was safe, and he said he had subjected it to a test of 180 pounds hydraulic pressure; and he brought his man, and he said the same thing, and I took his word for it, as he is an old boiler maker."

It is urged by plaintiff that this ruling was erroneous, for the reason that it was not competent to relieve the defendant from responsibility for failing to have the boiler inspected as required by statute (R. L. 1905, § 2172), by hearsay evidence of what some one said about a test applied to it. This must be conceded, as an abstract proposition; but it does not appear from the record that the evidence was offered or received for any such purpose. Precisely why it was offered is not clear from the record, and we assume for the purposes of this appeal that the evidence was immaterial. The trial court, however, in this connection, instructed the jury to the effect following: "Under the laws of this state it was the duty of defendant, before operating or raising steam in the boiler, to have it inspected by a duly appointed boiler inspector of this state. Therefore, if you find that defendant's failure to have this boiler inspected, as required by law, was in any way responsible for the accident complained of, then defendant would be liable in this action for such injuries as the plaintiff has shown himself to have sustained as a direct result of such failure." The attention of the jury, by this instruction, was specifically directed to the necessity of an inspection by a duly appointed inspector of this state, and by necessary implication excluded any other inspection or test as a substitute therefor. It is clear, therefore, that the admission of the evidence complained of was not reversible error.

[3] 2. The next group of alleged errors relates to the instruction of the trial court in submitting to the jury the question of the causal connection between the alleged negligence of the defendant and the injury of the plaintiff. The specific claim is that the court erred in using in this connection the word "direct," instead of the word "proximate." No exception was taken at the trial to this instruction, or any other, nor was the court requested to make it more specific. The word "proximate," for the want of a better one, is usually used by courts to designate the legal cause of an injury; but the word "proximate," when so used, is synonymous with "direct" and "immediate." *Nelson v. Railway Co.*, 30 Minn. 74-77, 14 N. W. 360; *Renner v. Canfield*, 36 Minn.

90-92, 30 N. W. 435, 1 Am. St. Rep. 654; *Ermentrout v. Insurance Co.*, 63 Minn. 305-308, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481. The instruction was legally correct, and if there was any reason to apprehend that the jury might be misled by the use of the word "direct," instead of "proximate," it was the duty of counsel to call the matter to the attention of the court, and ask for a more specific instruction.

Several other alleged errors of the trial court in its instructions, and in failing to give instructions upon its own motion, none of which was requested, are here urged as a ground for reversal. We find no reversible error in the instructions as given, nor did the court err in not giving instructions not requested.

[4] 3. The last contention of the plaintiff to be considered is to the effect that the trial court erred in denying his motion for a new trial on the ground that the verdict was "contrary to the evidence," and also on the ground of newly discovered evidence. A consideration of the evidence and the affidavits as to the alleged newly discovered evidence has led us to the conclusion that the question whether the plaintiff was injured as a result of the defendant's negligence was one of fact, to be determined by the jury, and, further, that the newly discovered evidence was largely impeaching, which is not a ground for a new trial, except in extraordinary cases, which this is not, and that the court did not abuse its discretion in denying the motion for a new trial on either of the grounds urged.

Order affirmed.

In re JUDICIAL DITCH NO. 14 OF MARTIN COUNTY.

DODGE et al. v. MARTIN COUNTY.

(Supreme Court of Minnesota. Nov. 22, 1912.)

(Syllabus by the Court.)

1. DRAINS (§ 36*) — ASSESSMENTS — APPEAL FROM DECISION OF VIEWERS.

On the trial of an appeal from the report of the viewers in drainage proceedings, the instructions of the trial court are construed, and held to have in effect laid before the jury for consideration the determination of the viewers in the matter of the assessment of benefits, and, as so construed, the instructions were prejudicial to appellants.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 44-50; Dec. Dig. § 36.*]

2. DRAINS (§ 36*) — ASSESSMENTS — APPEAL FROM DECISION OF VIEWERS.

Such appeals bring the matter of damages and benefits before the court for trial de novo, and the amount awarded by the viewers is not a proper matter for consideration by the jury.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 44-50; Dec. Dig. § 36.*]

Appeal from District Court, Martin County; James H. Quinn, Judge.

In the matter of Judicial Ditch No. 14 of

Martin County. L. A. Dodge and others, landowners, appealed from an assessment and demanded a trial by jury, under Laws 1905, c. 230 (Rev. Laws Supp. 1909, §§ 2651—44 to 2651—106). From an order denying a new trial, the landowners appeal. Order reversed, and new trial granted.

J. E. Haycraft, of Madella, for appellants. Albert R. Allen, of Fairmont, for respondent.

BROWN, J. In judicial ditch proceedings, pending in the court below, appellants, landowners whose land was assessed for benefits to result from the construction of the drain, appealed from the assessment as made by the viewers and approved by the court, and demanded a trial of the issue by a jury, as provided for by chapter 230, Laws 1905 (Rev. Laws Supp. 1909, §§ 2651—44 to 2651—106). The appeal came on for trial, and the sole issue litigated was the question of benefits to appellants' land. The jury returned a verdict, fixing the benefit at the sum of \$2,135; the same being the exact amount fixed by the viewers. A new trial was denied, from which order this appeal was taken.

The motion for a new trial was founded in the main upon alleged erroneous instructions to the jury, and whether the instructions complained of were prejudicial to appellants presents the only question on this appeal. The court in its charge to the jury referred to the statutes on the subject of drainage of wet and overflowed lands, and to the proceedings necessary to the completion of a drainage project. Among other things the court said that one of the essential steps was the ascertainment and the equalization of the amount each tract of land should bear toward the expense of constructing the drain, and to that end that the court was required at a certain stage of the proceedings to appoint viewers, whose duty it was to examine the affected land and assess the damages or benefits necessarily to result from the improvement. The jury was informed that in compliance with the statutes viewers had been appointed in this proceeding for the purpose stated, and that the viewers so appointed "went out and assessed the benefits which in their judgment would accrue to each of the pieces of land affected. * * * Those men qualified, went out, and performed their duties, as the law requires them to do, of what, in their judgment, were the benefits which each tract of land would receive—the amount that each tract would be benefited by the construction of the drain." The court further stated that upon the presentation of the viewer's report it became the duty of the court to examine the same, and to approve or reject or modify the allowances made by the viewers, as the facts presented justified or demanded. In this connection the court further said: "Now, when the court makes its order, it is what is known as the final order, and it fixes the

amount of benefits which it appears to the court is reasonable and right under all circumstances, as shown by the proofs offered." The court then stated that the law grants to persons affected by the ditch, and where lands are assessed for benefits, the right to demand a jury trial, and to thus review the action of the viewers and the court; that in the present case appellants were within their rights in appealing from the final order of the court approving the action of the viewers, and that the jury should determine the merits of the issue from the evidence presented to them. Following this the court again referred to the determination by the viewers in the following language: "I might say, so that you may clearly understand, that the viewers and the court should undertake * * * to assess the benefits so as to equalize the payments among the different lands that are affected by the ditch, so that each one will pay, as near as can be, in accordance with their actual benefits, no more and no less. That is the purpose of the law. That is why the viewers go out there, and one of the principal reasons why the viewers are sent out there, why the court reviews it afterwards, and why, finally, if a man asks for it, a jury is impeached for the purpose of assessing benefits, to get it as near right, and to get it as near in accordance with what the actual benefits will be, as possible." The charge of the court in other respects clearly stated to the jury the rules of law controlling their consideration of the case, and was complete and unobjectionable.

[1.2] An appeal of this character brings to the district court, for trial de novo, the issue of benefits or damages, as the case may be, and should be there determined without reference to the conclusion reached by the viewers. The object of the law in granting the right of appeal is to afford the appellant the right to the independent judgment of a jury, uninfluenced by the result from which the appeal was taken. If in any such case the jury, by the charge of the court or otherwise, is led to the conclusion that consideration and respect should be given the assessment made by the viewers, the appellant is deprived of his right to the separate opinion of the jury, and his appeal becomes fruitless. In the case at bar we cannot escape the conclusion that the instructions complained of tended strongly to impress upon the jury that view of the case. That it had such effect is made apparent by the result. The verdict concurred exactly with the report of the viewers. We are not to be understood as intimating that the court below intended to influence the jury in the suggested direction. All that the court said to them was abstractly correct; but it was unnecessary, and its natural tendency was to create an erroneous impression on the minds of the jury prejudicial to appellants.

The viewers' report, including the amounts of benefits thereby awarded, was before the jury, not as evidence bearing upon the question of benefits, but as a part of the proceedings, and the jury could not properly consider the same upon the issue to be by them decided. *Railway Co. v. Duncan*, 87 Minn. 91, 91 N. W. 271. A reference to that report by counsel would have constituted error. *Pierce v. Brennan*, 88 Minn. 50, 92 N. W. 507; *McKenzie v. Banks*, 94 Minn. 496, 103 N. W. 497. And if such reference by counsel would constitute error, for a stronger reason would instructions of the court, in language naturally tending to impress upon the minds of the jury the importance of the viewers' determination of the subject-matter of the litigation, constitute error. While, as already suggested, the instructions complained of stated correct propositions of law, and were not in fact intended to influence the jury, yet it is clear that such was the effect. The charge of the court must be construed from the standpoint of the jury, and the impression likely to be created by what the court said to them. *Mailand v. Mailand*, 83 Minn. 453, 86 N. W. 445. The natural effect of the charge in this case was to lay before the jury the conclusion reached by the viewers, leaving with them the impression that such report was proper for consideration in reaching their verdict.

Our conclusion, therefore, is that in this the court erred to the prejudice of appellants.

Order reversed, and new trial granted.

O'DONNELL v. DAILY NEWS CO. OF MINNEAPOLIS.

(Supreme Court of Minnesota. Nov. 22, 1912.)

(Syllabus by the Court.)

1. CONTRACTS (§ 148*)—OFFER AND ACCEPTANCE—TELEGRAMS—PRIOR NEGOTIATIONS.

A telegraphic offer of employment, which is manifestly the result of prior verbal negotiations, and which alone does not purport to contain all the essential terms of a contractual offer, must be considered as though the language thereof had been used at the conclusion of the negotiations, or, conversely, as though express reference to the substance of the negotiations had been incorporated in the telegram; and the terms of the contract created by a telegraphic acceptance of such offer are to be gathered from the telegrams and the negotiations taken together, and not from the telegrams alone.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 731; Dec. Dig. § 148.*]

2. FRAUDS, STATUTE OF (§ 53*)—CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR—EMPLOYMENT.

A contract for services, which by its terms shows that it is not to be performed or is incapable of performance within one year from the making thereof, is within the statute of frauds; but a contract for one year's services,

commencing on the date on which the contract is made, is not within the statute.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 80; Dec. Dig. § 53.*]

3. FRAUDS, STATUTE OF (§ 118*)—SUFFICIENCY OF MEMORANDUM—TELEGRAM AND LETTER.

Defendant's telegraphic offer of employment, and its letter explanatory thereof, and the plaintiff's telegraphic acceptance, held not to be sufficient writings to satisfy the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 262-265; Dec. Dig. § 118.*]

4. FRAUDS, STATUTE OF (§ 158*)—CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR—COMMENCEMENT OF PERFORMANCE.

Where the date for the commencement of the performance of a contract is shown by the same evidence which establishes the contractual consensus, such date must, for the purpose of determining the applicability of the statute of frauds, be deemed to appear from the terms of the contract.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 373-376; Dec. Dig. § 158.*]

5. FRAUDS, STATUTE OF (§ 53*)—CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR—COMMENCEMENT OF PERFORMANCE.

Contract for one year's employment considered, and held to show by its terms that the commencement of its performance was to begin in the future, thus bringing it within the operation of the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 80; Dec. Dig. § 53.*]

6. FRAUDS, STATUTE OF (§ 53*)—CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR—COMMENCEMENT OF PERFORMANCE.

In determining the applicability of the statute of frauds to a contract of employment, the date of the contract will not be presumed to be the date for the commencement of its performance, where it affirmatively appears from the terms of the contract that a subsequent date therefor is contemplated.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 80; Dec. Dig. § 53.*]

7. FRAUDS, STATUTE OF (§ 44*)—CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR—DE MINIMIS.

The doctrine of de minimis cannot be invoked to avoid the operation of the statute of frauds upon a contract which by its terms is not to be performed within one year.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 66, 92; Dec. Dig. § 44.*]

Appeal from District Court, Hennepin County; Andrew Holt, Judge.

Action by Charles A. O'Donnell against the Daily News Company of Minneapolis. From a judgment for defendant, plaintiff appeals. Affirmed.

A. B. Jackson, of Minneapolis, for appellant. Wilson, Mercer, Swan, Ware & Stinchfield, of Minneapolis, for respondent.

PHILIP E. BROWN, J. This is an action for damages for breach of an alleged contract for the plaintiff's employment as advertising manager for the defendant, the Minneapolis Daily News. The case was tried to the court without a jury. Findings were filed,

it being held that the plaintiff was entitled to recover of the defendant the sum of \$85, and judgment was ordered to be entered accordingly. Whereupon the plaintiff made request for substituted or additional findings, which request was denied, and judgment was entered as ordered. This is an appeal by the plaintiff from the judgment so entered.

The facts, as gathered from the undisputed evidence and the findings of the court, are as follows:

On January 27, 1910, the plaintiff came to St. Paul, met the president and general manager of the defendant corporation, and orally proposed to enter the employment of the defendant as its advertising manager at Minneapolis, at a salary of \$60 per week, for the first year, and moving expenses from his then home at Germantown, Pa. No direct reply was made by the defendant's representatives to this proposition, but the parties entered into a general conversation with reference to employing the plaintiff as the defendant's advertising manager at Minneapolis. In the course of this conversation the defendant's president objected to the proposition as to the payment of the plaintiff's moving expenses, and suggested that he would prefer to pay the plaintiff a definite sum, \$250 or \$300, to cover such expenses, to which suggestion the plaintiff assented, as being satisfactory to him. The plaintiff also stated that he wanted a contract for at least a year; but the defendant's representatives said nothing as to the length of time for which the contract was to continue, though they did intimate strongly that they did not wish the plaintiff to use a position with the defendant as a stepping stone to a position with some other newspaper. It was agreed between the parties that, if a contract should be made, the plaintiff could report for work at Minneapolis in about a week from the date of the conversation, or on February 7th, and that such would be agreeable to the defendant. The negotiations then closed, without any contract having been made, but with the understanding that the plaintiff would receive a telegram, upon his return to his home, relative to his application for the position. The plaintiff then, after receiving from the defendant's president a check for \$75 to cover the expenses of the trip which he had made to St. Paul in order to have the conference above described, returned to his home in Germantown, where, on January 30, 1910, he received the following telegram from the defendant: "Minneapolis, Minn., 1—29—10. To Charles A. O'Donnell, 243 Durham St., Airy. Come for \$65.00 per week, without payment of moving expenses. When can you report? J. Burgess, Minneapolis Daily News." In reply to this message, the plaintiff, on January 31, 1910, sent to the defendant the following telegram: "All right, will be there next Monday"—which day fell on February

7th. After sending this message, but on the same day, he received a telegram from the defendant as follows: "Have made other arrangements. Will not need you now." And likewise, on the same day, he received the following letter from the defendant: "Minneapolis, Minn., Jan. 29, 1910. Mr. Chas. A. O'Donnell, 243 E. Durham St., Philadelphia, Pa. Dear Mr. O'Donnell: I wired you to-day as follows: 'Come for \$65 per week without payment of moving expenses. When can you report?' I prefer to pay you \$5.00 more per week salary than to pay your moving expenses, simply as a matter of bookkeeping, and because it is not our practice to pay expenses of this sort. I hope that this will be satisfactory to you, and that you will come on the field at once. I may say that I am very much pleased at this arrangement myself, and am glad to have you associated with me in the conduct of the Minneapolis Daily News. I am expecting that you will be able to report by Feb. 7th. With kindest personal regards, I am, yours for business. The Minneapolis Daily News, by J. Burgess, Manager."

Previously to the receipt of the telegram notifying him that he was not wanted for the position in question, the plaintiff had surrendered the lease for his home in Germantown, and had begun to pack and ship his furniture and household effects to Minneapolis; and on February 7, 1910, he reported at the office of the defendant in the said last-mentioned city, ready and willing to commence work, but the defendant refused to allow him to do any work for it, its alleged reasons for such refusal being immaterial in the view which we take of the case. The plaintiff thereafter made diligent effort to find other employment, but failed to get any, except to the extent of earning \$500 during the following year.

Aside from the ultimate questions presented to this court for determination, the above statement represents the substance of not only the findings made by the court, but also the substituted or additional findings requested by the plaintiff, and thus we are relieved of the necessity of passing upon the propriety of the court's denial of the plaintiff's request for additional findings, except, of course, in so far as such request may involve the ultimate questions involved. These questions are: (1) Was the contract which was entered into by the parties one for an indefinite period at a fixed salary of \$65 per week, or was it a contract for a year's services at such salary? (2) If the contract was for a year's services, what must be deemed to be the date contemplated thereby for the commencement of its performance?—this question being material upon the defense of the statute of frauds.

[1] 1. Upon the first of these questions we must hold, with the plaintiff, that the contract which was closed by the plaintiff's

telegram of acceptance of date January 31st was not for an indefinite period, but for the term of one year. It seems clear to us that while the telegrams above quoted, taken alone, did not constitute a contract, yet that the defendant's telegram of January 29th must be considered in connection with and as supplementary to the negotiations which took place on January 27th, and that when so interpreted it must be read as though it had been written out substantially as follows: "Referring to our negotiations of January 27th, in the course of which you offered to take the position of advertising manager for the Minneapolis Daily News at a salary of \$60 per week for the first year, with an allowance for moving expenses, we have decided to offer you \$65 per week, without moving expenses." Such an interpretation of the telegram is, furthermore, strongly supported by the defendant's letter of January 31st, explaining the telegram. And if such be its proper interpretation, we think it clearly follows that the offer made thereby was for a year's employment. Conversely stated, our conclusion is that the whole transaction which culminated in the defendant's offer by telegraph should be considered just as if the language of the telegram had been used by the defendant's officers at the conclusion of the negotiations which took place on January 27th, and the offer made thereby had thereupon been accepted by the plaintiff in the words of his telegram of acceptance. All the circumstances of the transaction point to this conclusion, of which may be mentioned the character of the work contemplated, the distance which the plaintiff was expected to move, with his household effects and his family, the uneasiness of the defendant's manager lest the plaintiff would abandon the work soon after taking it up, and the plaintiff's expressed expectation of a year's employment, to which the defendant's officers made no objection. And in the latter connection we will say that if such officers, being apprised of the plaintiff's expectation of a year's contract and then knowing that his proposition was based thereon, refrained from expressing themselves in this regard, and thereafter sent the telegram first above mentioned, pursuant to a secret intention that the contract should be subject to termination by them at will or upon a week's notice, then it does not now lie in the mouth of the defendant to assert such intention. We hold that the contract was for a period of one year at a salary of \$65 per week. See *Smith v. Theobald*, 86 Ky. 141, 5 S. W. 394, 9 Ky. Law Rep. 449.

[2, 3, 5] 2. This brings us to the second question, which in its general form is: Was the contract within the statute of frauds, as being a contract not to be performed within one year from the making thereof? In its ultimate analysis, however, the ques-

tion here is: What must be deemed to be the date contemplated by the contract for the commencement of its performance? For it is settled that a contract for services, which by its terms shows that it is not to be performed or is incapable of performance within one year from the making thereof, is within the statute (*Spinney v. Hill*, 81 Minn. 316, 84 N. W. 116; *White v. Fitts*, 102 Me. 240, 66 Atl. 533, 15 L. R. A. [N. S.] 313, 120 Am. St. Rep. 483; *Chase v. Hinkley*, 126 Wis. 75, 105 N. W. 230, 2 L. R. A. [N. S.] 738, 110 Am. St. Rep. 896, 5 Ann. Cas. 328; *Lee v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666; *Fertilizer, etc., Co. v. Reneau*, 94 Miss. 904, 48 South. 292, 136 Am. St. Rep. 607), while a contract for one year's services commencing on the date of the contract is not within the statute (*Sanborn v. Fireman's Ins. Co.*, 82 Mass. [16 Gray] 448, 77 Am. Dec. 419); and it is also clear that the writings in the instant case are not sufficient to satisfy the statute (*Palmer v. Marquette, etc., Co.*, 32 Mich. 274; *Seymour v. Oelrichs*, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154).

[4] Does, then, the contract here involved show that it was not to be performed or was incapable of performance within one year from the date on which it was made, January 31, 1910? The plaintiff contends that it does not so appear, insisting that it must be deemed to be for one year's services, beginning January 31st, and ending on the same date in the following year. The defendant, on the other hand, contends that the contract was for services beginning February 7th. As between these two contentions, we hold with the defendant. That February 7th was the date on which the performance of the contract was to commence is, we think, manifest; and, moreover, as this fact is established by the same evidence which establishes the contractual consensus, the date for the commencement of the performance of the contract must be deemed to appear on its face, or at least to be fixed by its terms. February 7th was the date in the minds of the parties throughout the negotiations, and such date was expressly incorporated in the contract by the telegrams and the letter above quoted. It was the date fixed as giving the plaintiff a reasonable time in which to reach Minneapolis from his home in another state, and the distance he would have to travel in order to reach Minneapolis precluded the possibility of his actually beginning work in that city on the date of his telegram of acceptance.

[6] Undoubtedly the parties could have contracted that the plaintiff's services, and his pay, should be deemed to begin January 31st; but they did not do this. Nor did they leave the date undetermined. They fixed February 7th as the date when the plaintiff should come and take the position contracted for. Until that date his time was his own, to do with as he pleased, provided only

that he reported to the defendant at Minneapolis on February 7th. Could it successfully be contended that the date of the contract was the date for the commencement of its performance, if March 7th, or any later date, had been specified as the day on which the plaintiff was to report for work? If not, how, then, can the contention made here prevail? The only difference would be that an employer might more readily agree to pay a week's salary without service, in order to get a desired employé, than he would agree to pay a month's salary, or more, by way of an inducing bonus. But we do not think such an agreement is to be inferred in either case, where the only evidence thereof is that the date specified as that upon which the employé is to report for work is subsequent to the date of the contract. If nothing whatever had been said about when the plaintiff was to report for work, there might be room for the plaintiff's contention that a contract is, if possible, to be construed so as to keep it out of the operation of the statute of frauds, and that where no other date is specified the date of the contract will be presumed to be the date for the commencement of its performance; but where, as in this case, the contract indicates the date when the services are to begin such contentions are irrelevant. *Lee v. Hill*, supra; *Chase v. Hinkley*, supra; *White v. Fitts*, supra; *Sutcliffe v. Atlantic Mills*, 13 B. I. 480, 43 Am. Rep. 39; *Fertilizer, etc., Co. v. Reneau*, supra; *Shumate v. Farlow*, 125 Ind. 359, 25 N. E. 432; *Smith v. Theobald*, 86 Ky. 141, 5 S. W. 394, 9 Ky. Law Rep. 449. See, also, note to *Oklin v. Selidor*, 138 Am. St. Rep. 611 et seq.

[7] And it makes no difference that the year is exceeded by only a week, for the doctrine of *de minimis* cannot be invoked to avoid the operation of the statute of frauds. *Chase v. Hinkley*, supra. "An hour more than the time specified is in law as fatal to the contract as though it were two, five, or a hundred years." *Reynolds v. First National Bank*, 62 Neb. 747, 752, 87 N. W. 912, 914.

We have considered the cases cited by the plaintiff to sustain his contention that, where no date for the commencement of performance is specified, the date of the contract must control, and also those, including *Phipps v. McFarlane*, 3 Minn. 109 (Gil. 61), 74 Am. Dec. 743, cited as holding that contracts should be construed with a view to sustaining them as against the operation of the statute of frauds; but, in view of our interpretation of the contract here involved, none of these cases are in point. Nor are we called upon either to assent to or to dissent from the doctrines promulgated thereby. We will say, however, that we think a contract should be construed according to the intention of the parties as gathered therefrom, without reference to the consequences, statutory or oth-

erwise, and that if a contract, doubtful as to the date of the commencement of its performance, is held not to be within the statute, it should be so held solely because the statute covers only such contracts as affirmatively show by their terms that they are not to be or cannot be performed within a year, and not because the court deems obnoxious a law which the Legislature has seen fit to place in the statutes and has allowed to remain therein for many years. See *Cram v. Thompson*, 37 Minn. 172, 175, 91 N. W. 483.

The true method of approach to the consideration of the rights here involved is, first, to determine the question of the existence of the contract, and thereafter to determine the applicability of the statute of frauds thereto. We think that a contract can be established in this case only on the theory that both of the parties understood that its performance was to commence February 7th; for, if there was no meeting of minds upon that term of the contract, no claim being made that any other time was fixed for the commencement of performance, and it being apparent that both parties understood that immediate performance or performance within a reasonable time was not contemplated, then no contract was in fact consummated, and the plaintiff would have no standing here whatever. But we are satisfied that there was a meeting of minds to the effect that performance of the contract should begin on February 7th and end one year from that date, with the resulting contract to that effect, to which we must apply the law as declared in the statute of frauds.

By way of answer to some of the claims of plaintiff's counsel to the effect that, as nothing was said by the defendant's officer during the negotiations which led up to the contract, directly, as to when its performance should commence, to which we have already adverted, it must be deemed to commence immediately, we will say that the logical effect of such a conclusion would require a holding that the plaintiff's compensation commenced January 31st. We think that it would astonish a business man to learn that, under the law, if he hires an agent or servant at a weekly, monthly, or yearly salary, with the understanding that the employé is to report at some future date, he must, in the absence of an express agreement to such effect, pay the employé, not from the time when the subsequent performance of the service begins, but from the date on which the agreement for the future service is made. It would also, no doubt, equally surprise the servant, under like circumstances, to learn that he was legally entitled to such compensation during the intervening time in which he was engaged in attending to his own affairs. Contracts similar in their general aspect to the one under consideration are of frequent occurrence; and

we are not prepared to adopt a rule of construction which seems to us to be forced, unnecessary, and inequitable.

The contract in this case being, as we have held above, one which contemplated that its performance should commence in futuro, and that the services contracted for should continue for one year from the commencement thereof, it follows that, in the absence of writing sufficient to satisfy the statute of frauds, the plaintiff was not entitled in any event to a more favorable judgment than he obtained.

Judgment affirmed.

HOLT, J., tried the case below and took no part here.

FIRST NAT. BANK OF BENSON v. GALLAGHER et al.

(Supreme Court of Minnesota. Nov. 29, 1912.)

(Syllabus by the Court.)

1. MORTGAGES (§ 309*)—PERSONAL LIABILITY OF MORTGAGOR—RELEASE.

The mortgagor in a mortgage of real property, the mortgage being a mere incident to the debt or obligation secured, may be released and discharged from his personal liability for the payment of the debt by a subsequent parol agreement with the mortgagee, founded upon a valuable consideration; and such an agreement is not in violation of the statute of frauds.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 870, 900, 902-906, 907-912; Dec. Dig. § 309.*]

2. MORTGAGES (§ 319*)—PERSONAL LIABILITY OF MORTGAGOR—PAROL RELEASE—EVIDENCE.

An agreement in parol to release the mortgagor from his personal liability must be established by clear and convincing evidence, for the effect thereof is to set aside the written contract.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 855-863, 913; Dec. Dig. § 319.*]

(Additional Syllabus by Editorial Staff.)

3. FRAUDS, STATUTE OF (§ 139*)—CONTRACT NOT TO BE PERFORMED WITHIN A YEAR.

Where the mortgagor executed a note to the mortgagee under a parol agreement that as a consideration thereof he should be relieved from personal liability for the mortgage debt, the agreement was a fully executed contract, and was not within the statute of frauds because the note was not to be paid within a year.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 334-341; Dec. Dig. § 139.*]

Appeal from District Court, Swift County; G. E. Qvale, Judge.

Action by the First National Bank of Benson against P. S. Gallagher and others. Verdict for plaintiff. From an order granting a new trial, it appeals. Affirmed.

E. L. Thornton, of Benson, for appellant. John I. Davis, of Benson, and Thos. E. Davis, of Marshall, for respondents.

BROWN, J. On March 1, 1906, defendants, husband and wife, made and delivered to plaintiff their promissory note for the sum of \$2,500, payable in five years, as and for a loan of that sum then made to them by the bank. To secure the payment of the note defendants executed a mortgage upon real property owned by the husband. Default was made in the payment of the debt, and the mortgage was duly foreclosed; plaintiff becoming the purchaser at the sale. The amount bid for the property at the sale was \$2,500, and there remained then due upon the mortgage, principal and unpaid interest, the sum of \$971.79. This action was brought to recover the deficiency. Defendants interposed in defense that on August 15, 1907, long before the mortgage indebtedness became due, the parties entered into a parol agreement by which, for the consideration of \$180, then paid to plaintiff in the form of a promissory note executed by defendants, plaintiff agreed to release and discharge defendants from personal liability for the payment of the indebtedness, and to look only to the mortgaged property, which defendants allege was then worth \$3,500. In performance of the agreement defendants then made and delivered to plaintiff their promissory note for the amount stated. On the trial evidence tending to establish this defense was received over plaintiff's objection, but was subsequently stricken out on motion, and a verdict directed for plaintiff for the amount claimed. Thereafter, on defendants' motion for a new trial, the court concluded that in striking out the evidence error was committed, and a new trial was granted. Plaintiff appealed.

It is the contention of plaintiff that the alleged contract or agreement releasing defendants from their personal liability, conceding it to have been entered into as claimed, was void and unenforceable because not in writing; that it was in violation of the statute of frauds, since it modified by parol the terms of the mortgage, required by statute to be, and which was, in writing. Whether this contention be sound presents the only substantial question on this appeal.

[1] 1. It is no doubt elementary that a contract, required by the statute of frauds to be in writing and executed in a particular manner, can only be changed or modified subsequent to its execution by a writing of equal solemnity, duly signed and executed by the parties, except, perhaps, in cases where the doctrine of equitable estoppel applies. But the rule has no application to the facts in the case at bar. The effect of the agreement here involved was to discharge the personal liability of the mortgagors, and was not a modification of the terms of the mortgage. In the case of a mortgage securing the payment of a promissory note, or other specified indebtedness, the debt secured is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the principal obligation, and the mortgage a mere incident thereto. The assignment of the debt carries with it the mortgage, and the payment of the debt, as between the parties, extinguishes the lien of the mortgage. If the verbal agreement in the case at bar had been for the payment of \$2,000 in full discharge of the secured indebtedness, there can be no question, as between the mortgagors and the mortgagee, that the mortgage would have been ipso facto satisfied; the agreement and payment being made before the debt became due. *Schweider v. Lang*, 29 Minn. 254, 13 N. W. 33, 43 Am. Rep. 202. Nor can there be any serious question of the right of the parties to stipulate and contract, subsequent to the execution of the mortgage, for the release of either the security or the personal liability of the mortgagor. *Donnelly v. Simonton*, 13 Minn. 305 (Gil. 278). And since such an agreement, at least as respects a release of the personal liability of the mortgagor, operates as a discharge, and not as a modification, of the mortgage, we are clear that a parol agreement is perfectly valid when founded upon a new and independent valuable consideration. That such an agreement is valid and enforceable is maintained by many of the courts. *Wallis v. Long*, 16 Ala. 738; *Carpenter v. Murphree*, 49 Ala. 84; *Ryan v. Dunlap*, 17 Ill. 40, 68 Am. Dec. 334; *Ackla v. Ackla*, 6 Pa. 228; *Brooks v. Jones*, 114 Iowa, 385, 82 N. W. 434, 86 N. W. 300; *Huff v. Farwell*, 67 Iowa, 298, 25 N. W. 252; *Leddell v. Starr*, 20 N. J. Eq. 274; *Southerin v. Mendum*, 5 N. H. 420; *Howard v. Gresham*, 27 Ga. 347; 2 *Pingry on Mtgs.* 1166; 27 *Cyc.* 1418. The rule is otherwise in Maine and Massachusetts, where it is held that a parol release is void under the statute of frauds. *Leavitt v. Pratt*, 53 Me. 148. The decisions of those states are evidently based upon the theory that the mortgage is the principal contract or obligation, and the debt the incident. The converse of the proposition is the law of this and the other states whose decisions are here cited.

The question would seem to be disposed of in this state by the decision in *Schweider v. Lang*, 29 Minn. 254, 13 N. W. 33, 43 Am. Rep. 202. That case involved a verbal agreement, by which the payee of a promissory note, which was secured by a real estate mortgage, agreed to accept in full payment a sum less than the face of the obligation, and upon such payment to release and discharge the mortgage. The agreement was entered into before the maturity of the note. The court held the agreement valid, and not within the statute of frauds. See, also, *Wiley v. Dean*, 67 Minn. 62, 69 N. W. 629. Of course, the rights of third persons can only be affected by a discharge of the mortgage of record in the manner pointed out by law. But a formal written discharge is not necessary to the

validity of an agreement made for that purpose between the mortgagor and mortgagee, where the rights of third persons are not involved.

[3] We therefore hold that the agreement in the case at bar to release defendants from personal liability was valid, and not within the statute of frauds. The further suggestion that the agreement was not to be performed within a year, and for that reason void, is not sound. The agreement was not executory; on the contrary, when defendants paid the consideration, the transaction was completed and became a fully executed contract.

[2] 2. The further contention that the evidence is not sufficient to support a verdict or finding that the contract was not entered into as claimed by defendant cannot be considered. While it is true that a contract of the kind should be made to appear by clear and convincing evidence (*Stevenson v. Adams*, 50 Mo. 475), for the effect is to set aside the written contract, and though the evidence presented on the trial below, and subsequently stricken out, is not at all satisfactory, still the question is one of fact, and should be first passed upon by the trial court. The court below, in striking out the evidence, did not intend, as we understand the record, to pass upon the sufficiency or insufficiency of the evidence. On the contrary, the court proceeded on the theory that the contract or agreement was invalid, since it was not in writing. The question must therefore be deemed an open one and go back for trial.

Order affirmed.

MERCHANTS' & MINERS' STATE BANK OF HIBBING v. CHISHOLM.

(Supreme Court of Minnesota. Nov. 23, 1912.)

(Syllabus by the Court.)

FRAUD (§ 41*)—ACTIONS—PLEADING.

Complaint construed, and held to state a cause of action to recover damages which resulted from alleged fraudulent and illegal acts of defendant in procuring a loan from plaintiff to be made to an insolvent borrower for defendant's purposes.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 36, 37; Dec. Dig. § 41.*]

Appeal from District Court, St. Louis County; Herbert A. Dancer, Judge.

Action by the Merchants' & Miners' State Bank of Hibbing against Archibald M. Chisholm. From an order overruling a general demurrer to the complaint, defendant appeals. Affirmed.

Francis W. Sullivan, of Duluth, for appellant. Theo. Hollister and J. A. P. Neal, both of Duluth, for respondent.

BUNN, J. This is an appeal from an order overruling a general demurrer to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

complaint, which, after alleging the corporate character and business of plaintiff, is substantially as follows:

On and prior to March 5, 1906, John F. Killorin was president, L. G. Sicard, cashier, and defendant and P. H. Nelson, directors, of plaintiff. The capital stock of plaintiff bank was \$25,000; its surplus, \$10,000. On March 3, 1906, the president and cashier were absent from Hibbing, where the bank was located, which fact was well known to defendant. On this date N. E. La Mond was assistant cashier, and the only person in charge of the affairs of the bank through whom its funds could be obtained. On March 3, 1906, defendant wrote and caused to be delivered to La Mond the following letter: "Dear Sir: Inclosed I hand you note of Daniel Waite for \$6,000, secured by certificates Nos. 13 and 14 of Blake & Waite Company, which Mr. Nelson arranged to let him have \$6,000 on. Will you kindly mail me two drafts, one for \$4,000, and one for \$2,000 for same, and oblige. Yours truly, A. M. Chisholm."

La Mond was about to sever his connection with plaintiff, and become the private secretary of defendant, by reason of which fact, and the relations existing between defendant and La Mond, defendant had great influence over La Mond, and could and did induce him to make and mail the two drafts asked for in the letter, which drafts were made payable to Daniel Waite, indorsed by him, and paid by plaintiff. The note of Waite was delivered to La Mond for plaintiff, at the time of the delivery of the letter. Said sum of \$6,000 has never been paid, nor has any part thereof, nor the interest thereon, except the interest to December 6, 1907. The statement in the letter that Nelson had arranged to let Waite have \$6,000 was false and fraudulent, and made by defendant solely for the purpose of inducing La Mond to deliver the funds of the bank to Waite, and defendant on said date knew that Waite was not entitled to a loan from plaintiff in the sum of \$6,000, or any other sum. Waite was then and still is financially irresponsible. At the time defendant procured the loan aforesaid to be made to said Waite, he contemplated the purchase of stock in a corporation known as the Blake-Waite Company, and defendant used his influence and the statements contained in the letter to procure the said loan to be made to said Daniel Waite "in his own interest, and indirectly to himself." Said loan was not acted upon by the board of directors of plaintiff, or by any officer of said bank, except defendant, and was procured by defendant in violation of section 2989, R. L. 1905. Defendant well knew that neither the president, cashier, nor any director of plaintiff, other than himself, would sanction the loan; that he chose a time and opportunity, when all the other officers of the bank were absent, to, and did,

exert his influence upon La Mond to procure the funds aforesaid from the bank.

It is also alleged that the loan was in violation of section 2993, R. L. 1905; that the sum was in excess of the amount which the bank had any right to loan to any person; that the said loan so procured by defendant to the said Waite was a fraud upon plaintiff. It is then alleged "that, by reason of the unlawful and fraudulent acts of defendant, plaintiff has been damaged in the sum of \$6,000, with interest thereon from December 6, 1907." A demand for judgment in such sum follows.

If this complaint, by a liberal construction of its allegations, states a cause of action, either in tort or on contract, the demurrer was properly overruled. The trial court held that, if the complaint was to be construed as attempting to set up a cause of action for a loss resulting to the bank from a loan to Waite, an insolvent borrower, a demurrer would lie, for the reason that there is no sufficient allegation that the bank suffered any loss or damage. The complaint was construed, however, as alleging a loan indirectly made to defendant himself, and held to show an absolute liability on the part of defendant for the amount of the loan.

We are not disposed to disagree with the conclusion of the trial court that a cause of action on contract can be spelled out; but it seems quite apparent, considering all the allegations of the complaint, that the intention of the pleader was to state a cause of action sounding in tort, to recover damages resulting from the fraud and illegal acts of defendant in procuring the loan to be made to Waite. We imagine this to be the case which plaintiff will attempt to prove in the event the complaint is sustained, and therefore deem it of importance to the parties to dispose of this question.

It cannot be doubted that the allegations are ample to show fraud and violation of the statutes on the part of defendant. But if plaintiff was not damaged by the procuring of the loan to Waite, of course, it has no cause of action against the wrongdoer. The note was given and the loan made March 3, 1906. Interest was paid to December 6, 1907, but not thereafter. This action was commenced in March, 1912. It may fairly be assumed that the note was long past due, and that plaintiff was unable to collect either principal or interest from the maker. The chief ground of defendant's contention that a cause of action is not stated is that it does not appear from the complaint that the stock certificates, referred to in the letter of defendant as securing the note of Waite inclosed, were worthless, or that they were not worth the full amount of the note. But the complaint does not allege that those certificates were ever delivered to or held by the bank as security for the note. The letter does not say they were inclosed, nor does it state the par or any other value

of the stock. There seems no ground for assuming, either that the bank holds the collateral, or that, if it does, it is of any value. The allegation that plaintiff has been damaged in the sum of \$8,000 by the fraudulent and unlawful acts of defendant pleaded, while not, standing alone, a sufficient allegation of damages, must be construed with the other allegations referred to. We think, considering the complaint as a whole, that it sufficiently alleges that plaintiff has lost the \$8,000 which defendant, by fraud and in violation of the statutes, procured, for his own purposes, to be loaned to an insolvent borrower.

We cannot hold that it conclusively appears from the complaint that plaintiff is precluded by the long delay, or by receiving interest on the note, from maintaining an action for damages for the fraud. Plaintiff is not seeking to rescind a contract procured by fraud. The complaint does not show such an affirmance or ratification of the transaction as estops plaintiff from now claiming that the loan was procured by fraud or in violation of the statute.

We hold that the complaint, liberally construed, as it should be, states a cause of action, and that the demurrer was properly overruled.

Order affirmed.

GEE v. GREAT NORTHERN RY. CO.
(Supreme Court of Minnesota. Nov. 29, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 282*)—TRESPASSERS—EJECTION—EVIDENCE.

In this, a personal injury action, it is held that the evidence sustains the verdict, and that there was no error in the instructions to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 910-923; Dec. Dig. § 282.*]

(Additional Syllabus by Editorial Staff.)

2. RAILROADS (§ 277*)—TRESPASSERS—EJECTION—DUTY OF CARRIER.

Where a trespasser on a freight train, after ejection, reboarded the train to recover his hat, and was again forcibly ejected by the brakeman while the train was in motion, and was injured, it was not error to charge that defendant's duty applied to both instances, when plaintiff was ejected from the car.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 887-890; Dec. Dig. § 277.*]

3. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTED CHARGE—DUTY TO REQUEST INSTRUCTIONS.

In an action for injuries to a trespasser by ejecting him from a moving freight train, defendant was not entitled to complain of error, in that the court omitted to instruct on the issue of assault in self-defense, where no exception was taken to the charge at the trial, and no instruction submitting such question was requested.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 623-641; Dec. Dig. § 256.*]

Holt, J., dissenting.

Appeal from District Court, Yellow Medicine County; Gorham Powers, Judge.

Action by George Gee against the Great Northern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Winsor & Keith, of Sioux Falls, S. D. (M. L. Countryman and W. L. Clift, both of St. Paul, of counsel), for appellant. Bert O. Loe, of Granite Falls, and Daly & Barnard, of Renville, for respondent.

BUNN, J. This is an action to recover for personal injuries received by plaintiff in being pushed from a flat car, on which he was riding, by brakemen in defendant's employ. Plaintiff had a verdict for \$1,000. Defendant appeals from an order refusing a new trial.

[1] The questions here are as to the sufficiency of the evidence to sustain the verdict and as to alleged errors in the charge. Plaintiff, a gentleman of color, with two companions, boarded a flat car in a freight train of defendant as it was leaving the station of Cottonwood. Their story is that a brakeman demanded money of plaintiff, and, upon his pleading inability to pay, shoved him from the car. Plaintiff caught on a box car, two cars to the rear, walked over the tops of the intervening cars, and came down the ladder to the flat car. He claimed that he was returning to recover his hat. He and one of the brakemen grappled, and in the altercation both fell from the car. It was the claim of plaintiff's witnesses that the brakeman was the aggressor, and that plaintiff was only bent on recovering his hat, and not looking for trouble. Defendant, in its answer, claimed the plaintiff assaulted the brakeman; but we find little, if any, evidence to sustain this claim. A careful reading of the evidence convinces us that the verdict has such support that we cannot say that it was an abuse of discretion to deny a new trial. We are not impressed with the probability of the story told by plaintiff and his companion who testified. They were clearly trespassers, and some degree of force was justified on the part of the brakeman. But the evidence is such that the question was clearly for the jury, and we find no ground upon which we can logically disturb the verdict after the trial court has approved it.

[2] It was not error to instruct the jury that the duty of defendant applied to both instances when plaintiff went off the car. The claim that plaintiff's cause of action was based alone on the second encounter with the brakeman is not sustained by an examination of the complaint.

[3] It is urged that it was error to ignore in the instructions the issue of assault and self-defense, raised by the answer. It is doubtful if there was any evidence that would warrant the submission of this issue to the jury. The trial court did instruct

the jury: "But if you find, on the other hand, that it was merely an accident, or that he was not so injured by the wrongful acts of the defendant, you will find a verdict in favor of the defendant." No exception was taken to the charge at the trial, and there was no request for an instruction submitting the question of self-defense. If defendant was not satisfied with the instruction above quoted, it was its duty to request a more specific one, or at least to call the attention of the trial court to any inaccuracy or insufficiency in the instruction given.

Order affirmed.

HOLT, J. I dissent. Plaintiff was violating two criminal statutes the second time he boarded defendant's train. Sections 5026 and 5178, R. L. 1905. He passed over two box cars to reach the brakeman, who had just pushed him off the flat car. The two grappled, and in the struggle both fell from the moving train. There is nothing to show that this outcome was intended by the brakeman. It seems to me that there should be no recovery, in view of plaintiff's deliberate violation of the law, unless the brakeman acted in wanton disregard of plaintiff's rights; and this the evidence fails to show.

BURWELL v. GAYLORD.

(Supreme Court of Minnesota. Nov. 29, 1912.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 469*) — ACTIONS — PLEADING.

A complaint on a promissory note against an indorser, which fails to allege notice of dishonor, is demurrable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1494-1502; Dec. Dig. § 469.*]

2. BILLS AND NOTES (§ 243*)—LIABILITIES ON INDORSEMENT—PAYEE AS MAKER.

The legal obligation of an indorsing payee on a promissory note is that of indorser only, and cannot be considered, or proven to be, that of a maker.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 549, 552, 553; Dec. Dig. § 243.*]

Appeal from Municipal Court, Hennepin County; E. A. Montgomery, Judge.

Action by C. H. Burwell against E. S. Gaylord. From an order overruling a demurrer to the complaint, defendant appeals. Reversed and remanded.

M. L. Fosseen and W. A. McDowell, both of Minneapolis, for appellant. Henry Deutsch and Breiding & Filgelman, all of Minneapolis (Walter S. Whiton, of Duluth, of counsel), for respondent.

HOLT, J. Suit on a promissory note. A demurrer to the complaint was overruled, and defendant appeals.

The complaint alleges that one George W. Hale, on October 8, 1898, executed and delivered his promissory note, whereby he promised to pay to the order of defendant herein \$200 in six months from date, with interest. It is then alleged that, before delivery of the note, defendant for value indorsed his name thereon, for the purpose of giving credit thereto and inducing plaintiff to accept the same, and that plaintiff did accept and is the holder of the note. It is also alleged that at maturity the note was presented for payment, and payment refused.

[1, 2] There is one fatal defect in the complaint, in that it fails to allege notice of dishonor to defendant. *Michaud v. Lagarde*, 4 Minn. 43 (Gil. 21); 8 Cyc. 126, and cases there cited. The pleading is evidently drawn in an attempt to make defendant, the payee named in the note, a maker. But, under an unbroken line of decisions in this state, this may not be done. *Levering v. Washington*, 3 Minn. 323 (Gil. 227); *Barnard v. Gaslin*, 23 Minn. 192; *Coon v. Pruden*, 25 Minn. 105; *People's Bank v. Rockwood*, 59 Minn. 420, 61 N. W. 457; *Bowler v. Braun*, 63 Minn. 32, 65 N. W. 124, 56 Am. St. Rep. 449; and *Porter v. Winona & Dakota Grain Co.*, 78 Minn. 210, 80 N. W. 965.

Barnard v. Gaslin, supra, approves the trial court's conclusion of law: "That the defendant, W. H. Gaslin, being the payee of the promissory note upon which this action is brought, his relation is such that he cannot, in law, be held to be the maker of such note, even though his indorsement was for the purpose of giving credit to the note." In *Coon v. Pruden*, supra, where there was an attempt to prove that defendants intended to become makers by their indorsement, though named as payees, Chief Justice Gilfillan says: "The case is not analogous to those in which parol evidence has been admitted to show the character which a party writing his name on the back of the note intended to assume. That can be done only where such character is not shown by the writing itself, as where, at the time of making a note, a party other than the payee indorses it."

The defendant in the case before us is named as payee in the note, and when he placed his name on the back thereof his legal obligation became complete, clear, and unambiguous, to the effect that if the note, when due, was presented to the maker for payment and not paid, he (the defendant) would, upon due notice of dishonor, pay. In *Dennis v. Jackson*, 57 Minn. 286, 59 N. W. 198, 47 Am. St. Rep. 603, an attempt was made to prove that one, not the payee, who wrote his name on the back of the note before delivery, was an indorser and not a maker; but this court held it could not be done. The same reasoning forbids the payee indorser from being shown a maker.

The rule established by the cited cases in this state obtains in other jurisdictions, as appears from the following, among others: *First Nat. Bank v. Payne*, 111 Mo. 291; 20 S. W. 41, 33 Am. St. Rep. 520; *Finley v. Green*, 85 Ill. 535; *Bigelow v. Colton*, 79 Mass. (13 Gray) 309, 74 Am. Dec. 633; *Dubois v. Mason*, 127 Mass. 37, 34 Am. Rep. 335.

The order overruling the demurrer to the complaint must therefore be reversed, and the action remanded for further proceedings.

JONES v. MAGOON et al.

(Supreme Court of Minnesota. Nov. 29, 1912.)

(Syllabus by the Court.)

1. FRAUD (§ 58*)—ACTION—SUFFICIENCY OF EVIDENCE.

In an action for fraud and deceit alleged to have been practiced in an automobile exchange, it is *held* that the evidence is sufficient to support the verdict, and that no reversible errors were committed on the trial of the action.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

2. FRAUD (§ 46*)—ACTIONS—PLEADING.

An allegation in the complaint that plaintiff relied upon and was induced by the representations to enter into the contract is equivalent to an allegation that plaintiff "believed" the representations to be true, if such an allegation be necessary in an action of this kind.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 41; Dec. Dig. § 46.*]

3. ELECTION OF REMEDIES (§ 7*)—RESCISSION OF CONTRACT—ACTION FOR DAMAGES.

An attempted rescission of the contract *held* not to bar an action for damages for the fraud.

[Ed. Note.—For other cases, see *Election of Remedies*, Cent. Dig. § 12; Dec. Dig. § 7.*]

Appeal from District Court, Hennepin County; Horace D. Dickinson, Judge.

Action by Harry W. Jones against Richard H. Magoon and others, as the Woods Electric Company. From an order denying an alternative motion for judgment or a new trial, defendants appeal. Affirmed.

Wilson, Mercer, Swan, Ware & Stinchfield, of Minneapolis, for appellants. S. B. Kay, of Minneapolis, for respondent.

BROWN, J. Action for fraud and deceit, in which plaintiff had a verdict, and defendants appealed from an order denying their alternative motion for judgment or a new trial.

The short facts are as follows: Plaintiff purchased of defendants an electric motor car at the agreed price of \$1,600. In payment of the car plaintiff paid to defendants \$100, and turned over to them an automobile, for which he was to receive credit to the amount of \$1,450. The balance, or \$50, was to be paid at a later day. Plaintiff alleged in his complaint that to induce him to enter into the transaction defendants falsely

and fraudulently represented (1) that the electric car was of the 1910 model and make; (2) that it had been run not to exceed 200 miles; (3) that it would run a distance of 50 miles on a single charge of its batteries; (4) that it was equipped with "exide" batteries; and (5) that it was worth and of the value of \$1,600. Plaintiff further alleged that he relied upon the representations so made, and was induced thereby to purchase the car, and, further, that the representations were false and untrue, and known by defendants to be false and untrue when made. Plaintiff also alleged that the car had as a matter of fact been run about 2,000 miles, that it would not run to exceed 20 miles on a single charge of its batteries, that it was not equipped with "exide" batteries, and was worthless and of no value whatever. Defendants by their answer put in issue the allegations of fraud and deceit, and interposed counterclaims for the balance due on the purchase price of the car and for a small amount due for services rendered to plaintiff subsequent to the bargain and sale. The counterclaims were not disputed, and the aggregate amount thereof was allowed by the jury, and deducted from plaintiff's recovery.

The trial below centered around the question whether defendants falsely represented the condition of the motor car in the respects heretofore stated, and as submitted to the jury the issues in this particular were confined to the extent the car had been used, whether it would run 50 miles on a single charge of its batteries, and whether it was equipped with "exide" batteries. The jury by their verdict found for plaintiff upon those questions. It is the contention of defendants that the verdict is not supported by the evidence, and, further, even though sufficient to support a finding of false representations, that the evidence wholly fails to show any diminution in the value of the car in consequence or because of the fact that the representations were not true. Whether this contention be sound presents the principal question on this appeal. Other points are made by defendants, which will be referred to later; but the main claim is that the evidence fails to make a case for recovery of damages.

[1] 1. Our examination of the record discloses sufficient evidence to support the verdict. Defendants were dealers in automobiles and motor cars, and had been for some time prior to the transaction in question. The particular electric car had been in their possession for six months or more, and was used by them during that time for demonstration purposes. They were familiar with the car, and necessarily knew at least to what extent it had been used by them, and whether it would run a distance of 50 miles on a single charge of its batteries. They also knew whether the car was equipped with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"exide" batteries. Though there was a conflict in the evidence upon the question whether defendants made the representations alleged, the record sustains the finding of the jury that they were made, and also that they were false and untrue. There was also ample evidence that the car was in fact worth substantially less than the contract price, and the amount awarded to plaintiff was within the limits fixed by the witnesses. The principal question upon this branch of the case is whether the value of the car, as testified to by plaintiff's witnesses, was shown to be affected by the fact that it had been run in the neighborhood of 1,600 miles, that it was not equipped with "exide" batteries, and would not run to exceed 30 miles on a single charge of its batteries. It is contended by defendants that the opinion of plaintiff's witnesses as to the value of the car was not shown to have been based upon the condition of the car in the respect stated, and, therefore, that the alleged false representations were not shown to be the cause of plaintiff's loss. The evidence upon this phase of the case is not entirely clear or satisfactory, but we deem it sufficient to support the verdict. Taking the testimony of witness Lunt as a whole, the jury were justified in concluding that his estimate of the value of the car was based, in part at least, upon the fact that it had been used for demonstrating purposes and had been run about 1,600 miles, and the further fact that it would not run to exceed 30 miles on a single charge of its batteries. Such is the natural inference from his testimony taken as a whole. He was familiar with the car, had examined it to some extent, and knew the general market value of similar cars. In fixing his value he took into consideration the "whole mechanism of the car," the fact that it had been used for demonstrative purposes, and would not run to exceed 30 miles on one charge of its batteries. Though the usual question in cases of this kind, namely, what was the value of the car in its actual condition, having reference to the defects complained of, was not put to any of the witnesses, yet we conclude that the testimony, at least of this particular witness, was in the main founded upon that inquiry, and sufficiently supports the verdict.

[3] 2. On the trial of the action the court required plaintiff to elect whether to proceed on the theory that the contract had been rescinded for the alleged fraud, or for damages resulting from the fraud. Plaintiff elected to proceed on the theory of damages for the alleged fraud, and the trial was so conducted. It was brought out on cross-examination of plaintiff that before the commencement of the action he offered to return the car to defendants, and demanded the return of his automobile and the money paid at the time of the transaction. It is

contended that this constituted a rescission of the contract, and that plaintiff cannot recover for the false representations; that his only remedy is an action for the return of the property he parted with. We do not sustain this claim. Defendants refused to accept a return of the car or to surrender to plaintiff the automobile or repay the \$100 paid them when the trade was made. Plaintiff retained the car, and subsequently disposed of it. The evidence shows only an attempted rescission. Plaintiff's offer to rescind did not operate to deprive him of the remedy for damages, since the attempt did not become effective.

[2] 3. Several other questions raised by defendants may be disposed of without separate discussion. It is claimed that the complaint is fatally defective, since it contains no allegation that plaintiff "believed the misrepresentations" alleged to have been made by defendants. The objection is not well taken. While such allegation is often made in pleadings in actions of this kind, we think it unnecessary in the case at bar. The equivalent is found in the allegations that plaintiff "relied upon the representations and was induced thereby to enter into the contract." Again the question was not raised until the time of trial, and was properly overruled. The court charged the jury that the measure of damages was the difference between the value of the car in its actual condition and the value thereof, had it been as represented. This was technical error. The measure of damages was the difference between the actual value of the car and the contract price. *Mountain v. Day*, 91 Minn. 249, 97 N. W. 883. But the error of the court was not a matter of substance, was clearly an inadvertence, and attention should have been called thereto by counsel. *Mountain v. Day*, *supra*. There was no error in submitting to the jury the question whether the car was equipped with "exide" batteries. There was evidence tending to support the claim that it was not, and the court rightly left the issue to the jury.

This covers all that need be said. We have considered all the assignments of error, and discover no grounds or reasons justifying a new trial of the action.

Order affirmed.

POIRIER v. BRADFORD.

(Supreme Court of Minnesota. Nov. 29, 1912.)

(Syllabus by the Court.)

PATENTS (§ 216*)—CONTRACTS AFFECTING PATENT RIGHTS—CONSTRUCTION.

A corporation was organized to manufacture and sell certain farm implements covered by patents obtained by plaintiff and to be obtained by him at the expense of the corporation. Plaintiff was the manager, and a stock-

holder and officer, of the corporation. For the right to use such patents in the manufacture of such implements, plaintiff was monthly paid a certain sum in the nature of a royalty. *Held*, that the right to sell the articles so manufactured under plaintiff's patents was incident to the right to manufacture, and therefore all articles manufactured while that right existed may, after such right ceased, be sold by the corporation or its successor in interest without let or hindrance from plaintiff.

[Ed. Note.—For other cases, see *Patents*, Cent. Dig. § 329; Dec. Dig. § 216.*]

Appeal from District Court, Ramsey County; William Louis Kelly, Judge.

Action by Octave A. Poirier against John M. Bradford. From an order denying a new trial, plaintiff appeals. Affirmed.

Harry S. Locke, of St. Paul, for appellant. Denegre & McDermott, of St. Paul, for respondent.

HOLT, J. Claiming that the defendant had in his possession 400 disc drills and unassembled parts for about 800 more, made according to principles covered by certain letters patent owned by plaintiff, which drills defendant threatens to sell without the license or permission of plaintiff, this action is brought to enjoin defendant from selling or using the drills. The court made findings and ordered judgment for defendant. Plaintiff's motion for a new trial being denied, he appeals.

The here material and undisputed facts are that plaintiff owned a patent for a drill shoe, which was thought valuable, and in 1902 he associated himself with some men who furnished the means and incorporated the Poirier Manufacturing Company, to manufacture and sell drills equipped with this shoe. Plaintiff became, and thereafter till October, 1907, continued to be, the secretary, vice president, and manager of the corporation. He received 250 shares of stock, of the par value of \$100 per share. Plaintiff was an inventor, and, in addition to the shoe for grain drills, had also turned his attention to disc drills. Soon after the incorporation of the company he applied for several patents covering such drills, the company paid the fees and expenses for obtaining these patents, and under plaintiff's management manufactured and put on the market disc drills covered by patents subsequently issued upon his applications. The arrangement between plaintiff and the corporation is contained in this letter, written by the former to the latter:

"January, 1903.

"Poirier Mfg. Co., Gladstone, Minn.—Gentlemen: Confirming the conversation had with your Mr. Brooks last Saturday, relative to my certain inventions of improvements on grain drills, at which time it was agreed that the Poirier Mfg. Co. should pay all the expenses for labor in procuring models and furnish all the cash necessary for ap-

plications for U. S. patent and final government fees, that I should grant to said Poirier Mfg. Co. the right to use such inventions before and after the issuance of the U. S. Patents, free of charge, for such time as my present interest in your company as stockholder and officer is retained, but that in no way shall the title or ownership of said inventions and contemplated patents pass from me to you, without further agreement and consideration.

"Respectfully yours,

[Signed] O. A. Poirier."

Plaintiff received \$150 per month from the corporation, which he says was in the nature of royalties for the use of his patents. In September, 1907, plaintiff on account of some nervous trouble became incapacitated for work. He was not paid anything thereafter, as he claims. No disc drills, nor any parts for drills, were ever manufactured thereafter. The drills and parts of drills now in defendant's possession were all completed by the corporation prior to September, 1907. The drills manufactured were evidently not a success, for the corporation, in August, 1908, was duly adjudicated a bankrupt, and the said drills and parts of drills were in the bankruptcy proceeding duly sold to defendant herein. Plaintiff still retains his stock in the corporation, but ceased to be an officer in February, 1908.

The foregoing facts clearly indicate that there is no justice in plaintiff's claim. The defendant has succeeded to the rights of the corporation in this property, which was manufactured for the purpose of sale and use by the permission, license, and direction of plaintiff. These implements and parts were so manufactured in the ordinary course of business, with the expectation that all would be sold in due time. The manufacture was undertaken solely for the purpose of realizing a profit from the sale of the article manufactured, so that the sale and use of the drill followed as an incident to the right to manufacture. In other words, plaintiff, having granted the corporation, for a royalty paid monthly, the right to manufacture, according to his patents, these implements designed for sale and use, has no further interest in their disposition or use after they have been manufactured. Therefore the position of plaintiff is untenable that, if he chose to withdraw his license, the manufactured articles then on hand could not be sold. In *Steam Cutter v. Sheldon*, 10 Blatchf. 1, Fed. Cas. No. 13,331, the court says: 'If a party engaged exclusively in the construction of machines of various kinds, for sale to others, were to receive a license to manufacture a patented machine, for a consideration presently paid to the patentee, a construction which would deny him all opportunity to make the privilege of any value, forbidding his sale of the machines

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

when manufactured, should be very clearly imported by the license, or the court would hold that the parties meant that he should derive some benefit from the license, and not be left thereafter wholly dependent on the will of the patentee." See, also, *Gill v. United States*, 160 U. S. 426, 16 Sup. Ct. 322, 40 L. Ed. 480; *Keyes v. Bureka Consolidated Mining Co.*, 158 U. S. 150, 15 Sup. Ct. 772, 39 L. Ed. 929; *Dable Grain Shovel Co. v. Flint*, 137 U. S. 41, 11 Sup. Ct. 8, 34 L. Ed. 618.

We do not think the facts of the present case bring it within the decision of *Standard Sanitary Mfg. Co. v. Arrott*, 135 Fed. 750, 68 C. C. A. 388, cited and relied on by plaintiff. There the machine covered by the patent was built for the purpose of use in the manufacturing plant under a license given by the patentee; he being an officer and servant of the company operating the plant. It was held that a sale of the plant did not transfer to the new owner the right to use the machine. We doubt not the proposition that the owner of a patent may, in granting the right to use the same, place such limitations and restrictions as he may see fit. But clearly there was no intention in the instant case to restrict in any manner the sale or use of the articles manufactured by the corporation; and defendant is in no worse position than the corporation.

The views already expressed lead to an affirmance of the order, and render unnecessary a consideration of any other errors assigned, because on the undisputed facts the learned trial court's conclusion is manifestly right.

Order affirmed.

BENEKE v. BENEKE'S ESTATE.

(Supreme Court of Minnesota. Nov. 29, 1912.)

(*Syllabus by the Court.*)

1. EXECUTORS AND ADMINISTRATORS (§ 221*)—CLAIMS AGAINST ESTATE—SUFFICIENCY OF EVIDENCE.

Evidence upon an application by a son for the allowance of a claim against his deceased mother's estate for board, services, etc., such services being held to have been rendered her while she was living with him as a member of his family, considered, and held to sustain the trial court's finding that the estate was not liable for such claim.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 901-903½, 1858, 1861-1863, 1866, 1868, 1871-1874, 1876; Dec. Dig. § 221.*]

2. EVIDENCE (§ 84*)—PRESUMPTIONS—INDEBTEDNESS.

The execution of a promissory note gives rise to a rebuttable presumption that the payee was not at the time of such transaction indebted to the maker.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 106; Dec. Dig. § 84.*]

Appeal from District Court, Olmsted County; Arthur H. Snow, Judge.

Claim by Edward W. Beneke against the estate of Sophia M. Beneke. From an order of the district court, on appeal from the probate court, denying a motion for new trial or for amendment of findings, the claimant appeals. Affirmed.

M. D. Halloran and Thomas Spillane, both of Rochester, for appellant. Chas. C. Willson and Henry O. Christensen, both of Rochester, for respondent.

PHILIP E. BROWN, J. Sophia M. Beneke died testate in Olmsted county on November 24, 1910, aged 83 years. After the appointment and qualification of an executrix of her estate, her son, this appellant, filed a claim against the same, amounting to the sum of \$1,830, in the probate court, for the value of board, room, light, and washing, alleged to have been furnished the decedent by him while she was residing with him and his family, in his home, during nearly all of the last 6 years of her life, including therein also an item for the value of the board of a nurse for his mother, alleged to have been furnished for her in his home during her last illness. The executrix interposed an answer, denying the son's claims in toto, and presented to the court by way of offset thereto the amount of the principal and interest of three promissory notes, the principal of which aggregated \$1,160, executed by the claimant to the deceased in her lifetime. The probate court, after a hearing, denied the son's claim, and allowed the offset. The claimant appealed to the district court, where, a jury being waived, a trial was had to the court, and findings were filed, affirming the action of the probate court. Thereafter the claimant moved for a new trial, and, as a part of his application, included therein a demand to the effect that, in the event of the denial of his motion, the court amend its findings in specified particulars, which demand would, if granted, necessarily have resulted in the allowance of the appellant's claim. The court denied this motion in all respects, and this is an appeal from its order in such regard.

[1] The evidence adduced on the trial established, and the court found, among other things, in effect, that the services specified in the claimant's demand were in fact furnished by him as claimed and were of the value stated. Furthermore, it appears and was found that the claimant rendered all of these services while the deceased resided in his dwelling house as a member of his family under no express agreement on her part to pay therefor, and that she never definitely promised to pay him for the same. The court also found the evidentiary facts

concerning the business and domestic relations of the deceased and the claimant at great length, and by its conclusions of law denied him any relief. Likewise, under the uncontroverted testimony, the findings established the execution of the three notes interposed by the executrix by way of offset as above stated, and their nonpayment, all as claimed by the executrix.

The appellant makes no claim that there was any express agreement on the part of the deceased to pay for these services, but insists, substantially, that the trial court erred in finding that the deceased lived with the claimant as a member of his family, and also erred in refusing to find substantially as follows: "It appears from the evidence that there was a mutual understanding between Sophia and Edward that the services rendered and the accommodations furnished were not to be rendered and furnished gratuitously, and that Sophia expected and intended to pay for the same, and that Edward expected to be paid therefor, and that said services rendered and the accommodations furnished to Sophia by Edward were rendered and furnished under circumstances from which an obligation to pay for the same is justly inferred."

The case turns on the determination of the above-stated contentions, other points covered by the assignments of error either having been waived by failure to argue them, or else being such as to require no comment. The appellant makes no real complaint concerning the facts found, but rests his objections on the deductions drawn by the court from the facts, and the questions thus presented are, whether the deceased was a member of the claimant's family at the time the services were rendered, and, if so, could the trial court reasonably infer from the proofs that pecuniary compensation was contemplated by the parties therefor at the time when the services were rendered. The fair determination of these questions requires a recital of the salient features of the findings, all of which we hold to be supported by the evidence. Such in effect are that, after the death of the husband of the deceased in 1895, she, in settlement of certain matters growing out of his will, conveyed to the claimant all of her interest in the estate of her deceased husband, and the claimant, in turn, conveyed to her a life estate in 80 acres of land, the parties agreeing that the claimant should use the land during his mother's life and pay her therefor as rent the sum of \$160 per year, payable annually, and \$400 in addition thereto, and the claimant further covenanted that she should have the use of three rooms in the building situate on the 80, and also be furnished by him with what was "necessary for her use which could be raised on the farm, viz., flour, meat, potatoes, milk, eggs, and vegetables, also the necessary firewood cut and ready for

the stove," during her lifetime. The claimant complied with his covenants and agreements literally, up to the time he left the farm, except that his mother accepted from him a note for \$400, in lieu of the payment above mentioned. The parties lived on the farm in the same house, until about 9 years prior to the death of the mother, when she and the claimant and his family, consisting of his wife and children, moved to Rochester, where the mother thereafter lived with the son as a member of the family up to the time of her death. Until the last 2 years of her life, she participated in the work of the household, but then ceased because of a serious affliction, which incapacitated her for labor and necessitated increased care, attention, and nursing on the part of the claimant and his family. With the exception of the special attention made necessary by her disease, however, she received no more rewards than he had agreed to furnish her on the farm. During the period she resided with him in Rochester, she paid the bills of her physician, the major part of the compensation of her nurses, and a part of the wages of the house servants. She also paid for her clothing and articles for her personal use, and at one time contributed \$100 towards the payment for a sewer connection for the son's residence, in order that her own conveniences would thereby be increased. During her lifetime, her son, the claimant, made no demand on her for payment for any of the services rendered, and continued to pay her the stipulated rent for the 80-acre farm when it matured. She never paid him anything on account of services rendered. It also appeared that the claimant executed notes to her as follows: November 3, 1901, \$160, payable on demand, with 6 per cent. interest; November 1, 1906, \$500, payable on demand, with 5 per cent. interest; November 1, 1907, \$500, payable on demand, with 5 per cent. interest. No part of these notes has been paid, except that all of the interest accruing thereon was paid annually up to November, 1910. The claimant testified that he expected payment to be made for the items stated in his account. There was, also, evidence of declarations of the deceased, made on several occasions during the last years of her life, but not to the claimant or in his presence, to the effect that she would pay the claimant for all that was done for her, and that she did not expect them, the family, to "do it" for nothing, and that claimant would get his pay for all done for her.

Such being the facts before us, we think that it is too clear for argument that the deceased was a member of the claimant's family during the period of the rendition of the services in question; and, such being the case, the only remaining question is whether the court ought to have amended the findings

as requested. While the case of *Elnolf v. Thompson*, 95 Minn. 230, 103 N. W. 1026, 104 N. W. 547, is not precisely in point here, the rule there stated, supported, as it is, by *Donahue v. Donahue*, 53 Minn. 460, 55 N. W. 602, and *Wetherill v. Canney*, 62 Minn. 341, 346, 64 N. W. 818, governed the trial court in its consideration of this case, which rule is as follows: "The general rule deducible from the authorities is that where a child, after arriving at majority, continues to reside as a member of the family with a parent, or with one who stands in the relation of a parent, * * * the presumption is that no payment is expected for services rendered or support furnished by the one to the other. This presumption is not, however, conclusive, and may be overcome by proof, either of an express agreement to pay, or of such facts and circumstances as show satisfactorily that both parties at the time expected payment to be made"—citing 21 Am. & Eng. Enc. Law (2d Ed.) 1061. See, also, *Hodge v. Hodge*, 11 L. R. A. (N. S.) 873 to 913, and *Hardiman's Adm'r v. Crick*, 133 Am. St. Rep. 248, where the cases are collated, and in the notes to the latter case the rationale of the rule is discussed.

The appellant insists that it appears that the dealings of his mother and himself were "at arm's length, a mere matter of dollars and cents," and that both parties expected payment to be made for the services involved, and, furthermore, that any presumption to the contrary growing out of the relationship of parent and child was destroyed by the evidence of the facts and circumstances. But we do not consider the proofs sufficient to establish the appellant's contentions in this regard, nor to give rise to an implied contract between the members of a family to pay for services, which can be established only by evidence sufficient to warrant the deduction that payment was contemplated by both parties when the services were rendered.

[2] This conclusion is reinforced by a consideration of the facts recited as to the claimant's payment of the annual rents on the 80-acre farm, and especially as to the execution by him of notes payable to his mother for large sums, and his payment of annual interest thereon. Why should he pay rents and execute notes to her, when she was indebted to him in large amounts? It seems to us that such actions are inconsistent with the claimant's theory that the parties should be considered as dealing at arm's length in the matter of the services rendered. True it is that such facts are not conclusive against the claimant. His explanation of why he paid such interest, namely, because it was due to his mother, and because he figured that he had money enough in his possession to pay her what she owed him—that is, that he owed her

enough money on his notes to nearly cover her indebtedness for his services—is not, however, convincing. Moreover, such conduct on the part of the claimant raised a presumption against him, for it is well established by the authorities that the execution of a note by one person to another gives rise to a presumption that the payee was not at the time of such transaction indebted to the maker. *Barnes v. Green's Adm'r* (Ky.) 12 S. W. 277; *McIntyre v. Meldrim*, 63 Ga. 58; *Downs v. Downs* (Iowa) 102 N. W. 431; *Fitzpatrick v. Phelan*, 58 Wis. 251, 16 N. W. 606; *Atchison v. Davidson*, 2 Pin. (Wis.) 48.

We have not overlooked the testimony of the several witnesses who testified to the deceased's declarations concerning her intention to pay for the services rendered by the claimant, or that he would be paid. Such declarations are, however, too ambiguous and equivocal to establish liability. Nor are they sufficient to rebut the presumption, above referred to, arising from the execution of notes by the claimant to the deceased and payments made by him to her. They might as well have referred to his expectancy as his mother's heir at law, as to anything else. It would be mere guesswork to conclude therefrom that the deceased intended to pay for the services in question.

Finally, while the principle announced in *Elnolf v. Thompson*, *supra*, must be applied here to the same extent as in the trial court, we are required to apply in connection therewith also the familiar rule of appellate procedure, which, stated most favorably for the appellant, is that we cannot disturb the findings of the trial court, if the evidence fairly tends to support them. This rule applied here necessarily requires an affirmation.

Order affirmed.

ERWIN v. SHELL et al.

(Supreme Court of Minnesota. Dec. 6, 1912.)

(Syllabus by the Court.)

1. JUDGMENT (§ 199*) — NOTWITHSTANDING VERDICT—EVIDENCE.

A collision occurred on a dark night in a public highway between the plaintiff's team, driven by him, and the automobile of the defendants, driven by one of them, whereby plaintiff was injured by the alleged negligence of the defendants in not observing the law of the road. A verdict was returned for him, and the trial court ordered judgment for the defendants notwithstanding the verdict. *Held*, it is not alone sufficient to authorize a judgment notwithstanding the verdict that the trial court upon the evidence, in the exercise of a fair discretion, ought to have granted a new trial, for such a judgment can only be ordered when the evidence is as a matter of law practically conclusive against the verdict.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. JUDGMENT (§ 199*)—NOTWITHSTANDING VERDICT—EVIDENCE.

The evidence does not bring this case within the rule stated, and the court erred in ordering judgment for the defendants.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.*]

Appeal from District Court, Nobles County; L. S. Nelson, Judge.

Action by C. R. Erwin against Daniel Shell and another. From a judgment entered in favor of defendants notwithstanding the verdict for plaintiff, he appeals. Reversed.

Chas. H. Schweitzer and Morris & Hartwell, all of La Crosse, Wis., and Herbert M. Bierce, of Winona, for appellant. J. A. Town and El. J. Jones, both of Worthington, for respondents.

START, C. J. On the evening of December 27, 1910, at 8:30 o'clock, the plaintiff was driving a team of horses hitched to a farm wagon with an empty hayrack along the public highway near Worthington, this state, when a collision occurred between the team and rig of the plaintiff and the defendants' automobile, driven by one of them, whereby the plaintiff sustained personal injuries. He brought this action in the district court of the county of Nobles to recover from the defendants damages for his injuries on the ground, as alleged, with others, in the complaint, that the defendants negligently failed to observe the law of the road and drive the automobile to the right of the middle of the traveled part of the highway, so that the vehicles could pass without interference. The answer admitted the collision, denied any negligence on the part of the defendants, and alleged that the plaintiff's injuries resulted from his own negligence. The issues were submitted to a jury, and a verdict returned in favor of plaintiff in the sum of \$300. The defendants then made a motion for judgment in their favor notwithstanding the verdict, on the ground that the court erred in denying their motion for a directed verdict. No alternative motion for a new trial was made. The trial court granted the motion for judgment absolute, and it was so entered, from which the plaintiff appealed.

[1] The law here applicable is well settled, and to the effect that it is not alone sufficient to authorize a judgment notwithstanding the verdict that the trial court upon the evidence ought, in the exercise of a fair discretion, to have granted a new trial, for such a judgment can only be ordered when the evidence is as a matter of law practically conclusive against the verdict. *Marquardt v. Hubner*, 77 Minn. 442, 80 N. W. 617; *Jones v. Railway Co.*, 91 Minn. 229-234, 97 N. W. 893, 103 Am. St. Rep. 507; *Peek v. Ostrom*, 107 Minn. 488, 120 N. W. 1084.

[2] The question, then, is whether the evidence brings this case within the rule stated.

The evidence is undisputed that the plaintiff was, at the time of the collision, driving with a gentle team hitched to a wide-tired farm wagon along the highway from Worthington, and that the defendants were driving an automobile toward that city. The night was very dark and misty. The road at the place of collision was 52 feet wide between the fences. There was a gutter 2 feet wide and 1 foot deep along and next to the fence on plaintiff's side of the road. The traveled track, which was some 14 feet from the right-hand fence going from Worthington, was worn smooth. There were no obstructions in the road to prevent the defendants from driving the automobile to the right of the traveled track as the vehicles approached each other, but they did not do so. There was evidence on the part of the plaintiff tending to show that he was driving 4 miles an hour, and, when about a mile from the point of collision, he saw a light, and as he got closer, and within about a half mile, he saw two lights, and then concluded that an automobile was approaching. When he was within 12 or 15 rods of it, he noticed that no effort was being made by the defendants to turn out. He thought they would do so, but they did not, so he pulled the right line of his team. The automobile, when it was within some 2 rods of the team, ran in toward the fence on the plaintiff's side of the road, and the collision followed which resulted in his injury. The next day after the accident there were found, at the place of the collision, marks of a wide-tired wagon in the gutter next to the fence. There was evidence on the part of the defendants tending to show that the automobile immediately before the accident was not running to exceed 8 miles an hour, and that by reason of the darkness the driver could not distinguish an object in front of the automobile more than 2 rods away, and that he had no notice of the approach of the plaintiff until they were within 15 to 25 feet of each other, and the team was then coming directly toward the automobile. The driver testified that when he saw the team he immediately stopped the automobile in the middle of the traveled track, because he believed there was not time to turn out and avoid the collision, and that any attempt to do so would expose the occupants of the automobile to serious injury, as he believed the team was running away, seeing no driver with them, and, if they were, they would swerve around the automobile. There was other evidence tending to show contributory negligence on the part of the plaintiff, and also that neither the wagon nor the automobile left the traveled track before the collision.

Upon a careful consideration of all the evidence, we have reached the conclusion that it does not bring the case within the rule we have stated. The credibility of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

witnesses, the alleged negligence of the defendants, and the contributory negligence of the plaintiff were primarily questions of fact for the jury. Whether their verdict is so manifestly and palpably against the preponderance of the evidence as to entitle the defendants to a new trial, if a motion therefor had been made, is a question which is not presented by the record. We accordingly hold that the evidence is not, as a matter of law, practically conclusive against the verdict.

It follows that the judgment appealed from must be reversed, and case remanded, with direction to enter judgment for the plaintiff upon the verdict. So ordered.

PHILIP E. BROWN, J., took no part.

STUHR v. WRIGHT COUNTY TELEPHONE CO.

(Supreme Court of Minnesota. Dec. 6, 1912.)

(Syllabus by the Court.)

1. DAMAGES (§ 180*)—HIGHWAYS (§§ 211, 213*)—RIGHTS OF TRAVELER—LOW TELEPHONE WIRE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

While the plaintiff was driving a threshing outfit on a highway, the smokestack of the engine came in contact with the wires of the defendant, suspended over the highway so low as to obstruct travel thereon, whereby he sustained personal injuries, for which he had a verdict for \$2,450. Evidence considered, and held, that it sustains a finding that the defendant was negligent, that the plaintiff was not, and that the award of damages is not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 357-367, 370, 371; Dec. Dig. § 130;* *Highways*, Cent. Dig. §§ 527-532, 535-537; Dec. Dig. §§ 211, 213.*]

(Additional Syllabus by Editorial Staff.)

2. APPEAL AND ERROR (§ 232*)—INSTRUCTIONS—OBJECTIONS—GROUNDS OF REVIEW.

Where defendant objected to an instruction given, he is limited on appeal to the grounds of objection relied on in the trial court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1351, 1368, 1430, 1431; Dec. Dig. § 232.*]

3. PLEADING (§ 236*)—AMENDMENT—DISCRETION.

Where defendant, in an action for injuries, excepted to an instruction authorizing the jury to consider any loss of time resulting to plaintiff directly from his injury, on the ground that loss of time was not pleaded as an element of damage, it was not an abuse of the trial court's discretion to overrule the objection and permit plaintiff to amend the complaint in that regard.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.*]

Appeal from District Court, Wright County; Arthur E. Giddings, Judge.

Action by Rudolph Stuhr against the Wright County Telephone Company. From an order denying defendant's alternative mo-

tion for a judgment notwithstanding the verdict for plaintiff or for a new trial, it appeals. Affirmed.

Latham, Pidgeon & Larson, of Minneapolis, for appellant. Woolley & Johnson, of Buffalo, for respondent.

START, C. J. The plaintiff, on September 15, 1911, was driving on a public highway in the town of Marysville, in the county of Wright, with a threshing outfit, when the smokestack of the engine on which he was riding came in contact with the wires of the defendant suspended over the highway. He heard some one call out that he was against the wires. He stopped the engine at once, and went forward on the running board of the engine to investigate the situation, when the wires broke loose and threw him down, whereby he was injured to some extent. This is an action to recover damages for his injuries, on the alleged ground that they were caused by the negligence of the defendant in maintaining its wires so low over the highway as to obstruct and endanger travel thereon. The answer denied the alleged negligence, and alleged that the plaintiff's injuries were caused by his own negligence. The plaintiff had a verdict for \$2,450, and the defendant appealed from an order of the district court of the county of Wright, denying its alternative motion for judgment or a new trial.

[1] No claim is here made by the defendant that the evidence was not sufficient to sustain a finding that it was negligent as alleged, but it contends, in effect, that as a matter of law both the complaint and the evidence conclusively show that the plaintiff's injury was the result of his own negligence. The contention is, in substance, that the plaintiff, when he stopped his engine, upon being told that he was against the wires, went forward from a place of safety to one of danger to investigate their condition; that he knew before he started forward that the wires were taut against the smokestack and pushed out of line, and liable to break any time and injure some one; and that he fully appreciated the hazard of the situation. While detached portions of the plaintiff's cross-examination seemingly furnish some basis for the contention, yet it is clear from his whole testimony, if credible, of which the jury were the judges, that he did not in fact know of the condition of the wires, or of any danger, when he started forward, and did not learn of it until he was within two feet of the smokestack.

His cross-examination as to where he was when he first learned that the wires were taut against the smokestack was this: "Q. And after you saw how taut they were, you came to the conclusion it was dangerous for anybody to be around there; that they were liable to break at any time, and injure some

one? A. Yes, sir. Q. And when you came to that conclusion, and saw the condition it was in, you were down in the position you occupied when you operated your machine? A. No, sir; I was on the platform by the side of the engine. When I noticed the wires were against the smokestack, I was standing on the platform by the side of the engine. Q. That is, when you noticed the condition of the wire that it was taut and dangerous? A. Yes, sir. Q. How far away were you when you noticed that condition? How far was the little platform on which you were standing from the wires on the smokestack at the time you saw and noticed it was in a dangerous condition? A. About two feet. Q. I think you said you thought it was liable to break at any time and tear the machine to pieces? A. Yes, sir. Q. And right in the face of that knowledge, and of that condition that it was liable to break at any time and tear the machine to pieces, you stepped up there and tried to loosen it? A. No, sir; when I seen it was in that dangerous condition— Q. Where were you then? A. I was on this little platform by the side of the boiler. Q. Two feet away from the wire? A. Yes, sir. Q. That is when you were about two feet from the wire? A. Yes, sir; I didn't know just how far, but I stepped back, or thought I would go back, and back up the engine to slacken the wires, so the men could take a fork and raise the wires over the stack. Q. When you saw the wires were so taut against the smokestack, you testified a moment ago that when you saw that position, you were down on the platform where you operated the engine? A. No, sir; I was on the little platform on the side of the boiler. Q. You say that you heard * * * some one holler that the wires were caught? A. Something like that; I heard some one holler, 'Whoa!' Q. And you looked up from where you were, and saw the wires were against the smokestack? A. I couldn't see if they were against the smokestack or not."

It is perfectly obvious, in view of this testimony, that the plaintiff was not guilty of contributory negligence, and that the defendant was not entitled to an instructed verdict. Nor is it entitled to a new trial on the ground that the verdict is not sustained by the evidence. The trial court instructed the jury that, in case they found for the plaintiff, they might, in assessing his damages, take into consideration any loss of time resulting directly from his injury. The defendant excepted to this instruction on the sole ground that loss of time was not pleaded, and the trial court, on plaintiff's motion, then allowed an amendment of the complaint in this respect. On the motion for a new trial, and here, the defendant assigned the giving of the instruction as error, and assigned the same reason stated in taking its exception on the trial. In its brief the de-

fendant urges that the instruction was error for the further reason that there was no evidence of the value of the time lost.

[2] The defendant is limited to the ground relied on and urged in his exception and assignment of error in the trial court; for, having undertaken to advise the court of its specific objection to the instruction, and the court having obviated it by allowing an amendment to the complaint, it would be manifestly unfair to permit him here to urge for the first time another ground of error.

[3] We hold that the trial court did not abuse its discretion in allowing the amendment, and that the instruction was not reversible error.

The last contention is that the damages awarded are excessive, and appear to have been given under the influence of passion or prejudice. The evidence tends to show that the plaintiff is a farmer; that he fell against the wheel of the engine, breaking his rib, and seriously injuring his back and hip bone, causing him severe pain; that he was confined to his bed for two weeks, and has not been able to do any work since, as it hurts his backbone. There was also medical testimony to the effect that at the time of the trial there was a weakness of his hip, due to the injury, a possibility of nerves or tendons included in the callous, and that in time, with the hardening of the tissues, excruciating pain might result, and such condition might be permanent. A consideration of the whole evidence leads us to the conclusion that the award of damages was liberal, but not so excessive as to justify any interference with it by this court.

Order affirmed.

JOHNSON v. SCOTT.

(Supreme Court of Minnesota. Nov. 29, 1912.)

(Syllabus by the Court.)

1. NEGLIGENCE (§ 136*)—WILLFUL NEGLIGENCE—SUBMISSION.

Where the complaint, in an action for injuries alleged to have been caused by the defendant's negligence, failed to allege "willful negligence," but such issue was litigated by the parties, and it was manifest that the defendant was not misled, there was no reversible error in submitting such issue to the jury; provided, of course, the evidence was sufficient to authorize such submission, especially where no exception on this account was taken on the trial.

Quære, whether "willful negligence" is provable under an allegation of ordinary negligence. [Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

2. MUNICIPAL CORPORATIONS (§ 706*)—STREETS—AUTOMOBILE ACCIDENT—WILLFUL NEGLIGENCE.

Evidence considered, and held sufficient to authorize submission of an issue of "willful negligence."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

3. TRIAL (§ 260*)—REQUESTED CHARGE—INSTRUCTIONS GIVEN.

Where, in an action by a pedestrian, who was struck by an automobile while he was crossing a street, the question of the plaintiff's contributory negligence was fully and fairly covered by the instructions given, there was no error in refusing to instruct that the plaintiff was guilty of contributory negligence, if he failed to look before he started to cross the street and while crossing the same.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

4. NEW TRIAL (§ 54*)—GROUNDS—MISCONDUCT OF JURORS.

Refusal of the trial court to grant the defendant a new trial on the ground of misconduct of one of the jurors in conversing with one of the witnesses for the plaintiff, etc., *held*, upon the showing made, clearly proper.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 112-114; Dec. Dig. § 54.*]

(Additional Syllabus by Editorial Staff.)

5. APPEAL AND ERROR (§ 263*)—SUBMISSION OF ISSUES—REVIEW—NECESSITY OF EXCEPTION.

Error in submitting an issue not within the pleadings was not available, where no exception was taken thereto at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1532; Dec. Dig. § 263.*]

Appeal from District Court, Watonwan County; A. R. Pfau, Judge.

Action by William D. Johnson against John H. Scott. Judgment for plaintiff, and defendant appeals. Affirmed.

Hammond & Farmer, of St. James, for appellant. J. E. Haycraft, of Madella and S. B. Wilson, of Mankato, for respondent.

PHILIP E. BROWN, J. Action to recover damages for personal injuries suffered by the plaintiff in colliding with the defendant's automobile. The cause was tried to a jury, who returned a verdict for the plaintiff. This is an appeal by the defendant from an order denying him a new trial.

The complaint charged, in substance, that while the plaintiff was crossing Main street, in Madella, on November 29, 1910, he was run down and injured by an automobile owned and driven by the defendant, which accident occurred without fault on the plaintiff's part, and because the defendant was negligent in propelling the machine at an unlawful and high rate of speed, without lights and in violation of law. The defendant answered, admitting that the plaintiff was injured, and putting in issue the other claims recited. It appeared on the trial that the accident happened in the evening of the day stated.

1. We conclude from an examination of the record that there was sufficient evidence to warrant the jury in finding that the defendant was negligent as charged. In fact, the defendant makes no serious claim to the contrary.

2. The defendant asserts that the court erred in charging the jury as follows: "I will

further charge you in this case that if the plaintiff was negligent in this case, and did place himself in a negligent position, and if the defendant, before the happening of the injury or accident, discovered the negligence of the plaintiff, but by and through the want of ordinary care upon his part, after discovering the danger of the plaintiff, the danger that he was in, caused by his own negligence, nevertheless ran against him and injured him, operating his machine without using ordinary care, then the plaintiff can recover and should recover a verdict at your hands. On the other hand, I charge you, gentlemen, that if the defendant, after discovering that the plaintiff had placed himself in a dangerous position, was negligent, guilty of negligence on his part, if the defendant used ordinary care on his part, then the plaintiff cannot recover." The defendant contends that this instruction constituted error for the following reasons: (a) That the complaint contains no allegations charging the defendant with the commission of willful negligence, which claim is true; (b) that the evidence is insufficient as a predicate for the instruction or to sustain a finding of the defendant's guilt of willful negligence.

[1] The defendant forcefully argues that, since this action is plainly one, under the allegations of the complaint, for the recovery of damages inflicted because of ordinary negligence, no question of willful negligence was involved; that to warrant the court in submitting a claim grounded upon this latter charge the plaintiff must plead the material and ultimate facts constituting such negligence, to the end that the defendant may be apprised of the charge he is to meet, and of the precise subject of the controversy, in order that he may have an opportunity to prepare his defense, and the plaintiff, having failed in this regard, should not be permitted to prove upon the trial, or, at least, to have submitted to the jury, the effect of negligence materially different in kind from that alleged.

We are not agreed upon the proper determination of the point of pleading here involved, as an abstract proposition. We hold, however, that it is not necessary to the decision of this case to pass upon such question, because, at most, if there were sufficient evidence in the record to justify the court in submitting the so-called "willful negligence" of the defendant to the jury—a question which we will presently consider—then under the facts we would have a case, we think, of mere harmless variance. *R. L. 1905, § 4158; Wilcox Lumber Co. v. Ritteman, 88 Minn. 18, 92 N. W. 472; Kaufman v. Barbour, 103 Minn. 173, 114 N. W. 738.* The several features of the cause of the accident were fully covered by the evidence, and evidently the defendant was not misled. From the fact that the alternative portion of the in-

struction complained of embraces the substance of one of the defendant's requests, it is apparent, also, that this issue was litigated without objection, and hence objections now made are unavailing. *Dunnell's Minn. Dig.* § 7675.

[5] Moreover, no exception was taken on the trial to the portion of the charge now criticised, which, we hold, was necessary in order to raise the question now under consideration, under the rule of *Steinbauer v. Stone*, 85 Minn. 274, 88 N. W. 754, and subsequent cases developing its application.

Nevertheless, it was error to give this instruction, if it be true as claimed by the defendant, that the evidence adduced on the trial was insufficient to warrant the submission of this phase of the case. We have examined the record in this regard. No useful purpose would be subserved by stating the evidence in detail. That the plaintiff was in a place of danger immediately before the collision is established by the result, and clearly such place was made unsafe by the interposition of defendant's machine.

[2]* While the question of the defendant's wilful negligence is a somewhat close one on the proofs, we have concluded that the evidence was sufficient, if believed by the jury, to warrant the deduction therefrom that the defendant saw the plaintiff's peril in time to have avoided striking him with the machine, had he thereafter used ordinary care in its management, and, furthermore, that the verdict cannot be disturbed on this ground after being approved by the trial court.

[3] 3. The defendant claims that the trial court erred in refusing to give the following instruction, requested by him: "You are instructed that if the plaintiff did not look at the time he started across the street, or while he was crossing the street, or until the automobile was upon him, he did not exercise common prudence, and was guilty of contributory negligence." We find no error here. The jury were fully and fairly instructed concerning the defendant's claim that the plaintiff was guilty of contributory negligence, and the requested instruction comes within the rule that the court is not required to charge as to the effect of particular items of evidence, or what conclusion may or may not follow therefrom. *Senro v. Chicago, etc., R. Co.*, 115 Minn. 110, 131 N. W. 1011. We also think that, assuming this requested instruction to be abstractly correct—which is more than doubtful in the light of *Stallman v. Shea*, 99 Minn. 422, 109 N. W. 824—it was not warranted by the evidence.

[4] 4. The last claim urged by the defendant is that there was misconduct on the part of the jury. The showing made by the defendant below in support of this claim amounts to this: One of the witnesses called

by the plaintiff, after testifying on the trial favorably to the plaintiff's theory, and also being strongly prejudiced in the plaintiff's favor and cognizant that one Jacobson was a juror in the case, called such juror into a saloon, during an intermission of the court's proceedings occurring prior to the conclusion of the giving of evidence on the trial, in a surreptitious manner, and, after having a private conversation with him therein, treated him to a cigar. Neither the alleged conversation nor its purport appears, and the affidavits offered fail to connect the plaintiff with this transaction. Furthermore, the affidavits offered by the plaintiff contradicted the allegations of those of the defendant in regard to the matter. It also appears that both the defendant and his counsel were advised of the existence of the alleged facts, the defendant himself prior to the submission of the case to the jury, and his counsel before the verdict was rendered, and that no steps were taken to apprise the court thereof. Under these circumstances the trial court was clearly right in refusing to grant a new trial on this ground. See *Dunnell's Minn. Dig.* §§ 7104, 7107. The rule of this court is stated in section 7105.

Order affirmed.

VERNON v. IOWA STATE TRAVELING MEN'S ASS'N.

(Supreme Court of Iowa. Nov. 20, 1912.)

1. EVIDENCE (§ 127*)—RES GESTÆ—ACTION ON ACCIDENT POLICY—CAUSE OF DEATH.

Where, in an action on an accident policy, plaintiff claimed that her husband, the insured, died of blood poisoning due to an abrasion of the skin of one of his limbs caused by the use of a brush or other implement in the hands of a bath attendant, testimony that insured, upon returning from the bath, exhibited one of his limbs, disclosing the abrasion, with the remark, "I want to show you how rough that damn fool was with me in the bathroom," was properly admitted as *res gestæ* of the transaction.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 377-382; Dec. Dig. § 127.*]

2. EVIDENCE (§ 127*)—RES GESTÆ—ACTION ON ACCIDENT POLICY—CAUSE OF DEATH.

And declarations of present pain in the limb, made during the illness which followed and finally resulted in the death, were properly admitted as *res gestæ* to indicate a probable cause of death.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 377-382; Dec. Dig. § 127.*]

3. WITNESSES (§ 192*)—PRIVILEGED COMMUNICATIONS—HUSBAND AND WIFE.

In an action on an accident insurance policy for death, the declarations of the deceased to his wife, made both before and after he took out his policy, in regard to his condition of health, were privileged and therefore inadmissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 739; Dec. Dig. § 192.*]

4. EVIDENCE (§ 121*)—DECLARATIONS.

In an action on an accident insurance policy, declarations of the deceased tending to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

show his condition of health before and after he became a member of the defendant association, made to his father and mother, are inadmissible unless part of the res gesta.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303, 307-338, 1117, 1119; Dec. Dig. § 121.*]

5. APPEAL AND ERROR (§ 1047*)—HARMLESS ERROR—STRIKING OUT TESTIMONY—CONCEDED FACTS.

In an action on an accident insurance policy, the striking out of a statement of the plaintiff, in evidence, that her husband had been troubled with a slight kidney trouble was not prejudicial where such fact was freely conceded upon the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1047.*]

6. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—REJECTION OF TESTIMONY—SUBSEQUENT ADMISSION.

Rulings on the rejection of testimony will not constitute reversible error where the matters rejected are fully covered by a subsequent admission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200-4204, 4206; Dec. Dig. § 1058.*]

7. INSURANCE (§ 646*)—ACCIDENT POLICY—BURDEN OF PROOF—CAUSE OF DEATH.

Where the by-laws of a mutual benefit association, which were, by reference, made a part of the accident insurance policy, provide for a payment whenever a member in good standing shall, through external, violent, and accidental means receive bodily injuries which shall, independently of all other causes, result in death within a certain time from the accident, the burden is on the plaintiff in an action on a policy to show that the deceased came to his death by such means.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.*]

8. INSURANCE (§ 646*)—ACCIDENT INSURANCE—EXCEPTED CAUSES—BURDEN OF PROOF.

In an action on a contract of insurance relieving the company from liability for death resulting from certain causes, the defendant has the burden of showing that death resulted from an excepted cause.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.*]

9. TRIAL (§ 260*)—INSTRUCTIONS—INCLUSION IN OTHERS GIVEN.

Instructions requested were properly refused where covered by others given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

10. INSURANCE (§ 454*)—ACCIDENT INSURANCE—ACTION—RIGHT OF RECOVERY—DEATH FROM EXCEPTED CAUSE.

A policy of accident insurance, by reference to the by-laws of the issuing company, exempted it from liability where the death or accident resulted wholly or partially from disease or bodily or mental infirmity. *Held*, such a provision must be construed most strongly against the insurer and must be held to apply only to such diseases or mental infirmities as in some manner contribute, directly or indirectly, either to the injury or the death, so that a mere showing that there was disease or bodily or mental infirmity would not defeat the beneficiary's right to recover.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1177, 1178; Dec. Dig. § 454.*]

11. TRIAL (§ 251*)—INSTRUCTIONS—ISSUES.

An instruction presenting a defense which was not pleaded was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

12. INSURANCE (§ 451*)—ACCIDENT INSURANCE—CONSTRUCTION OF POLICY—DEATH FROM MEDICAL TREATMENT.

An accident insurance policy providing for the nonliability of the company in case of death or disability resulting from medical or surgical treatment was undoubtedly intended to cover cases of accident growing out of medical or surgical treatment, and would not apply to such treatment when necessary for the purpose of relieving the insured from the results of accidental injury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1171, 1172; Dec. Dig. § 451.*]

13. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL TO GIVE REQUESTED CHARGE.

Where, in an action on an accident insurance policy, plaintiff claimed that the death of the insured was due to blood poison caused from an abrasion made on his limb by a bath attendant, the court properly charged as to the meaning of the words "accident" and "accidental," charged that the plaintiff had the burden of showing that the accident as described caused the death, and also charged that the plaintiff must prove by a preponderance of evidence that the deceased's death was caused proximately and solely by accident through external, violent, and accidental means, the jury could not have rendered a verdict for the plaintiff if they believed that death was due to any other cause than that claimed and the refusal to give an instruction that there was no accident, and the plaintiff could not recover if the death was caused by reason of an operation performed on him to relieve a sore or boil on his limb, was not prejudicial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

14. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS—FAILURE OF JURY TO READ CHARGE.

Where a recital of a withdrawn issue made by a division of a reply was inadvertently included by the court in its charge, but, while not read by him on his noticing the mistake, was given to the jury on its retirement, their failure to read it would render its submission non-prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

15. APPEAL AND ERROR (§ 1066*)—INSTRUCTIONS—INCLUSION OF WITHDRAWN ISSUE—FAILURE OF JURY TO READ CHARGE.

A court's recital of a withdrawn issue in its charge which was handed to the jury on its retirement was harmless where the fact of withdrawal was called to the jury's attention three times, the court did not read the portion of the charge in question, and where the only reference was in the portion of the charge stating the issues made by the pleadings; no reference being made thereto in the main portion of the charge in which the attention of the jury was directed to the exact issues which they were to determine.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

16. APPEAL AND ERROR (§ 1002*)—REVIEW—FINDINGS OF FACT.

A verdict on conflicting testimony is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Appeal from District Court, Polk County; Hugh Brennan, Judge.

Action at law upon a certificate of membership in the defendant association issued to Leo O. Vernon; plaintiff being the beneficiary named in said certificate. Upon issues joined, the case was tried to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Sullivan & Sullivan, of Des Moines, for appellant. Dunshee & Haines, of Des Moines, for appellee.

DEEMER, J. The defendant, a mutual benefit accident association, on the 21st day of February, 1906, issued to Leo O. Vernon a certificate of membership, naming plaintiff (his wife) as beneficiary. The certificate was issued pursuant to an application of the assured in which he stated in answer to an interrogatory that he had some kidney trouble. He left unanswered a question as to whether or not he had ever had Bright's disease. Assured died on the 30th day of July, 1906, and plaintiff claims that his death was the result of blood poison due to an abrasion of the skin on one of his limbs, caused by the use of a brush or other implement in the hands of a bath attendant while giving him a bath at a sanitarium in the town of Colfax. Defendant denies that he died of blood poisoning, and claims that his death was caused or contributed to by a diseased condition of the kidneys. On these issues the case tried to a jury with the result hitherto stated. Numerous assignments of error are made in the brief, and to such as are regarded as material we shall now devote our attention.

[1] 1. In making her case, plaintiff was permitted to prove over defendant's objections that early in the month of July of the year 1906, while she and her husband were at the sanitarium in Colfax, the husband went to the bathroom for a bath, and that upon his return he exhibited to her one of his limbs, disclosing an abrasion of the skin, with the remark, "I want to show you how rough that damn fool was with me in the bathroom." This testimony was properly *res gestæ* of the transaction, and there was no error in overruling defendant's objection. *N. A. Ass'n v. Woodson*, 64 Fed. 689, 12 C. C. A. 392; *Keyes v. Cedar Falls*, 107 Iowa, 509, 78 N. W. 227; *Insurance Co. v. Mosley*, 8 Wall. 397, 19 L. Ed. 437.

[2] During the illness which followed and finally resulted in death, it seems that deceased was in pain from the wound, and witnesses were permitted to testify to his declarations of present pain in the limb. In this there was no error. These declarations were also part of the *res gestæ* and were material as indicating a probable cause of death.

[3] Defendant sought to show the assured's condition of health, both prior to and

after he became a member of the association, and before it is claimed he received his injuries by declarations or admissions made by him to his father and mother, and also to his wife, the plaintiff. The declarations said to have been made to his wife were absolutely privileged, and therefore inadmissible.

[4] Our attention has not been called to any other declaration sought to be introduced; but, if such were offered, they were inadmissible as against the plaintiff, unless shown to have been part of the *res gestæ*. These propositions are ruled by *Sutcliffe v. Association*, 119 Iowa, 220, 93 N. W. 90, 97 Am. St. Rep. 298, and need not be further elaborated.

[5] Complaint is made of the striking out of some of plaintiff's testimony, and particularly of a statement made by her that her husband "was troubled with a slight kidney trouble ever since the Cedar Rapids fire." There is some doubt about whether the ruling went this far, but, if it did, there was no prejudice, for this fact was virtually conceded upon the trial. Again the witness said that her only means of knowledge was from statements made to her by her husband. Assuming that to be true, the ruling seems to be sustained in *Sutcliffe Case*, *supra*.

[6] Some rulings on the rejection of testimony were erroneous, but they were either fully covered by subsequent admission or were without prejudice.

[7] 2. The certificate of membership, or the articles of incorporation and by-laws which by reference were made a part of the certificate, contained the following, among other, provisions:

"Art. 6, § 2. Benefits: Whenever a member in good standing shall, through external, violent and accidental means, receive bodily injuries, which shall, independently of all other causes result in death within twenty-six (26) weeks from said accident, the beneficiary named in his application for membership or his heirs, if no beneficiary is named therein, shall be paid the proceeds of one assessment of two (\$2.00) dollars upon each member in good standing, but in no case shall said sum exceed the sum of five thousand (\$5,000) dollars, and shall be in full satisfaction of all liability to the said deceased member, his beneficiary, heirs or legal representatives."

"Art. 6, § 6. Benefits: Nor shall this association be liable in any manner to any member or beneficiary for any indemnity or benefit for accidental death, loss of limb, sight, disability resulting wholly or partially, directly or indirectly, from any of the following causes, conditions or acts, or when the member is under the influence or affected by any of the conditions or acts to wit: disease, bodily or mental infirmity, medical or surgical treatment. * * * Each of the foregoing causes, conditions or acts are expressly

exempted from all the provisions of these by-laws granting to members or beneficiaries thereof benefits or indemnities."

In view of these provisions, and in the light of the testimony, it is contended for appellant that the plaintiff did not make out a case, and that the court erred in some of its instructions; and also erred in denying certain requests made by the defendant. That all these provisions became a part of the contract, and that the burden was upon plaintiff of showing that the deceased came to his death by external, violent, and accidental means, is well established by authority. *Binder v. Association*, 127 Iowa, 25, 102 N. W. 190; *Carnes v. Association*, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. Rep. 306; *Taylor v. Insurance Co.*, 110 Iowa, 621, 82 N. W. 326.

[8] But it is also true that the burden is upon the defendant of showing that death resulted from one of the causes excepted by the contract of membership. *Jones v. Association*, 92 Iowa, 652, 61 N. W. 485; *Carnes v. Association*, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. Rep. 306.

The trial court did not err to defendant's prejudice in instructing upon these propositions, but it is contended that it erred in giving the following: "(4) It is provided in the by-laws of the defendant association, which is a part of the contract sued on, that no benefits shall be paid for death caused wholly by disease, nor in any case except when the accidental injury was the proximate and sole cause of the death. Under the terms of this contract, the defendant is only liable in the event that death resulted solely, and independently of all other causes, from the alleged accident, and this the plaintiff must prove by a preponderance of the evidence. This provision of the by-laws of the defendant association entered into became. and was at the time of the death of the said Leo O. Vernon, a part of the contract between him and the defendant association, and is binding upon the plaintiff and the defendant association in this case. (5) If you find by a preponderance of the evidence that an accident happened to the deceased, Leo O. Vernon, by an abrasion of the skin of his left leg by the use of a brush by an attendant administering said bath, and that from such abrasion blood poison or septicæmia set in, and you further find that by virtue of this injury and the resulting blood poison, if you find there was such injury and blood poison, death resulted as the sole result thereof, then and in that event the plaintiff will be entitled to recover in this case, and you should so find by your verdict. If, however, you find that the death of the said Leo O. Vernon resulted directly or indirectly from or in consequence of disease, then there can be no recovery in this case, and your verdict in that case should be for the defendant."

Error is also predicated upon the court's failure to give the following bearing upon the same proposition: "(3) You are instructed that it is provided in the contract sued on: 'Nor shall this association be liable in any manner to any member or beneficiary for any indemnity or benefit for accidental death, loss of limb, of sight, disability resulting wholly or partially, directly or indirectly, from any of the following causes, conditions or acts, or when the member is under the influence or affected by any such cause, condition or act, to wit: disease, bodily or mental infirmity. * * * Each of the foregoing causes, conditions or acts are expressly exempted from all the provisions of this by-law granting to members or beneficiaries thereof benefits or indemnities.' You are instructed that, if at the time of the alleged injury, if you find an injury was received, the said Leo O. Vernon was in any manner affected by disease or bodily infirmity, then the plaintiff cannot recover and you should so find. (4) You are instructed that, before the plaintiff in this cause can recover, you must find, by a preponderance of the evidence, that the death of said Leo O. Vernon, independently of all other causes, was the result if external, violent, and accidental means, and if you find that other causes contributed to his death besides said injury, if you find he did receive one, then in such event the plaintiff could not recover, and you should so find. (5) You are instructed that, if you find that the death of Leo O. Vernon was caused directly or indirectly, wholly or in part, by disease or bodily infirmity afflicting Leo O. Vernon at the time of the alleged accident, if he did receive an injury, then you are instructed that the plaintiff could not recover, and you should so find. (6) You are instructed it is claimed by the defendant association the said Leo O. Vernon prior to and at the time of his death was affected by a disease, and that his death resulted from such disease. If you find that the said Leo O. Vernon, prior to and at the time of his death, was affected by disease, and such disease contributed to his death, then said death was not accidental within the meaning of these instructions, and the plaintiff cannot recover. (7) You are instructed that the contract sued on provides: 'Nor shall this association be liable in any manner to any member or beneficiary for any indemnity or benefit for accidental death * * * resulting wholly or partially, directly or indirectly, from any of the following causes, conditions or acts, or when the member is under the influence of or affected by any such condition or act, to wit: medical or surgical treatment.' If you find that the said Leo O. Vernon, deceased, did receive an injury in the manner alleged and stated in the petition of the plaintiff, yet if you further find that said injury was the result of medical or surgical treatment for the purpose

of relieving the said Vernon from his then condition, then in that case the defendant would not be liable even if he did receive an accidental injury." "(9) You are instructed that if you find by a preponderance of the evidence that the sore or boil upon the left leg of Leo O. Vernon was open or incised by his attending physician, and that thereafter an infection set in by reason of such incision, then you are instructed this is not an accident for which the defendant herein would be liable, and you should so find."

In connection with those given, the following should also be considered: "(2) It appears from the record without controversy in this case that Leo O. Vernon became a member of the defendant association in the year 1905, and so continued, and was at the time of his death a member in good standing in said association; that the said Leo O. Vernon died near Bloomfield, Iowa, on the 30th day of July, 1909; and, if the plaintiff is entitled to recover in this case, the amount of her recovery will be \$5,000, with interest at 6 per cent. per annum from the 30th day of September, 1909. You will therefore accept these as facts established in the case. (3) The plaintiff in this case claims that the said Leo O. Vernon died, at the time hereinbefore stated, from an accidental injury produced by a bath attendant rubbing the left leg of the said Leo O. Vernon so hard as to cause an abrasion of the skin, and that from such injury septicemia or blood poison set in, which was the sole and proximate cause of his death. On the other hand, the defendant in this case claims that the deceased, Leo O. Vernon, was afflicted with disease, and that his death was caused thereby, and that therefore his death was not from an accidental injury. * * * 'Proximate cause' is the primary and efficient cause, or the moving and producing cause—that is, that but for such cause the death of Leo O. Vernon would not have occurred."

[9] Complaint is made of the instructions given, and also of the refusal to give the ones asked, and the argument in support of these complaints is that the provisions with reference to benefits which we have quoted were not correctly interpreted by the trial court. The exact claim is that the court did not succinctly state to the jury that there could be no recovery unless plaintiff showed that the death of the assured resulted from injuries received through external, violent, and accidental means, independently of all other causes; and failed to instruct that if the death resulted wholly or in part, directly or indirectly, from medical or surgical treatment, there could be no recovery. We are of the opinion that the first proposition is fairly covered by the instructions given. The jury was told that plaintiff must show the "death was caused solely and proximately by accident"; and

the term "proximate cause" was defined. Again the court charged that defendant was liable only in the event that death resulted solely and independently of all other causes from the alleged accident, "and specifically charged that, if the death of Vernon resulted directly or indirectly from or in consequence of disease, there could be no recovery. The instructions, as it seems to us, cast the burden upon plaintiff of showing that death was due solely to the accident and did not result either directly or indirectly from, or in consequence of, disease.

[10] While what is known as article 6, § 6, of the contract is somewhat obscure, it would not do to hold that no recovery could be had on the certificate if the assured was afflicted with any disease or bodily or mental infirmity, either at the time he received his injuries or at the time of death. Very few persons are free from some form of disease or bodily infirmity, and if a condition of that kind, without reference to its casual connection with death, should be held a bar to recovery, the proposed insurance would be a delusion and a snare. Such conditions as we here find are to be construed most strongly against the insurer; and, taken together, we think they must be held to apply to such diseases or bodily or mental infirmity as in some manner contribute, directly or indirectly, either to the injury or to the death. Unless there be such contribution, then the death, loss of limb, etc., cannot result either wholly or partially, directly or indirectly, therefrom. In other words, the disease or bodily infirmity must be a cause or one of the causes of the injury or death, and it is not enough to defeat recovery to show either disease or bodily or mental infirmity. *Binder v. Association*, 127 Iowa, 25, 102 N. W. 190. For this reason the trial court did not err in the instructions given or in refusing to give the third instruction asked. The fourth, fifth, and sixth requests were sufficiently covered in the instructions given.

There was testimony to the effect that, shortly after the assured arrived at Colfax early in the month of July, a boil or pimple about the size of a quarter was discovered upon his leg, and it also appears that an attending physician made an incision at this point in order to afford relief. The wound remained open after this incision, and it is claimed for defendant that this incised wound may have become infected and brought about the blood poisoning from which it is claimed the assured died.

[11] It will be noticed that the provisions of the contract from which we have quoted except accidental death resulting wholly or in part, directly or indirectly, from medical or surgical treatment. The seventh request was made to direct the jury's attention to this particular provision, and it is claimed that the court erred in refusing to give it.

To this there are two answers. The first is that no such defense is pleaded. An examination of the answer shows that no reference was made therein to this claimed defense.

[12] Second, the instruction itself is fundamentally wrong in that it announces the rule of nonliability, even if the medical or surgical treatment was necessary, or thought to be necessary, for the purpose of relieving the assured from the results of an accidental injury. The provision of the by-laws quoted is somewhat obscure in its provisions regarding this matter, but we do not think it should be held that the association is not liable if the medical or surgical treatment was for the purpose of relieving the assured from the results of accidental injuries. It was undoubtedly enacted to cover cases of accident growing out of medical or surgical treatment, and should not be held to apply to such treatment which was necessitated because of an accidental injury. Either proposition is a sufficient answer to defendant's contention here.

[13] The refusal to give the ninth request is a little more difficult to sustain. That has reference to what would be an accidental injury, and has reference to article 6, § 2, of the by-laws, rather than to article 6, § 6. It means nothing more than this: That if the insured, by reason of an operation performed upon him to relieve a sore or boil upon his leg, came to his death, then there was no accident within the meaning of the law. If it should be construed to cover the exception contained in article 6, § 6, then the court correctly refused it, for the reason that no such defense was pleaded. Giving to the instruction the only interpretation which we think it will properly bear, we are inclined to the view that, while it might well have been given, no prejudice resulted from the court's refusal to embody it in the charge. The court, after stating plaintiff's claim as set forth in instruction 3, from which we have already quoted, defined an accident as follows: "By 'accidental' is meant as the result of accident, happening by chance, unexpectedly taking place, not according to the usual course of things, or not as expected. An accident is an unexpected event which happens as by chance, which does not take place according to the usual course of things, an event which takes place without one's foresight and expectation; an undesigned, sudden, and unexpected event." And by the fifth, which we have hitherto set out, the burden was cast upon the plaintiff of showing that the claimed abrasion was an accident caused by a bath brush. The court also said in its charge that plaintiff

was required to prove by a preponderance of the evidence that the death of Leo O. Vernon was caused proximately and solely by accident through external, violent, and accidental means. It is manifest that, if the jury had found there was no abrasion of the skin as claimed by plaintiff, it could not, under the instructions as given, have rendered a verdict for her. In other words, had it found that death was due to an incision made to afford relief from a sore or a boil, it would by the same mental process have determined that it was not due to the abrasion upon the leg, as claimed by plaintiff. This was the only claim of accident made by the plaintiff, and this, under the instructions, she was bound to show to justify a recovery.

[14] 3. In a reply filed by plaintiff, waiver of these conditions was pleaded because defendant knew, or should have known, of the condition of the assured's health when he was admitted to membership, and that it did in fact know because of the reputation in the community. During the trial this division of the reply was withdrawn, and at three different times the jury's attention was directed to the matter of withdrawal. Notwithstanding this fact, when the court prepared its instructions, it overlooked this withdrawal, and in stating the issues recited the substance of this division of the answer. When he came to read the instructions, he noticed this mistake, and did not read that part to the jury—intending, as he says, to remove that statement before sending the instructions to the jury. This, too, he failed to do, and the statement went to the jury room. After the verdict, plaintiff was permitted to show in support of the verdict that the jury did not read this part of the instruction, and did not hear the statement read. This testimony, if it were admissible, and we are inclined to think it was, removed any possible prejudice.

[15] Aside from this, however, the error was nonprejudicial, even if read; for the jury was specifically directed in the main part of the charge to exact issues they were to determine, and these made no reference whatever to that issue. Indeed, no reference was made thereto save in stating the issues made by the pleadings. Moreover, the jury was fully advised by counsel and through the remarks of the court that this issue was withdrawn. The thought of prejudice is distinctly negated.

[16] 4. There was testimony to support the verdict, and it is not for us to say that we would have arrived at a different conclusion.

Finding no prejudicial error, the judgment must be, and it is, affirmed.

MAINE v. CONSTANTINE.

(Supreme Court of Iowa. Nov. 18, 1912.)

1. LANDLORD AND TENANT (§ 252*)—LEASE—LIEN FOR RENT.

The fact that a duly acknowledged and recorded lease providing that the lessor should have a lien for rent upon the lessee's property on the leased premises stipulated for the lien in general terms, and therein resembled the landlord's statutory lien, did not cause the lien created to be merely a statutory lien, or in any manner impair its validity or the lessor's right to enforce it against a purchaser of the incumbered property.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1002, 1022-1026; Dec. Dig. § 252.*]

2. LANDLORD AND TENANT (§ 231*)—ACTION FOR RENT—EVIDENCE.

Evidence in an action on rent notes and to enforce a lien given by the lease to secure their payment held to sustain the court's finding that \$228.25 was still owing plaintiff.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 926-934; Dec. Dig. § 231.*]

3. LANDLORD AND TENANT (§ 254*)—LIEN FOR RENT—WAIVER.

A landlord did not waive his lien under an existing lease for rent past due by executing a new lease and receiving subsequent payments of rent, where the new lease was executed upon the understanding that the rent due was to be paid, the rent notes were not surrendered, defendants were not prejudiced, and the plaintiff was guilty of no fraud.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 986, 1034-1044; Dec. Dig. § 254.*]

4. FRAUD (§ 6*)—IMPLICATION.

Fraud on the part of the plaintiff in connection with the matter sued on could not be implied merely because he sued for more than was finally found due.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 7; Dec. Dig. § 6.*]

5. LANDLORD AND TENANT (§ 262*) — ACTION FOR RENT—LIEN—PARTIES.

In an action on rent notes and to enforce a lien given by the lease, a person who had no interest in the property in controversy when the action was begun or thereafter was not a necessary party, though he had an interest at a prior time while the property was subject to the lien; the only necessary parties defendant being the maker of the lease and notes, together with the present owner of the incumbered property.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1049-1058; Dec. Dig. § 262.*]

Appeal from District Court, Johnson County; R. P. Howell, Judge.

Action to recover for rent alleged to be due from James Constantine, and to establish an alleged mortgage lien therefor on goods transferred by him through another to Demetrios Constantine. Relief, though for a lesser amount, was awarded as prayed. Demetrios Constantine appeals. Affirmed.

Ney & Bradley, of Iowa City, for appellant. S. C. Ranck, of Iowa City, for appellee.

LADD, J. On February 6, 1906, plaintiff leased a store building to James Constantine

for a period of three years beginning March 1st following at the rental of \$50 per month. A lease was executed containing a provision that "the lessor shall have a lien for the rent at any time due or to become due upon any and all the property of the said party of the second part, including all goods, merchandise, fixtures, and kitchen furniture used in or about said premises of any character or description during the term of this lease, whether the same is exempt from execution or not. No demand for rent shall be necessary to entitle rights herein stipulated."

This lease was duly acknowledged by the lessee and recorded December 28, 1906. As evidencing the monthly rental 36 promissory notes were executed by the lessee to the lessor of \$50 each payable on the 1st day of the respective months, and bearing interest at the rate of 7 per cent. per annum if not paid at maturity. The petition alleged that the notes maturing on the 1st days of January, February, April, May, and June, 1908, and January and February, in 1909, had never been paid, and that but \$50 had been paid June 19, 1909, on the note maturing November 1, 1908. Judgment was prayed against James Constantine for the amount of these notes, and that a lien for such amount be established against the property on the premises, conceded to be that which belonged to the lessee named in its lease and by him kept thereon. On October 3, 1906, James Constantine made a conditional sale of the property contained in the building to John Constantine and Stephen Saphos, the terms being that the purchasers were to go into possession January 1, 1907; and, when their promissory notes amounting to \$2,200, evidencing the price, were paid, the seller should execute to them a bill of sale of said property. This contract was also duly recorded. Subsequently Saphos sold his interest in the property and business to John Constantine, and about the termination of the lease the latter took Demetrios in as a partner. In the fall of 1907 plaintiff extended the building 12 feet to the rear under an agreement, as he claimed, that John Constantine would pay an additional rental of \$10 per month. John denied having so promised, but his numerous checks for \$60—each the total of the two rentals—strongly corroborate the plaintiff's testimony, and we are satisfied that the arrangement was as claimed by plaintiff. On May 20, 1909, two months after the expiration of the lease to James Constantine, a new lease for a term of two years beginning May 1, 1909, at a monthly rental of \$60 per month, was executed to John and Demetrios. On February 3, 1911, Demetrios acquired the interest of John Constantine in the property, and interposed several defenses, which will now be considered.

[1] 1. As the lease was duly acknowledged and recorded, subsequent purchasers were

charged with notice of its contents in so far as these erected any incumbrance, and, even though the lien stipulated was in general terms and therein somewhat resembled the landlord's lien created by statute, this in no manner impaired its validity or the right of the lessor to enforce the same in equity. 1 Jones on Liens, § 540 et seq. The clause creating the lien was definite in terms with respect to the extent thereof and the property to which attached, for it was to secure the rent reserved in the lease, due or to become due, and to cover all the goods of the lessee on the demised premises. There is no basis for the contention that the lien thus created was but the statutory landlord's lien, or that Demetrios Constantine took without notice.

[2] 2. It is said, however, that the notes sued on had been paid. This conclusion is reached in two ways: (1) By computing all which has been paid throughout the period of both leases, and then excluding the rent of the last three months as unpaid; (2) in claiming that certain disputed items have in fact been paid. Under the sale of James to John Constantine, the latter was to pay the rent from January 1, 1907, and there is no controversy but that none was owing for the use of the premises prior to that time. The rent since January 1, 1911, has been paid. From January 1, 1907, to October 1st of that year it should be computed at \$50 per month and thereafter at \$60 per month, amounting without interest to \$2,790. The plaintiff concedes that he has been paid \$2,349. Appellant argues upon the assumption that the \$240 paid after January 1, 1911, was not applied on the rent thereafter maturing, and, of course, reaches the conclusion that much less at least is owing on the rent previously maturing. John Constantine testified to having paid plaintiff by check, \$50.20 June 6, 1908, and \$50 October 3, 1908. Neither of these checks were produced, but items of like amounts were charged a few days after each check was issued in Constantine's account with the bank at which he did business. No credit, however, was given plaintiff, who had an account with the same bank. But, of course, he might have indorsed the checks to others or drawn the money thereon. He explained that he thought he had indorsed one of the checks to James Constantine in payment of a note owing him by John. These items must have been allowed. A check of \$107.20 was issued to Maine by John Constantine May 20, 1908, and the latter contends that this was in payment of rent, while the former testified that it was to recoup him for a like amount paid to satisfy a judgment recovered by James Constantine against John in the justice's court. Also John Constantine testified to having paid the rental for January and February, 1908, in cash, and also to having made two pay-

ments of \$50 each in 1908. His testimony as to these payments is entirely uncorroborated and denied by plaintiff. In view of this state of the record and the fact that the several witnesses testified orally, the findings of the district court either that the \$107.20 should be credited and the alleged payments of rents for January and February, 1908, rejected or vice versa, and the alleged cash payments of \$50 each were not made, ought not be disturbed. If so, then the finding of the district court that \$228.25 was still owing should not be disturbed.

[3] 3. The contention that plaintiff in executing the new lease and in receiving subsequent payments of rent waived the lien of the first lease is not well founded. It is true he had first declined to execute the new lease until the rental of the former lease had been fully paid, but testified that he finally executed the lease upon the understanding that the amount due on the first lease was to be satisfied.

[4] The notes sued on were not surrendered, and the making of the new lease in no way prejudiced the defendants, nor did the matter of application of payments, and we discover no ground upon which the doctrine of waiver can well rest, nor is fraud to be inferred from the fact that plaintiff claimed more than was finally found to be due. The evidence does not warrant the conclusion that he acted in bad faith, and therefore fraud cannot be imputed to him.

[5] It is urged that John Constantine should have been made a defendant. He had no interest in the property in controversy when the action was begun or thereafter. Judgment was not claimed against him. It was enough that the maker of the lease and notes, together with the present owner of the property, were made parties defendant.

We discover no error in the record, and the judgment is affirmed.

Affirmed.

BOSLEY v. LAMMERS et al. (WILSON, Intervener).

(Supreme Court of Iowa. Nov. 20, 1912.)

CONTRACTS (§ 186*)—RIGHTS OF THIRD PERSONS.

Where a party to a contract agreed to pay the adverse party a specified sum and a note on which such adverse party's wife was a surety, and gave a note as collateral, and indorsed it in blank, the rights of the wife paying the note on which she was surety and obtaining the collateral note were under the contract, and she could only recover from the party the extent of his nonperformance to the adverse party.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 790-797; Dec. Dig. § 186.*]

Appeal from District Court, Polk County; W. H. McHenry, Judge.

Action upon a promissory note. There was an intervention by one Wilson, the payee of the note, and alleged assignor to

the plaintiff. On May 29, 1911, judgment was rendered for the plaintiff upon the pleadings for the full amount of the note, \$1,158. Two days later and at the same term a motion was filed by the intervener to set aside the judgment. On June 3d this motion was sustained in part, and the judgment as entered was modified. The plaintiff appeals. Affirmed.

A. M. Miller, of Des Moines, for appellant.

EVANS, J. The plaintiff is the wife of B. J. Bosley. In March, 1910, B. J. Bosley and the intervener Wilson entered into a contract of exchange of property. This contract called for a conveyance from Wilson to Bosley of certain Texas land; and from Bosley to Wilson of certain stock in the Valley Union Coal Company. It also provided that Wilson should pay to Bosley a sum upwards of \$1,200, and that he should pay also a certain note of \$800 held by the First National Bank of Valley Junction. Later Wilson put up "as security for the fulfillment of this agreement" a note for \$1,049.56, and this is the note in suit. It does not appear into whose hands the note was put, but a writing was signed by B. J. Bosley and I. K. Wilson stating that such note was put "in escrow." Later a further agreement or modification was entered into and signed by the same parties. Certain papers, including the note in suit, were put into the hands of A. M. Miller. The note was indorsed in blank by Wilson. The agreement entered into at that time contained the following provision: "And on the failure to pay said note to said Valley Bank the said A. M. Miller may collect the amount of said note and pay to the said Bosley or to Martha Bosley the amount thereof, less the costs of collection."

Martha Bosley was not a party to the agreement nor to any modification thereof. Neither did any of the writings disclose any interest on her part therein, nor did her name appear therein except as above quoted. Upon the trial, however, it was made to appear that she was a surety upon the \$800 note held by the First National Bank of Valley Junction. The undertaking of Wilson, therefore, to pay the \$800 note operated beneficially to her. Wilson failed to pay the note. Martha Bosley, as surety, was compelled to pay it. Thereupon she brought this suit against the makers to recover the full amount of the collateral note on the theory that she was an assignee thereof; the same having been indorsed in blank by Wilson. Wilson intervened in such action and pleaded that he was the owner of the note, and that the plaintiff had no interest therein unless it be as security for the \$800 note. He further pleaded that another action was pending between himself and B.

J. Bosley, the plaintiff's husband, wherein he prayed for a rescission of the contract. This petition of intervention was filed March 20, 1911. This was the state of the pleadings when the trial court entered judgment thereon without trial on May 29th. The merits of the case were not developed until the hearing on the motion of the intervener to set the judgment aside. In plaintiff's motion for judgment, she had incorporated an allegation that rescission of the contract had been refused to the intervener, Wilson, by another branch of the court. Upon the hearing of the motion to set aside, it was made to appear that the plaintiff's husband, B. J. Bosley, had brought an action in his own behalf on the contract against Wilson, wherein he claimed to recover of Wilson, among other items, the sum of \$800, for his failure to pay the First National Bank note. This suit was tried in another branch of the court and went to judgment in the latter part of April, 1911. Bosley prevailed in that suit and was allowed full recovery as to the \$800 and other items. Offsets, however, were allowed as against Bosley arising out of the same contract, and a balance was found in his favor of only \$425. Upon the final hearing in the present case, the trial court took notice of these facts and modified the judgment accordingly by reducing the recovery of the plaintiff therein to the sum of \$425 and interest.

It is now argued for appellant that she was not a party to the other case and was not bound by any judgment entered therein. Granting that this appellant was not bound by the judgment as such, she was nevertheless affected by the facts herein stated. Her right to sue on the note, if any, arose wholly out of the contract between Wilson and her husband. The contract was indivisible. Her rights were not separate or independent from those of her husband under the contract. Her rights under the contract were only incidental to those of her husband and inseparable therefrom. A performance of the contract to Bosley was all that was required from Wilson. If Wilson had performed in full to Bosley, it would terminate his liability. Lacking only \$425 of performance, that was the full measure of his remaining liability under the contract. Wilson's liability could not be increased by controversy or dispute, if any, between the plaintiff and her husband. He was not bound to do business with both of them. Indeed, it does not appear that there was any controversy between them. The effect of final order of the trial court was to limit the full liability of Wilson to the sum of \$425, for which judgment had already been obtained against him by the husband.

The order was clearly right, and it is affirmed.

CRAWFORD v. MANDELL, Circuit Judge.
(Supreme Court of Michigan. Nov. 27, 1912.)

1. BANKRUPTCY (§ 151*)—TRUSTEE IN BANKRUPTCY—STATUTORY RIGHTS.

Under the direct provisions of Bankruptcy Act July 1, 1898, c. 541, § 47, 30 Stat. 557 (U. S. Comp. St. 1901, p. 8438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), the trustee in bankruptcy is, as to property of the bankrupt not in the custody of the bankruptcy court, vested with all the rights, remedies, and powers of a judgment creditor holding an execution returned unsatisfied.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 193; Dec. Dig. § 151.*]

2. CREDITORS' SUIT (§ 31*)—ANSWER TO INTERROGATORIES—DISCOVERY—DISCRETION OF COURT—"SPECIAL MOTION."

Under Comp. Laws 1897, § 436, 437, providing that a judgment creditor whose execution has been returned unsatisfied may file a bill to compel the discovery of any property belonging to defendant, and the court shall have power to compel such discovery and prevent transfer of such property, and chancery rule 30, subd. "b," providing that, when the complainant in a creditor's bill shall have the statutory right of discovery, the defendant shall fully answer all interrogatories, and, if he fails to do so, the complainant may have his right to further answer and disclosure determined by the court on special motion, the trial court has a discretionary power to compel such discovery; the chancery rule having been promulgated by the Supreme Court, which is presumed to have used the term "special motion" in its technical sense which is not a motion of course, but one directed to the discretion of the court.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 127, 128; Dec. Dig. § 31.*]

For other definitions, see Words and Phrases, vol. 7, p. 6585.]

Original application by Milo H. Crawford, Trustee in Bankruptcy, for mandamus against Henry A. Mandell, Wayne Circuit Court Judge. Application denied.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, BIRD, and KUHN, JJ.

Harry M. Lau and Abram W. Sempliner, both of Detroit (Keena, Lightner & Oxtoby, of Detroit, of counsel), for relator. E. T. Berger, of Detroit, for respondent.

STEERE, J. In this proceeding relator seeks by mandamus to compel the circuit court of Wayne county, in chancery, to set aside an order made by it on the 17th day of May, 1911, in which it denied relator's motion for an order to compel certain defendants in a chancery suit there pending to more specifically answer, under oath, certain interrogatories touching allegations of fraud contained in a creditor's bill of complaint filed against them for discovery, and to make a more full disclosure of facts in relation thereto. The principal question involved is whether, under the provisions of sections 436 and 437, Comp. Laws of 1897, in connection with subdivision "b" of chancery rule 30, it is obligatory or discretionary with the

trial court to grant complainant's motion for an order requiring further disclosure and more specific answer setting forth the particular facts called for in a creditor's bill.

On the 1st day of August, 1910, relator was duly appointed trustee in bankruptcy of the estate of one Fred. C. Ross, who was adjudicated a bankrupt by the United States District Court for the Eastern District of Michigan. The schedule of assets and liabilities filed in bankruptcy proceedings by said Ross represented that he was not possessed of any assets and was owing debts amounting to over \$10,000. Relator, in his capacity as trustee, succeeding in collecting into said estate, for the benefit of its creditors, in money and property between \$2,100 and \$2,200, on February 6, 1911, filed a bill of complaint in the Wayne county circuit court in chancery against said bankrupt, his brother George W. Ross, Daniel A. Ross, his father, and the Michigan Lumber Yard, for the purpose of also collecting for said estate certain equitable assets alleged to belong to said bankrupt and to be held by the other defendants for the purpose of defrauding the creditors of said estate.

[1] The bill was filed under authority of the Bankruptcy Law of 1898, § 47, as amended on June 25, 1910, the material portion of which reads as follows: "Trustees as to all property in the custody, or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied." It was alleged that the property sought to be reached by said bill was not within the custody of the bankruptcy court, but unlawfully withheld, and that therefore the trustee stood in the same position as a judgment creditor, and had the same rights under said sections 436 and 437 to file a creditor's bill for the purpose of reaching equitable assets of said estate wrongfully withheld under the provisions of said section 436. The bill of complaint demanded a sworn answer by all of said defendants, and sought discovery from them in relation to matters alleged to be entirely and peculiarly within their knowledge by reason of their relationship with the bankrupt.

Complainant claimed that the defendants in their answer ignored and refused to answer certain interrogatories propounded in said bill, simply filing a general unsworn answer denying that complainant was entitled to the relief prayed for. Complainant therefore filed a motion in the circuit court on the 26th of April, 1911, asking for an order that defendants file a sworn answer and specific-

ally make reply under oath to certain interrogatories in said bill. This motion was at first denied, but, on it being subsequently renewed, the order denying the same was set aside, and defendant Daniel A. Ross was required to make answer under oath within two weeks; the remainder of the relief asked for being again denied. That relator, as trustee in bankruptcy, stood in the position of, and with the same statutory rights as, a judgment creditor, with an execution returned unsatisfied, seems clear.

[2] For consideration of the question involved, it need only be said of complainant's lengthy and carefully prepared creditor's bill that it contains such averments, allegations, and interrogatories as to render chancery rule 30 and said sections of the statute relative to creditor's bills applicable, and complainant's motion proper in practice. If the court, when required to act upon such special motion for further answer and disclosure, had no discretionary power, the proceedings were in such form as entitled complainant to the order asked for. If the court was vested with authority to exercise judicial discretion, we cannot hold that there was an abuse of the same. The return of respondent to the order issued herein to show cause why a writ of mandamus should not issue shows, amongst other things, that a sworn answer of Daniel A. Ross was filed as ordered and is now of record with a verified answer of the other defendants; that the answer of said defendants specifically denied each and every allegation of fraud contained in said bill; that said answer consists of 38 paragraphs, each one of which categorically answers the corresponding paragraph in the bill of complaint, and "respondent believes that the petitioner's bill of complaint has been fully and specifically answered by the answer filed by the defendants for the purposes of this case, by reason whereof more specific answers to the separately enumerated paragraphs in the prayer for relief are unnecessary and improper and not contemplated by the requirements of our practice"; that, as is shown by the bill of complaint, "there has been full, complete, and exhaustive examination of the affairs of the bankrupt in the bankruptcy court before the referee thereof, at which examination George W. Ross, Fred. C. Ross, and the officers of the Michigan Lumber Yard were examined and at which time all the facts alleged in said bill of complaint were disclosed and the complainant given an opportunity to fully examine and cross-examine said witnesses; that by reason of said examination this respondent believes that all the matters to which discovery is sought in this action are as well within the knowledge of the petitioner as within that of the defendants to this cause. * * *

The petitioner's bill of complaint, while alleging acts of fraud, all of which the an-

swer of defendants under oath specifically denies, makes no showing of any necessity for such specific answer and discovery. It seems proper to this respondent that, until there has been a trial and adjudication in open court of the issues joined by the defendants' answer, no drastic orders or requirements should be imposed upon the defendants, and until such trial and hearing, at which time the complainant has full, complete, and adequate opportunity to examine the defendants in open court, to summon witnesses, and to produce testimony, it cannot be said that the complainant and petitioner is in any manner injured or justice retarded."

The sections of the statute relied upon by complainant are as follows:

"(436) Sec. 24. Whenever an execution against the property of a defendant shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a bill in chancery against such defendant, and any other person, to compel the discovery of any property or things in action belonging to the defendant, and of any property, money or things in action due to him, or held in trust for him, and to prevent the transfer of any such property, money or things in action, or the payment or delivery thereof to the defendant, except where such trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant.

"(437) Sec. 25. The court shall have power to compel such discovery, and to prevent such transfer, payment or delivery and to decree satisfaction of the amount remaining due on such judgment, out of any property, money, or other things in action belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by proceedings in chancery, whether the same were originally liable to be taken in execution at law or not: Provided, this act shall not apply to property exempt from execution."

Subdivision "b" of chancery rule 30 provides that: "(b) When the complainant in such creditor's bill shall have a right by statute to a discovery and disclosure of facts from the defendant, the defendant shall in his answer fully and explicitly set forth the particular facts called for. If he fail so to do, the complainant may have his right to a further answer and disclosure determined by the court on special motion, and the court may enforce its order thereon by the attachment of the defendant, and may strike such insufficient answer from the files." This rule prescribes the practice to be followed in moving the court to exercise the authority conferred under said section 437 to compel discovery.

If relator's contention is correct, it follows that, when a special motion is made under chancery rule 30 for further answer and

discovery, complainant is entitled, as a matter of right, to the order asked, which then is an order of course, in effect a common order, made and entered in the discretion of the solicitor, and not of the court, on a formal showing in compliance with the course of procedure defined by rule and statute. While the exact question has not heretofore been squarely presented, we do not think the construction contended for has been recognized in previous cases before this court where those provisions of the statute and rule relative to creditor's bills were under consideration; but rather, so far as any intimation is found, to the contrary. The general subject is remotely touched upon in the following cases: *Turnbull v. Lumber Co.*, 55 Mich. 392, 21 N. W. 375; *McCreery v. Cobb*, 93 Mich. 463, 53 N. W. 613; *Remick v. Bradley*, 119 Mich. 399, 78 N. W. 326; *Avery v. Forest Lawn Cemetery Co.*, 127 Mich. 125, 86 N. W. 538; *Saginaw Savings Bank v. Duffield*, 157 Mich. 522, 122 N. W. 186, 133 Am. St. Rep. 354. The case coming closest to the question before us is *McCreery v. Cobb*, Circuit Judge, *supra*, which recognized that the remedy by discovery is generally obsolete by reason of the statute making parties to a suit competent witnesses, but held that these statutory provisions in regard to judgment creditor's bills, authorizing discovery in such cases, are still in force. It was there said: "Furthermore, discretion to compel such a discovery is lodged in the court, and his return shows that he exercised that discretion, although not to the full extent that he would have done had he not regarded the practice obsolete. As already stated, complainants can compel discovery by causing to be produced the books and papers relating to the transactions, and by the testimony of witnesses before the court, * * * and when it is remembered that the allegations of fraud in the bill are mainly upon information and belief, and are expressly denied, this court ought not to interfere by the discretionary writ of mandamus." In the early case of *Hubbard v. McNaughton*, 43 Mich. 220, 5 N. W. 293, 38 Am. Rep. 176, it was said by Justice Campbell: "No universal rule can be laid down where most of the facts must necessarily be within the knowledge of the defendants. Under the old practice, before parties became competent as witnesses it was often necessary to draw out such matter by discovery, and it is still competent, although not common, to do so." To hold that the trial court has no discretionary powers under chancery rule 30 would be to lay down a universal rule of law relative to discovery.

Respondent returns that upon hearing the motion, in the exercise of his best judicial judgment and discernment, acting as seemed to him just and proper under the circumstances, he did not deem it expedient nor de-

manded by justice or equity to then order discovery and further answer, and therefore denied the motion. The statute does not say the court must, but that it "shall have power to," compel such discovery; the decisions say in such cases "no universal rule can be laid down," and "discretion to compel such discovery is lodged in the court"; the rule says the complainant may have his right to further answer, etc., "determined by the court on special motion."

Chancery rule 30 was promulgated by this court, and we can assume that the technical legal terms there found were used, and intended to be understood, according to their long-recognized and well-settled meaning as words of practice. It is to be noted that the application to the court is required to be made by "special motion." A special motion is "one which is not a matter of course to grant, but which the court, in the exercise of its discretion, may, on the facts established in support of the application, either grant or refuse." *Daniell's Ch. Pr.* (4th Ed.) vol. 2, p. 1592. "A motion addressed to the discretion of the court, and which must be heard and determined, as distinguished from one which may be granted of course." *Black's Law Dictionary*; *Merchant's Bank v. Chrysler*, 14 C. C. A. 444, 67 Fed. 388. To grant or refuse said special motion was discretionary with the court, and, as already stated, we cannot hold that the order complained of was an abuse of discretion.

Relator's application for a writ of mandamus is therefore denied.

MILWAUKEE TRUST CO. v. CITY OF MILWAUKEE.

(Supreme Court of Wisconsin. Nov. 19, 1912.)

1. MUNICIPAL CORPORATIONS (§ 402*) — CHANGE OF GRADE—PROCEEDINGS FOR DAMAGES—SPECIAL VERDICT.

In proceedings involving the assessment of damages for change of grade of a street, special interrogatories were submitted: "(1) What was the reasonable market value of plaintiff's property immediately before the grading of the street in front thereof? Answer: \$3,000. (2) What was the reasonable market value of plaintiff's property immediately after the street was filled to the new grade? Which was answered: \$2,133.06. (3) What was the reasonable cost of putting plaintiff's property in substantially the same condition relative to the newly established grade as it was before such change of grade? Answer: \$866.94." Held that, since the proper measure of the property owner's damages was the difference in value as established by questions 1 and 2, and not any loss of rentals, or the amount ascertained by question 3, that question was improper and should not have been submitted, relating merely to an item of evidence, and the special verdict being complete without it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 969-981; Dec. Dig. § 402.*]

2. MUNICIPAL CORPORATIONS (§ 395*) — CHANGE OF GRADE PROCEEDINGS—ADMISSION OF EVIDENCE.

In proceedings involving the assessment of damages caused by the change of grade of a street, evidence of the reasonable cost of putting the property in substantially the same condition relative to the newly established grade as it was with reference to the former grade is admissible on the measure of the property owner's damages, consisting of the difference between the reasonable market value of the property immediately before and after the change of grade.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 946-948; Dec. Dig. § 395.*]

3. APPEAL AND ERROR (§ 1062*)—HARMLESS ERROR—SPECIAL VERDICT.

The error in submitting the third question in the special verdict and refusing to strike out the evidence thereon was not prejudicial to the city, there being direct evidence of the difference between the reasonable market value of the property before and after the change of grade.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.*]

4. APPEAL AND ERROR (§ 1070*)—HARMLESS ERROR—SPECIAL VERDICTS.

If a special verdict reasonably covers all the material issues, other immaterial answers or answers not covering distinct issues will not be deemed reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4231-4233; Dec. Dig. § 1070.*]

5. TRIAL (§ 365*)—SPECIAL VERDICT.

In construing a special verdict its substance and not its form is considered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 871-874; Dec. Dig. § 365.*]

6. EVIDENCE (§ 113*)—"MARKET VALUE."

In view of the difficulty of forming a proper conception of the word "value" and of ascertaining what is called "market value," where there is no open market recording numerous transactions, courts have adopted as the equivalent of "market value" the phrase "what the property is worth or will sell for as between one who wants to purchase and one who wants to sell."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 259-296; Dec. Dig. § 113.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4383-4388; vol. 8, p. 7717.]

7. EVIDENCE (§ 113*)—MARKET VALUE.

Where there is no regular market for a commodity, a wide range of investigation is permitted in determining its market value, and the rules relating to the admission of evidence are liberally construed, especially where the damages are submitted by a special verdict covering the correct measure of damages.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 259-296; Dec. Dig. § 113.*]

8. MUNICIPAL CORPORATIONS (§ 402*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

In a proceeding involving the assessment of damages for a change of grade of a street, an instruction was requested by the city that, in determining where the clear preponderance of the evidence is, the jury should not exclude or disregard the direct, positive evidence of witnesses who made measurements as to certain facts and find the facts according to the evidence of witnesses who, without making such measurements, merely gave an estimate of the same, as the testimony of witnesses who have measured distances and made memorandum of such measurements, if otherwise credible, is of greater weight than the evidence of witnesses who merely gave their recollec-

tion, based on estimation of such distances. Held, that the instruction was correct and might well have been given.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 969-981; Dec. Dig. § 402.*]

9. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.

The refusal of the requested instruction could not have injured the city; the instruction relating to a matter not directly in issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

10. APPEAL AND ERROR (§ 1003*)—VERDICT—CONCLUSIVENESS.

The Supreme Court cannot set aside a verdict upon the ground that it is against the weight of the evidence and must sustain it if there is some credible evidence to support it, and the trial court has denied a new trial, though it might not have reached the same result as the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.*]

Appeal from Circuit Court, Milwaukee County; J. C. Ludwig, Judge.

Action by the Milwaukee Trust Company against the City of Milwaukee. From a judgment for plaintiff, defendant appeals. Affirmed.

Daniel W. Hoan, City Atty., and Clifton Williams, Sp. Asst. City Atty., both of Milwaukee, for appellant. Flanders, Bottum, Fawcett & Bottum, of Milwaukee, for respondent.

TIMLIN, J. This is an action which originated in an assessment of damages for change of grade made by the board of public works of the city of Milwaukee in 1904. The action is, therefore, in substance and effect, an assessment of damages. Upon appeal from that tribunal to the circuit court, there was a special verdict as follows: "(1) What was the reasonable market value of plaintiff's property immediately before the grading of the street in front thereof? Answer: \$3,000. (2) What was the reasonable market value of plaintiff's property immediately after the street in front thereof was filled to the newly established grade? Answer: \$2,133.06. (3) What was the reasonable cost of putting plaintiff's property in substantially the same condition relative to the newly established grade as it was in before such change of grade? Answer: \$866.94." The respondent had judgment for the last-named sum and costs, and the city appeals to this court.

Of appellant's assignments of error, 1, 2, 3, 4, 7, and 8 relate directly or indirectly to the matter covered by question 3 of the special verdict, and remotely, if at all, to questions 1 and 2, namely, error in admitting evidence of loss of rentals; in refusing to strike out evidence of cost of raising house at a period four years after the assessment; in submitting question 3 to the jury; in refusing to submit question as to the neces-

sity of raising houses and refusing to instruct the jury so as to exclude loss of rentals; in refusing to instruct that, because of said defect in the evidence of cost of restoration, question 8 should be answered "nothing."

[1] But question 8 of the special verdict was improper, and the verdict is complete without it. It relates to an item of evidence and should not have been submitted. The true measure of damages was the difference in value as established by questions 1 and 2. This damage might exceed or fall short of or be identical with the cost found by the answer to question 3. Evidence relating to the loss of rentals after the assessment might have some bearing on the question of depreciation, but was not, and could not, be put forward as an independent ground of recovery.

[2] Evidence of the reasonable cost of putting the property in substantially the same condition relative to the new grade as it was in relative to the former grade is also competent as bearing upon the ultimate inquiry and true measure of damages. This cost should be estimated as of a time at or about the date of the assessment, otherwise it loses its value as evidence because the cost of labor and material may not be the same four years later as it was at the time of the assessment.

[3] While the court erred in refusing to strike out such evidence, we are not convinced that the error was prejudicial in a case like this in which there was other and direct evidence of the difference between the reasonable market value before and after the change of grade. Omitting question 8, we have a complete special verdict upon the question of damages. The surplus question 3, relating to an item of evidence, may be disregarded. The tendency of a special verdict is not always to promote reversals. In many cases it has the contrary effect. For illustrations: The erroneous admission of evidence, bearing upon a question of the verdict found in appellant's favor and having no bearing upon questions found against appellant, cannot be considered prejudicial. *Lehman v. Chicago, etc., Ry. Co.*, 140 Wis. 497, 504, 122 N. W. 1059. An erroneous admission of evidence, irrelevant to the issues finally submitted to the jury, is not prejudicial. *Samson v. Ward*, 147 Wis. 48, 50, 132 N. W. 629.

[4] If the special verdict in some reasonable form covers all the material issues, other immaterial answers, or answers that do not cover distinct issues, will not be considered reversible errors. *Twentieth Cent. Co. v. Quilling*, 136 Wis. 481, 485, 117 N. W. 1007. The appellant cannot complain of questions submitted, differing in form, but not in substance, from those requested by him. *Redepenning v. Rock*, 136 Wis. 372, 379, 117 N. W. 805. Where the special verdict covers all the issues, it is not reversible

error to refuse to submit other questions requested. *Berndt v. Cudahy*, 141 Wis. 457, 459, 124 N. W. 511; *Anderson v. Sparks*, 142 Wis. 398, 405, 125 N. W. 925. A judgment will not be reversed for an error in submitting one question of the special verdict if the remainder of the verdict supports the judgment. *Johnson v. Chicago, etc., Ry. Co.*, 64 Wis. 425, 25 N. W. 223.

[5] Substance, not form, is considered. *John R. Davis L. Co. v. Home Ins. Co.*, 95 Wis. 542, 70 N. W. 59; *Curran v. A. H. Stange Co.*, 98 Wis. 598, 74 N. W. 377. So instructions which are erroneous as to one of the issues submitted by a question of the special verdict are not ground for reversal if other questions fixing the liability of appellant on another ground were properly submitted. *Kortendick v. Waterford*, 142 Wis. 413, 417, 125 N. W. 945. So, also, errors in rulings upon certain questions of the special verdict become immaterial or nonprejudicial if there is no error upon the trial of other issues which determine the liability of appellant and are submitted by separate questions of the verdict. So, also, where one question of a special verdict is defective, but the subject intended to be covered thereby is properly covered by other questions in such verdict which were found against the appellant, the submission of the defective question will not warrant reversal. *Brown v. Milwaukee, etc., Co.*, 148 Wis. 98, 133 N. W. 589. These illustrations might be greatly extended by a more critical and comprehensive study of the decisions of this court.

It is contended that in the instant case the jury found the damages by subtracting from the former market value of the property in question the amount of the cost of restoration fixed by their answer to question 3, and this is inferred from identity in amount of cost of restoration and amount of difference in value. It is quite conceivable, however, that the jury was convinced from other competent evidence before it that the depreciation in value was exactly equal to the cost of restoration. The jury might have arrived at the difference between the first and second answers by cutting down the estimates of respondent's witness to an amount exactly equal to the cost of restoration four years later if they did not accept such cost as in any wise controlling, but took it merely as an arbitrary figure that corresponded quite closely with what they considered a fair discount upon the testimony of respondent's witness relative to the difference in market value before and after the change of grade. It does not appear to us affirmatively that the jury here committed an error which was prejudicial to appellant. The answers to questions 1 and 2 involved the ascertainment of what is called, for want of a better name, "market value" before and after the grading. The word "value" stands for one of the most difficult and elusive mental concepts, and the ascertainment of what

is called "market value" in a case where there is no open market recording numerous transactions of sale or barter and responding automatically to the relative quantities of demand and supply is still more difficult.

[6] For this reason courts have adopted as the equivalent of market value "what the property is worth or will sell for as between one who wants to purchase and one who wants to sell." *Esch v. Chicago, etc., Ry. Co.*, 72 Wis. 229, 231, 89 N. W. 129; 5 Words and Phrases, pp. 4383 to 4388, and cases. These attempts at definition disclose the difficult and comprehensive nature of the inquiry. *Maxon v. Gates*, 136 Wis. 270, 290, 116 N. W. 758.

[7] For these reasons in all inquiries relating to value, where there is no known, regular, and continuous market such as exists in the exchanges or such as exists generally for consumption of goods, a wide range of investigation is permitted, and the rules governing the admission of evidence are liberal, especially where the damages are submitted in the form of a special verdict properly covering the correct measure of damages. *Andrews v. Youmans*, 82 Wis. 81, 52 N. W. 23; *Allen v. Chicago, etc., Ry. Co.*, 145 Wis. 263, 129 N. W. 1094; *Stolze v. Manitowoc, etc., Ry. Co.*, 100 Wis. 208, 75 N. W. 987; *Moore v. Chicago, etc., Ry. Co.*, 78 Wis. 120, 47 N. W. 273.

If, in the instant case, we were to grant technical error in the several assignments, such errors would have no further effect than to destroy, impair, or render improper the third question and answer of such verdict. The same observation applies to the alleged error in refusing to charge the jury to the effect that question 3 of the verdict should be answered "nothing." Give it that answer now or strike it out entirely, and the judgment rests supported by the answers to questions 1 and 2.

[8] It is further contended that there was error in refusing to instruct the jury, at the request of appellant's counsel, that, in determining where the clear preponderance of the evidence is, they were not to exclude or disregard the direct positive evidence of witnesses who made measurements as to certain facts in dispute in this case, and so disregarding such evidence find the facts to be in accordance with the testimony of witnesses who, without making such measurements, merely estimate or give their judgment of the same as the testimony of witnesses who have measured distances and made memoranda of such measurements at the time of taking, if otherwise credible, is of greater weight than the evidence of witnesses who merely give their recollection based on estimates of such distances. This instruction was proper and might well have been given. *Koepke v. Milwaukee*, 112 Wis. 475, 88 N. W.

238; *Wanta v. Milwaukee, etc., Co.*, 148 Wis. 295, 134 N. W. 133.

[9] We are not convinced that its refusal injuriously affects the appellant. The instruction related to a matter not directly in issue but forming one of the bases for the estimates of value or of damages made by the witnesses. These estimates also rested upon actual inspection of the property by the witness. In such case, while it would have been better to give the instruction, we cannot say in an inquiry of value that it was prejudicial error to refuse it.

The fifth and sixth errors assigned refer to requests for instructions which might properly have been allowed. But their refusal was not prejudicial error. It is contended in support of the ninth assignment of error that the verdict is against the weight of evidence, and in support of the tenth assignment of error that it is perverse.

[10] It is not sufficient ground for setting aside the verdict of a jury in this court that it is against the weight of evidence, and we find no perversity in it.

There appears to be in this record some credible evidence to sustain the verdict, and, although we might not reach the same result on the evidence as did the jury, we cannot, under such circumstances, where the trial court has denied a motion for a new trial, interfere with the verdict. *Laville v. Lucas*, 13 Wis. 617; *Smith v. Wallace*, 25 Wis. 55; *Kearns v. Thomas*, 37 Wis. 118; *Kaufer v. Walsh*, 88 Wis. 63, 59 N. W. 460; *Janssen v. Lammers*, 29 Wis. 88; *Dorwin v. Hagerty*, 137 Wis. 161, 164, 118 N. W. 799.

The circuit court in granting or refusing a new trial, it is needless to say, acts upon a different rule.

The judgment of the circuit court is affirmed.

KRAWIECKI v. KIECKHEFER BOX CO. (Supreme Court of Wisconsin. Nov. 19, 1912.)

1. EVIDENCE (§ 474*)—EXPERT TESTIMONY—QUALIFICATION OF WITNESSES.

A witness who had had experience with belting machinery used in mills, and was familiar with the present conditions and practices as to guarding belts in factories in Milwaukee City, and had knowledge on the subject, was competent to testify as to whether a belt in a box factory could be properly guarded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.*]

2. MASTER AND SERVANT (§ 270*)—INJURIES—ADMISSION OF EVIDENCE.

In an employe's action for injuries from the breaking of a belt, the question as to whether any factory inspector had suggested before the accident that the belt on the planer which broke ought to be guarded or covered was properly excluded, where there was no

evidence that the method of operating the belting and planer was known to the inspectors.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

3. MASTER AND SERVANT (§ 270*)—INJURIES — ADMISSION OF EVIDENCE — CUSTOMS IN OTHER FACTORIES.

In an employe's action for personal injuries from the breaking of a belt, evidence as to the custom in other woodworking factories of guarding belts under similar conditions was admissible; such evidence being admissible on the question of negligence if the custom sought to be shown does not contradict common knowledge or involve a method obviously dangerous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

4. MASTER AND SERVANT (§ 289*)—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

In an employe's action for injuries from the breaking of a belt in a box factory, whether plaintiff was guilty of contributory negligence *held* a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

5. APPEAL AND ERROR (§ 1070*)—HARMLESS ERROR—REFUSAL OF SPECIAL ISSUES.

Where the verdict found every essential fact involved, there was no prejudicial error in not incorporating in the verdict certain special questions requested.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4231-4233; Dec. Dig. § 1070.*]

6. DAMAGES (§ 216*)—INSTRUCTIONS—EVIDENCE.

In an employe's action for personal injuries from the breaking of a belt, evidence *held* not to show that plaintiff sustained any loss of sexual power from the injuries, so that it was error to submit that item of damage.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

Appeal from Circuit Court, Milwaukee County; J. C. Ludwig, Judge.

Action by John Krawiecki against the Kieckhefer Box Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, unless plaintiff files remittitur, in which event judgment shall be rendered on motion in the trial court for a less amount.

The plaintiff was injured on March 15, 1910, in defendant's factory, by the breaking of a belt on a planing machine which the plaintiff was feeding. The plaintiff was 54 years of age and had worked for the defendant for 13 years. This is an action to recover damages for the injuries suffered by him by reason of the breaking of the belt.

The complaint alleges that the belt was worn and defective and was so placed that the person operating the machine could and would inadvertently come into contact with the belt and the pulley on which it ran; that the belt was not inclosed or guarded, as were like belts on like machines in the city of Milwaukee and vicinity; that such

inclosing and guarding could be done at but a nominal expense and so as to effectively protect from injury by a breaking of the belt the person operating the machine; that on March 15, 1910, the truck load of lumber which the plaintiff was to feed into the planer was so placed at the left of the planer, because of the crowded condition of the shop in which the plaintiff was working, that it was necessary for the plaintiff to reach over the belt which broke in order to take the lumber from the truck; and that, while the plaintiff was so employed at the planer, one of the belts on the machine suddenly broke and the broken end flew with great force against the plaintiff, causing the injuries. The injuries suffered are particularly described, negligence on the part of the defendant in several respects is alleged, and damages are demanded.

The answer denies that the belt was defective; that the person operating the planer was required to reach over the belt to secure the lumber it was his duty to feed into the planer; and that the belts were unguarded or so situated that the person operating the machine would inadvertently come into contact with the belts or be compelled to stand in dangerous proximity to the belts in the performance of his work; and alleges contributory negligence on the part of the plaintiff in failing to inspect and report any defective condition of the belts; and that the plaintiff assumed the risk.

Exception was taken on the trial to the opinion evidence of a witness as to the guarding of similar belts on iron-working machines, and to the evidence of this witness that such belts could be guarded and that they were ordinarily guarded in Milwaukee factories. Exception was also taken to the refusal of the court to permit the defendant to show that factory inspectors had not suggested that this belt should be guarded, and to evidence that feeders of planers objected to belt guards. The defendant objected to evidence that the injury as described would account for the plaintiff's nervous condition, and that such nervous condition would be a cause of the loss of sexual power. Evidence was presented by the defendant tending to show that whatever guarding there was of such belts in Milwaukee factories was to prevent injuries to persons by reason of their clothing being caught in the pulleys and belts, and that such guards were not designed to prevent injuries from the breaking of belts, and that guards for this purpose were ineffective and a source of greater danger.

The plaintiff was at the hospital for four or five days. The physician who attended him after he returned to his home testified that the plaintiff's left leg was very much contused, swollen, and discolored; there was considerable enlargement of the veins; his

testicles were enlarged and discolored; and the scrotum was almost black. At the time of trial plaintiff's testicles were still enlarged, and there was some enlargement of the veins; he was shaky and had no control of his nerves. The plaintiff testified that after the accident he had lost his sexual power. The medical testimony in plaintiff's behalf as to his condition in this respect at the time of the trial was that the plaintiff's testicles were of good size, and that his organs were apparently normal; that the physicians were unable to tell whether the testicles were larger than they were before the accident; that the accident was sufficient to account for the plaintiff's nervous condition; that the nervous condition of a man may affect his sexual power, but that plaintiff's nervous condition was not an adequate cause for the loss of sexual power. The court denied a motion for a verdict for the defendant, and refused to give certain instructions and to submit certain questions requested by the defendant.

The jury found that the plaintiff was injured by a broken belt while at work at the planer in the defendant's factory; that the belt was so located as to be dangerous to employes in the discharge of their duties; that the failure to guard or fence the belt was the proximate cause of the injuries suffered by the plaintiff; and that the plaintiff was not guilty of contributory negligence. The court, in submitting the elements of damage for which compensation was proper, included the element of loss of sexual potency to them; the appellant excepted and now avers that the court erred in this regard.

This is an appeal from the judgment on the verdict in plaintiff's favor for \$2,000 damages and for costs.

Doe & Ballhorn, of Milwaukee, for appellant. W. B. Rubin, of Milwaukee, for respondent.

SIEBOKER, J. (after stating the facts as above). [1] The claim that the witness Wikkerink was improperly permitted to testify as to guarding the belt because not qualified to speak on the subject is not sustained. The evidence discloses that he had had experience with machinery of the kind in question; that he is familiar with present conditions and practices in factories in Milwaukee; and that he has knowledge on the subject.

[2] The court excluded the following inquiry propounded by the defendant to its foreman as a witness: "Did any factory inspector or other official at any time before this accident suggest to you that this planer, as to its belts that I am referring to, ought to be guarded or covered?" There is no showing that the method of operating this planer and belting came to the notice of

any inspector, or that any inspector was advised of these conditions and the situation. Under such circumstances, an answer to the propounded inquiry was properly excluded. The materiality of the question and the evidentiary force of an answer thereto must rest on the fact that the circumstances and the condition of the situation of this planer and the belts referred to were known to the inspectors, and that they acted on such knowledge in not suggesting that the belting should be guarded.

It is contended that the evidence is without dispute that there is no custom in woodworking establishments of placing guards around belts like the one in question, and that the court erred in denying defendant's motion to direct a verdict in its favor upon that ground. An examination of the evidence discloses, however, that the witness offered by the plaintiff on this subject testified that such guards are in use on rapid-running planers, and that they are practical. Nor is the evidence on the subject adduced by the defendant so clear and convincing in itself that it can be held, as matter of law, to establish such a custom as defendant asserts. Taking all the evidence, it clearly does not justify the claim that the court should have held, as matter of law, that there is no custom in woodworking factories of guarding belts under the conditions and circumstances that existed here.

[3] Such evidence, however, was properly received as bearing on negligence. As declared in *Boyce v. Wilbur Lumber Co.*, 119 Wis. 642, 97 N. W. 563: "As a general rule, evidence to show the usual or ordinary methods of others in the same business is admissible upon the question of negligence" (headnote)—but not if such evidence contradicts common knowledge or if it shows a method so obviously dangerous as to be recognized as such by all intelligent persons. The court, after instructing the jury that the evidence as to custom did not justify him in holding, as matter of law, that the defendant was absolved from the duty of guarding the belt, instructed them to consider all such evidence in connection with the other evidence in deciding whether the defendant's officers and agents had exercised ordinary care in determining whether or not such belting ought, under the circumstances and conditions, to have been guarded. This was a proper submission of this issue and the evidence to the jury.

[4] A further contention is made that the court erred in refusing to hold that the plaintiff, under the evidence in the case, was guilty of contributory negligence. This claim is based on the ground that the plaintiff did not stand in the usual and proper place while feeding the planer, and that he so placed the truck loaded with lumber as

to make it dangerous to get the lumber from the truck and feed it into the planer. It is argued that the plaintiff's carelessness in placing the loaded truck at the side of the planer and in then reaching over the running belt exposed him to the danger complained of, and that he should have placed the truck behind him near the place which he ought to have occupied to perform his duty of feeding the lumber into the planer. Plaintiff testified that the loaded truck stood in the proper and customary place; that there was not sufficient room in the doorway to the south and back of him while he was feeding the planer; and that it was the common practice to place the loaded truck where it stood at the time of the accident, because it was the proper and most convenient place from which to handle the long lumber. In these matters the plaintiff is corroborated by some of the witnesses and contradicted by others. Under such circumstances, the question of his contributory negligence was one to be resolved by the jury.

An exception is urged to the court's refusal to incorporate in the special verdict certain questions which appellant requested. The verdict submitted covered the issues raised by the pleadings and the evidence, and is in proper form. The rejected questions embraced findings of facts which were necessarily included in the verdict rendered under the direction of the court and pursuant to the instructions given the jury.

[5] We are satisfied that in the verdict rendered the jury have found every essential fact involved, and hence that no prejudicial error was committed by not incorporating the special questions requested in the verdict. *Milwaukee Trust Co. v. Milwaukee*, 138 N. W. 707, decided herewith, and cases cited. The court's instructions to the jury as to the law applicable to the issues covered by the verdict are correct and sufficiently cover the case. In our opinion appellant was not prejudiced by the court's omission to give any of the specific instructions requested. Other alleged detailed errors are not of sufficient importance to be specifically noted. We do not find that any of them were prejudicial to the appellant, aside from the subject of damages, which will now be considered.

[6] Appellant objected to the introduction of evidence on the alleged element of damages as to plaintiff's loss of sexual power, and requested the court to exclude this alleged element of injury from consideration by the jury. The court, however, informed the jury that they might include as an element, for which plaintiff could recover damages, "the loss and impairment of his sexual powers, if any such loss or impairment existed or exists, and, if so, if it was a proximate result of such injury," and such impairment as should be found to continue in

the future. The evidence on the subject is very meager and uncertain, and speculative to a high degree, and amounts to no more than mere opinion. The facts on this branch of the case are not satisfactory and come within the views expressed by this court in *Bucher v. Wis. Cent. R. Co.*, 139 Wis. 597, 120 N. W. 518: "The verdict of a jury founded upon facts is entitled to great weight, and is almost conclusive upon this court if supported by any evidence. But the verdict of a jury, founded only upon the opinion of experts concerning the cause of a condition, which condition is itself established by the opinion of experts, has no such weight"—(citing).

The considerations advanced in that case for the rejection of the loss of sexual potency as an element of damages apply with all their force to the evidence before us in this case. We are led to the conclusion that the court erred in submitting this phase of the case to the jury as a basis for the allowance of compensatory damages, and that the judgment rendered is therefore erroneous and must be reversed. We have, however, examined the evidence in the case and are persuaded that we should follow the practice adopted in the cases of *Baxter v. Chicago & Northwestern R. Co.*, 104 Wis. 307, 80 N. W. 644, and *Heimlich v. Tabor*, 123 Wis. 565, 102 N. W. 10, 68 L. R. A. 669, and permit the plaintiff to avoid a new trial upon reversal of the judgment entered by electing to remit from the amount of damages assessed by the jury a sum which will reduce the award of damages to as low an amount as an impartial jury on the evidence would probably name. In our judgment that sum is \$1,000.

Judgment reversed, and action remanded for a new trial, unless the plaintiff elect, within 30 days after the filing of the remittitur in the trial court, by notice in writing served on the defendant's attorney, to take judgment for \$1,000, with costs, in which case judgment shall be rendered therefor upon motion in that court.

SOMERS v. GERMANIA NAT. BANK OF MILWAUKEE.

(Supreme Court of Wisconsin. Nov. 19, 1912.
On Motion for Rehearing or Change
of Mandate. Feb. 18, 1913.)

(Syllabus by the Judge.)

1. BANKS AND BANKING (§ 154*)—DEPOSITS—PAYMENT TO THIRD PERSON—EVIDENCE.

If a person have a certificate of deposit in a bank, payable to his order, and it be paid to another without endorsement thereon, proof thereof, unexplained, establishes, prima facie, a case in favor of such person to recover of such bank.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 502-512, 514-533; Dec. Dig. § 154.*]

2. PRINCIPAL AND AGENT (§§ 22, 122*)—EXISTENCE OF AGENCY—AUTHORITY OF AGENT—EVIDENCE—DECLARATIONS.

Neither agency or agency authority can properly be established by proof of declarations of the pretended agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 40, 416-419; Dec. Dig. §§ 22, 122.*]

3. PRINCIPAL AND AGENT (§§ 21, 121*)—EXISTENCE OF AGENCY—AUTHORITY OF AGENT—EVIDENCE—DECLARATIONS.

The foregoing does not affect competency of a person claimed to be the agent of another to testify in respect thereto.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 39, 413-415; Dec. Dig. §§ 21, 121.*]

4. PRINCIPAL AND AGENT (§ 121*)—AUTHORITY OF AGENT—EVIDENCE.

"The authority of an agent, when not in writing, or required to be, may be proved by the agent himself," and that obtains "where the wife acts as agent of the husband, or the husband as agent of the wife."

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 413-415; Dec. Dig. § 121.*]

5. ESTOPPEL (§ 116*)—EQUITABLE ESTOPPEL—PRESUMPTION.

In case one would naturally be expected to make a claim of a pecuniary nature, if it existed, against another and enforcement thereof would give rise to a claim over against a third person, and that one knows, or has reasonable ground to know, that such other has acted inconsistent with the existence of such claim, relying upon supposed authority of such person, and delay in making the facts known to such other might probably work to his prejudice, unreasonable delay, in that regard, raises a rebuttable presumption of prejudice.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 306; Dec. Dig. § 116.*]

6. ESTOPPEL (§ 116*)—EQUITABLE ESTOPPEL—PRESUMPTION.

In the circumstances stated the burden of proof is on the one who keeps silent, to show that his conduct was not prejudicial to the person against whom the claim is alleged to exist.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 306; Dec. Dig. § 116.*]

7. EQUITY (§ 72*)—LACHES—EFFECT.

A right may be lost by delay without any element of actual damage to him against whom it existed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 207, 210-220, 225, 226; Dec. Dig. § 72.*]

8. ESTOPPEL (§ 54*)—NATURE AND ELEMENTS—WAIVER.

An existing right, known, or which ought to be known, by the possessor, may be lost by waiver as well as by estoppel.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 128-135; Dec. Dig. § 54.*]

9. ESTOPPEL (§ 56*)—EQUITABLE ESTOPPEL—NATURE AND ELEMENTS.

A change of position by one relying upon the conduct of another—the relations between the two being such as to raise a duty of the latter to make known to the former the facts—so that a reversal of such conduct would work prejudice to such person, is essential to estoppel in pais.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 142; Dec. Dig. § 56.*]

10. ABANDONMENT (§ 7*) — OPERATION AND EFFECT.

The voluntary abandonment of a known, or presumably known right, constitutes a waiver thereof which cannot be displaced by a change of mind, regardless of any element of estoppel.

[Ed. Note.—For other cases, see Abandonment, Cent. Dig. § 11; Dec. Dig. § 7.*]

11. ABANDONMENT (§ 3*) — OPERATION AND EFFECT.

A right cannot be lost by abandonment without intention to waive; but the intent may appear, conclusively, as a legal result of conduct, regardless of existence of any actual or express intent, or even in case of an actual but undisclosed intention not to waive.

[Ed. Note.—For other cases, see Abandonment, Cent. Dig. § 2; Dec. Dig. § 3.*]

12. ESTOPPEL (§§ 53, 54*)—NATURE AND ELEMENTS.

There cannot be a waiver without intent to waive, based on knowledge of the facts; but the intent and such knowledge may be constructive as well as actual, and be conclusive where, in contemplation of law, knowledge does or ought to exist.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 126, 127, 128-135; Dec. Dig. §§ 53, 54.*]

Siebecker, J., dissenting.

Appeal from Circuit Court, Milwaukee County; Orren T. Williams, Judge.

Action by Fannie Sherwood Somers against the Germania National Bank of Milwaukee. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Action to recover \$3,500 principal and accrued interest claimed to be due on certificates of deposit. The plaintiff's claim was this: The certificates were duly issued by defendant to plaintiff in 1906, payable to her order. She never transferred them nor authorized transfer thereof. They were taken without her authority and presented to defendant for payment, with a forged indorsement of her name thereon, and were paid to the wrongdoer. As soon as she learned thereof she called on defendant and notified it of the true state of the case.

Defendant answered to this effect: Plaintiff's husband, as her duly authorized agent, transacted all the business respecting the certificates up to the time they were paid. He deposited the money September 23, 1905. Prior to January 15th the money was drawn on part of the certificates by Mr. Somers and placed in his account by plaintiff's permission; she indorsing the certificates. On that date one of the remaining certificates, and February 15th thereafter, the other, was presented for payment by Mrs. Somers, duly authorized agent, and paid. Though she knew of the transactions she made no complaint until March 10, 1909, during which time plaintiff's position had materially changed. There was evidence establishing these facts: Plaintiff and Paul J. Somers intermarried in 1904. They lived together thereafter as man and wife until some time

in the early part of 1909 when they separated. During 1905 and 1906 Somers was a practicing lawyer in Milwaukee. Mrs. Somers trusted him to do all business. He conducted all her financial transactions with defendant. In 1905, as her agent, he deposited with defendant the \$5,850, taking four \$500, one \$1,000 and one \$2,000 certificates of deposit, and credit in open account for \$500 in his name and \$350 in Mrs. Somers' name. All the certificates were left by Mrs. Somers in his care. He deposited them with his papers in a lock box at the Citizens' Trust Company in Milwaukee. He, alone, had access to the box. She knew that. She never had the key to the box except on one occasion for four days. Three of the certificates, aggregating \$1,500 were, prior to January, 1905, indorsed by her and used by her husband by her permission to augment his open account. By February 15, 1906, the other certificates were likewise used, he indorsing them in her name and his own.

Plaintiff and Mr. Somers lived together thereafter in quite an extravagant manner, considering their income, particularly his. In October, 1906, upon the occasion of plaintiff wanting \$95, for a special purpose, she asked defendant, by telephone, about her interest money, whereupon she was informed she had no interest-bearing fund at the bank. She told her husband of the occurrence and he supplied her with the needed money. She paid no further attention to such occurrence till the expiration of one year and three months. In the meantime, she and Mr. Somers had become somewhat estranged but were still living together as husband and wife.

After the expiration of such period, she became informed of all the facts in respect to the use of the certificates. She requested defendant to produce the papers, which he did. Then, and again a few days thereafter, there was conversation between the representatives of the bank and plaintiff respecting the certificates. Her claim was that Somers had used them without authority. She gave such representatives the impression that she was much in need of money and purposed realizing on the canceled certificates. She was given to understand that if Somers had really forged her name, to the papers, and thus improperly obtained the money, it was a very serious matter for him. She manifested a disposition not to press the question so far as to thus involve Somers. She said she would think it over, giving the officers of the bank the impression that she would reflect upon the situation and then conclude whether to hold the bank liable to her on the certificates, or submit to what had been done. She lived with Somers for about a year thereafter, going to Chicago for that purpose. There they parted; she returning to Milwaukee, where after some two months she applied for a

divorce and obtained it without contest. Mr. Somers in the meantime had gone to reside in a distant state. Some time after the divorce was obtained—about one year and three months after the last occurrence mentioned at the bank, and some two years and six months after payment of the certificates—the claim in suit was made. Between the call at the bank and the later occasion plaintiff did not communicate therewith or make known thereto that she intended to make a claim upon the certificates. In the meantime the matter had been practically forgotten at the bank. It was thought, because of her not returning to make a claim after going away to reflect over the matter, as before stated, that she had dropped it. She explained why she did not follow up the matter when informed over the telephone in 1906, she had no interest-bearing fund at the bank; saying that Somers stated to her, she must have been misunderstood by the bank official when she talked over the telephone, that he would look into it the next day and that he supplied her with the \$95, the need of which moved her to make the inquiry. She made no explanation of why she did not later see that Somers obtained an explanation of the communication over the telephone as he promised. She made no explanation of her silence from January, 1906, till about the time the action was commenced in 1909.

There was evidence to the effect that the bank had the customary identification card as to plaintiff's signature, but did not refer to it when the certificates were paid, taking it for granted, on account of the way her business had been done, that Somers had authority to sign her name. There was evidence tending to prove that he had authority in fact to do what he did, and, further, direct evidence that she ratified his conduct, such direct evidence, however, being put in issue by her.

Evidence by Mr. Somers was offered to prove that he acted as agent for his wife, fully authorized thereto, but it was rejected upon the theory of incompetence under the rule that the authority of an agent cannot be established by proof of his declarations.

The cause was submitted to the jury for a general verdict, instructions being given with reference to evidence of Mr. Somers, showing that he was authorized to handle the certificates as he did, which was received and then stricken out on motion, that it was condemned by the rule precluding agency, or agency authority, to be established by declarations of the agent, hence the exclusion of it. This was made very emphatic so as to guard, as far as practicable, against plaintiff being prejudiced by the supposed improper evidence having been gotten before the jury. The jury were further instructed to the effect that negligence or delay on plaintiff's part in making her claim against the bank after having full

knowledge of the facts, did not constitute a defense in the absence of satisfactory proof that defendant would be actually damaged by the laches, if it were compelled, at the late day, to pay the certificates.

The jury found in plaintiff's favor for the full amount claimed.

Austin, Fehr & Gehrz, of Milwaukee, for appellant. Paul D. Durant, of Milwaukee, for respondent.

MARSHALL, J. (after stating the facts as above). [1-3] It must be conceded that proof of appellant having paid the certificates without respondent having indorsed them, unexplained, made a case in her favor. It may also be conceded that, upon the whole case, as sent to the jury there was reasonable ground for the finding that respondent did not sufficiently hold out her husband as having authority to handle her business, to justify appellant in making the payment. However, there are many circumstances pointing in appellant's favor on that subject. The case, in that regard, was so strong that had the evidence of Somers as to authority having been given him, been allowed, pretty certainly, it would, with the jury, have turned the scales in appellant's favor. Most grievous error was committed in excluding that evidence. The rule which the trial judge supposed governed the situation,—the one that agency and agency authority cannot be established by proof of the declarations of the agent,—had no application to the case. It refers to declarations made out of Court and offered as evidence by the testimony of the person to whom made,—not of the agent himself, as in this case. Such is always proper.

That the trial judge went widely and prejudicially astray in ruling out Somers' evidence, is too clear to require more than a mere statement of the matter. His evidence would probably have proved, or strongly tended to prove, that he either had authority to use the certificates as he did or that his doing so was subsequently consented to by respondent. The error in excluding the evidence was intensified by the court's instruction to the jury. Remarks in their presence, misconceiving the scope of the rule excluding proof of declarations of an agent on the subject of his agency, were made as prejudicial as practicable by the supplementary remarks on the subject in the charge. The judge seems to have thought that such supplementary remarks were necessary to remove any vestige of Somers' evidence as to his agency, which, perchance, had not been stricken out, and all impressions which such supposed erroneous evidence might have made upon the minds of the jury.

[4] According to the idea which governed the trial, an agent is incompetent to testify to his agency or scope of his authority,

while the rule the court had in mind, only goes to evidence of persons other than the agent, as to the latter's declarations. It is not considered necessary to discuss the matter at length and illustrate by authorities. It is too elementary. While it is often said in the books, the declarations of an agent are, in general, no evidence of the agency, *Davis v. Henderson*, 20 Wis. *520; *McCune v. Badger*, 128 Wis. 191; speaking always of declarations made to third persons who are called to prove the same, it is quite as often said: "The authority of an agent, when not in writing or required to be, may be proved by the agent himself," and such principle "governs in the proof of all agencies" including "where the wife acts as agent of the husband, or the husband as agent of the wife." *O'Connor v. Hartford F. I. Co.*, 31 Wis. 160; *Roberts et al. v. Northwestern N. I. Co.*, 90 Wis. 210, 62 N. W. 1048; *Smith v. State*, 149 Wis. 63, 134 N. W. 1123.

For the manifest prejudicial error committed, as indicated, the judgment must be reversed; but it seems that still more vital error was committed on the trial. So strong a case of estoppel and waiver was made in appellant's favor, as seems to present an insurmountable obstacle to any other disposition of the appeal than, to not only reverse the judgment, but to remand the cause for dismissal with costs.

[5] According to the undisputed evidence, respondent and her husband, at the time she was first notified of her certificate money having all been drawn, lived so extravagantly that it could not well have failed to suggest to her probability of her money having been used up, if she did not actually know it. The circumstances point that way so forcibly as to be unexplainable on any reasonable hypothesis to the contrary. She was a woman of considerable experience. She had been married before she became the wife of Mr. Somers. She knew how to do business with a bank. She was accustomed to have a check account and to have certificates of deposit. She evidently knew such certificates and not an open account drew interest and that it was important to her to draw the accrued interest at regular periods.

A few days after the certificates in question had run a year,—the time requisite, presumably, to entitle her to the highest rate of interest, she called up the bank by telephone about the matter. The reply indicated that the whole sum of \$5,850 she possessed only a little more than a year before and placed in the hands of Somers had been exhausted. She knew that could not possibly be without Mr. Somers having signed her name to the certificates, yet there is nothing to indicate that she was particularly surprised. Though assured from the bank, in the most positive language, that her money was gone, according to her story she was

so satisfied with a mere remark by Mr. Somers that the bank official must have misunderstood her and that he would look up the matter the next day, that she never thought of the subject again for over a year,—even so as to inquire of Mr. Somers whether he had done as he promised.

How can the conduct indicated be reconciled with the idea that respondent did not, during the long period, know her money was gone? She must have known of it. The circumstances pointing that way are so strong as to render her claim to the contrary unbelievable. Her conduct from the first in leaving all her business with the bank to be transacted by Somers, gave him such dignity as her agent that, when she was informed he had used up all her money, it was her duty to, at least make seasonable efforts to acquaint appellant with his want of authority, if such want existed. How can such conduct be reasonably reconciled with the idea that she did not know, or have such reason to know the fact, as to be chargeable with knowledge thereof? The most natural thing for one in the circumstances she testified to herself, would be to follow up the matter by visiting the bank and make inquiry, or, at least, make inquiry of the husband as to whether he had investigated as she testified he promised to do. Yet, as it seems, she paid no attention to the matter for over a year, and until she had made up her mind to leave Somers. In that, it seems, there is such proof of prior authority, or subsequent acquiescence in the use of her certificates, the conclusion is irresistible that there was one or the other, and that appellant had a right to rely on the appearance as to what the truth really was.

[8, 7] At this point the instruction to the jury that the delay did not work a waiver or estoppel in the absence of proof of actual damage to appellant by the facts is important. It was not good law and could not have worked otherwise than prejudicially. Such long delay, thus preventing appellant from having the benefit of opportunity to pursue Somers, if he had wrongfully obtained the money from the bank, was presumably prejudicial to it. The burden was not upon appellant, as the court suggested, to affirmatively establish actual damages by the delay. At least, the burden was rather upon respondent to establish the contrary. Moreover, if there was actual acquiescence, as the evidence seems to conclusively circumstantially establish, it was binding on her. Having once acquiesced, she waived her right against the bank, regardless of whether there was any element of estoppel, strictly so-called, or not.

[8, 8] A change of position by one, in reliance upon the conduct of another, so that a reversal of such conduct would work prejudice to the former, is essential to estoppel in pais but not to waiver, and one is just as

effective as a defense as the other. She knew her rights, or should have known them. According to her testimony, she was fully informed of the fact that, if her husband had drawn her money without her authority she could insist upon its being paid to her just the same. She did not so insist till more than 2 years. She did not even raise the question for some 15 months, and until, as before indicated, serious trouble had occurred between her and Somers.

[10-12] The doctrine of waiver as applied to the facts in this case, seems to have been entirely overlooked by the trial court in deciding the motion made in appellant's behalf for a directed verdict. All the essentials of waiver were present without reasonable controversy. There was knowledge, actual and constructive, of the facts. Either was sufficient. The underlying facts, upon which to predicate a waiver, as in this case, and the waiver itself may be implied from circumstances as well as be established otherwise. Where implied, necessarily, from the circumstances, the mere claim of absence of intent to waive does not overcome such situation. This court has spoken on the subject, repeatedly. *Pabst Brew. Co. v. City of Milwaukee*, 128 Wis. 110, 105 N. W. 563; *Smith v. Burns Boiler & Mfg. Co.*, 132 Wis. 177, 111 N. W. 1123; *Voss v. Northwestern Nat. L. I. Co.*, 137 Wis. 492, 118 N. W. 212; *Castello v. Citizens' State Bank*, 140 Wis. 275, 280, 122 N. W. 769. In *Pabst Brew. Co. v. City of Milwaukee*, supra, the principle of waiver was stated thus:

"The intent to waive may appear as a legal result of conduct. The actuating motive, or the intention to abandon a right, is generally a matter of inference to be deducted with more or less certainty from the external and visible acts of the party, and all the accompanying circumstances of the transaction, regardless of whether there was an actual or expressed intent to waive, or even if there was an actual but undisclosed intention to the contrary."

"It is suggested that there can be no waiver without intent to waive based on knowledge of the facts. True, but one is presumed to know that which in contemplation of law he ought to know, and one is presumed to waive that which is necessarily implied from his conduct. Constructive as well as actual knowledge of the facts, and implied as well as express intent, satisfies the prime essential of a conclusive waiver."

As indicated in the cases cited, there is much tendency to confuse the doctrine of estoppel with that of waiver which does not require any element of estoppel at all,—only a voluntary choice to insist or not to insist upon a right, known, or conclusively presumed to be known. Unreasonable delay raises a conclusive presumption of acquiescence or choice. Speaking on the same subject in *Smith v. Burns Boiler & Mfg.*

Co., 132 Wis. 177, 111 N. W. 1123, the court said:

"Waiver is also applied to deprive one of a right or immunity when, having a right to assume either of two inconsistent positions, his acts unambiguously indicate an intention to adopt and avail himself of one. In such case the law holds him to have effectually waived his right to claim the other, whether or not he consciously intended such waiver."

In the light of the foregoing we cannot escape the conclusion from the circumstances, which are substantially without dispute, that respondent waited so long after being chargeable with knowledge of the misuse of her money, if there were such misuse, before asserting any right against appellant, that as matter of law, she waived such right. She voluntarily chose to abandon all claim for her money or to seek redress against her husband. Having once so acquiesced, either actually or constructively, the surrendered right was beyond her power to resume it; and that whether there were, technically, the essentials of estoppel in pais or not.

If there were any doubt as to the correctness of the foregoing, looking only to the conduct of respondent from the time she was informed by appellant in October, 1908, that her money had been withdrawn from the bank till she made inquiry 15 months later, that doubt must sink out of sight in face of her conduct at the later date and from the time she made the claim over a year later. She was still living with Somers when she was definitely informed by him, in the early part of 1908, that he had withdrawn her money, followed by her two interviews with appellant's officers in respect to the matter. When called to face the situation where she had to choose whether to insist upon the bank paying the certificates a second time, leaving Somers liable to an action for forgery, she informed appellant that she would reflect over the matter before taking the final step. In such circumstances she was bound to use some reasonable diligence in respect thereto. Certainly, the bank had a right to know from her pretty soon what conclusion she had arrived at. In case of her failure, for a period beyond a reasonable time, to speak the final word, the bank had a right to conclusively presume that she had chosen to acquiesce in Somers' conduct and waive her right against it. Certainly the long delay of over a year, and till she had left Somers for good and resolved upon obtaining a divorce from him, indicated to the bank, as a matter of law, what conclusion she had reached.

The fact that during this second long period of silence respondent lived with Somers shows, too conclusively, that she had elected to abide by the situation he had created, to leave her any standing to then claim she intended, all the time, to hold appellant lia-

ble to her. The inference that she had abandoned such intent, if she had it up to the time of her visit to the bank, as before stated, seems to appear most unambiguously, and also that the final separation from Somers and consciousness that their marital relations were practically ended, moved her to change her mind. That she could not efficiently do. The trial court seems to have thought she could, unless there was an element of estoppel involving actual damage to the bank by her delay, which is all wrong. The unambiguous purpose to waive her right against the bank, if she had any, as suggested by the authorities, ended the matter so far as appellant was concerned. The case in its favor seems, on the law and the facts, to be too clear to warrant pursuing the matter further or making any other disposition than to reverse the judgment appealed from, and remand the cause with directions to dismiss with costs. So ordered.

SIEBECKER, J., dissents.

On Motion for Rehearing or Change of Mandate.

PER CURIAM. Rehearing denied.

KERWIN, J. (dissenting). A motion for rehearing, or that the mandate be modified so as to grant a new trial, was made in this case. I have carefully re-examined the record, and am fully convinced that a new trial should be granted, and the mandate so modified. I am therefore forced to dissent from the order denying a rehearing or modification of the mandate.

SIEBECKER, J., concurs in the foregoing dissent of Mr. Justice KERWIN.

ENSIGN v. CITIZENS' INTERURBAN RY. CO. et al. (No. 16,829.)

(Supreme Court of Nebraska. Nov. 13, 1912.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 229*)—BONA FIDE PURCHASER—NOTICE.

A purchaser of a tract of land situated near a projected and surveyed line of street railway and boulevard is not thereby charged with notice that by a subsequent change of such projected route a part of his purchase may be taken for such public improvement.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 477-494; Dec. Dig. § 229.*]

2. EMINENT DOMAIN (§ 268*)—REMEDY OF OWNERS OF PROPERTY—EJECTMENT.

If, by a subsequent change of location, a part of his land is so taken, and he, without objection, acquiesces in such appropriation, he will not be permitted to regain possession by an action in ejectment, but under proper pleadings in such a suit may recover the value of his land so taken.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 697, 736-740, 742; Dec. Dig. § 268.*]

3. RAILROADS (§ 64*)—RIGHT OF WAY—RESCISSON OF CONTRACT.

Where a suburban landowner, in consideration of the location, construction, and dedication of an interurban railway and boulevard across his premises, enters into a written contract to convey to the street railway company a

part of his land for right of way purposes, and thereafter seeks to rescind his contract on the ground of fraud or mistake, he must act promptly and make known his intention to rescind upon his discovery of the facts.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 144, 147-152; Dec. Dig. § 64.*]

4. RAILROADS (§ 64*)—RIGHT OF ACTION—ESTOPPEL TO RESCIND CONTRACT.

If, with full knowledge of all of the facts upon which he relies for a rescission of his contract, he remains silent and acquiesces in the construction of the improvement and the dedication of the boulevard to the public use, a court of equity may require him to specifically perform his contract.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 144, 147-152; Dec. Dig. § 64.*]

Appeal from District Court, Lancaster County; Frost, Judge.

Action by Milton W. Ensign against the Citizens' Interurban Railway Company and others. From a judgment for plaintiff, the defendant railway company appeals. Reversed and remanded, with directions.

E. J. Hainer, of Lincoln, for appellant. Shepherd & Ripley, of Lincoln, for appellee Ensign. Greene & Greene and Geo. A. Adams, all of Lincoln, for appellee Funk.

BARNES, J. This action was brought by Milton W. Ensign as a suit in ejectment to recover the possession of a strip of land which is covered by a boulevard and the right of way of the defendant, the Citizens' Interurban Railway Company. The defendant by its answer alleged, in substance, that on or about the 1st day of March, 1908, one Laura T. Funk, then the owner of the land in question, described as lots 48 and 52, in the N. E. $\frac{1}{4}$ of section 6, township 9, range 7, being desirous of obtaining a boulevard 150 feet in width and a line of street railway from the corner of Twenty-Sixth and South streets, in the city of Lincoln, to the village of College View, over and across her said premises, made an agreement with the defendant company for such boulevard to be constructed and dedicated as a public highway, and agreed to convey to the said company or its assigns, by good and sufficient special warranty deed, from said lots 48 and 52, $7\frac{1}{2}$ acres, including the right of way for its interurban railway track and boulevard; that the defendant company, in good faith, relied upon her agreement, and in pursuance of the terms and conditions thereof did proceed to obtain the right of way for the boulevard, and caused preliminary surveys to be made of said line or route across her land and the lands of others, and thereafter proceeded diligently with the locating, laying out, establishing, building, and constructing said line, and thereby performed its part of the agreement; that plaintiff, Ensign, had full notice and knowledge of the contract between Mrs. Funk and the company, and was induced to purchase the premises in question by

reason thereof; that the contract with Mrs. Funk rested in parol until about May 1st, when the same was reduced to writing and duly executed. The defendant company prayed that Laura T. Funk and Ancil L. Funk, her husband, be required by the decree of the court to convey to the company the premises described in the agreement above mentioned; that any right, title, or claim of the plaintiff, Ensign, in and to any part of the public road, boulevard, or strip of land 150 feet in width be declared to be subject, junior, and inferior to the rights of the defendant and the public.

After the defendant company filed its answer, Laura T. Funk and her husband, Ancil L. Funk, were made parties defendant, each of whom filed separate cross-answers. In the answer of Laura T. Funk it was alleged, in substance, that the agreement set forth in the answer and cross-petition of the defendant company was procured from her by fraud and misrepresentation in this: That some months prior to May 1, 1908, she agreed, under certain conditions, to dedicate to the public and the defendant company the right of way for a boulevard and electric car line 150 feet wide, running in an easterly and westerly direction through the south half of the west 10 acres of lot 52 to the village of College View, Neb.; that all the negotiations with reference to the agreement were conducted on her part by Ancil L. Funk, who in that particular matter acted as her agent; that she was ignorant of all matters and facts connected with the transaction, save only that she signed or authorized said Ancil L. Funk to sign the particular agreement referred to at his request; that on or about May 1, 1908, the defendant company, at a time when Ancil L. Funk was away from home, and when it was impossible for her to communicate with him, came to her at her home in the city of Lincoln with a document, probably the original contract attached to the cross-petition of defendant company, and falsely and fraudulently represented to her that said contract was, to all intents and purposes, identical with the contract theretofore made between her and the defendant company; that it referred to exactly the same land described in said contract; that it provided for the conveyance of said land to the same party described therein, and that the only difference between it and the original agreement was in matter of form; that the representations so made to her were false and untrue; that the contract was not, to all intents and purposes, identical with the agreement theretofore made; that it referred to different land entirely from that described in the former agreement, and provided for the conveyance to a different party from that described therein, and differed from the contract in all material respects in substance and intent; that, relying upon said represen-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tations, she executed and delivered said last-named contract to the defendant company.

The reply of plaintiff, Ensign, was in the nature of a denial, and concluded with a prayer that the court determine the amount of damages he had sustained, in case it was found that he was entitled to recover. The defendant company replied to the answer and cross-bill of Laura T. Funk by a general denial. There was a trial to the court, without the intervention of a jury, and a finding for plaintiff, Ensign, and a judgment in his favor against the defendant company for \$350. The court also found that the contract executed between the company and the Funks was obtained by fraud or mistake, and denied any relief to the defendant company. From that judgment the railway company has brought the case to this court on appeal.

From the foregoing it appears that the issues to be determined between the plaintiff, Ensign, and the defendant railway company are: First. Did the plaintiff, at the time of the purchase of his tract of land from the Funks, have notice of such circumstances as to put him on his guard, and call for an inquiry with respect as to where the company had a right to permanently locate its line upon and across the premises in question? Second. If he did not have such notice and purchased his land in good faith, what is the reasonable value of the land taken by the company, and which he seeks in this action to recover? The issues between the defendant railway company and Laura T. Funk are: First. Was the contract sued upon obtained from her by fraud and misrepresentation? Second. Can Laura T. Funk rescind the contract executed between her and the defendant railway company on account of fraud or mistake, without having given prompt notice of her intention to rescind it upon the discovery of the facts in relation thereto? Third. Can Laura T. Funk rescind the contract on account of fraud or mistake after having full notice of the facts, and permitting the defendant company to expend large sums of money in locating, building, constructing, equipping, and putting in operation the railway and boulevard in question?

[1] In considering the questions at issue between the plaintiff, Ensign, and the defendant railway company, it appears that when Ensign purchased his tract of land from Mrs. Funk in April, 1908, there had been a preliminary survey of the proposed line of street railway and boulevard; that its location, as evidenced by the stakes then upon the ground, indicated that no part of the Ensign purchase would be taken for either the railway or boulevard. It appears that he obtained his deed from the Funks on April 20, 1908, and immediately filed it for record in the office of the register of deeds; that while he was absent from the state some time in the latter part of August, 1908, the line was changed; that the construction proceeded on such new line, and when complet-

ed there was taken from Ensign's tract, without his consent, about three-tenths of an acre thereof. We are of opinion that he was not required by anything contained in this record to presume or expect that when the road was constructed any part of his land would be taken for that purpose. Therefore the finding of the district court upon that point should be sustained.

[2] We are also of opinion that under all the circumstances, as shown by the record, Ensign should not be permitted to oust the defendant company from its possession of that part of his land actually taken and occupied for the railway and the boulevard in question, but is entitled to recover the value of his land so taken. We also find sufficient evidence in the record to sustain the judgment of \$350 awarded him by the trial court; and the decree appealed from, so far as it relates to plaintiff, Ensign, is affirmed.

[3,4] Upon the issues between the defendant railway company and the cross-petitioners, Laura T. and Ancil L. Funk, we find that the evidence shows, without serious dispute, that the Funks entered into a contract with the defendant railway company, which was afterwards reduced to writing, and signed by both parties, as alleged in defendant's answer and cross-petition, by which, in consideration of the construction and operation of an electric street railway and a boulevard from Twenty-Sixth and South streets, in the city of Lincoln, to Union College, in the village of College View, they agreed to convey to the defendant railway company $7\frac{1}{2}$ acres of land including a strip of 150 feet in width for the right of way of the street railway and boulevard, out of lots 48 and 52, situated in the N. E. $\frac{1}{4}$ of section 6, township 9, range 7, in Lancaster county, Neb.; that the written contract was not obtained by fraud, misrepresentation, or mistake; that the claim that the written contract provided for a route different from the one described in the original agreement is without foundation; that the street railway and boulevard run through said tracts of land in an easterly and westerly direction, as described in their original contract; that the defendant railway has complied with and performed all of the conditions, stipulations, and agreements contained in the written contract on its part; that the Funks have obtained the benefits expected therefrom, and at all times have had full knowledge of any and all changes of location, including the one finally adopted for the construction of the street railway and boulevard; that during the progress of such construction they demanded from the officers of the street railway company payment for the corn growing on the proposed right of way, and in that behalf finally received therefor the sum of \$100; that they made no claim of fraud, misrepresentation, or mistake, and gave no notice to the railway company of any desire on their part to rescind their contract until long after the street railway was constructed and in operation, and the boulevard was completed

and dedicated to the public as a highway. It follows that, if the Funks were induced to sign the same through fraud or mistake, by their subsequent conduct they are now estopped to rescind it.

In the case of *Gallagher v. O'Neill*, 78 Neb. 671, 111 N. W. 582, the following language, found in *Booth v. Ryan*, 31 Wis. 45, was quoted with approval: "It is a principle which has been too long and too thoroughly established in our law to admit of any doubt or discussion either as to the principle itself, or the reasons upon which it is founded, that a party claiming to rescind a contract on the ground of fraud must do so promptly upon discovery of the facts, and that if he delays, or takes any further steps in the execution of the contract, or does any act recognizing its validity, after discovery he loses all right to this particular form of relief."

In the case of *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798, it was held: "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon discovery of the facts, at once announce his purpose and adhere to it." The same doctrine was announced by this court in the case of *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434, 67 N. W. 493.

We therefore find that the defendants *Laura T. Funk* and *Anclil L. Funk* should be required to convey to the street railway company so much of lots 52 and 48, above described, as is now embraced in the strip of land 150 feet wide occupied by the street railway and boulevard over and across their said lots; and as to the remainder of the 7½ acres mentioned in their contract, if any there be, the description thereof is so indefinite that a court of equity will not require its specific performance.

It follows that the decree of the district court, so far as it relates to the issues between the defendant railway company and *Laura T. Funk* and *Anclil L. Funk*, should be, and is, reversed, and the cause is remanded to the district court with directions to render a decree in harmony with this opinion.

Judgment accordingly.

MOLINE v. CARLSON et al. (No. 16,860.)
(Supreme Court of Nebraska. Nov. 13, 1912.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE (§ 41*)—ORAL CONTRACTS — PARTIAL PERFORMANCE OF CONTRACT.

The rule is now well settled in this court that a parol contract will be enforced by a court of equity where one party has wholly and the other partly performed it, and its nonfulfillment on the one hand would amount to a fraud upon the party who has fully performed it.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 120-123; Dec. Dig. § 41*]

2. WILLS (§ 58*)—CONTRACT TO DEVISE—PARTIAL PERFORMANCE.

Where a husband and wife take into their family the infant child of a stranger, and either then or subsequently they jointly orally agree that, if such child will remain with them during their lives and render them faithful and obedient service as a child, they will at their death, by will or otherwise, leave him all of the estate of which they die seised, *held*, that the statute as to homesteads cannot be pleaded by the heirs of either the husband or wife as a defense to a suit by such child for the enforcement of the parol contract.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 164, 165; Dec. Dig. § 58*]

3. CONTRACTS (§ 28*)—ORAL CONTRACT—EVIDENCE.

The evidence examined and set out in the opinion, *held*, that the parol contract in this case possessed the elements of certainty, and the proof establishing it is sufficiently clear and satisfactory.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 133-140, 1755, 1782-1784; Dec. Dig. § 28*]

Appeal from District Court, Saunders County; Corcoran, Judge.

Action by *Charles W. Moline* against *Eva Charlotta Carlson*, impleaded with *John A. Johnson*, executor of the estate of *Peter A. Carlson*, and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

C. Petrus Peterson, of Lincoln, and *Chas. H. Slama*, of Wahoo, for appellant. *B. E. Hendricks*, of Wahoo, and *Simpson & Simpson*, for appellees.

FAWCETT, J. This suit was instituted in the district court for Saunders county to quiet title to the east half of the northwest quarter and the north half of the northeast quarter of the southwest quarter of section 25, township 14, range 8, in said county. The decree quieted plaintiff's title to an undivided one-half interest in the land, and dismissed the suit as to the other half. Plaintiff appeals.

Plaintiff relies upon a parol contract, which he sets out as follows: "That on September 1, 1896, and at many divers times prior and subsequent to said day, said *Peter A. Carlson* and his wife, the defendant *Eva Charlotta Carlson*, orally promised that, in consideration of the plaintiff's services and of the plaintiff remaining with them on the farm until said *Carlson's* death, they would leave to plaintiff, by will or otherwise, all of said *Carlson's* estate of which he would die seised, and that plaintiff would be made *Carlson's* residuary legatee; that in consideration of said promises, and relying thereon, the plaintiff yielded to the request and agreed thereto; that he refused to go with his own father; that he sacrificed all other opportunities for his own advancement and remained with the said *Peter A. Carlson*, serving and obeying said *Carlson* in all his wishes and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

desires, and rendered unto said Peter A. Carlson full and faithful service in implicit reliance upon the said oral agreement; that pursuant thereto said Peter A. Carlson did execute a will conforming to said agreement; but that thereafter said Peter A. Carlson wrongfully executed another will giving plaintiff the sum of only \$400." The petition also alleges that the land belonged to Carlson in his lifetime; that Carlson died March 24, 1909; and that defendant Johnson is the duly qualified executor of the will of said Carlson, deceased. The defendant Eva Charlotta Carlson entered her voluntary appearance in the suit and filed her answer, in which she admits all the allegations contained in, and consents to, the prayer of the petition; and further alleges "that this action is brought with her consent and to satisfy her wish and desire that the agreement between this defendant's lamented husband and the plaintiff may, in justice and equity, be fulfilled, so plaintiff will be the sole residuary heir of Peter A. Carlson, deceased."

The heirs of Peter A. Carlson being all nonresidents of Saunders county and unknown to plaintiff, service was had upon them by order of the court in accordance with the provisions of the statute in such case made and provided. After disposing of certain motions and demurrers, which we deem it unnecessary to refer to, Ida Sofia Ahlen filed her separate answer alleging that said Carlson left as his only heirs at law and next of kin Eva Charlotta Carlson, his widow, Carl W. Carlson, a brother, and John Emil Larson, a nephew, and Ida Sofia Ahlen (herself), a niece; the last two being children of a deceased sister of said Peter A. Carlson. She further admits the death of Carlson; the appointment of Johnson as executor; that Eva Charlotta Carlson is the widow of deceased; the ownership of the land by Carlson prior to his decease; and that plaintiff has resided upon the premises as tenant of said Carlson for several years last past; alleges the execution of the last will of Carlson; that the same had been duly admitted to probate, attaching a copy of the will to her answer; alleges that Carlson and his wife resided upon the land as their home; that neither of them during said time owned or possessed any other lands, houses, or town lots; and that the real estate in controversy was the home and homestead of Carlson and his wife; and denies every other allegation. The will attached to her answer devised the lands to the widow for her life, bequeathed \$400 to plaintiff, and all the rest and residue of his property, share and share alike, to his legal heirs. The answer of defendant Johnson, executor, is substantially the same as that filed by defendant Ahlen.

Carl W. Carlson first appeared especially, objecting to the jurisdiction of the court over him, which objection was overruled.

He thereupon answered separately; his answer in all essentials being similar to the answer of defendant Ahlen. John Emil Carlson, the nephew referred to in the answers of Mrs. Ahlen and Carl W. Carlson, made no appearance.

The reply to the three answers above set out denies all allegations of such answers except such as admit allegations in plaintiff's petition. The decree found that, under the pleadings and answer of defendant Eva Charlotta Carlson, plaintiff is entitled to judgment against her; finds all the allegations of the three answers above set out to be true; and that as to said defendants, and each of them, the plaintiff has no cause of action; finds that the land in controversy was in September, 1896, occupied by Carlson and his wife as their homestead; that the same constituted their homestead at all times thereafter until the death of Peter Carlson; that the value of the lands in September, 1896, was \$3,000; adjudged that the plaintiff is the owner of an undivided one-half of the lands, "being such interest only as the defendant Eva Charlotta Carlson had in said lands as the widow of Peter A. Carlson, deceased"; quieted in plaintiff title to such half interest, subject to any rights the executor may have for the payment of debts and expenses of administration; that, as to the defendants other than Eva Charlotta Carlson, plaintiff's action be dismissed.

The issues presented for our consideration are stated in the brief for appellees as follows: "First. Was any oral contract entered into between Peter A. Carlson, the testator, and the appellant herein, whereby Carlson obligated himself to convey the land described in the petition to the appellant, either by will or otherwise? Second. Was the land owned by Peter A. Carlson at all times his family homestead and not subject to his individual disposal?"

[3] The first question is not accurately stated. It is not alleged that Carlson agreed to convey "the land described in the petition." The allegation is that he agreed to "leave to plaintiff, by will or otherwise, all of said Carlson's estate of which he would die seised." As thus modified, the question must be answered in the affirmative.

The defendant Mrs. Carlson testified substantially as follows: "I am 88 years old. I have lived in Saunders county about 35 years. * * * We have lived on this farm over 20 years. My husband and I had four children, but they are all dead. My oldest daughter had one child, a boy, but he died when he was two months old. All my children have been dead many years. My oldest daughter's little boy died about 16 years ago. Anyway, Charlie Moline is my son. He was four years old when he came to us. He is married and has got six children. He has lived on this farm since he was four years old. He has been in this place always until now, and I hope he will stay here too.

His mother was dead, and his father asked us to take him, and I say, 'Well, if I can be mother for him I will; I don't want to take him if I cannot be like a mother.' My husband, Mr. Carlson, was there and heard that talk, and he wanted to do that too; both of us wanted to take the boy. Mr. Carlson said, 'We'll do the best we can for the little child,' and Carlson said he wanted to take him for his son; he said he would take him for his boy, and we say, 'He shall come to us and stay with us forever, and afterwards he can attend to us while we be old,' and at that time it was said that all our property should belong to Charlie Moline after we died; then Charlie came to live with us, and we do all we can for him, and he do everything he could do to help us. We send him to school, and he done what he could, and as he grew older he act all right, he work on the farm, and he been all right. My husband and Charlie they talk about the farm many time after Charlie got older, and when Charlie was 16 years old Carlson promised him for sure that Charlie was to have the farm. They had a talk in our house when Charlie was about 16 years old, and then Carlson promised Charlie for sure that he would get the farm. When my husband told Charlie that Charlie should have the farm, I was willing. It was all right with me. I was willing then, and I am willing now, to let him have every bit. Of course you know I want my board so long I live; I do not know how long I live, and then it goes to him; no child could be a better child than Charlie have been to me. My husband tell Charlie many times that he should have the farm. I couldn't tell how many times he told him, but many, many times, and he never say anything different." On cross-examination she testified: "We send him to school and clothe him. He never needed a doctor, for he hardly be sick. We gave him a little spending money, a little bit, a quarter of a dollar. We furnish him clothes and treat him kindly. Yes, Mr. Carlson and Charlie had some trouble. It was pretty hard to get along with Carlson. He was hard on me, I hate to talk about it. Sometimes Charlie and Carlson didn't get along well because Carlson was drunk, and then he hardly know what he do. Once Carlson was going to choke Charlie when he was drunk, and Charlie pushed him away. They quarreled two times. They weren't friendly towards each other. Once Charlie went to see his father. I tell him to go and see him. He stay about a week. Charlie and I were friendly; he called me 'mother.' Mr. Carlson and Charlie wasn't so friendly. Mr. Carlson was sorry when Charlie was away; he said, 'I be glad if Charlie come back.' Carlson scolded Charlie and he scold me, but when Charlie was away Carlson was so angry. 'I wish Charlie come back, I wish he come,' he say. * * * Once Carlson and I went to Wahoo, and he made a will

for Charlie; he had a will drawn, and he showed it to Charlie, and afterwards Charlie said, 'You better keep the will, papa, for maybe you take better care of it than I do.' He kept this will about a year. I don't know just how long, but a year, and then Carlson burnt the will up one time when he got drunk. * * * I knew that Carlson had a brother and had a sister, but she died and left two children. I don't know anything about them. I don't know if they live or not. Charlie don't know anything about them, and he didn't know where they are. I never had anything to do with those people, never. Carlson used to write to them; 'he write a letter and William hardly answer him, so he didn't get much love for him.' Carlson didn't write to his sister's daughter; he didn't know where she lived. He tried to find out, but couldn't. Charlie comes to see me often; he come in the morning, and he come in the noon, and he come in the evening; he comes every day. Oh, he be so kind to me. I want him to have everything. We rented the farm to Charlie since he has grown up. He pays us \$300 rent; he paid that always. * * * " Re-direct: "Q. How did it happen, what made the bad feeling between Mr. Carlson and Charlie? A. The brandy. Q. And who used the brandy? A. Carlson; Charlie never, and that is why I love him for, for I hate brandy; I pour many tears for it. When I sign the paper in this case it was my free will. I hope and pray God you do the best you can for me and Charlie. You know what you done for Charlie you done for me and for his poor little children."

The witness A. F. Johnson testified substantially: "I am 70 years old and now live at Mead; have lived there about 6 years. Before that I lived on a farm four miles from Peter A. Carlson's farm. Carlson and I visited back and forth a good deal. I was well acquainted with Carlson; I knew him since we were 18 years old. * * * Mr. Carlson and I talked about his farm and about Charlie Moline. I remember that talk. It is a pretty long time ago. It must be 13 or 14 years ago. The talk was right in his house. He called me and my wife to come down there for dinner, and after dinner we go into the front room and sit down, and then he says to me, 'There is something I want to talk to you and let you know.' 'Well,' he say, 'my wife and I have agreed to promise Charlie Moline the farm and everything what we have after we is dead, and he have promised us to stay here and take care of us; he have done that before, and he have promised to do that after this, so we want to make up a will for him;' and I say, 'Do you want to do that you might do that pretty quick;' and he say, 'Well, I want to talk about that before you so you know what we want to do. I am outside a good many times, and I do not know what some can help me if I may die before we make up the

will, so you hear that now, you can witness that.' I remember this well. I also remember that the boy was about four years old when he was taken into the Carlson home."

The witness Reim testified that he was the assessor. "I called at Mr. Carlson's home to assess him; we talked about one thing and another, and he finally got to telling me that he received a letter from Charlie's father; that he wanted the boy back; and Carlson told me that he had made agreements now with Charlie and his father that if he stays until the old folks were dead that everything that was theirs, real and personal, was Charlie's."

The witness Baur testified that Carlson traded with him in his store; that on one occasion "we got to talking and he told me his whole life story, how he had to go through life, and how he struggled, and, as he was coughing pretty heavy, I says, 'It's about time, old man, you prepare for death,' and one thing brought on another, and he said he has got it pretty nice and everything is all right, and I asked him who would get all the stuff he left behind, and he says, 'All is Charlie's, Charlie Moline'; he told me at one time that Charlie Moline took care of his things, and that in case something should happen that he gets his estate."

The witness Okeson testified that he had been acquainted with Carlson for 24 years; that he did work on Carlson's new house about 9 or 10 years ago; that, "while walking with Mr. Carlson on the road by his farm and near Frank Halstead's place—Mr. Halstead was married to Mr. Carlson's daughter at one time—I said to Mr. Carlson, 'Well, sometimes when you die Frank will come after some of your property,' and Mr. Carlson he said, 'No, everything that would be after me and my wife that will fall to Carl'—that is, Carl Moline, the plaintiff—Mrs. Halstead, Carlson's daughter, had died long before that time, about 10 years before."

Five other witnesses testify to statements made to them by Carlson of quite similar import. It is also shown that, when plaintiff married, Carlson built a cottage on the farm into which he and Mrs. Carlson moved, and in which they lived until the death of Mr. Carlson, and that plaintiff with his wife resided in the old house. Carlson and his wife retained about five acres for a garden, and plaintiff tilled the farm, paying Carlson \$300 a year rent therefor. During all of the years that plaintiff worked upon the farm, up to the time of his marriage, he never received wages of any kind for his services. Every act and statement of Carlson's during the nearly 30 years of plaintiff's association with him, except the making of the last will, clearly indicate that the relations existing between him and his wife on the one side and plaintiff on the other were as claimed by plaintiff.

It is hard to see how a stronger case

could be made in support of a parol agreement of the kind alleged in this case. To our minds the evidence is clear and satisfactory to the effect that Mr. and Mrs. Carlson made the agreement set out in plaintiff's petition, and that plaintiff fully performed his part of the contract. The fact that Mr. Carlson in his later years became addicted to the use of strong drink, and that while intoxicated he quarreled with the plaintiff for no other reason, as appears from the record, except that plaintiff interfered in behalf of his foster mother affords no justification for a breach of the contract on the part of the deceased. Plaintiff was taken into their home when he was little more than a babe, under an assurance then made by the deceased and his wife that upon their death he should have all of their estate, and when, at the age of about 16 years, his father desired to have the boy return to him, the Carlsons again expressly agreed that, if he would remain with them until their death, he should have all of the estate. Acting under that agreement, plaintiff did not return to his father, but remained with the Carlsons and performed every duty faithfully and well. Upon this point there is no evidence to the contrary. We hold therefore that the contract alleged in the plaintiff's petition is fully proven.

[1] That a parol contract of the kind set out in plaintiff's petition will be enforced where the making of the contract is sustained by clear and satisfactory proof is now so well settled in this state as to no longer require reference to our former decisions upon that point.

[2] This brings us to the second point, viz. "Was the land owned by Peter A. Carlson at all times his family homestead, and not subject to his individual disposal?" Upon this branch of the case counsel for defendants rely upon *Teske v. Dittberner*, 70 Neb. 544, 98 N. W. 57, 113 Am. St. Rep. 802, and *Lichty v. Beale*, 75 Neb. 770, 106 N. W. 1018. We do not think either of the cases cited is a bar to a recovery in this suit. *Lichty v. Beale* is not in point. In the *Dittberner* Case the oral agreement was that the son Carl was to remain upon the particular premises in controversy, pay the taxes, keep up the place and improve it, and provide a home, board, clothing, and spending money for the said Frederick Teske and his wife so long as they should live. If either the said Frederick Teske or his wife should desire to leave the home to be provided by plaintiff, then they were to receive \$100 each per year in lieu of the above provisions relative to their support. In considering that contract the court was of the opinion that it was governed by section 4, c. 36, Comp. St. 1901, entitled "Homesteads." The difference between that case and the one at bar is marked. The effect of the oral contract in that case was that the parents presently parted with the control of their homestead,

and, instead of the son living with and serving and caring for them in their own home until their death, he was to provide a home for them; while in the case at bar no limitations whatever were put upon the right of Carlson and his wife to occupy, sell and convey, or incumber their homestead in any manner they saw fit. Their only contract was that, in consideration for the services rendered by plaintiff, he should have whatever estate remained after their death.

It will be seen, therefore, that this case does not come within the purview of section 4, *supra*, but that it is controlled by section 17, c. 36, *supra*, which provides: "If the homestead was selected from the separate property of either husband or wife, it vests, on the death of the person from whose property it was selected, in the survivor for life, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same except the life estate of the survivor by will." In the light of this statute there can be no doubt but that if Carlson, at the time he made the oral contract relied upon, had executed his will, devising to plaintiff all of the estate, real and personal, of which he might die seised, subject to the life estate of his wife, the will would have been valid and could not have been assailed by any one after his death. If he could have lawfully made a will thus disposing of his property, then he could lawfully contract to make such a will, and his heirs would have no more standing in court to plead the statute as to homesteads as a defense to an action to enforce the contract than they would have to plead the same statute if the suit were based upon such a will. By the parol contract, which we have already held is established by clear and satisfactory proof, Mr. Carlson did not attempt to convey or incumber his homestead or to defeat his wife of her life estate as his surviving spouse, if she became such. He simply agreed to do that which the section of our statutes above quoted shows he had a legal right to do; and, having executed a will leaving his estate to persons other than the plaintiff, he has broken his contract, and plaintiff is entitled to the relief prayed. In addition to all this, it appears from the record before us that at the time Carlson made the contract, and at the time of his death, there was no one dependent upon him for support except his wife, who joined with him in the oral contract, and who now insists upon its performance. She was the only person, except Carlson himself, who had any right of homestead, and this right she has expressly waived and relinquished by her answer in this case.

The judgment of the district court is therefore reversed, and the cause remanded, with directions to enter a decree quieting plaintiff's title in and to the lands in controversy, subject only to the debts, if any, of Peter A. Carlson and Eva Charlotta Carlson, and the

costs of administration. The costs of the suit to be taxed against the defendants Ida Sofia Ahlen and Carl W. Carlson.

Reversed and remanded.

SCHMIDT v. VILLAGE OF PAPILLION.
(No. 16,836.)

(Supreme Court of Nebraska. Nov. 27, 1912.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR (§ 547*)—REVIEW—MOTION FOR NEW TRIAL.

Affidavits used on the hearing of a motion for a new trial cannot be considered in this court unless preserved in a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2427-2432; Dec. Dig. § 547.*]

2. PLEADING (§ 9*) — CONCLUSIONS FROM FACTS ALLEGED.

Where a petition in an action for personal injuries sets out the facts, it is unnecessary to plead the legal conclusion to be drawn therefrom.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 29; Dec. Dig. § 9.*]

3. APPEAL AND ERROR (§ 1002*)—REVIEW—CONFLICTING EVIDENCE.

Where the verdict of a jury is reached upon conflicting evidence sufficient to sustain a recovery in favor of either party, this court will not disturb the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Appeal from District Court, Sarpy County; Troup, Judge.

Action by Henriette Schmidt against the Village of Papillion. Judgment for plaintiff, and defendant appeals. Affirmed.

James T. Begley, of Papillion, for appellant. E. R. Ringo, of Portland, Ore., and W. R. Patrick, of South Omaha, for appellee.

LETTON, J. Action for damages for personal injuries alleged to have been received by falling upon a defective sidewalk in the village of Papillion. Plaintiff recovered a verdict and judgment for \$200. Defendant appeals.

[1] There have been two trials of this case in the district court. At the close of the first trial a motion for a new trial was filed, which was granted by the court. This is assigned as error. The motion was submitted upon affidavits which are not preserved in the bill of exceptions. We must therefore presume the evidence justified the action of the district court in granting a new trial.

The defendant contends that the petition fails to state a cause of action. In substance, it pleads that the defendant is a municipal corporation; that the sidewalk along the east side of lots 1 and 2, in block 23, was in a dangerous and defective condition, describing the same; that it was in that condition on the day of the accident and for several months prior thereto; that the plaintiff,

while passing on the walk, tripped on one of the loosened boards, fell, and received the injuries described in the petition; that due notice was given to the village authorities of the accident; and that, by reason of the injuries, plaintiff has been damaged in the sum of \$1,500.

[2] It is said that the petition fails to charge negligence, a duty to repair, and neglect of the same; that sufficient time has elapsed for the repairing; that it fails to charge notice of the defect and due care on behalf of the plaintiff. When a petition sets out the facts, it is unnecessary to plead the legal conclusions to be drawn therefrom.

[3] It is contended that the verdict is contrary to the evidence. The evidence on the part of defendant tends to prove that the walk was in a good state of repair at the time of the accident; that it had been inspected by the village authorities about four months before and found to be in good order; that it appeared to be sound as far as any one could see; and that it was not until about four or five days after the accident that a loose board was discovered near the point where plaintiff fell. There was also testimony that plaintiff had said that the injury was caused by her tripping and falling between the sidewalk and the fence, striking her knee and hip on the edge of the walk, and not by falling forward as she testified at the trial. On the other hand, there is testimony that plaintiff fell from tripping on a loose or broken board; that the sidewalk at that point at the time of the accident, and for a number of months before, was in a defective and dangerous condition; that a part of the cross-boards were broken and loose; that it was shaky and had settled so that one side was lower than the other; that the stringers on which the boards were nailed were so rotten that nails would not hold therein and stuck up above the boards. The evidence being in this condition, it is apparent that we cannot interfere with the verdict of the jury. The charge of the court covers the issues presented, and we think the defendant has no cause to complain of the refusal to give those requested.

We find no error in the record. The judgment of the district court is affirmed.

Affirmed.

PRINCE v. STATE. (No. 17,716.)
(Supreme Court of Nebraska. Nov. 27, 1912.)

(*Syllabus by the Court.*)

HOMICIDE (§ 237*)—INSANITY AS DEFENSE—EVIDENCE.

Plaintiff in error was convicted of the crime of murder in the first degree and sentenced to death. On error to this court, no question of law as to procedure is presented. The defense was insanity at the time of the killing, and the case is presented upon the sole question of fact as to the accountability of the

accused. Upon a review of the evidence it is held, by a majority of the court, that the judgment and sentence should be affirmed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 500; Dec. Dig. § 237.*]

Error to District Court, Lancaster County; Cornish, Judge.

Albert Prince was convicted of murder in the first degree, and brings error. Affirmed.

A. E. Howard and Ray J. Abbott, both of Lincoln, for plaintiff in error. Grant G. Martin and F. E. Edgerton, both of Lincoln, for the State.

REESE, C. J. On the 17th day of February, 1912, the county attorney of Lancaster county filed in the office of the clerk of the district court of said county an information against Albert Prince charging him with the crime of murder in the first degree by cutting and stabbing one Edward D. Davis so that, from the effects thereof, the said Davis died. The information is in the usual form followed and prescribed in such cases, and, as its sufficiency is not here questioned, it will not be necessary to set it out in detail. The accused was arraigned in open court, and entered the plea of not guilty. A jury trial was had, which resulted in a verdict finding him guilty as charged in the information, and fixing the punishment at death. A motion for a new trial was filed and overruled, when sentence of death was pronounced, and fixing the date of execution on the 30th day of August, 1912. The case is now presented to this court for review by petition in error, and, under the constitutional provision, all further proceedings are thereby stayed pending such review.

No serious question of law as to the procedure is presented by the briefs or was argued upon oral argument. The killing of Davis, while denied by the plea of not guilty, is not controverted, but was admitted by plaintiff in error while upon the witness stand in his own behalf. It is contended, however, that, at the time of the killing, plaintiff in error was insane and not legally responsible for his act, and evidence was introduced tending to support the contention. Counter evidence was introduced by the state tending to disprove the claim of insanity. The question of the sanity or insanity of a defendant in a criminal prosecution is usually largely a question of fact to be solved by the trial jury under proper instructions, yet in a case involving the life, or even the liberty, of a human being, the courts will not hesitate to look carefully into the evidence, and, if the verdict is not supported thereby, grant the needed relief or correct the error in such way as the condition of the proofs may suggest.

The bill of exceptions is quite voluminous, consisting of about 600 pages of typewritten matter. It has all been carefully read. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

uncontroverted facts may be said to be that plaintiff in error is and was at the time of the tragedy an inmate of the Nebraska penitentiary, serving under a sentence imposed for a violation of the criminal law of the state, and was laboring in the broom factory then being carried on in the building. The decedent was the deputy warden and was largely in charge of the discipline and control of the prisoners. A short time prior to the 11th day of February, 1912, plaintiff in error secreted a knife used in the broom factory and carried it to his cell, keeping it in his pocket. The date named was on a Sunday, and, when the inmates were assembled for the usual chapel exercises, he carried the knife with him into the chapel. The usual place of the deputy warden during the exercises was pretty well to the front in the audience, and near the close of the service it was his custom to pass down the aisle toward the entrance door through which the assembly would pass out. Plaintiff in error was seated near the aisle and not far from the door, and when the last hymn was being sung—the audience standing—the decedent walked down the aisle between the standing rows of men, and, when he came opposite and near plaintiff in error, plaintiff in error stabbed him a number of times in quick succession, and from which death soon after resulted. A guard approached plaintiff in error to whom he surrendered the knife without resistance, and was led away and placed in the solitary confinement cell. He was a witness in his own behalf on the trial, and with commendable frankness admitted that he had made preparation to take the life of either the warden or the deputy as opportunity might offer, and that, in taking the life of the deputy, he had carried out his previously conceived purpose and intention.

The evidence tends strongly to show that at one time, under a previous administration of the affairs of the prison, plaintiff in error was subjected to a long and, from his point of view, a cruel administration of discipline. The evidence shows that he had been guilty of an act of insubordination and defiance of authority, and it was necessary to maintain the rules and discipline of the prison, but whether it was necessary to carry the punishment to the extreme to which it was carried we are not called upon to decide. The complaint made by plaintiff in error was that in the first instance he had violated no rule of the prison, and that he was never informed of what charges were against him, and does not know to this day, but that his whole treatment up to the time of the incident referred to was arbitrary, vindictive, tyrannical, and without cause. The testimony of the guard under whom he worked, called by the state, was that prior to that time plaintiff in error had been a faithful worker, pleasant, affable, and agreeable, and that he was obe-

dient to the rules of the prison, causing no annoyance or trouble whatever.

There was considerable evidence offered by the defense that from that time his mental condition appeared to undergo a change; that he became "moody," absent-minded, and when not at work would sit, resting his head upon his hands, lamenting his fate, frequently saying the officers and guards "had it in for him," and would beat and otherwise mistreat him without cause. There seems to be little doubt but that, during the administration of a subsequently appointed warden, the management of some of the prisoners was cruel and brutal, and it was stated by the witnesses that this seemed to affect plaintiff in error's mind, he often referring to the treatment others had received, and which he deemed unreasonably harsh and severe; that during the later times, prior to the tragedy for the commission of which he was convicted, his mind seemed to wander; that his continuity of thought was impaired, and he could be induced to converse upon one subject for only a very short time, and his mind would "fly from one subject to another." Much of the evidence in his behalf was given by convicts and ex-convicts, while the opposite was maintained by the guards and some of the convicts yet serving time. It was gratifying to note that all the witnesses testified to a much more reasonable and humane system of government of the prison by the present warden and officers. The cruel and inhumane treatment of plaintiff in error and others, it is claimed, so weighed and preyed upon his mind as to destroy his accountability for his acts, dethrone his judgment, and weaken his appreciation of the enormity of his act. He took the witness stand in his own behalf and testified, with candor and intelligence, what he understood to be the moving cause of his own treatment and the treatment of others, and that he contemplated taking the life of the then warden or his deputy, and that he believed he would be doing right in the act, and believed he was doing right in taking the life of the deputy, for which he was being prosecuted. There seems to be no claim that he was otherwise than sane at the time of the trial. If we assume that the evidence offered on his behalf at the trial was all or substantially all true, it would be difficult to find any justification for the infliction of the death penalty.

Among the witnesses called by the state were certain physicians who were summoned to the bedside of the decedent, all of whom conversed with, or heard others converse with, plaintiff in error soon after the tragedy, and they all testified that they saw no indication or symptom of insanity during the conversations had; that he did not appear to be under any mental excitement, but conversed freely upon what he had done and was ready and willing to receive punishment

therefor. Two local alienists were called who made an examination of plaintiff in error during the trial, and both testified to the absence of any symptom of existing or previous insanity. Guards and others from the penitentiary testified on behalf of the state that they had discovered no symptoms of mental aberration in the conduct or manner of plaintiff in error either before or after the tragedy, and some deny the truth of the charges of needless cruelty to other prisoners; but it appears to be well established that such charges were made and believed in by the inmates, and that they were heard and believed by plaintiff in error.

The fact that a delusion existed, if such were the fact, would produce the same effect upon the party deluded as if the belief were based upon the real fact. The legal presumption originally is that all people are sane, and that presumption continues until evidence to the contrary is introduced. That presumption applied to plaintiff in error in the first instance. Upon evidence being introduced to show mental derangement, it devolved upon the state to prove his sanity at the time of the commission of the act charged beyond a reasonable doubt. There is also a presumption that, where a state or condition is shown to exist, it continues until shown to have been removed. This applies to the mental condition of people. Judging by the evidence of the acts, conduct, and manner of plaintiff in error, there may be some doubt whether his act was prompted by a diseased mind, or a desire for revenge as against the warden and deputy for acts of oppression and cruelty of which he deemed them guilty. If the former, he should not be held to the infliction of the extreme penalty. If the latter, there would be, in law, no extenuation. While these questions were largely for solution by the jury, yet, in the interest of human life, the duty of carefully considering the evidence is ultimately devolved upon the courts. From a consideration of all the evidence and a contemplation of the mainsprings of human conduct, it is the conviction and firm opinion of the writer hereof that plaintiff in error should not and cannot be held guiltless, but that he did not and does not deserve the taking of his life; but that he should be confined in the prison during his life as a protection to society, and that the sentence of the court should be reduced from execution to that of life imprisonment.

However, a majority of the court are of the opinion that there is no proper cause shown why the judgment of the district court should be interfered with, and it will therefore have to be affirmed. The time fixed by the district court for the execution of plaintiff in error having passed, it is ordered that the sentence be carried out on Friday, the 21st day of March, 1913.

Affirmed.

TRILLER v. SADLE. (No. 16,697.)

(Supreme Court of Nebraska. Nov. 27, 1912.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT (§ 25*)—AUTHORITY OF AGENT.

Ostensible authority to act as agent for the principal may be inferred if the party to be charged as principal affirmatively, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency. *Thomson v. Shelton*, 49 Neb. 644, 68 N. W. 1055.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 42-45; Dec. Dig. § 25.*]

2. PRINCIPAL AND AGENT (§ 171*)—AUTHORITY OF AGENT.

Where the name of the principal was signed to a lease by a firm of persons who signed the principal's name by themselves as agents, and subsequently attempted to collect the money due on the lease by superintending the giving of the bill of sale executed by the original lessee to the plaintiff, their principal, and obtained possession of the hay growing on the land leased by means of an action of replevin maintained in the name of their principal, they will be held to have been the general agents of the plaintiff, and the plaintiff will be bound by what they did.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 644-655; Dec. Dig. § 171.*]

3. SUFFICIENCY OF EVIDENCE.

The evidence examined and held to support the judgment of the district court.

Appeal from District Court, Lincoln County; Grimes, Judge.

Action by Henry A. Triller against James Sadle. Judgment for defendant, and plaintiff appeals. Affirmed.

Wm. E. Shuman, of North Platte, for appellant. Hoagland & Hoagland, of North Platte, for appellee.

HAMER, J. The plaintiff, Triller, seems to have been the owner of certain land in Lincoln county. He executed a lease of this land or a part of it to one C. W. Hutchinson. The plaintiff did not reside in the state, but seems to have been represented by Bratt & Goodman, a firm at North Platte, and the lease was signed "H. A. Triller, per Bratt & Goodman, Agts." Triller is the appellant and the plaintiff in the court below. The mortgage lease seems to have provided that the rental for the land, \$115, was to be paid on or before December 1, 1908, with interest from date, and the lessee of the land agreed in the lease that there should be a lien upon the hay grown upon the land during that year. On the 4th of May, 1908, the date of the lease, it is not probable that the grass had grown much, but it was probably alive and growing a little, so that it was in existence. The lease was filed for record May 19, 1908. On October 14, 1908, no part of the lease money seems to have been paid, and James Sadle, the defendant and appellee, seems to have been hauling the hay away.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

To prevent Saddle from getting the hay, an action of replevin was brought by the plaintiff, Triller, against him in the county court. The plaintiff had the verdict and judgment, and the defendant appealed to the district court. The case was tried in the district court, where the defendant obtained a verdict and judgment. Before the commencement of the replevin suit, but about the time the same was commenced, and on October 14, 1908, Bratt & Goodman received from Hutchinson a bill of sale of all the hay upon the land and which was executed to their principal, Triller. This seems to have been done the day the replevin case was commenced and after this hay was cut. It is claimed on the part of the plaintiff that Bratt & Goodman were without authority to collect the money, and it is contended that they did not bind the plaintiff by what they did except as to the making of the lease. Whatever the fact may be, they seemingly exercised the right to do whatever they claimed was necessary to enable them to secure and collect the money for their principal, the plaintiff in the case. At any rate, they were taking care of the plaintiff's business seemingly as best they could. The affidavit for replevin alleged, among other things, "that he (the plaintiff) is the owner of the following described property, to wit: All the hay located upon, * * * part of said hay being in stack, part baled, and part loose; upon the above described land; * * * that said plaintiff is entitled to the immediate possession of said property." The petition alleged, among other things: "That the plaintiff had * * * a special interest in said hay in that one C. W. Hutchinson on May 4, 1908, executed and delivered to this plaintiff a chattel mortgage lease, by the terms of which the said Hutchinson, who was at that time the owner of all of said hay, mortgaged the same to this plaintiff to secure the payment of the sum of \$115 and interest at 8 per cent. per annum from May 4, 1908." It was also alleged that the same was a valid indebtedness from said Hutchinson to the plaintiff, and a copy of the chattel mortgage lease was attached to the petition as Exhibit A.

In the third paragraph of the petition it was alleged: "That thereafter, on October 14, 1908, and prior to the commencement of this action, the said C. W. Hutchinson delivered to the plaintiff herein the possession of all of said hay, and also gave this plaintiff the right of possession thereof, and executed and delivered to this plaintiff a bill of sale of said hay, conveying to the plaintiff all the interest and ownership of said hay not conveyed by the mortgage above described, a copy of which bill of sale is hereto attached and marked Exhibit B." In the fourth paragraph it was alleged that the plaintiff was, at the commencement of this action, and now is, entitled to the immediate possession of all of said hay. And in the

fifth paragraph it was alleged that the said hay was, at the commencement of this action, wrongfully detained by the defendant. It will be seen that the plaintiff claimed both by reason of the chattel mortgage lease and also by reason of the bill of sale. While the mortgage was not yet due when the case was commenced, it is claimed that the instrument entitled the plaintiff to possession, and that therefore he was entitled to maintain his action of replevin against the mortgagee and against any stranger, even though the mortgage was not yet due.

The bill of sale was dated October 14, 1908, in the consideration of the sum of \$1 and other considerations paid by Henry A. Triller. It undertook to grant, sell, transfer, and deliver to the said Triller, his executors, administrators, and assigns, all the hay now located upon the particular land, describing it, in Lincoln county, Neb.; "part of said hay being in stack, part baled, and part bunched on the ground." It also described the hay as "all of the hay grown upon said premises during the year 1908, wherever situated, whether located on wagons or racks." It also proposed to sell and assign all Hutchinson's interest in and to the proceeds of certain hay grown on the above-described land and delivered to Harrington & Tobin, and authorized Triller, or his agents, to collect such proceeds. It also contained this clause: "It is my intention by this instrument to fully convey all my interests in the hay which I mortgaged to the said Triller on May 4, 1908, by a written chattel mortgage lease."

Upon the trial the defendant sought to prove that he was the owner of 20 tons of loose hay and 21 tons of stacked hay, and that the plaintiff took this hay in the writ of replevin. Of course the main question to be determined is, Who was entitled to the possession of the hay?

Upon the trial Mr. Goodman, of the firm of Bratt & Goodman, testified: "We were agents for the owner of the land, Henry A. Triller, for leasing it." An effort was made to show that the agency of Bratt & Goodman for Triller was a restricted or special agency, and that they were not the general agents of the plaintiff. The defense was that, after the chattel mortgage lease had been filed, the lessee, Hutchinson, entered into a contract with one Shaw to cut, stack, and bale the hay for one-half of it, and that Shaw learning about the mortgage to the plaintiff, Triller, went to North Platte to see Mr. Bratt of the firm of Bratt & Goodman, agents of Triller, and that he had a talk with Mr. Bratt in which it is claimed that Mr. Bratt told him (Shaw) that he might go ahead and put up the hay in controversy, but that he should leave one-half of it upon the ground. While an examination of the bill of exceptions shows that Shaw did not testify, others undertook to relate what was said in the con-

versation between Bratt, of the firm of Bratt & Goodman, and Shaw. It is also claimed that the defendant, Sadle, had certain conversations with Mr. Bratt along the same line, and in which Mr. Bratt said that Shaw was to have half of the hay for cutting it. Sadle himself testified to a deal with Shaw with reference to cutting and stacking the hay, and that he afterwards saw Hutchinson, and that he and Hutchinson divided the hay. Sadle also testified that he talked with Goodman in North Platte, and that Goodman asked him if he was hauling the hay from Shaw's and, when he told Goodman that he was, then that Goodman told he did not want him to haul any more hay "until they (meaning Bratt & Goodman for their client, Triller) had got their money." Sadle then testified: "I told him that we had divided the hay and I was going to haul my half of it right along; he said, 'You can't do it,' and I said I was going to do it anyhow." Sadle also testified to a conversation with Mr. John Bratt (of the firm of Bratt & Goodman). They talked about putting up the hay, and Bratt told him that the hay was mortgaged and then he (Sadle) wanted to quit. He told Bratt that he was not going to do anything more, and then Bratt told him to go ahead providing Hutchinson would give up his half of the other hay, the Triller hay, and then Hutchinson said that he was willing to give up the hay, and that Bratt at that time made no claim to both halves of the Triller hay. Sadle testified that at that time Bratt or Triller were not claiming any interest in the Triller hay other than half, which Hutchinson was to have. Sadle testified that Bratt was just claiming half of the hay on the ground, "the Triller half."

Mr. Bratt testified as a witness and denied the statements attributed to him by these witnesses. The defendant claimed that he secured the right to take one-half of the hay without regard to the mortgage upon the same, and that he was authorized to do so by what Bratt said to him. The plaintiff attempts to make the point that there was no evidence to the effect that Triller, the plaintiff, authorized Bratt to make these statements, and had no knowledge that Bratt made such statements or that Bratt in any way ratified what was done. While Mr. Goodman, the other member of the firm of Bratt & Goodman, testified that Bratt & Goodman were the agents of the owner of the land simply for the purpose of "leasing" it, yet they seem to have sold the hay after possession was obtained under the writ of replevin. Over the plaintiff's objections, the defendant was permitted to introduce evidence to the effect that, after the chattel mortgage had been filed, Hutchinson had agreed with Shaw to divide the mortgaged hay if he (Shaw) would cut, stack, and bale it; that Shaw delivered his interest in the contract to the defendant Sadle; and that the hay was di-

vided. There was testimony to show that the hay had been divided at the time the replevin suit was commenced, and that Sadle's share of hay under the division was taken away from him by the replevin proceedings.

There is a most strenuous contention that the plaintiff, Triller, never authorized Bratt to make any statement whatever to either Shaw or Sadle to the effect that any one might go ahead and cut, stack, and bale the hay, and that Bratt was getting outside of his authority if he said anything of that kind. It is claimed on behalf of the plaintiff that, after Bratt & Goodman leased the land to Hutchinson their powers ended, and, that being the fact, any talk that Bratt had with Shaw or Sadle about cutting the hay and dividing it was improperly received; it is also claimed that the instructions of the court improperly submitted to the jury the question of whether or not Bratt & Goodman on behalf of the plaintiff, Triller, had agreed with Shaw that he (Shaw) might have half of the hay in consideration of cutting and harvesting it.

[1,2] Whether Bratt & Goodman were "special" agents or "general" agents, they were all the agents there were, and they seem to have authorized everything to be done that was done, and they hardly have the right to say that they had less authority than they exercised for the benefit of their principal. If the hay had not been cut, the plaintiff would have had no hay and no pay for the use of the land. While Bratt & Goodman made a contract for their principal to take a mortgage upon the hay for the purpose of securing the payment of the amount promised to be paid for the use of the land, it is apparent that they would have received nothing if somebody had not cut the hay, because there would have been nothing out of which to realize the rent money. If the hay was cut, the men who cut it ought to be paid. There was no hay before the grass was cut and cured. Bratt & Goodman had authority to make the original bargain for their principal. They seem to have had authority to take the subsequent bill of sale which was delivered to them to secure the money due for the rent of the land. At least they proceeded. When they got this bill of sale, there was immediately a replevin suit under which possession was taken, and they sold the hay which they got under the writ of replevin. If they had the authority to take the bill of sale, they apparently had the authority to secure the payment of the money and to collect it. It would seem to be better to hold that Bratt & Goodman had the right to bind their principal, the plaintiff, than to hold that the men who cut the hay, and therefore made it valuable to the plaintiff and enabled him to get his money out of it, are to do without the money necessary to pay them for their labor. Bratt

& Goodman zealously looked after the interest of their principal, Triller. Triller has accepted the proceeds of the property and the work of Bratt & Goodman as his agents. During the summer, when it was apparent that Hutchinson was not going to cut the hay upon which Triller had the lien of the chattel mortgage lease, and afterwards when Shaw was about to quit, and when Sadle was about to quit, then Bratt & Goodman were active in getting the hay cut and stacked so that they could get the rent of their principal out of it. Of course, if Shaw had not cut the grass, it would have been left standing and would not have been hay. It would have gone back into the ground again; but when Bratt & Goodman told Shaw to go ahead and cut the grass and leave half of it on the ground, and when Bratt tells Sadle to go ahead, they are both exercising business thrift on behalf of their principal. While it is true that Mr. Bratt testified that he was not acquainted with Shaw, he did not fully deny his conversation with Sadle; but, whatever this testimony may have been, it was fairly submitted to the jury, and the jury found in favor of the men who cut and stacked the hay.

In view of what was done in the premises by Bratt & Goodman on behalf of their principal, we think that the instructions of the court to the jury were correct, and that, when the jury found against the plaintiff, they determined the agency of Bratt & Goodman to be general agency to lease the land and collect the rent. The agency was shown. *Crilly v. Ruyle*, 87 Neb. 367, 127 N. W. 251; *Cooper & Cole Bros. v. Cooper*, 90 Neb. 209, 133 N. W. 243; *Creighton v. Finlayson*, 46 Neb. 457, 64 N. W. 1103; *Thomson v. Shelton*, 49 Neb. 644, 68 N. W. 1055; *Quinn v. Dresbach*, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138; *Kasson v. Noltner*, 43 Wis. 646; *Brown v. Eno*, 48 Neb. 538, 67 N. W. 434; *Bankers' Life Ins. Co. v. Robbins*, 55 Neb. 117, 75 N. W. 585; *Phoenix Ins. Co. v. Walter*, 51 Neb. 182, 70 N. W. 938; *Faulkner v. Simms*, 68 Neb. 295, 89 N. W. 171, 94 N. W. 113; *Oberne v. Burke*, 30 Neb. 581, 46 N. W. 838. The acts of Bratt & Goodman on behalf of their principal seem to have been ratified. Not one of them has been disavowed.

Notwithstanding the ingenious and plausible argument of counsel for the plaintiff, we are constrained to hold that the trial court committed no error in the instructions given and rulings made, and that the judgment was properly rendered for the defendant.

The judgment of the district court is affirmed.

FAWOETT, LETTON, and SEDGWICK, JJ., concur in the conclusion only.

CRONK v. CRONK. (No. 17,024.)

(Supreme Court of Nebraska. Nov. 27, 1912.)

(Syllabus by the Court.)

DIVORCE (§ 130*)—EXTREME CRUELTY.

Decree granting a husband a divorce on the ground of extreme cruelty affirmed as a proper disposition of the case under the evidence.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 442-445; Dec. Dig. § 130.*]

Reese, C. J., and Fawcett, J., dissenting.

Appeal from District Court, Douglas County; Troup, Judge.

Action by George P. Cronk against Cora L. Cronk. Judgment for plaintiff, and defendant appeals. Affirmed.

W. W. Slabaugh and G. W. Shields, both of Omaha, for appellant. Crane & Boucher and Jefferis, Howell & Tunison, all of Omaha, for appellee.

ROSE, J. The parties are husband and wife. The husband is plaintiff, and the trial court granted him a divorce on the ground of extreme cruelty. The wife appeals and insists that, under the evidence, the divorce should not have been granted.

They were married September 18, 1906, and the suit was commenced June 20, 1910. The intervening time was full of sensation and scandal. Both had been previously married and divorced. They lived in Omaha. Evidence relating to what occurred after they became husband and wife fairly establishes the following facts: Defendant accused her husband of marital infidelity, and at the trial was unable to prove her charges, though she had previously given them wide publicity. She clandestinely took his watch and other articles of personal property and pawned them to secure money for herself. She accepted from her husband money and transportation for a trip to Virginia to visit her relatives, and consented to his going to California at the same time to visit his children by a former wife. After he left Omaha pursuant to this understanding, she secretly followed him and spied upon him while he was visiting with his children at Long Beach. She falsely intimated to police officers there and at Los Angeles that her husband was having improper relations with his former wife and importuned them to arrest him. In California she deliberately gave newspaper publicity to her simulated wrongs and made him and his children the subjects of sensational notoriety and scandal. In Omaha she went before the grand jury, falsely charged him with wife desertion and nonsupport, and attempted to have him arrested. She directed public attention to her scandalous relations with her husband by hurrying after him in the public streets of Omaha, by calling to him, and by giving publicity to her unfounded

suspicious. She went personally to eminent citizens who were fraternal brethren of her husband and falsely accused him of desertion and nonsupport with a view to having him investigated by his lodge and disgraced. She was wholly unable to disprove this conduct. In some form it was often repeated. It was deliberately planned, and appeared to get worse. There is convincing proof that it robbed her husband of his peace of mind, made his marital relations intolerable, and seriously impaired his health. It amounted to extreme cruelty within the meaning of the divorce laws. His conduct is assailed by his wife, but the proofs do not justify a finding that he was guilty of such misconduct as would warrant a court of equity in dismissing his suit on that ground.

Defendant offered a vast amount of testimony to establish condonation. If full credence could be given to the witnesses who testified in favor of defendant on that issue, the defense might be established, but the trial court, under all the circumstances, properly disbelieved their testimony on material matters. After the alleged condonation, defendant's conduct was more cruel than before. A careful consideration of the entire record leads to the conclusion that the findings below were right, and that the divorce was properly granted. An analysis of the evidence would not benefit the parties nor improve the literature of the court. It has all been carefully examined, however, and the decree below is adopted as correct.

Affirmed.

REESE, C. J. (dissenting). Having read the abstract containing the proceedings upon the supplemental hearing, I am compelled to dissent from the opinion of the majority in this case. After the submission of the case to the district court, quite a lengthy memorandum opinion was written and filed by the judge who heard and decided the case. A portion of that opinion impresses me most strongly. After discussing another feature of the case, the court says: "But apart from this, what seems to be improbable in plaintiff's testimony is that these persons should be together even as much as plaintiff admits they were, and under the circumstances they were, and yet at no time were familiarities of any nature indulged in, or even suggested, as plaintiff testifies. Knowing these parties as I do, and have come to know them, since this litigation commenced, particularly the defendant, and knowing as I do that her persistent and almost unceasing effort and object has been to reinstall herself in her husband's favor, whether for good or evil, I need not now say, I can scarcely conceive it possible for these two persons to have been together for even as much as nine nights from 7 or 7:30 to 10 or 11 o'clock, according to plaintiff's testimony, or much later, according to defendant's testimony, in a room alone, and yet neither, at no time, having

made any advances of familiarity to the other; that at no time throughout the entire series of visits did anything occur between them but what might be expected to occur between two strangers. Such a thing, of course, was possible, but, in the very nature of things, it seems to me it would not be probable."

There are many things stated in the opinion which reflect strongly upon the conduct and character of defendant, and which are probably merited, but for the purpose of this dissent need not be set out. The question submitted upon this supplemental hearing was whether there had been a condonation after the rendition of the decree of divorce in favor of plaintiff, the husband. It is alleged by defendant that after the decree was rendered, and while the cause was pending in the Supreme Court on appeal, the parties became reconciled, lived and cohabited together as husband and wife. There was a mass of evidence introduced, aside from the direct and positive testimony of defendant, which tended to establish that fact. The testimony of plaintiff, in denial of the statements of defendant and her witnesses, is equally strong and emphatic, and yet he shows by his own statements that he was often in the room of defendant of evenings, but seeks to explain his presence there by testifying that those visits were at the solicitation of defendant for the purpose of advising her upon matters of her business upon which she was considering, and, in part at least, in which she was engaging. The consideration of this mass of evidence with the knowledge of both parties, as gained by the same judge upon the hearing of the trial of the principal case, no doubt prompted the remarks by the court above quoted. It was but the measurement of both parties, applied after their vile lives had been uncovered and laid bare to the court, and which forced the judicial mind to the announcement made.

It is shown that this is the third matrimonial venture by plaintiff and the second by defendant, each made possible by the divorce route, now much traveled to the disgrace of the American people. Near the close of the opinion the district court makes use of the following language: "Again, speaking for the state as a party to these proceedings, so much of crimination and recrimination already has been indulged in between these parties that I am satisfied no good could possibly result from any attempt at reunion. Better, far better, and now more than ever, both for themselves and the public, that these persons be divorced and this tiresome and unprofitable litigation end." To this doctrine I cannot agree. The legitimate conclusion to be drawn, though not so intended by the court, must be that, since the parties have so far graduated in sin and uncleanness and by their "crimination and recrimination" have laid open to the public gaze the immorality of the life of each, and

that owing to that fact "no good could possibly result from any attempt at reunion," therefore it would be "better, far better, and now more than ever, both for themselves and the public," that they be divorced, and "this tiresome and unprofitable litigation end." Judging the future by the past in the lives of these two people, I fear the decree would not have that salutary effect. On the contrary, each would thereby be turned loose upon society with the legal right to embark in new matrimonial schemes with other parties, much to the enjoyment, doubtless, of these litigants, but to the disgrace of the state and the crushing of the hopes and hearts of others.

The divorce laws were never intended for such abuses. Since divorces have been granted, in the earliest days, they have only been intended for the protection of the innocent, but never as a reward for wrongs and crimes committed. Where each party is guilty of such conduct as might be grounds for divorce for one, had the applicant been innocent, it was never intended that the sacred bond of marriage should be severed because both were guilty. It does not follow that, because a reunion is rendered improbable, by reason of the iniquities of both parties a divorce should be granted in order that they may form "unions" with others, and in and by which the disgraceful courses of life may be further pursued in fresher and greener fields. This is the teaching of the whole theory of the divorce laws of this country. To my mind it is clear as the noonday sun that this divorce should not be granted to either party. Neither is entitled to it, and neither should receive it. If they do not desire to be reunited, they can remain separate, but should never be permitted to contaminate other lives under the guise of "holy matrimony."

For these reasons the whole proceeding should be dismissed and the merited and unqualified condemnation of the court placed upon it.

FAWCETT, J., concurs in the dissent.

In re WICKSTRUM.

WICKSTRUM v. HUNGER, Chief of Police.
(No. 17,778.)

(Supreme Court of Nebraska. Nov. 27, 1912.)

(Syllabus by the Court.)

CONSTITUTIONAL LAW (§ 235*)—MUNICIPAL CORPORATIONS (§ 703*)—USE OF STREETS—OPERATION OF MOTOR VEHICLES—VALIDITY OF ORDINANCE.

A provision, in a general ordinance of the city of Lincoln regulating the use of motor vehicles, that "it shall be unlawful for any person operating a motorcycle to carry another person on said machine, in front of the operator," held, to be general with respect to all members of the class affected, to be based upon a reasonable classification, and to be a valid exercise of

the police power of the city, in protecting the safety of travelers on the city streets and persons carried on motorcycles.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 683; Dec. Dig. § 235; Municipal Corporations, Cent. Dig. §§ 1509-1513; Dec. Dig. § 703.*]

Appeal from District Court, Lancaster County; Stewart, Judge.

Application of Parker M. Wickstrum for a writ of habeas corpus against Ernest Hunger, Chief of Police of the City of Lincoln. From a judgment denying the writ, petitioner appeals. Affirmed.

Barton Green, of Lincoln, for appellant. Fred C. Foster and D. H. McClenahan, both of Lincoln, for appellee.

LETTON, J. Appellant was arrested and convicted of the violation of a city ordinance providing that "it shall be unlawful for any person operating a motorcycle to carry another person on said machine in front of the operator." This provision is embraced within a general ordinance regulating the use of motor vehicles in the city of Lincoln. Having failed to pay the fine and costs adjudged against him, he was committed to jail. He applied to the district court for release upon a writ of habeas corpus, on the ground that the ordinance was unreasonable and void, and from a denial of the writ he has appealed.

Summarily stated, his contention is that the ordinance arbitrarily invades personal rights; that a motorcycle is a type of motor vehicle which is no more dangerous to operate with a passenger in front than an ordinary electric automobile, which is usually a glass-enclosed cab in which passengers may occupy a seat directly in front of the operator. From these facts he argues that where a restraining law or ordinance is against a class, or one type of a class, that type or class must be more dangerous than others, or legislation against it cannot be upheld. The testimony is that, when a person is carried in front of the operator upon a motorcycle, he sits between the handlebars of the machine, directly over the gasoline tank; that while, by leaning the body or moving the head to one side, the operator may see directly in front, the presence of the passenger obstructs the view to some extent. It is also shown that several instances have occurred of fuel tanks leaking and catching fire, and that in case of accident it is difficult or almost impossible for the person carried to get out from between the handlebars. It is also shown that such vehicles may be operated at a speed of from 30 to 60 miles per hour, and that upon wet pavements they are more likely to slip than four-wheeled vehicles.

The principles controlling the question presented are so well settled in this state as scarcely to require repetition: "Courts will

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not ordinarily inquire into the motive of a city council in its exercise of a discretionary power conferred upon it by the Legislature." *Enders v. Friday*, 78 Neb. 510, 111 N. W. 140, 15 Ann. Cas. 685. In *Peterson v. State*, 79 Neb. 132, 112 N. W. 306, 14 L. R. A. (N. S.) 292, 126 Am. St. Rep. 651, it is said: "It is a general rule that the determination of the question whether or not an ordinance is reasonably necessary for the protection of life and property within the city is committed in the first instance to the municipal authorities thereof by the Legislature. When they have acted, and passed an ordinance, it is presumptively valid; and, before a court will be justified in holding their action invalid, the unreasonableness or want of necessity of such measure for the public safety and for the protection of life and property should be clearly made to appear. It should be manifest that the discretion imposed on the municipal authorities has been abused by the exercise of the power conferred, by acting in an arbitrary manner." See, also, *In re Anderson*, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421. We think there is such a distinct difference between the operation of a motorcycle and of ordinary motor vehicles as to justify the enactment of the ordinance. Even if it be true that regulation in respect to passengers obstructing the view of the driver would be proper as to other classes of motor vehicles, perhaps the authorities have only made a beginning. It may be presumed that, if the city authorities become convinced of the necessity of further safeguarding the lives of the inhabitants of the city, they will take steps to do so. It seems clear that the provision complained of was intended to protect, not only ordinary travelers on the streets from the danger that might accrue from the obstruction to the vision of the operator of such a speedy vehicle, but it was also intended to avoid the danger of accident to the person carried.

The ordinance is general with respect to all persons who operate motorcycles, and since it treats all members of that class alike, and the classification is founded upon a reasonable basis, it was within the power of the city council to adopt the same.

We find no error in the judgment of the district court and it is therefore affirmed.

BRADFORD v. BEE BLDG. CO. (No. 16,822.)
(Supreme Court of Nebraska. Nov. 27, 1912.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 217*)—DANGEROUS MACHINERY—ASSUMPTION OF RISK.

It is the duty of the employer to furnish a reasonably safe place for his employé to work; but if a machine which is a necessary part of the equipment is unsafe, because not sufficiently protected to prevent contact with it, and the employé has full knowledge of its condition, and takes charge thereof, with the other

machinery, without objection, and is injured by coming in contact with the exposed machine, he will be held to have assumed the risk of such injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

Appeal from District Court, Douglas County; Day, Judge.

Action by *Ida Bradford*, administratrix of *Charles Bradford*, against the *Bee Building Company*. Judgment for defendant, and plaintiff appeals. Affirmed.

W. W. Slabaugh, of Omaha, for appellant.
Greene, Breckenridge, Gurley & Woodrough, of Omaha, for appellee.

SEDGWICK, J. In the basement of the Bee Building, in Omaha, there is complicated machinery, including dynamos, commutators, and generators for furnishing power to printing presses and other machinery in the building, and for furnishing light to the various other occupants of the building. For ventilating the basement there was placed therein a fan, described by the parties as a large section fan, with arms like a boat propeller, which ran about one-half inch from the two crossbars, one perpendicular and the other horizontal, into which, at their junction, the pivot of the fan revolved. There was no screen or guard or protection over the fan, except these two bars crossing before it at right angles to each other. Bradford was an employé of the defendant company in the capacity of an electrical engineer. While in that employment he passed in front of this fan, and alleged that his hand was brought into the fan and injured. He brought this action in the district court for Douglas county to recover the damages sustained. Upon the close of the plaintiff's evidence, the defendant moved the court for an instruction to find in its favor. The court instructed the jury to find a verdict in favor of the defendant, and the plaintiff has appealed.

The fan revolved rapidly, and had great power, to remove the air from the basement and force it out of the building. The first contention is that the defendant was negligent in not further protecting the fan; that the fan was a dangerous instrument, and should have been covered with a screen, or otherwise so protected as to prevent the employés of the defendant from coming into contact with it. It is, of course, the duty of an employer to furnish his employés with a safe place in which to work, and there appears to be sufficient evidence in this record from which the jury might have found that the defendant had failed in this respect. The duty of the employer to furnish a safe place for his employés to work is an important one. He has the control of such matters, and is in a position to know whether his building and machinery are properly con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

structed and guarded. If we conclude that this fan should have been covered, and that the defendant was negligent in that regard, we still have the questions of assumption of risk and contributory negligence to determine. These questions have been before the courts everywhere very often, and this court has frequently considered them. Some propositions governing their applications in actions for personal injuries have been so firmly settled in the earlier decisions that the courts are not now at liberty to overturn them. If the law, as it has long been established in this state, is unjust to the employé, it devolves upon the people, through the Legislature, to correct it. Under the law, as it now is, even if a machine or instrument is imperfect and dangerous, an employé, who, without objection, uses it with full knowledge of its condition, assumes the risk of injury in its use. And when the employer is guilty of negligence, causing injury to the employé, he is not liable in damages if the employé is also guilty of negligence directly contributing to the injury.

Applying the so long-established principles of law, the plaintiff's case must fail. Mr. Bradford was an electrical engineer of 20 or more years' experience. It was because of this experience that he was intrusted with the management of this complicated machinery. Mr. Parker was his superior; but, when Mr. Parker was away, Mr. Bradford was in full charge and control of the room and machinery. This was generally the case in the evening and fore part of the night, and Mr. Bradford was alone in charge when the accident happened. At such times this fan ran for his benefit, if it ran at all. He was not accustomed to keep it running when he was alone in the evening. Generally Mr. Parker turned it off when he left the building in the afternoon. When he failed to do so, Mr. Bradford turned it off himself. He says that on this occasion he did not know it was running; but it was his duty to know, and to determine for himself whether it should continue to run. He discovered that something was wrong in the electrical machinery, and had been directed to attend to such matters at once, and instructed that great danger to the machinery and building might result almost instantly if the generators or other electrical machinery became out of order. There was a narrow passageway in front of this fan, which he says was some eight feet shorter way, to the machinery where he had observed trouble, than the passageway usually used. In his haste to remedy the fault in the machinery, he took the shorter way, which was dangerous, and while passing the fan his hand was drawn into it by the air. If he was not himself negligent in carrying his hand so close to the fan, the danger was certainly easily avoidable. He knew all of the existing con-

ditions. The apprehended danger to the electrical machinery was not so imminent as to justify risking human life or limb to remedy it, and yet he rushed by the fan and placed his hand where it was injured thereby. The fan was a part of the permanent equipment of the building. He undertook to manage it with the rest of the apparatus, and made no objection on account of any supposed dangerous condition. Either he allowed himself unnecessarily to become so unreasonably excited as to fail to use his senses, or else he deliberately assumed the risk of accident. In either case, under the long-established law of this state, he cannot hold his employer liable for the consequences.

This action now appears in the name of the administratrix of his estate. It is said that since the trial below Mr. Bradford has died. The defendant questions this statement, and raises questions as to the regularity of the appeal to this court. We have preferred to dispose of the case upon its merits. The evidence was not sufficient to support a verdict for plaintiff, and the court was right in directing a verdict for defendant.

Affirmed.

KISER v. CHICAGO, B. & Q. R. CO. (No. 16,864.)

(Supreme Court of Nebraska. Nov. 27, 1912.)

(Syllabus by the Court.)

CARRIERS (§ 228*)—SHIPMENT OF LIVE STOCK—DELAY IN TRANSPORTATION—EVIDENCE.

Verdict against a carrier for damages resulting from delay in transporting live stock to market *held* sustained by the evidence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.*]

Appeal from District Court, Harlan County; Dungan, Judge.

Action by William Kiser against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant appeals. **Affirmed.**

Byron Clark and A. R. Wells, both of Omaha, and W. S. Morlan, of McCook, for appellant. John Everson, of Alma, for appellee.

ROSE, J. The suit was brought to recover damages in the sum of \$175.83 for defendant's delay in transporting a car of hogs loaded at Woodruff, Kan., February 13, 1909, and delivered at St. Joseph, Mo., too late for the market, February 16, 1909. Plaintiff pleaded that the consignment, in the ordinary course of transportation, would have reached its destination in the morning of February 15, 1909; that defendant permitted the loaded car to stand on its track at Woodruff two days during stormy, cold weather;

and that in consequence the hogs crowded together, 15 of them died, and the others depreciated in value. The answer contained a general denial and an affirmative plea that plaintiff undertook to load the hogs and to care for them until they were taken away from Woodruff; that he put them into the car during a snowstorm, which increased in severity until it blockaded defendant's railroad; that by reason of the blockade defendant was unable to transport the car any earlier than it did; and that the delay and the resulting injuries were caused by the storm, and by want of ordinary care on part of plaintiff in loading the car when it was storming and in failing to give the hogs proper care while they were at Woodruff. Plaintiff recovered a verdict and judgment for \$163.86. Defendant appealed.

The only question presented is the sufficiency of the evidence to sustain the verdict. There is no proof in the record, except that adduced by plaintiff. It shows: Two stock trains a week, going eastward, ran out of Woodruff, one Wednesday at 4 o'clock in the morning, and the other at the same hour Sunday. At night there was no agent at the station. It was customary for the station agent to deliver the bill of lading Saturday evening for Sunday's shipment, for the shipper to load the car before 4 o'clock the next morning, and for the carrier to take it away shortly afterward. Defendant maintained stockyards at Woodruff. About 5 o'clock Saturday afternoon, February 13, 1909, plaintiff put 80 hogs in the stockyards, told the agent what he had done, where the hogs were to be shipped, and procured from him the same evening a bill of lading. Between 3 and 4 o'clock the next morning, plaintiff loaded the hogs into a stock car on defendant's track, and went home. The car was not moved until Monday evening, did not reach St. Joseph until Wednesday, and the consignment was injured in the manner pleaded in the petition.

Defendant argues these propositions to show the insufficiency of the evidence: There was no delay, except at Woodruff. The consignment was picked up by the first train going east. Plaintiff undertook to care for the hogs during the delay. He failed to prove that they were delivered to defend-

ant for shipment before the car was taken away.

Defendant's view of the evidence relating to the delivery is not the only reasonable one. Plaintiff testified in substance: There was no agreement on his part to care for the hogs, or to furnish a caretaker at the station, or en route. He learned about 10 o'clock Sunday morning that the car had not been taken away. He promptly went to the station, found some of the hogs dead, reported the conditions to the agent, under his direction nailed grain doors on the car to protect the rest of the hogs from the storm, and afterward bedded and fed them. The proof of these facts, when considered with the entire record, is sufficient to sustain findings that the hogs would have had less protection from the storm in defendant's stockyards than they had in the car; that what plaintiff did to protect and care for them was done by direction of the station agent; and that plaintiff surrendered full control over the hogs, for the purpose of shipment, when he loaded them.

It is also argued that the evidence is insufficient for the following reasons: The hogs had proper care at Woodruff. There was no delay elsewhere. Defendant was prevented by an unprecedented snowstorm from starting the shipment sooner.

The last conclusion thus stated by defendant is not a necessary deduction from the proofs. The testimony relating to the storm is meager. Plaintiff said it was storming some when he got the bill of lading, and that it was snowing quite a little and blowing when he loaded the car. He also said he was told about noon Sunday that one of defendant's engines was stuck in a drift west of Woodruff. Neither the place nor the distance west was shown. This comes far short of proving an unprecedented storm, which excused the delay in shipping the hogs, though plaintiff never before had a similar experience. There is no evidence that defendant's road was blockaded between Woodruff and St. Joseph, or that the car could not have been taken out promptly by an engine or train from the east.

A sufficient reason for setting aside the verdict has not been given, and the judgment is affirmed.

BEEBE v. SCOTTS BLUFF COUNTY.

(No. 16,850.)

(Supreme Court of Nebraska. Nov. 27, 1912.)

*(Syllabus by the Court.)***1. HIGHWAYS (§ 191*)—DUTY OF MUNICIPALITY—REASONABLY SAFE CONDITION.**

The road law of this state does not require a county or municipality to guarantee the safety of its highways and streets; but it is required to keep them in a reasonably safe condition for public travel.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 481, 482; Dec. Dig. § 191.*]

2. HIGHWAYS (§ 192*)—LIABILITY FOR DEFECTS.

For a county to allow an open ditch nearly a mile in length, and from 6 to 8 feet wide, with a depth of from 26 to 34 inches, to be and remain for many years in the center of one of its public roads may render it liable for an injury caused thereby.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 483-485; Dec. Dig. § 192.*]

3. HIGHWAYS (§ 192*)—DEFECTS—CONCURRENT ACCIDENT—LIABILITY OF COUNTY.

Where injuries result to a traveler upon such highway, caused by the combined effect of the county's neglect and an accident, such as the sudden fright of an ordinarily gentle farm team of horses, for which the driver is in no way to blame, the county is liable for the injuries thereby sustained.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 483-485; Dec. Dig. § 192.*]

4. APPEAL AND ERROR (§ 1066*)—ERRONEOUS INSTRUCTIONS—HARMLESS ERROR.

Where it clearly appears that the plaintiff, in an action for personal injuries, was not guilty of contributory negligence, the submission of that question to the jury by an erroneous instruction is error without prejudice to the defendant's rights.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

Appeal from District Court, Scotts Bluff County; Grimes, Judge.

Action by Ida M. Beebe against the County of Scotts Bluff. Judgment for plaintiff, and defendant appeals. Affirmed.

W. W. White, of Gering (Morrow & Morrow, of Scotts Bluff, of counsel), for appellant. Wright & Duffie, of Scotts Bluff, for appellee.

BARNES, J. Action to recover damages for personal injuries alleged to have been sustained by plaintiff while traveling upon a public road or highway by reason of the failure of the defendant county to maintain the road in a reasonably safe condition for the public use. On the trial in the district court of Scotts Bluff county, the plaintiff had the verdict and judgment, and the defendant has appealed.

The record discloses that the highway or public road in question was established some time about the year 1893, and has been in use by the public ever since that time. It is situated on the section line running north and south between sections 13 and 14, township 22 north of range 56, in Scotts Bluff

county, and there is a ditch, about a mile long, running along the section line and in the middle of the highway, which had existed and remained in that condition for many years; that the fences on each side of the section line had been moved back a distance of about 33 feet—the fence on the west side of the road being about 24 feet from the ditch. It appears that a traveled track existed on each side of the ditch, and on the 25th day of November, 1909, the plaintiff, with her husband and seven small children, was driving along this road in a two-seated carriage drawn by an ordinary farm team of gentle horses. They were traveling in the beaten track on the west side of the road, and between the ditch and the fence. When they reached a point near to the residence of one Carr, the team, for some cause not clearly explained, became frightened, turned quickly to the east, and ran into the ditch. The carriage was overturned and badly damaged, and the plaintiff was severely and permanently injured.

[1] The defendant contends that the foregoing state of facts are insufficient to sustain the judgment, and in support of this contention cites section 6197, Ann. St. 1911, which reads as follows: "If special damage happens to any person, his team, carriage, or other property by means of insufficiency or want of repair of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in a case against the county, and if damages accrue in consequence of the insufficiency or want of repair of a road or bridge, erected and maintained by two or more counties, the action can be brought against all of the counties liable for the repairs to the same, and damages and costs shall be paid by the counties in proportion as they are liable for the repairs; provided, however, that such action was commenced within thirty (30) days of the time of said injury or damage occurring." It is argued that if there is any other cause concurring with the insufficiency or want of repair of a highway, which results in the damages complained of, to hold the county liable would be to extend its liability beyond that fixed by the statute. In support of this argument defendant cites *Bell v. Village of Wayne*, 123 Mich. 386, 82 N. W. 215, 48 L. R. A. 644, 81 Am. St. Rep. 204, *Harris v. Inhabitants of Great Barrington*, 169 Mass. 271, 47 N. E. 881, *Schaeffer v. Jackson Township*, 150 Pa. 145, 24 Atl. 629, 18 L. R. A. 100, 30 Am. St. Rep. 792, *Moore v. Inhabitants of Abbot*, 82 Me. 46, *Bartram v. Town of Sharon*, 71 Conn. 686, 43 Atl. 143, 46 L. R. A. 144, 71 Am. St. Rep. 225, and other cases decided by the courts of those states, where the rule for which the defendant contends seems to have been adopted. We find, however, that the authorities are divided on this question.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 138 N.W.—47

The courts of Iowa, Vermont, New York, Minnesota, and many other states hold that when two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate, the one being a culpable defect in the highway and some other occurrence for which neither are responsible, the municipality is liable, provided that the injury would not have been sustained but for such defect. *Langhammer v. Manchester*, 90 Iowa, 295, 68 N. W. 688.

In *Gould v. Schermer*, 101 Iowa, 592, 70 N. W. 697, it was held that the mere fact that some other cause operates with the negligence of the defendant to produce the injury does not relieve the defendant from liability. His original wrong concurring with some other cause, and both operating proximately at the same time in producing the injury, makes him liable, whether the cause was one for which the defendant was responsible or not. The authorities on this question are collected in note to case of *City of Denver v. Utzler*, 8 L. R. A. (N. S.) 77 (38 Colo. 300, 88 Pac. 143, 120 Am. St. Rep. 108), where, at page 80, it is said: "And even those states which deny liability where the horse has become uncontrollable have modified the strictness of their rule somewhat by holding that a horse which merely starts or shies to one side cannot be regarded as unmanageable or beyond the driver's control, so as to preclude him from recovering, where, because of such shying, the horse comes in contact with a defect or obstruction, and injury results."

[2] In the instant case it clearly appears that the county authorities knew that the ditch in question had existed in the center of the public road for many years, and had negligently permitted it to remain in that condition. It is also clear that the result was to render the traveled parts of the highway so narrow that it could not, under all conditions, be safely used by the traveling public. It is true that so long as nothing happened to the harness or vehicle in which a party was riding, so long as a well-broken horse exhibited its usual docility, one could travel along the path on the west side of the ditch, and within six or eight feet of it, safely. But it is well known to all that the horse, while probably one of the most docile and tractable of all our domestic animals, is the most subject to fright, and a trivial cause will often startle him and render him, for the moment, uncontrollable. The nature of his movements at such a time cannot reasonably be anticipated, and when we consider his strength and agility it is not unreasonable to suppose that he cannot always be controlled. The defendant in this case, therefore, ought to have provided against the contingency which caused the plaintiff's injury.

[3] To our minds it seems clear that but

for the existence of the ditch in question the plaintiff's husband could have controlled his team, and their sudden fright would not have resulted in any injury to the occupants of the carriage. The rule adopted by the trial court accords with the one adopted by a majority of the courts of this country, and we feel constrained to follow that rule. We therefore hold that one whose negligence has concurred with some other cause, both operating proximately at the same time in producing the injury, is liable therefor.

[4] Defendant complains of the seventh paragraph of the court's instructions. By that instruction the jury were told, in substance, that, to render the defendant county liable for the injury complained of, the insufficient condition of the highway must have been the proximate cause of such injury; that if plaintiff's injury was sustained by reason of the team becoming beyond control of the driver, and such control of said team was for such a distance and such a time as shows that the uncontrollable condition of the team was the proximate and effective cause of plaintiff's injury, then their verdict should be for the defendant.

We have not quoted this instruction, but have attempted to give its substance as we understand it. It is not clear in expression, and is not to be commended. But, as we view the evidence, the defendant was clearly liable to the plaintiff for the injuries which she sustained. It is not contended that the judgment is excessive, and this case ought not to be reversed for a technical error of instructions. Finally, in any view of the case, it cannot be said that the instruction complained of resulted in any injustice to the defendant.

For the foregoing reasons, the judgment of the district court is affirmed.

TONGUE v. LLOYD et al. (No. 16,820.)
(Supreme Court of Nebraska. Nov. 27, 1912.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 146*)—APPEAL—FINAL ORDER—"DISCONTINUANCE."

The continuance of a civil suit by a justice of the peace for more than 90 days from the return day of the summons, without the consent of the parties, is a "discontinuance" of the action, and therefore a final order, which may be reviewed by proceedings in error in the district court.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 490-492; Dec. Dig. § 146.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2088-2089.]

Appeal from District Court, Polk County; Good, Judge.

Action by John Tongue against R. D. Lloyd and others before a justice of the peace. From an order for a continuance, plaintiff brought error to the district court,

and from a dismissal of the petition in error he appeals. Reversed.

Mills, Mills & Beebe, of Osceola, for appellant. E. E. Stanton, of Chicago, Ill., and C. S. Roe, of Lincoln, for appellees.

REESE, C. J. This action was commenced before a justice of the peace of Polk county. The summons was issued on the 30th day of August, 1909; the 9th of September being set for the trial. On that day the parties appeared, and, by agreement, the cause was continued to October 9th. On October 9th a further continuance was had to November 9th, on the motion of plaintiff. On that day the cause was again continued to December 9th by agreement of the parties. December 9th the parties appeared, when, on motion of defendant, and over the objection and exception of plaintiff, a continuance was had for an additional 30 days, to January 8, 1910. The objection to the continuance was based upon the ground that the order extended the continuances for more than 90 days from the return day of the summons. Plaintiff then presented the case to the district court by petition in error, upon the contention that the order worked a discontinuance and dismissal of the case, and was therefore final. This view seems not to have been entertained by the district court, and the petition in error was dismissed at plaintiff's costs. Plaintiff appeals.

Defendants have filed no brief, nor have they appeared in this court, further than to acknowledge service of the notice of appeal; and we are left wholly in the dark as to their theory of the case, or the views of the district court.

Sections 960 and 961 of the Code provides that a case may be adjourned for 30 days upon the application of either party, either on the return day, or any subsequent day to which the cause may stand adjourned, "but not to exceed ninety days from the time of the return of the summons, upon compliance with the provisions" of the statute. If the adjournment, without plaintiff's consent and over his objection, for more than 90 days worked a dismissal of the case, and the justice thereby lost jurisdiction to proceed further without the consent of the parties, the order was final, and the proceeding in error would lie. We are not aware that this identical question has ever been before us. In *Fischer v. Cooley*, 36 Neb. 628, 54 N. W. 960, the final adjournment, beyond the 90 days, was had by the agreement of the parties to the suit, and, for that reason, it was held that jurisdiction was not lost; but we said: "Under said section [961], when a justice of the peace adjourns a suit pending before him, without the consent of parties, for more than 90 days from the return day, it operates as a discontinuance." In *Maxwell, Practice in Justices' Courts* (5th Ed.) 129, it

is said: "Without consent of the parties, the court has no authority to adjourn a cause more than 90 days from the return day of the summons. An adjournment exceeding that time, without consent of the parties, operates as a discontinuance of the action"—citing *Dunlap v. Robinson*, 12 Ohio St. 530. While the exact question here presented was not involved in that case, the logic of the opinion sustains the text in *Maxwell's Justice Practice*. In the body of that opinion it is said: "His [the justice] power of adjudication is derived from the statute, and, if not exercised within the time allowed by law, it is clearly lost; and the cause is no longer pending before him. The legal effect of such a failure in duty is a discontinuance of the action. So jurisdiction may be lost by an adjournment of the suit, without consent of parties, for a longer time than the statute permits. Such unauthorized adjournment, or other neglect of duty by the justice, which prevents a hearing and determination of the suit within the proper time, it has been repeatedly held, works a discontinuance of the action."

The judgment of the district court is reversed, and the cause is remanded to that court, with direction to reverse the ruling of the justice of the peace, with costs to plaintiff, and retain the cause for trial, as provided by section 601 of the Code.

Reversed and remanded.

MITCHELL v. OMAHA PACKING CO. (No. 16,831.)

(Supreme Court of Nebraska. Nov. 27, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 185*)—VICE PRINCIPAL.

Whether an employé occupies the position of a fellow servant to another employé, or is the representative of the master, is not to be determined from the grade or rank of the offending or injured servant, but should be determined by the character of the act performed by the offending servant, by which another employé is injured; or, in other words, whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

2. MASTER AND SERVANT (§ 185*) — NEGLIGENCE OF VICE PRINCIPAL—LIABILITY OF MASTER.

Where a master, instead of performing a duty which is personal to himself, directs an employé to perform that duty, he is liable for the neglect of that other, no matter what may be the position of the employé as to other matters.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

3. APPEAL AND ERROR (§ 1064*)—ERRONEOUS INSTRUCTIONS—HARMLESS ERROR.

Where it clearly appears that the plaintiff, in an action for personal injuries, was not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

guilty of contributory negligence, the submission of that question to the jury by an erroneous instruction is error without prejudice to the rights of the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

Appeal from District Court, Douglas County; Sears, Judge.

Action by Mike Mitchell against the Omaha Packing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Greene, Breckenridge, Gurley & Woodrough, of Omaha, for appellant. John P. Breen, of Omaha, and H. C. Murphy, of South Omaha, for appellee.

BARNES, J. Action to recover damages for personal injuries sustained by plaintiff while in the employ of the defendant, the Omaha Packing Company. On the trial in the district court of Douglas county, the plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that the plaintiff and a native of Japan, called "Joe," on December 12, 1906, were working for the Omaha Packing Company, and were under the charge and direction of one Aleck Romansky, who was night fireman of the defendant in its packing plant. The general duties of the plaintiff and Joe, hereafter called the "Jap," were to bring coal to the boiler from cars that were set opposite the defendant's boiler house, to help pull the clinkers and ashes from under the boilers, to help Romansky swab the boiler flues, to wheel out the ashes and clinkers from the boiler house and deposit them in open railroad cars, which were set upon the tracks, from time to time, near the boiler house; that the defendant furnished a mechanical contrivance, called a "crane," for the purpose of elevating the ashes from the platform of the boiler house into the railroad cars; that the crane was broken, and for three nights before the plaintiff received his injuries he and the Jap had taken the ashes and clinkers out in wheelbarrows over a temporary runway, and dumped them into the cars, which were set opposite the building for the purpose of receiving them. The cars were moved every day, which made it necessary to construct a new runway every night. On the night when the accident occurred, after the ashes and clinkers were taken out and cooled off, Romansky, who, it is conceded, was, as to the defendant company, a vice principal, ordered the Jap to go out and construct a runway and platform, to be used for the purpose of depositing the ashes and clinkers in the car. The Jap constructed such a runway and a platform out of materials which the defendant company had furnished, and were at hand for that purpose. The runway appears to have been properly constructed; but the

platform, which extended over the top of the open car, consisted of what is called a "grain door," which extended across the top, and from side to side thereof. This platform or grain door appears to have been thin in structure, or so defective in its condition as to be unsafe for that purpose. Plaintiff testified that when the Jap returned and stated that the runway and platform were ready for use Romansky ordered him to wheel out the ashes and clinkers; that when his third wheelbarrow load of clinkers struck the platform the wheel of the barrow broke through it, and thus caused him to lose his balance; that he fell from the car to the track below, a distance of some 10 feet, and he thereby sustained very serious injuries. He also testified that the runway was made of solid plank, and was suitable for that purpose; that the grain door, which was used as a platform, as above stated, appeared in the dim light situated near by to be sound and safe and all right. There was practically no conflict in the evidence. At the close of the testimony defendant requested the court to direct the jury to return a verdict in its favor. This request was denied. The jury were instructed by the court, and afterwards returned a verdict for \$1,500 in favor of the plaintiff.

It is not claimed that the verdict is excessive; but it is strenuously contended that the court erred in not directing the jury to return a verdict for the defendant; and it is argued that the Jap and the plaintiff were fellow servants; that the defendant was not liable to the plaintiff for injuries received by reason of the negligence of his fellow servant. On the other hand, it is contended that, notwithstanding the fact that the plaintiff and the Jap were fellow servants in the performance of the general duties assigned to them, yet, when the Jap, under the direction of his vice principal, Romansky, constructed the runway and platform in question, he was acting for the company as vice principal; that it was defendant's duty to furnish plaintiff with a reasonably safe place to work, and that duty could not be delegated to the plaintiff's fellow servant, and the defendant be thereby relieved from liability for the negligent performance of that duty.

It must be conceded that it was the duty of the defendant company to furnish the plaintiff with a reasonably safe place to work; that when the crane, which had been successfully used for elevating and dumping the ashes and clinkers into the railroad car, was broken, or otherwise put out of commission, it was the duty of the defendant to supply another suitable and reasonably safe appliance to be used for that purpose. It must also be conceded that if Romansky, who it is admitted was defendant's vice principal, had constructed the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

runway and platform his negligence would have rendered the company liable. Therefore, when Romansky delegated that duty to another, he thereby constituted him a vice principal, so far as the performance of that particular act was concerned; and such is the great weight of authority in this country.

[1, 2] In *Schroeder v. Flint & P. M. R. Co.*, 103 Mich. 213, 61 N. W. 663, 29 L. R. A. 321, 50 Am. St. Rep. 354, it was said (quoting from McKinney, Fellow Servants, § 23): "The true test, it is believed, whether an employé occupies the position of a fellow servant to another employé, or is the representative of the master, is to be found, not from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant, by which another employé is injured; or, in other words, *whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master.*" The rule has been stated in another form, as follows: "If, instead of personally performing these obligations, the master engaged another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such." *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994. See *Robertson v. Chicago & E. R. Co.*, 146 Ind. 486, 45 N. E. 655; *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74, 87, 16 S. W. 924; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303; *Filke v. Boston & A. R. Co.*, 53 N. Y. 549, 13 Am. Rep. 545. For the foregoing reasons, we are of opinion that the court did not err in refusing defendant's request for a directed verdict.

Defendant contends that the district court erred in instructing the jury, in substance, that Romansky was a vice principal over the Jap, who constructed the runway and platform in question, and while the Jap was engaged in that work he also acted as a vice principal. The foregoing authorities effectually dispose of this contention, and error cannot be predicated on such an instruction.

[3] Defendant further contends that the court erred in giving the eighth paragraph of his instructions, by which the jury were told, in substance, that one is charged with knowing that which he would have known under the circumstances, had he taken ordinary care and prudence to know; but he is not charged with knowing more than ordinary prudence required him to know. If the plaintiff actually knew of the condition of the platform as to quality, and still went

on with his load, and that such act of so going was one of foolhardiness, then plaintiff cannot recover, as it would be a negligent act of a proximate nature leading to the injury. A workman, such as the plaintiff, has a right to repose some degree of confidence and reliance upon such structure erected by his principal for his use, and thereby, to that extent, is not charged with as close an inspection, as a duty towards himself, as if it were not so erected. But this does not admit of such employé closing his eyes or conscience to dangers that are apparent, but only a reasonable reliance under all attendant facts and circumstances as are known.

By this, and other instructions, the court submitted the question of the plaintiff's contributory negligence to the jury. While this instruction is not to be commended, and in some cases might be erroneous, still, under the facts disclosed by the evidence, we are unable to see how it could have resulted in prejudice to any of the defendant's substantial rights.

It appears that a runway and platform had been constructed and used for at least two nights before the accident occurred, but on those occasions the grain door rested on a solid bed of ashes and cinders; while on the night in question the Jap constructed the platform without such solid foundation. The plaintiff testified that when he looked at the platform by a nearby light, which was, to some extent, insufficient to enable him to ascertain its condition, it appeared to be sound and all right. This testimony was not disputed by any one; and when we consider the fact that the plaintiff and the Jap had theretofore erected and used such a runway and platform with safety it can hardly be said that the plaintiff was guilty of contributory negligence in assuming that the platform in question was safe and sufficient for the purpose for which it was constructed. As we view the record, the evidence fails to disclose contributory negligence on the part of the plaintiff; and therefore the instruction complained of was error without prejudice.

We think the foregoing disposes of the questions which were presented in the argument of counsel for the defendant; and, finding no prejudicial error in the record, the judgment of the district court is affirmed.

SINGER SEWING MACH. CO. v. BARGER
et al. (No. 16,830.)

(Supreme Court of Nebraska. Nov. 27, 1912.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT (§ 170*)—UNAUTHORIZED ACT OF AGENT—DISAFFIRMANCE.

"A principal must disaffirm the unauthorized act of his agent within a reasonable time after such act comes to his knowledge, or he will be bound thereby." *Farmers' & Mer-*

chants' Bank v. Farmers' & Merchants' Nat. Bank, 49 Neb. 379, 68 N. W. 488.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 638-643; Dec. Dig. § 170.*]

2. PRINCIPAL AND AGENT (§ 171*)—RATIFICATION OF AGENT'S ACTS.

Where, in settlement of a balance due upon the sale of a sewing machine, what is termed a "single payment note" is given by the purchaser for such balance, and said note provides that the machine is to remain the property of the seller until full payment of the purchase money, and the holder of such note, with notice that it has been altered by raising the amount, brings an action of replevin upon the note in its altered condition, and endeavors to recover in such action, he thereby ratifies the act of alteration.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 491-493; Dec. Dig. § 171.*]

3. PRINCIPAL AND AGENT (§ 171*)—RIGHT OF ACTION ON ALTERED NOTE.

And in such a case, if it is established that such note was altered by the agent of the holder, who sold the machine and obtained the note from the purchasers, after the latter had signed the same, and without their knowledge or consent, the plaintiff in such action cannot recover.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 491-493; Dec. Dig. § 171.*]

Appeal from District Court, Cedar County; Graves, Judge.

Action by the Singer Sewing Machine Company against John L. Barger and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Claude S. Wilson, of Lincoln, for appellant. J. C. Robinson, of Hartington, for appellees.

FAWCETT, J. This is an action of replevin brought in justice court in Cedar county and appealed to the district court for that county. From a judgment in favor of defendants, plaintiff appeals.

The property replevined was a sewing machine sold by plaintiff, through its agent, Poole, to the defendants. The evidence shows that the price fixed upon the machine was \$60; that plaintiff took as part payment an old machine, and, according to the testimony of defendants, was to receive \$35 in addition, of which \$5 in cash was paid at the time. Poole testified that defendants were to pay \$39, and paid \$5 in cash at the time. What is termed a "single payment note" was signed by defendants and delivered to Poole. This note provided for the payment of the difference between the two machines one year after date, and also provided that the machine, for the purchase money of which the note was given, should remain the property of the company until full payment of the purchase money, with interest and costs. Defendants testified that when they signed the note it was drawn for the sum of \$30. When the note was about to mature, it was sent to a bank for collection. Defendants were notified of that fact,

and were requested to make payment at the bank; the notice stating that the note was for \$34. The defendant John L. Barger went to the bank and asked to see the note, stating that there must be something wrong about it. When the note was shown to him, he at once stated that the amount of the note had been raised from \$30 to \$34, and refused to pay it, stating that he was willing to pay the \$30, but would not pay any more. The bank reported to plaintiff what had been said, and received in return a letter from plaintiff, in which it is said: "We accepted this note with a balance of \$34.00 and had no thought but what it was correct. If Mr. and Mrs. Barger say they were to pay only a \$30.00 balance you may collect same and we will settle with our Mr. Poole. Kindly make arrangements with Mr. Barger to let us have the note to help us make our settlement." When notified of the statement of plaintiff, defendant refused to pay the \$30, and upon the trial gave as his reason for such refusal that he was not willing to pay the \$30, unless he got his note. Some time later a representative of plaintiff called at the home of the defendants and demanded payment of the \$34, and, upon payment being refused, said he was going to take the machine. This the defendants would not permit him to do. The next step in the matter was when another agent of plaintiff, with a constable, called at the home of defendants and again demanded payment of the note. Defendants refused to make payment, giving as their reason the raising of the note from \$30 to \$34. Plaintiff's agent thereupon offered to take the \$30 in settlement of the matter and he testified that he made that offer without adding anything for costs. This testimony is contradicted by defendants, who state that he only offered to take the \$30 on condition that they would pay the expenses of himself and the officer for coming after the machine, which amounted to something like \$6, which defendants refused to do. Thereupon the constable served the writ of replevin in this action and took the machine.

Upon the trial defendants both testified unequivocally that at the time they signed the note it was drawn for \$30. The note shows upon its face that the word "four" must have been written into the note after the word "thirty," after the note had been drawn. An examination of the original note, which is before us, shows that as originally drawn it read "thirty no/100 dollars." Subsequently there was written in between the word "thirty" and the "no/100 dollars" the word "four." That this was written in afterwards is evident from the manner in which the last letter of the word "four" is crowded up against the line between the word "no" and the figures "100." Plaintiff's agent admits that he wrote the word "four" in after the other part was written, and explains his act in doing so by testifying that the de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fendants were to pay \$9 in cash and give a note for \$30, and that after he had the body of the note written, but, before writing the figures \$34 in the upper left-hand corner thereof, defendants said they only had \$5 cash on hand; that he thereupon agreed to accept the \$5, and raised the note to \$34 before it was signed by defendants. This testimony is positively contradicted by both defendants, who say that there never was any talk about \$9 or \$39, but that the amount was to be \$35, \$5 in cash and a note for \$30. Counsel for plaintiff, in his brief, says: "The question then reduces itself to two propositions: (1) Has the contract been altered since it was signed? and, if so, (2) what effect has such alteration had upon the rights of the parties to this action?" He then concedes that there were only three persons present, viz., Poole and the two defendants, and then says: "The contract shows no alteration upon its face; and, while appellant still contends that the same had not been altered, yet, inasmuch as a jury found against the appellant upon conflicting evidence, we realize that it would be a waste of time to argue to this court that phase of the question. For the sake of argument, then, let us concede that said contract was altered as alleged; we still contend that the judgment of the district court must be reversed."

In the light of the admissions of counsel, which are eminently proper in the face of the record, his contention must fail. It is argued, and authorities cited in support of the argument, that where an agent has no authority, either express or implied, to make an alteration of the character under consideration, it is simply a spoliation by a stranger to the contract, and does not impair the validity as it originally stood. The trouble with plaintiff's contention and with his authorities is that they do not fit the facts established at the trial. We think the rule of law applicable here is that if the alteration is made by an agent, while in the transaction of the principal's business and within the scope of his authority, then the act of the agent is the act of the principal. The cases supporting this rule are numerous and hardly call for citation. Among them may be noted authorities cited in defendants' brief, among which are *Kingman & Co., Limited, v. Silvers*, 13 Ind. App. 80, 37 N. E. 413; *Mechem, Law of Agency*, § 739; *Denver, S. P. & P. R. Co. v. Conway*, 8 Colo. 1, 5 Pac. 142, 54 Am. Rep. 537; *Law v. Grant*, 37 Wis. 548, reaffirmed in *Matteson v. Rice*, 116 Wis. 328, 92 N. W. 1109; *Rhomberg v. Avenarius*, 135 Iowa, 176, 112 N. W. 548. We think in this case the act of Poole, who, the evidence shows, was "managing salesman" of the plaintiff, and made the alteration while engaged in the service of the plaintiff in this particular transaction, is sufficient to bind the plaintiff.

[1, 2] But, even if this were not so, there

is another rule of law from which we are unable to see any escape by plaintiff. The evidence shows that, after plaintiff had due notice of the alteration of the note, it failed to disaffirm the unauthorized act of its agent, but, on the contrary, affirmed his action by taking the machine in a replevin action, under the authority given by the altered note. It being established by the verdict of the jury that the note had been altered, it was void in its entirety, and plaintiff obtained no rights under it. Without that document to aid it, plaintiff had no authority to take the sewing machine; for, if no valid contract, in the terms and of the kind relied upon, was ever signed by defendants, then the transaction between plaintiff and defendants was simply an ordinary sale of a sewing machine on one year's time. By such a sale plaintiff would part with its title to the machine; and its only legal remedy, in the event of a failure by defendants to pay the balance due, would be by an ordinary action at law and a collection upon execution. "A principal must disaffirm the unauthorized act of his agent within a reasonable time after such act comes to his knowledge, or he will be bound thereby." *Farmers' & Merchants' Bank v. Farmers' & Merchants' Nat. Bank*, 49 Neb. 379, 68 N. W. 488. "The acceptance or retention by the principal, after knowledge of the facts, of the fruits of an unauthorized act of an agent is a ratification of the agent's act, and it relates back to the time of the act and makes it as if the agent had been empowered to perform it at its date; and the principal is bound in all respects as if he himself had been the actor." *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb. 68, 68 N. W. 383. "When the holder of a note had notice that it had been altered by changing the amount, and with such notice sued upon it in its altered condition, and endeavored to recover thereon, held, that he thereby ratified the act of alteration; and that the court did not err in refusing to permit him, after trial, to amend by counting on the note as originally made." *Perkins Windmill & Ax Co. v. Tillman*, 55 Neb. 652, 75 N. W. 1098. "A principal must adopt the unauthorized contract of his agent as a whole, or not at all. He cannot adopt the portion that is beneficial and reject the remainder." *Citizens' State Bank v. Pence*, 59 Neb. 579, 81 N. W. 623.

It is contended that the court erred in giving instruction No. 2. In that instruction the jury were told that the burden was upon the plaintiff to prove every material allegation contained in its petition, and, if the jury found the evidence bearing upon any material allegation was evenly balanced, or that it preponderated in favor of defendants, plaintiff could not recover. The instruction is not open to the construction placed upon it by plaintiff. It is next contended that the court erred in giving instruction No. 6. This instruction should be

considered in connection with No. 5, and when so considered it is free from error. It is further urged that the court erred in not giving instruction No. 1, requested by plaintiff, as follows: "You are instructed that, if you find from the evidence, exclusive of the written instrument in question, that at the time of the commencement of this action the title and right of possession of the property replevined was in the plaintiff, then your verdict should be for the plaintiff, regardless of any alleged alteration in the written contract." This instruction was clearly bad, and was properly refused. No right of possession of the property replevined had been shown, "exclusive of the written instrument in question."

[3] The verdict of the jury being conclusive as to the fact that the note was materially altered after its execution by the defendants, and plaintiff having ratified the unauthorized act of its agent by bringing this action upon such fraudulent note, the trial court did not err in overruling the motion for a new trial and entering judgment upon the verdict.

Affirmed.

LENDERINK v. SAWYER et al. (No. 16,805.)

(Supreme Court of Nebraska. Nov. 27, 1912.)

(Syllabus by the Court.)

1. COURTS (§ 26*)—EXECUTORS AND ADMINISTRATORS (§ 540*)—EXECUTOR DE SON TORT—SET-OFF—CLAIM FOR FUNERAL EXPENSES—RETENTION OF CAUSE FOR COMPLETE RELIEF.

Where the defendant, who was the coroner of Dakota county, and his surety, the defendant company, were sued by the administrator of the estate of one Robert Reed, deceased, who sought to recover from them the value of certain personal property which had belonged to said Reed at the time of his death, and which had been sold by the defendant coroner immediately after the death of the deceased, and to enable him to pay the necessary expenses of the funeral, and he had sold the property for its full and fair value, and had used the proceeds for that purpose, and at the request of the nephew of the deceased and his son, *held*: (1) That the defendants were entitled to set off the money paid out for the necessary expenses of the funeral against the plaintiff's claim. (2) That the district court having the parties before it, and having jurisdiction of the subject-matter and the parties, should adjudicate and determine the whole matter, instead of rendering judgment against the defendants and then sending the coroner to the county court to file claims against the estate, thereby unnecessarily increasing the expenses of the litigation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 82, 83, 88-90; Dec. Dig. § 26.* Executors and Administrators, Cent. Dig. § 2591; Dec. Dig. § 540.*]

2. EXECUTORS AND ADMINISTRATORS (§ 539*)—EXECUTOR DE SON TORT—LIABILITY.

Under the facts shown, the defendant Sawyer was at most an executor de son tort. The true representative is bound by those acts of an executor de son tort which are lawful and

such as the true representative would be bound to perform in the due course of administration. As the administrator of the estate of the deceased would be bound to pay the funeral expenses, if they were not already paid, he cannot complain because the coroner paid them.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2590; Dec. Dig. § 539.*]

Appeal from District Court, Dakota County; Graves, Judge.

Action by Henry J. Lenderink, as administrator of the estate of Robert Reed, against B. F. Sawyer and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Paul Plizey, of Boise City, Idaho, for appellants. J. J. McCarthy, of Ponca, for appellee.

HAMER, J. This is an appeal from the judgment of the district court of Dakota county against the coroner of that county and the surety on his official bond. The suit was brought by the administrator of the estate of Robert Reed, deceased. It appears that one Robert Reed died intestate at his home in Dakota county while living alone; that when his body was found the defendant Sawyer, at the request of the nephew of the deceased, took charge of the body and gave it a Christian burial; that he took possession of certain personal property of the deceased, sold it for its full value, and applied the proceeds to the payment of the expenses necessarily incurred for the burial casket, the lot in the cemetery, etc. The plaintiff, as administrator, brought this action to recover the value of the personal property so sold. On the trial the defendant offered to prove as a matter of set-off that the expenses incurred by him were proper and necessary, and were just and reasonable in amount; that the property was sold with the consent of the nephew and a son of the deceased, or at least the son ratified the sale; that the amount realized from the sale was the full value of the property; and the defendant sought to set off his expenses against the sum received by him for the sale of the property. The proposed evidence was rejected, and the court directed the jury to return a verdict against the defendants for the amount that the defendant Sawyer realized from the sale of the property. The verdict and judgment rendered were for \$499.72. For the rejection of the evidence so proffered and the giving of the peremptory instruction, the defendants assign error.

[1] It is claimed by the defendants that the administrator is estopped from prosecuting the action; that all the charges made by the defendant were reasonable and just; and there seems to be no controversy concerning the fact that defendant Sawyer sold the property and paid the funeral expenses with the proceeds. One purpose of an administra-

tor is to take charge of the property belonging to the estate. He becomes the means by which the property belonging to the estate is applied to the payment of debts, if there are any, and the surplus remaining is distributed among the heirs. The statute in this case seems to contemplate that those of the relatives who are near the deceased are charged with the duty of taking care of the body and burying it. If the defendant Sawyer carried out the wishes of the relatives who were there, it would seem that the other relatives would have no reason to complain. As the administrator represents the creditors and the heirs, and is only a trustee, it would seem that he is estopped from maintaining an action against the defendant Sawyer and his bondsmen for doing that which Sawyer was requested to do, and which he actually did, in taking charge of the body of the deceased and burying it. In *Dame, Probate and Administration*, § 231, it is said: "All courts generally hold that the personal representatives may pay the same [funeral claims] directly, without their being exhibited." If this be true with respect to personal representatives, it should be true of the coroner, who is requested by the personal representatives to discharge the duties which are a natural burden upon them.

It is altogether probable that when Sawyer sold the property he thought he was authorized to do so by section 110, c. 18, art. 1, Comp. St. 1909: "When any valuable personal property, money, or papers are found upon or near the body upon which an inquest is held, the coroner shall take charge of the same and deliver the same to those entitled to its care or possession; but if not claimed, or if the same shall be necessary to defray expenses of the burial, the coroner shall, after giving ten days' notice of the time and place of sale, sell such property, and after deducting coroner's fees and funeral expenses, deposit the proceeds thereof, and the money and papers so found, with the county treasurer, taking his receipt therefor, there to remain subject to the order of the legal representatives of the deceased, if claimed within five years thereafter, or if not claimed within that time, to vest in the school fund of the county." He was brought face to face with the problem of giving the body of the deceased decent and immediate Christian burial. The sale of the property would furnish the means of paying the very necessary expenses of the funeral. He sold it, got the money, and used it. The dead man seems to have been decently and properly buried according to Christian rites. The defendant is equitably entitled to his pay for it, and it is not quite right that the plaintiff should have judgment against him. We do not intend to hold that the section quoted justified the conduct of the coroner. The same is justifiable upon other grounds. We think that if the defendant Sawyer was requested by the nephew, Bert Reed, to take

charge of the body and to prepare it for burial, and that he did so because of such request, and that he sold the property for its full and fair value, which is not questioned, and used the money which he received therefor in payment of the necessary funeral expenses, then that he is equitably entitled to pay therefor, and that he is further equitably entitled to set off the money so paid out by him against the plaintiff's claim for the value of the property sold. The same is true if the matter was ratified and adjusted between the defendant Sawyer and the son of the deceased, Earnest Reed. We do not undertake to say what, if any, steps should have been taken before the county court towards proving these claims, because that question is not before us.

[2] "The true representative is bound by those acts of executor de son tort which are lawful and such as the true representative would be bound to perform in the due course of administration." 18 Cyc. 1361. Among the authorities cited is *Thompson v. Harding*, 75 E. O. L. (Eng.) 630, holding that a proper payment to a creditor of the estate will bind the true representative. In that case Richard Smith was employed to receive the rents of the deceased in his lifetime, and after his death continued to receive the rents due to the deceased. No other representative of the deceased appearing, Smith paid various debts due from the deceased. Among other things, he paid the defendants, who were bankers of the deceased. A considerable time after payment administration was granted to the plaintiff, who brought the action. The court held, under the facts, "that the rule to enter a verdict for the plaintiff ought to be discharged."

In *Outlaw v. Farmer*, 71 N. C. 31, John Farmer gave his promise in writing to pay John Lewis or James Parker, agents, by agreement with the heirs of Anna Herring, deceased, the sum of \$125.50. Lewis and Parker were appointed agents by the heirs of Anna Herring. As the agents of such heirs, they had charge of the entire beneficial interest in the estate. In a suit by the duly appointed administrator of the estate against the makers of the promise, it was held that "administration was only the technical form of passing the legal estate from the intestate to the distributees. Without administration they had the potential dominion over the estate, and could dispose of it by sale, gift, or testament. Therefore a sale by their agent conferred upon the purchaser a title which the courts will protect. The bond given for the property was given on a valuable consideration and is valid, both as to the principal and as to the sureties." The court further said: "Where the equitable as well as legal rights of parties are administered, the bond sued on will be upheld as valid against the defendant, and the plaintiffs are entitled to judgment thereon."

"Although an executor de son tort cannot

by his own wrongful act acquire any benefit, yet he is protected in all acts, not for his own benefit, which a rightful executor might do." 18 Cyc. 1363.

In *Brown v. Walter*, 58 Ala. 310, it was held that, "where one has received and used assets of an intestate, under circumstances constituting him an executor de son tort, he may show, when called to account in equity by the rightful representative, that there are no outstanding debts, and that he has applied the assets for the use and benefit of the distributees, as they must have been applied in due course of administration."

In *Risk v. Risk*, 10 Ky. Law Rep. 566, 9 S. W. 712, R., having paid the first installment on land, died, leaving a widow and six children, and the defendant, without administering on the estate, but with the concurrence of the plaintiff, undertook to pay the deferred payments and to support the widow and minor children, and he failed to make the third payment, and the land was sold under a judgment by the vendors; and when A. advanced to the defendant money to redeem the land, and the widow and heirs obtained an order for the sale of the land to pay A., who purchased and offered to permit the widow and heirs to redeem, and he conveyed the land to defendant, who paid the balance of the purchase money, in an action by plaintiff for the settlement of the estate of the father, a division of the land, and allotment of dower, held, that the acts of defendant should be treated as those of a duly appointed administrator from the date of the father's death; and that he holds the land in trust for the widow and heirs.

It is incumbent upon the executor de son tort to show that he has applied the assets which have come into his hands in the same manner in which they would have been lawfully applied by a rightful representative. 18 Cyc. 1363. Among the authorities cited in support of the doctrine stated is that of *Gay v. Lemle*, 32 Miss. 309, holding that, where it appears that he has paid one particular debt not entitled to preference, leaving others unpaid, he cannot claim that he has done what the law required to be done with the assets in due course of administration, but must be liable as executor de son tort to the other creditors. But in that case the doctrine announced emphasizes the contention that the executor de son tort is entitled to fair treatment if he has acted justly. The syllabus in that case reads: "If an executor de son tort, when sued by a creditor, attempt to justify his unlawful intermeddling with the assets of the deceased by showing that he has applied them to the payment of his debts, he must show that he has applied them in the same manner that

they would have been lawfully applied by the rightful executor; and if it appear that he has expended the assets in the payment of one particular debt, not being a lien on them, leaving others unpaid, he will be liable to the other creditors." The body of the opinion fully sustains the syllabus, and requires only that the executor de son tort "must show that he has applied them [the assets of the estate] in the same manner in which they could have been lawfully applied by the rightful executor."

In *Holeton v. Thayer*, 89 Ill. App. 184, it was held that, where a person named as executor in a will acts without qualifying, and receives proceeds of the sales of lands and rents, the burden is upon him to account for the same; and if he assumes to pay debts, without having them probated, against the estate he assumes the burden of producing evidence that would be sufficient to prove such claims in the probate court in case of objection.

In *Crispin v. Winkleman*, 57 Iowa, 523, 10 N. W. 919, it was held: "One who intermeddles with the estate of a decedent, without having been appointed administrator, has no right to pay claims out of the assets of the estate; and in no case can he escape liability for so using the money of the estate, without an affirmative showing that the amounts paid were correct."

Since the district court has acquired jurisdiction of the parties, and the whole subject-matter is presented for adjudication, nothing can be gained by rendering a judgment against the defendant and compelling him to file his claim against the estate, thus unnecessarily increasing the litigation and costs. We think that the district court should dispose of the whole case before it.

There is no showing that the deceased was in any way indebted. The estate is solvent. The defendant is not shown to have injured any one by reason of what he did. The claim of no creditor is endangered.

It follows that the district court erred in excluding evidence tending to show that the money received from the sale of the property was expended in and about the burial of the deceased.

The judgment of the district court of Dakota county is reversed.

Reversed and remanded.

LEITON and FAWCETT, JJ. (concurring in result only). We think the principles announced in *Phillips v. Phillips*, 87 Me. 324, 32 Atl. 963, and *Adams v. Butts*, 16 Pick. (Mass.) 343, apply, and hence concur in the result.

SEDGWICK, J., concurs in the conclusion.

PARSONS v. CATHERS et al. (No. 16,817.)
(Supreme Court of Nebraska. Nov. 27, 1912.)

(Syllabus by the Court.)

1. CREDITORS' SUIT (§ 16*)—CONDITIONS PRECEDENT—EXHAUSTION OF REMEDIES AT LAW.

For the purpose of maintaining a creditor's bill, proof of a judgment at law, of the issuance of an execution, and of a sheriff's return *nulla bona*, is sufficient, in the absence of fraud or collusion, to show that plaintiff's remedies at law have been exhausted.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 45, 73-87; Dec. Dig. § 16.*]

2. CREDITORS' SUIT (§ 8*)—PROPERTY SUBJECT—INTEREST IN JUDGMENT.

In equity, the interest of a judgment debtor in a judgment against a city may, in a proper case, be subjected to the claim of his judgment creditor.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 12-41; Dec. Dig. § 8.*]

3. CREDITORS' SUIT (§ 47*)—RELIEF GRANTED—PROCEEDINGS PENDING ACTION.

Failure of a court of equity to dismiss a creditor's bill on an answer alleging that plaintiff has possession of unsold collateral security for his judgment *held* not reversible error in a record which shows that plaintiff, before filing his reply, sold the collateral and applied the proceeds in part payment of his claim; that the case was tried on pleadings raising all the issues essential to an adjudication of the rights of the parties; and that no one was prejudiced by the procedure adopted by the trial court.

[Ed. Note.—For other cases, see Creditors' Suit, Dec. Dig. § 47.*]

4. FRAUDULENT CONVEYANCES (§ 295*)—EVIDENCE—SUFFICIENCY.

Decree upholding a conveyance from a husband to his wife *held* proper under the evidence, though assailed as fraudulent in a creditor's bill.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 867-876; Dec. Dig. § 295.*]

Appeal from District Court, Douglas County; Troup, Judge.

Action by Frank H. Parsons against John T. Cathers (revived in the name of Louisa E. Cathers, administratrix of the estate of John T. Cathers) and others. From the judgment, defendants Cathers appeal, and plaintiff filed a cross-appeal. Affirmed.

J. O. Detweiler, of Omaha, for appellants. Chas. Battelle and Stout & Rose, all of Omaha, for appellee.

ROSE, J. This is a creditor's bill in which plaintiff seeks to collect a judgment for \$8,369.88, rendered August 14, 1909, in the district court of Douglas county, against John T. Cathers and others. The suit wherein the judgment was rendered was commenced April 28, 1894, and the liability of Cathers was that of surety on a promissory note for \$5,000, dated April 8, 1892, and payable to the McCague Savings Bank. Plaintiff succeeded to the rights of the payee. Execution was issued and returned "*nulla bona*." The property which the court is asked to subject to the payment of the judgment

consists of three items: (1) A lot in Omaha, conveyed January 7, 1898, by Cathers to his wife, through a trustee; it being alleged that the conveyance was made without consideration, with the intent to hinder, delay, and defraud plaintiff in collecting his claim against grantor. (2) Unpaid awards of \$1,245 against the city of Omaha in favor of the wife; the city having appropriated to public purposes part of the lot conveyed to her, and the amount recovered by her being the value of the property thus taken. (3) The interest of Cathers in two unpaid judgments against the city of Omaha, one rendered in favor of Anna J. Robinson, November 30, 1907, for \$1,640, and the other rendered in favor of Rhoda Gilliland, March 27, 1909, for \$1,500; Cathers having filed an attorney's lien for one-half of each of the two judgments. The principal debtors and Cathers and wife and other persons claiming an interest in the property in controversy are defendants herein. The answer contains a denial that the conveyance from Cathers to his wife was made without consideration, or to defraud plaintiff, or to hinder or delay him in collecting his claim. On the contrary, it is alleged that the conveyance was executed in good faith for the full consideration of \$5,087.92. Other matters pleaded in defense are that the creditor's bill was prematurely filed; that Cathers was a surety only; that plaintiff held as collateral security for the payment of his claim 20,000 shares of capital stock of the Colorado Gold, Silver & Lead Mining Company, property alleged to be of great value belonging to the principal debtors; and that the collateral described, though in control of plaintiff, was never sold or in any way applied to the payment of the note on which Cathers was surety. In a reply plaintiff states that on February 24, 1910, a date subsequent to the filing of the answer to the creditor's bill, he sold the collateral at public sale, after due notice, for \$100 and credited the proceeds on his judgment. The trial court upheld the conveyance from Cathers to his wife and declined to apply the latter's awards against the city of Omaha on plaintiff's judgment, but subjected thereto the attorney's liens on the judgments against the city of Omaha. Cathers and wife appealed, and plaintiff filed a cross-appeal. After the record was filed in this court, Cathers died, and the case was revived in the name of his wife, Louisa E. Cathers, as administratrix of his estate.

[1] Should the creditor's bill be dismissed because the action was prematurely brought? It is argued that relief was erroneously granted to plaintiff, because his pleadings and proofs do not show that he exhausted his legal remedies before bringing his suit in equity. This proposition is based on the assertion that property subject to execution was not sold before the filing of the

creditor's bill. The record shows that plaintiff pleaded and proved his judgment, and that an execution was issued thereon and returned nulla bona. Nothing more could be done without the aid of equity. *First Nat. Bank v. Gibson*, 60 Neb. 767, 84 N. W. 259. Fraud or collusion on part of the sheriff in performing his duties under the writ, or in making his return, is not shown. Under the circumstances plaintiff was not required to impeach the officer's return, or to show by additional evidence that neither the principal debtors, nor the surety, had any property subject to execution. In absence of fraud or collusion on part of the officer, the judgment, the execution, and the sheriff's return were sufficient evidence that the remedy at law was inadequate. *Weaver v. Cressman*, 21 Neb. 675, 33 N. W. 478; *First Nat. Bank v. Gibson*, 60 Neb. 767, 84 N. W. 259; *Cochran v. Cochran*, 62 Neb. 450, 87 N. W. 152; *Nebraska Nat. Bank v. Hallowell*, 63 Neb. 309, 88 N. W. 556; *Howard v. Raymers*, 64 Neb. 213, 89 N. W. 1004; *Coffield v. Parmenter*, 2 Neb. (Unof.) 42, 96 N. W. 283.

[2] It is further argued that the funds burdened with the attorney's lien, while under the control of the city of Omaha, cannot be impounded or subjected to the payment of plaintiff's judgment. The city of Omaha is a defendant, and at the trial did not resist the making of an order directing payment of those funds to plaintiff. The statute creating a remedy in aid of execution provides: "Where a judgment debtor has not personal or real property subject to levy on execution, sufficient to satisfy the judgment, any interest which he may have in any banking, turnpike, bridge, or other joint stock company, or any interest he may have in any money, contracts, claims, or choses in action, due or to become due to him, or in any judgment or decree, or any money, goods, or effects which he may have in possession of any person, body-politic, or corporate, shall be subject to the payment of such judgment by proceedings in equity, or as in this chapter prescribed." Code, § 532. In direct terms the equitable remedy extends to the interest of a judgment debtor in a judgment against a "body-politic or corporate." The remedy in aid of execution does not exclude relief in equity. *Monroe v. Reid, Murdock & Co.*, 46 Neb. 316, 64 N. W. 983. It follows that this point, on the record presented, is not well taken.

[3] Should the action be dismissed because plaintiff, before filing his creditor's bill, failed to sell the collateral security in his hands and apply the proceeds on his claim? That defense was pleaded in an answer filed by Cathers January 24, 1910. The court of equity had acquired jurisdiction. In a reply plaintiff alleged that he sold the collateral February 24, 1910, and applied the proceeds on his claim. Fraud or illegality in the sale

is not shown. At the time of the trial, therefore, this feature of the defense had no existence as originally pleaded. The proceeds of the collateral paid a small part of the debt. Leviable property subject to execution and the collateral were wholly insufficient for the satisfaction of the judgment in favor of plaintiff, when the creditor's suit was tried. Equitable relief was not granted before the remedies at law had been exhausted. Had the suit been dismissed under these circumstances, the parties would necessarily have been burdened with the costs and expenses incident to the bringing and prosecuting of a second suit of the same nature as the first. In *Haffey v. Lynch*, 143 N. Y. 241, 38 N. E. 298, the court said: "Equity courts, in awarding relief, generally look at the conditions existing at the close of the trial of the action and adapt their relief to those conditions. The plaintiff, in an equity action, as a general rule, should not be turned out of court on account of any defense interposed to his action, if at the time of the trial the facts are such that, if he then commenced his action, he would be entitled to the equitable relief sought." For these reasons, the case having been tried below under pleadings raising all the issues essential to an adjudication of the rights of the parties, the action will not now be dismissed, since no one was prejudiced by the trial court's procedure.

[4] Was the conveyance from Cathers to his wife fraudulent? Both testified that early in their married life the wife received from her father's estate, from a life insurance company, and from the sale of stock of the Chartiers Valley Railroad Company, various sums of money aggregating several thousand dollars; that this money was turned over to the husband under an agreement to return it; and that he never did so until he deeded her the lot in controversy in fulfillment of his promise. Cathers testified, also, that the consideration mentioned in the deed was the amount received from his wife, with interest. There is proof that the wife, when she accepted the deed, had no knowledge of her husband's liability as surety; that the husband then thought his liability was fully protected by collateral security; that plaintiff, for many years, made no effort to bring his suit on the note to trial; and that Cathers, before, and two years after, the conveyance to his wife, retained in his own name title to a large tract of valuable land near Omaha. Plaintiff made no effort to contradict this testimony by direct proof. When it is all considered with the entire record, the trial court's finding against plaintiff on the issue of fraud in the conveyance from Cathers to his wife appears to be correct. It necessarily follows that plaintiff is not entitled to the awards against the city of Omaha for that part of grantee's lot taken for public purposes. There is no error apparent in the proceedings below. Neither appellant

nor cross-appellants having obtained relief in this court, the costs here will be equally divided between them.

Affirmed.

BUTLER v. SECRIST et al. (No. 17,358.)
(Supreme Court of Nebraska. Nov. 27, 1912.)

(Syllabus by the Court.)

1. ADVERSE POSSESSION (§ 45*)—RUNNING OF LIMITATIONS—ARREST—SERVICE OF SUMMONS.

Service of summons in ejectment arrests the running of the statute of limitations in favor of a defendant who claims by adverse possession, though the form of action is subsequently changed by amendment of plaintiff's petition to a suit to redeem. *Butler v. Smith*, 84 Neb. 78, 120 N. W. 1106, 28 L. R. A. (N. S.) 436, approved and followed.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 232-254; Dec. Dig. § 45.*]

2. APPEAL AND ERROR (§ 964*)—MATTERS OF DISCRETION—CONSOLIDATION OF ACTIONS—REVIEW.

The consolidation of two actions pending in the same court, at the same time, against different defendants, to redeem from the lien of a mortgage, is a matter within the sound discretion of the trial court, and error cannot be predicated on the order of consolidation unless an abuse of discretion is shown.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3834; Dec. Dig. § 964.*]

(Additional Syllabus by Editorial Staff.)

3. JUDGMENT (§ 574*)—RES JUDICATA—NATURE OF DETERMINATION—RULING ON MOTION.

A ruling on a motion during the progress of a cause is not res judicata, and it is within the discretion of the court to permit another motion to be filed and to change its ruling.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1021; Dec. Dig. § 574.*]

Appeal from District Court, Knox County; Welch, Judge.

Action by Mary Butler against James B. Secrist and others, impleaded with Susie M. Smith and others. Judgment for plaintiff, and defendants appeal, and defendant Secrist prosecutes a cross-appeal against defendants Smith and others. Affirmed.

Field, Ricketts & Ricketts, of Lincoln, W. A. Meserve and J. F. Green, both of Creighton, for plaintiff. W. R. Butler and M. F. Harrington, both of O'Neill, and W. A. Meserve, of Creighton, for defendants.

BARNES, J. This is an appeal from a judgment of the district court of Knox county allowing the plaintiff to redeem a tract of land situated in that county from a void decree of foreclosure, and a finding of the amount which plaintiff should be required to pay the defendants for that purpose.

It appears that in January, 1890, one Ellis W. Wall owned the land in question and mortgaged it to Pierce, Wright & Co. for \$2,850. After giving the mortgage, Wall con-

veyed the premises to Clement L. Boone. Boone did not take the title by his initials, but took it by his real name as Clement L. Boone, and his deed was promptly recorded in the office of the county clerk of Knox county. In March, 1894, one Henry H. Drake, who had become the owner of the mortgage, brought a foreclosure suit in the district court of Knox county against Wall and his wife and C. L. Boone. The records in the office of the county clerk stated plainly that the land was owned by Clement L. Boone. Service was had by publication only. None of the defendants appeared, and a decree of foreclosure was granted. Thereafter the land was sold under the decree, and on May 24, 1895, the owner of the mortgage, who was the purchaser, took possession of the premises through one Green, and the purchaser and his successors in interest, the defendants in this action, have ever since retained such possession. It further appears that the plaintiff obtained her title by quitclaim deed from Clement L. Boone, and mesne conveyances, and on the 11th day of March, 1906, commenced this action in the district court of Knox county as a suit in ejectment against James B. Secrist, Mary E. Secrist, and Susie M. Smith to obtain possession of a part of the land in question; that she also at the same time commenced an action in ejectment against Charles A. Kissinger and Emily Kissinger to obtain possession of the remainder of the mortgaged premises; that thereafter plaintiff was permitted to amend her petitions by changing the form of her actions to suits to redeem the land, and require the defendants to account for the rents and profits. Trials in the district court resulted in judgments for the defendants. From those judgments plaintiff appealed and obtained reversals in this court, and the causes were remanded to the district court of Knox county for further proceedings. For a more full and complete statement of the facts, reference may be had to *Butler v. Smith*, 84 Neb. 78, 120 N. W. 1106, 28 L. R. A. (N. S.) 436. When those suits came on again for trial in the district court, an order was made consolidating them, and thereafter, upon the issues thus presented, a decree was rendered allowing the plaintiff to redeem, and fixing the amount necessary for such redemption. From that judgment, the defendants have prosecuted separate appeals.

The record discloses that, upon the second trial in the district court, defendants Secrist and Smith interposed a plea of former adjudication, alleging that the judgment in their favor upon the former trial had never been reversed, and was a complete bar to the further prosecution of this action; while defendants Kissinger also entered a like plea, and contended that the judgment in their favor in the former action had never been

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

reversed, and was a bar to the further prosecution of this suit against them. Their pleas of former adjudication were overruled, and this ruling is assigned as error.

It appears that, when the petition in *Butler v. Smith*, supra, was amended, Charles A. Kissinger and his wife Emily were made parties defendant in that action, all of the land involved in both actions was described therein, and plaintiff prayed to be allowed to redeem from the Wall mortgage as to all of the defendants. The defendants in that case all filed answers to the amended petition. The same course was pursued, and like pleadings were filed in the original case of *Butler v. Kissinger*, and both actions were then pending in the district court of Knox county. Plaintiff thereupon filed a motion to consolidate the two actions, which was overruled. There was a separate trial of each of said actions, and a judgment rendered in each of them for all of the defendants. The plaintiff thereupon prosecuted appeals from said judgments. The appeals were docketed in this court against all of the defendants. The plaintiff was named as the appellant, and all of the defendants were made appellees. All of the defendants appeared and filed briefs, and, upon the hearings in this court, both of the judgments were reversed as to all of the defendants named in each case, and the causes were remanded to the district court for new trials. An examination of the record in the former cases fully disposes of the plea of former adjudication, and the judgment of the trial court on this point should be affirmed.

[1] It is further contended that the court erred in overruling defendants' pleas of the statute of limitations. That question, however, was fully determined in *Butler v. Smith*, supra, where it was said: "Service of summons in ejectment arrests the running of the statute of limitations in favor of a defendant who claims title by adverse possession, though the form of action is subsequently changed by amendment of plaintiff's petition to a suit to redeem." *McKeighan v. Hopkins*, 19 Neb. 33, 26 N. W. 614, was a suit in ejectment, and was changed by amendment to an action to redeem, and it was said by this court: "The plaintiff sought in the original petition to recover the land, because he was the owner thereof; and in the amended petition, filed by him by leave of court, he seeks to recover the land in question upon the ground that he is the owner of the same; but, while asking equity, he offers to do equity by paying the defendant all valid claims held by him against the land. The cause of action is the same, although the relief is sought in a different manner from that in the first petition. This, however, does not change the cause of action, and the statute of limitations ceased to run when the summons which was served on

him was issued." In the instant case the actions were commenced before the limitation had expired, and when commenced, although separate suits were brought, such actions were sufficient to toll the statute.

[2] Error is predicated on the order of the district court consolidating the two actions for a single trial in the instant case, and it is argued that, because the court had once overruled a motion to consolidate the actions, it was error to thereafter sustain such a motion.

[3] A mere ruling on a motion during the progress of a cause is never *res judicata*, and it is within the sound discretion of the court to permit another motion to be filed and change its ruling. Unless the party complaining makes it appear that the trial court was thereby guilty of an abuse of discretion, error cannot be predicated thereon.

Finally it may be said that, when the two causes were remanded for new trials, the only matter left for the determination of the district court was an accounting to determine the amount the plaintiff should be required to pay defendants in order to redeem the land in question from the mortgage lien.

It is not contended that the court erred in determining the amount of redemption money, and the judgment of the district court is affirmed.

KISSINGER et al. v. BUTLER. (No. 17,357.) (Supreme Court of Nebraska. Nov. 27, 1912.)

Appeal from District Court, Knox County; Welch, Judge.

Action by Mary A. Butler against Charles A. Kissinger and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Field, Ricketts & Ricketts, of Lincoln, and J. F. Green and W. A. Meserve, both of Creighton, for appellants. W. R. Butler and M. F. Harrington, both of O'Neill, for appellee.

BARNES, J. This case presents the separate appeal of the Kissingers from the judgment of the district court in *Butler v. Secrist* (No. 17,358), 138 N. W. 749.

The facts and questions of law in the two appeals are identical, and for the reasons given in that case the judgment of the district court is affirmed.

HANKS v. MISSOURI PAC. RY. CO. (No. 17,058.)

(Supreme Court of Nebraska. Nov. 27, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 32*)—REGULATION—INTER-STATE CARRIERS.

In an action to recover from the defendant railway company the necessary costs of the labor, lumber, and material used in constructing grain doors for box cars used in transporting grain from Cook, Neb., to Kansas City, Mo., held, that the answer of the defendant company that the Interstate Commerce Commission had made a rule to the effect that the carrier might not lawfully reimburse ship-

pers for the expense incurred in attaching grain doors to box cars, unless expressly so provided in its tariff, and that there was no such provision in the tariff of the defendant company at the time the doors were so furnished (though afterwards one was adopted), and therefore that the defendant company was not liable, failed to state any defense.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83-85; Dec. Dig. § 32.*]

2. CARRIERS (§ 32*)—REGULATION—INTER-STATE CARRIERS.

That as there is no allegation in the pleadings stating when the particular rule was adopted it will not be presumed to have been adopted before the car doors were furnished, or to have been enforced at that time.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83-85; Dec. Dig. § 32.*]

Appeal from District Court, Johnson County; Pemberton, Judge.

Action by Lee A. Hanks against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

B. P. Waggener, of Atchison, Kan., and E. M. Morsman, Jr., of Omaha, for appellant. Hugh La Master, of Tecumseh, for appellee.

HAMER, J. On the 18th day of April, 1910, the plaintiff, who was a dealer in grain, lumber, coal, and live stock at the village of Cook, Johnson county, Neb., sued the defendant in the district court of Johnson county, alleging his business, and that he was the sole owner thereof; that the defendant was a railway corporation, incorporated under the laws of the state of Missouri, licensed to do business in the state of Nebraska, and doing a general transportation business as a common carrier, with lines of railroad in the state of Nebraska, and in other states, having a line of railroad running from Talmage, Neb., through Johnson county, Neb., and through the village of Cook in said county, to Crete, Neb.; that defendant maintains a depot at said village of Cook and an office at said depot, and keeps a duly appointed agent in charge of said office for the management of its business at said village; that from the 26th of July, 1906, until the 17th of January, 1908, the plaintiff at the request of the defendant made by the agent of the defendant, at Cook, Neb., sold, delivered, and furnished to the defendant certain lumber and nails and furnished certain labor to the defendant all of the value of \$271.03; that said articles were so furnished in repairing freight cars belonging to the defendant and freight cars of other companies then being used by the defendant, all of which cars were loaded and shipped by the plaintiff to points on the lines of the defendant, and all of which articles were necessary to put said cars in proper repair and condition for the transportation of grain and stock, and were not made for the purpose of violating any law, either state or federal, and in the construction of inside doors for grain cars own-

ed and used by the defendant; that an itemized bill of said lumber, showing the dates when furnished, amounts, dimensions, kinds, and prices was attached to the petition as a part thereof; that the same were just and reasonable prices, and were the prices agreed upon, and that the lumber was of the aggregate value of \$211.03; that nails were furnished as needed in making said repairs and said car doors from July 26, 1906, to January 17, 1908, and of the reasonable value of \$10, and that labor was furnished as needed in making said repairs and car doors from July 26, 1906, to January 17, 1908, and of the reasonable value of \$50; that, by reason of the sale, delivery, and furnishing of said lumber and nails and the doing and furnishing of said labor, the defendant became indebted to the plaintiff in the sum of \$271.03 for the payment of which the plaintiff has made demand of the defendant and which the defendant has refused to pay. The prayer was for judgment against the defendant for \$271.03, with interest at 7 per cent. from July 17, 1908, and costs. The defendant answered, omitting the title of the case, the signature of counsel, and the verification, as follows: "Comes now the defendant, and for its answer to the petition of the plaintiff it admits that plaintiff furnished the material and labor in the amount and of the value stated in the petition, and defendant states: That any and all lumber which may have been furnished by the plaintiff, as alleged in his said petition, was furnished for the purpose of constructing grain doors, or making repairs upon certain grain cars, which were furnished by the defendant to the plaintiff for the transportation of grain in the regular course of interstate commerce; that each of the said cars so furnished or repaired moved from Cook, in the state of Nebraska, to Kansas City, in the state of Missouri, and beyond; that, by reason of such shipments of grain being of an interstate character, this court is without jurisdiction in the premises to hear or try this case. The defendant alleges that at the time the plaintiff claims to have furnished such lumber for grain doors the defendant did not have regularly published and filed with the Interstate Commerce Commission, and posted as required by law, any tariff or any provision of any tariff, whereby the defendant promised, or agreed, or was permitted, to reimburse the plaintiff for and on account of lumber so furnished. Plaintiff alleges that the Interstate Commerce Commission by rule 78 of bulletin 2, of the Conference Rulings of the Commission, made a ruling as follows: '78. Grain Doors. A carrier may not lawfully reimburse shippers for the expense incurred in attaching grain doors to box cars unless expressly so provided in its tariff.' In construing and applying such ruling, the Interstate Commerce Commission held that, if carriers proposed to pay shippers for grain doors fur-

nished by such shippers, where the same were necessary and were actually furnished, carriers could pay the actual cost of such doors with stated maximum allowance per grain door and per car, provided same were covered by their tariffs; that following the ruling of the Interstate Commerce Commission the defendant company thereafter regularly published and filed with the Interstate Commerce Commission an amendment to its tariffs, which became effective November 16, 1908, as follows: 'When cars furnished for grain loading, requiring interior doors, are not so equipped by the railroad company, and such doors are furnished by the shippers, the actual cost thereof (when not to exceed \$1.20 per car) will be paid by this company.' That such amendment to defendant's tariffs was made subsequent to the time the plaintiff claims to have furnished the lumber for the grain doors in question, such lumber having been furnished from July 26, 1906, to and including January 17, 1908. The defendant states that payment by it to the plaintiff for the grain doors in question, without authorization therefor from the Interstate Commerce Commission, would be a violation of the Interstate Commerce Act, and would subject not only the plaintiff but also the defendant, to a severe penalty. The defendant states that this honorable court is not only without jurisdiction in this matter to enforce payment for grain doors prior to November 16, 1908, but its order so to do would be requiring the defendant company to violate the Interstate Commerce Act; that the defendant has no desire in any way to take advantage of the plaintiff, and stands ready and willing at all times to reimburse and pay to the plaintiff any and all amounts which it may be authorized to pay by the Interstate Commerce Commission, and the defendant alleges that, if the plaintiff has furnished lumber as claimed by him, the same would have been paid for in due course by the defendant, had such payment not been in violation of the law. Wherefore the defendant asks that it shall go hence without day, and recover its proper costs."

A general demurrer was filed by the plaintiff to the defendant's answer. Whereupon it was, on or about the 8th day of October, 1910, considered by the court that the said demurrer to the answer should be sustained. The defendant elected to stand upon its said answer, and refused to plead further, whereupon judgment was rendered for the plaintiff in the sum of \$313.71, with interest from the date of the judgment at 7 per cent. per annum and the costs.

[1] It would seem that the question presented is whether the plaintiff can recover for repairs to freight cars and for grain doors furnished for freight cars, such cars having been furnished by the defendant for transporting grain shipped by the plaintiff in interstate traffic. If the plaintiff cannot recover, it must be because of provisions

contained in the Interstate Commerce Law, and amendments thereto. The appellant seems to particularly rely on section 3 and section 6 of the original act of 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, pp. 3155, 3156]), and on the Elkins Act, approved February 19, 1903 (32 U. S. St. at Large, pt. 1, ch. 708, p. 847 [U. S. Comp. St. Supp. 1911, p. 1300]). The act as amended may be found in Drinker, Interstate Commerce Act (Supplement), and allied acts, which may be found on pages 1 to 75, inclusive. They may also be found in the act approved February 4, 1887 (24 St. at Large, ch. 104, p. 379), amended by act approved March 2, 1889 (25 St. at Large, ch. 382, p. 855), and by act approved February 10, 1891 (26 St. at Large, ch. 128, p. 743), and by act approved February 8, 1895 (28 St. at Large, ch. 61, p. 643), and by act approved June 29, 1906 (34 St. at Large, pt. 1, ch. 3591, p. 584), and by act approved April 13, 1908 (35 St. at Large, ch. 143, p. 60), and by an act approved June 18, 1910 (36 St. at Large, ch. 309, p. 539 [U. S. Comp. St. Supp. 1911, pp. 1284-1381]). Section 3, among other things, provides: "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Section 6, among other things, provides: "That every common carrier subject to the provisions of this act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad, as defined by the first section of this act." Among other things, it is provided in said section that the schedules shall be printed in large type, and that copies shall be kept for the use of the public in every depot or station, also that no advance shall be made in the rates, fares, and charges except after 10 days' public notice, the notice to plainly state the changes proposed to be made in the schedule then in force. Section 3 remains as it was originally adopted, but section 6 has been amended. As amended, it is provided in section 6 that, when the rates have been established and published, it shall be unlawful for the common carrier to charge, demand, collect, or receive from any person a greater or less compensation than is specified in such published schedule of rates, fares, and charges; that every common carrier shall file with the Commission copies of its schedules of rates, fares, and charges, and shall notify the Commission of

all changes made, and shall also file with the Commission copies of all contracts, agreements, or arrangements in relation to any traffic affected by the provisions of the act. There is also a penalty for failure to comply with the requirements of the act, such failure being punishable as a contempt.

The foregoing provisions are probably intended to prevent favoritism and the giving to one shipper an advantage over another. It is plain that the plaintiff should recover for the labor and material furnished, unless the statute is in derogation of the common law and thereby forbids it. To pay a reasonable and just price for the labor and materials furnished does not of itself give the appellee undue or unlawful preference or advantage. The payment of a debt is not giving an undue preference or advantage. But it is claimed that the rule adopted by the Interstate Commerce Commission wholly prevents the transaction itself, and that, therefore, there can be no recovery. It is claimed that the transaction is of such a nature that the defendant company might pay one shipper one price for the labor and grain doors and pay another shipper another price, and that there is thereby created a chance to be dishonest and to violate the original intention of the law which forbids discrimination.

Rule 78 adopted by the Commission and set forth in the answer to which the demurrer is interposed makes the reimbursement of shippers for expenses incurred in attaching grain doors to box cars unlawful, unless expressly provided for in the tariff of the common carrier. It is alleged in the answer that the defendant filed with the Commission an amendment to its tariffs which became effective November 18, 1908, and that this amendment provided that, when the cars required interior doors and the shipper furnished them, then that the company would pay to the shipper the actual cost of the doors not exceeding \$1.20 per door, and that the amendment was made after the time that the plaintiff claims to have furnished the doors in question. The date fixed in the petition when the grain doors were furnished seems to be from July 28, 1906, to January 17, 1908. The amendment made to the defendant's tariff was November 18, 1908, being about 10 months from the time the last item of the grain doors was furnished. It does not appear from the answer when rule 78 was adopted. Ten months elapsed after the last item of the grain doors was furnished before the tariff required was filed with the Interstate Commerce Commission, and became effective. In that 10 months the rule may have been, and probably was, adopted. If so, it was after the grain doors were furnished. There would be nothing in the way of paying for the grain doors if they were furnished before rule 78 was adopted. For anything that appears in the answer, the rule had not yet

been created, and was therefore not in existence when the doors were furnished.

It is the duty of the railway company to furnish the shipper a car that is fit to use. Perhaps the railway company fails to do so because of difficulties in the way. It may have been that the car doors have been stolen. Perhaps they have been broken up. At any rate, they are missing, and the agent of the railway company is not in a condition perhaps to furnish the doors, and therefore the shipper may be compelled to rely upon his own ingenuity, labor, and material. Therefore he builds the door and puts it in the car. The rule of the Interstate Commerce Commission is based upon the idea that such an opportunity as this will be utilized by the railway company and the shipper in paying and securing unjust rebates. This reasoning is based upon the assumption that men in an ordinary commercial transaction are likely to have a secret agreement, and that unlawful rebates will be collected to the special advantage of the particular shipper who builds the car doors. We simply take the view that before payment for the grain doors can be forbidden the rule must have been in force when the labor and materials for the grain doors were furnished.

[2] The plaintiff brought the action to recover for labor and material furnished to the defendant. The whole defense was that the plaintiff was engaged in interstate shipment, and furnished labor and material in connection therewith, and that the defendant was forbidden to pay such charges by rule of the Interstate Commerce Commission. A general demurrer to the answer was sustained, and judgment rendered for the plaintiff. It does not appear from the answer that the rule was in force at the time the shipments were made and the labor and material furnished. Of course, the rule could not be retroactive, and the answer therefore states no defense.

The judgment is affirmed.

SEDGWICK, J. (concurring only in result). The plaintiff brought the action to recover for labor and material furnished to the defendant. The whole defense was that the plaintiff was engaged in interstate shipment, and furnished labor and material in connection therewith, and that the defendant was forbidden to pay such charges by rule of the Interstate Commerce Commission. A general demurrer to the answer was sustained, and judgment rendered for the plaintiff. The defendant has appealed.

The rule relied upon is set out in the answer. It relates only to "grain doors to box cars." The petition counts upon lumber, labor, and nails furnished in repairing the cars of the defendant. The answer says nothing about the labor and nails, and alleges that the lumber furnished by plaintiff "was furnished for the purpose of constructing grain doors or making repairs upon certain grain

cars," without specifying that the doors were for box cars, or how much, if any, was for constructing grain doors. These allegations do not constitute a defense to plaintiff's claim. Moreover, it does not appear from the answer that the rule relied upon was in force at the time the shipments were made and the labor and material furnished. Of course, the rule could not be retroactive, and for this reason also the answer fails to state a defense.

ROSE, J., agrees with SEDGWICK, J. FAWCETT, J., concurs in this opinion.

WILKINS v. WATER & LIGHT CO. OF NEBRASKA CITY et al. (No. 16,852.)
(Supreme Court of Nebraska. Nov. 27, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 119*)—CONSTRUCTION OF TELEPHONE POLES—NEGLIGENCE.

The poles and wires of an electric light company were placed in an alley some years previous to the erection of a telephone distributing pole about 2½ feet away on adjacent private property. The telephone wires were contained in underground conduits in the form of a cable, and the cable was carried up the side of the telephone pole in a metal tube to the bottom of the cable box, which was nearly 30 feet from the ground. There was a platform on the pole 27 feet from the ground. The top of the pole was over 38 feet from the ground. The electric light poles were about 15 feet shorter than the telephone pole. The top cross-arm of the light pole carried two insulated and two uninsulated wires. The other cross-arms carried insulated wires. The bare wires were used as guard wires, and were not intended to carry electricity. The top of the cable box from which the telephone wires emerged for distribution was nearly 10 feet above the top of the light poles, and there was no opportunity for any of the wires of the telephone company to come in contact with the wires of the light company. *Held*, that these facts do not establish negligence on the part of the telephone company in placing its distributing pole in the position where it stood.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 210; Dec. Dig. § 119.*]

2. NEGLIGENCE (§ 105*)—DEFENSES—ASSUMPTION OF RISK.

The doctrine of assumption of risk arises from the relation of master and servant, and does not constitute a defense where that relation does not exist between the parties.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 172; Dec. Dig. § 105.*]

3. ELECTRICITY (§ 19*)—ACTIONS—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

The question whether an employé of a telephone company is guilty of contributory negligence in ascending a telephone pole in proximity to an uninsulated wire belonging to an electric light company is a question of fact for the jury, where reasonable minds may differ as to whether ordinary prudence justified the act.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 18.*]

4. ELECTRICITY (§ 16*)—LIABILITY FOR INJURIES—NEGLIGENCE.

Where the manager of an electric light company is informed that an uninsulated guard wire, which is strung upon poles belonging to

that company in close proximity to a telephone distributing pole upon which workmen may reasonably be expected to go, has become charged with a heavy current of electricity from contact with other wires of that company carrying a heavy voltage, it is his duty to remedy the dangerous situation as soon as practicable, and a delay of over 36 hours in remedying the defect may constitute gross negligence on the part of the light company.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 9; Dec. Dig. § 16.*]

(Additional Syllabus by Editorial Staff.)

5. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in the admission of evidence as to decedent being usually a careful man could not affect the verdict, where all the facts as to his actions were before the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

Appeal from District Court, Otoe County; Travis, Judge.

Action by Frank Wilkins, administrator of Clinton Gilman, against the Water & Light Company of Nebraska City and another. From a judgment for plaintiff, defendants appeal. Affirmed as to defendant Light Company, but reversed as to defendant Nebraska Telephone Company.

Pitzer & Hayward and Edwin Zimmerer, all of Nebraska City, for appellant Water & Light Co. of Nebraska City. R. W. Breckenridge, of Omaha, and Paul Jessen, of Nebraska City, for appellant Nebraska Telephone Co. Matthew Gering, of Plattsmouth, and John C. Watson, of Nebraska City, for appellee.

LEITTON, J. Action to recover for the death of plaintiff's intestate, Clinton Gilman. In the opinion for convenience the defendant Nebraska Telephone Company will be termed the "Telephone Company," and the defendant the Water & Light Company of Nebraska City, Neb., the "Light Company."

In the brief of the Telephone Company we find the following statement of facts: "The Water & Light Company of Nebraska City has a line of poles in a certain alley in that city along and upon which are strung two electric wires carrying a voltage of from 2,000 to 2,200 volts of electricity. These two wires are strung on the top cross-arm between two guard wires. There was also strung on these poles of the Water & Light Company a bare, uninsulated iron wire which had at one time been used as a signal wire in connection with a standpipe valve, and had been used on Sundays up to about March, 1908, for the transmission of a low-voltage of electricity, and after that it served the Water & Light Company as a guard wire to break the drops of individual telephone wires that were higher than the electric light wires. But this bare iron wire became 'crossed' or in contact with one of the high-tension wires, and thereby was unintentionally

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

charged with some of the 2,000 or more volts of electricity which was by intention carried over the two high-tension wires supplying power and light to the customers of the Water & Light Company. The poles of the Water & Light Company have been located in this alley for a long time, and on October, 1909, had become somewhat sagged and out of plumb. As a matter of fact, one of the poles in the alley already mentioned, which for convenient and distinct designation will be spoken of as electric light poles, back of a certain restaurant known as Kastner's, leaned toward a pole of the Nebraska Telephone Company which was outside of the alley and on private property, so that the bare iron wire on the electric light pole already mentioned swung and rubbed against the telephone pole, and had apparently been in contact with the telephone pole at some time, when through contact with the live electric wires it was carrying a high current of electricity, for the point of contact was plainly visible on the telephone pole. This iron wire was at a considerable distance above the ground. The telephone pole was about 30 feet high, and was used for the purpose of distributing the telephone wires to the customers of the Telephone Company in that locality. The telephone wires (which ran in an underground conduit) were carried up the side of the pole in a conduit or tube as far as the cable box. * * * The box projected over the property in which the pole was set, and not into the alley; and wires were distributed out of the cable box from the insulators at the cross-arm at the top of the pole to the places of business of the Telephone Company's patrons. The bare iron wire referred to was about 20 feet above the ground. It was not possible for any of appellant's telephone wires to come in contact with any wire of the Water & Light Company. * * * Clinton Gilman, the deceased, was an employé of the Telephone Company. He had formerly worked for the Water & Light Company, and had had some experience in working around telephone and electric light poles, and wires of both kinds. On October 4, 1909, and while working for the Telephone Company painting telephone poles, he got a shock by contact with this iron wire on the particular pole described in the testimony in the rear of Kastner's restaurant, which was the identical pole from which he fell the following Wednesday, receiving at that time the injuries which terminated his life. This wire had been cut at both ends. It was not used for the transmission of electricity at that time, and the fact that it was allowed to remain there in the situation in which Gilman found it on the afternoon of the day he received his injury created a condition which, it is claimed, was negligent as against the Water & Light Company. When this wire was charged with the electric current, it was

through contact with the electric light wire of the Water and Light Company, and not through any crossing or contact of the high-tension wires of the Water & Light Company with any of the Nebraska Telephone Company's wires, none of which were involved in the accident or the cause of it."

Plaintiff concedes that this statement of facts is correct as far as it goes. The following additional facts seem to be established by the evidence: On the afternoon of Monday, October 4, 1909, and while working for the Telephone Company painting the iron-work on this pole, Gilman received a slight shock, and was burned on the hand by touching this bare wire. He had been told that the wire was "hot" by another workman who had touched it that day when painting. This wire had become charged through coming in contact with another wire of the Light Company at a distance of a little more than a block away. Gilman, who was apparently much alarmed by the first shock, immediately reported the facts to George Bauman, the foreman of the Telephone Company, who directed him to cease working upon the pole. The foreman testifies that he immediately went to see Mr. Egan, the manager of the Light Company, and Egan promised to have the matter attended to at once or early the next morning. Egan says he promised to attend to the matter the next Sunday when there was no current on the wires. The next morning Gilman was told by the foreman of the Telephone Company of Egan's promise to make immediate repairs. The repairs were not made, and on Tuesday afternoon, October 5th, Bauman told Gilman that he had been informed by employes of the Light Company that the cross had not been cleared. Nothing further was said to Gilman about this matter. On Wednesday forenoon Gilman was engaged in trimming trees. Bauman directed him in the afternoon to resume the work of painting. Bauman testifies: "Q. What did you say to him? A. I told him to go out and follow the work he had been doing. Q. Did you tell him to go to any particular place? A. No, sir. Q. What else did you say to him? A. The last words I said to him was: 'Clint, for Christ's sake be careful.'" Gilman and John Bauman left the shop together. Nothing was said by Gilman to indicate he was going back to work on this pole. Soon afterwards Gilman climbed the pole, and some few minutes after fell to the ground enveloped in flames. He died as a result of the accident.

In substance, the petition alleges that Gilman was employed by the Telephone Company as a lineman; that he was inexperienced, and had no knowledge of the effect that contact between wires heavily charged with electricity or between such wires and metal would have; that it was his employer's duty to warn him as to the dangers incident to such work, to furnish him with a reasonably

safe place to work, to place its poles at a reasonably safe distance from the wires of the Light Company whose poles and wires were in close proximity; that it was the duty of each of the defendants to keep their poles and wires so that the same would not cross, interfere, or come in contact, to keep them properly insulated and stretched so as not to permit them to sag and become loose; that the Light Company permitted its wires to become loose so that they crossed and came in contact with the wires, poles, and cable of the Telephone Company. It ascribes similar negligence to the other defendant. It further alleges that on October 4, 1909, Gilman reported to each of the defendants that the wires were crossed and each of them promised to repair the same immediately but negligently omitted to do so, and that Gilman, relying on the promise, on the 6th day of October without any knowledge that the wire had not been repaired attempted to work on a pole of the Telephone Company; that the wires were crossed, which caused the accident; and that as a result Gilman died, leaving a widow and one minor child aged five years, who were dependent upon him for support.

The answer of each defendant pleads that the risks of the service were obvious and were understood, known to and assumed by plaintiff, and also pleads contributory negligence on his part.

We will first consider the errors assigned by the Telephone Company. The principal complaint made by this defendant is that the court erred in overruling its motion for a directed verdict for the following reasons: "(a) The testimony fails to show, and does not tend to prove, any negligence upon the part of the Nebraska Telephone Company which was the proximate cause of the injury resulting in the death of Clinton Gilman. (b) The evidence does not tend to establish why and how the injury to Clinton Gilman was received. (c) It is established that Gilman knew and appreciated the danger of his situation created by the proximity of the bare wire which was near to or abutting against the telephone pole described in the testimony and that he assumed the risk of injury therefrom. * * * (e) The ground, as alleged in the petition and stated by plaintiff's counsel in his opening statement to the jury, that defendant's foreman promised and assured Gilman that the dangerous situation of which Gilman was informed and which he reported to the foreman would be removed, is not sustained by the proof, nor does it appear in the evidence that he resumed his work relying on any promise of repair made by the Nebraska Telephone Company's foreman; but, to the contrary, he knew that the Telephone Company would not make such repair, and he knew or had reason to believe and feared that the danger still existed, and that the wire was hot." We cannot agree that the testimony does not

show why and how the injury to Gilman was received. The circumstantial evidence upon this point is sufficient, but we are of the opinion that some of the other grounds upon which the motion was predicated are well taken. We think the evidence fails to show negligence on the part of the Telephone Company in placing its distributing pole where it did. The top of the pole was 38 feet 6 inches from the ground. The bottom of the platform thereon is 27 feet from the ground, and the point on the pole opposite the loose wire is 23 feet 4 inches from the ground. The top of the cable box from which the wires emerged for distribution was nearly 10 feet above the burned place on the pole, and hence there was no opportunity for any of the wires of the Telephone Company to come in contact with the wires of the Light Company, and, in fact, such a condition did not occur. There were two cross-arms on the Light Company's pole beneath the one which carried the dangerous wire, each carrying insulated wires charged with heavy currents. There is no proof that these wires were not properly insulated opposite the pole.

Gilman knew the danger of the situation created by the charged wire which had burned him. The promise which was made to remove the danger was not made to Gilman by his employer, the Telephone Company, but it was a promise made by the manager of the Light Company to the Telephone Company and communicated to him, and there is no proof that Gilman expected or anticipated that the removal of the cross would be made by the Telephone Company, or that he resumed work upon a promise made by his foreman that the Telephone Company would remove the danger.

[1] We are convinced that it was not negligence on the part of the Telephone Company to place the pole where it did for the purpose of distributing its wires, nor was this the proximate cause of the injury. Neither is it liable for a failure to warn Gilman of the danger, since he had been told by another employé and warned by the foreman of the danger of working on this pole on account of the proximity of the charged wire. There being no negligence on the part of this defendant, the motion should have been sustained. The other errors assigned by the Telephone Company we need not consider.

Taking up the points presented in the brief of the Light Company, several matters with respect to the admission of evidence are urged as being erroneous. The first is that the plaintiff was permitted to show that, after the accident, a piece of rubber hose had been placed over the bare wire at the place of the accident, and it is argued that to admit proof of subsequent repairs made by the employer is prejudicially erroneous. Unfortunately for this contention, no such evidence is in the record. It does appear (at one place without objection) that a piece of

rubber hose had been nailed after the accident by the foreman of the Telephone Company upon the pole at a point opposite the bare wire. Since no change was made by the Light Company this could not be prejudicial as against this defendant. Moreover, the jury were carefully instructed as to how far this evidence should be considered.

[5] As to the admission of evidence as to Gilman being usually a careful man, we think this could not affect the verdict, since all the facts as to his actions were before the jury.

[4] It is next argued that the proof fails to show that the Light Company failed to perform any duty it owed to deceased, and that hence negligence on its part has not been proved. It is true that the duties of the Telephone Company and the Light Company to Gilman are not the same. It is also true that, if there had been no telephone pole in that locality, the accident would not have happened; still the Telephone Company had the right to place its pole as it did. If the Light Company had not allowed its poles to lean, and its wire to sag, and negligently allowed a dangerous current to flow through the bare wire, the accident would not have happened. The Light Company knew of the proximity of this pole with steps on each side, and with a platform and distributing box above the cross-arms and wires of the Light Company, and knew that men might be expected to work there with such tools and appliances as were needed. It owed the duty of exercising care either to insulate its wires at that point, or to see that vagrant and dangerous currents were not allowed to pass through its unused wires. *Olson v. Nebraska Telephone Co.*, 85 Neb. 331, 123 N. W. 422, 133 Am. St. Rep. 660; *Atlanta Street R. Co. v. Owings*, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798. Its manager recognized this duty by his promise to make repairs. The failure to do this was one of the proximate causes of the accident.

[2] This defendant also pleads that Gilman assumed the risks of his employment, and hence that there is no liability on its part. The Light Company owed Gilman as well as all other persons rightfully using the poles of the Telephone Company the duty of using no negligence with respect to the upkeep of its wires and poles. The legal doctrine of the assumption of risk arises from the relation of master and servant. Since Gilman was not an employé of the Light Company he assumed no risks as to the negligence of that company. Moreover, its promise to make immediate repairs had been communicated to him. This defense, therefore, is not available to the Light Company. The Light Company argues that there is no evidence that the wire was heavily charged, and that it may have carried no more than

110 volts. We cannot see that the intensity of the current is of much materiality in this connection. It is apparent that the uninsulated wire was charged with a current which might be dangerous to workmen on the poles of the Telephone Company. The circumstantial evidence seems to show that Gilman's fall was caused by the metal of the paint pail forming a short circuit with the charged wire and the metal covering of the telephone cable on the side of the pole, thus causing the sudden flashing into fire and explosion of the paint which was shown to be mineral paint containing turpentine and other highly inflammable ingredients.

[3] The question whether Gilman was guilty of contributory negligence was submitted to the jury under carefully prepared instructions. They were also permitted a view of the scene of the accident. Whether Gilman was justified in attempting to climb the pole and pass the charged wire in order to reach the platform is a question as to which reasonable minds might differ. The question is a close one, but it is peculiarly one for the jury to determine. *Lincoln Rapid Transit Co. v. Nichols*, 87 Neb. 332, 55 N. W. 872, 20 L. R. A. 853; *Cudahy Packing Co. v. Wesolowski*, 75 Neb. 787, 108 N. W. 1007; *Grimm v. Omaha Electric L. & P. Co.*, 79 Neb. 387, 112 N. W. 620. And we think there is sufficient evidence to warrant a finding for the plaintiff on this point.

The case seems to have been carefully tried and all rights of the Light Company preserved. It was submitted to the jury upon a clear and lucid statement of the law in the instructions. The only prejudicial error we find is that the motion of the Telephone Company for a directed verdict should have been sustained.

The judgment is affirmed as to the Light Company, and is reversed as to the Telephone Company.

VALPARAISO STATE BANK v. SCHWARTZ et al. (No. 16,848.)

(Supreme Court of Nebraska. Nov. 27, 1912.)

(Syllabus by the Court.)

1. CREDITORS' SUIT (§ 8*)—PROPERTY SUBJECT—CONTRACT FOR SUPPORT.

The contract of husband and wife to support his father in their family and furnish him with \$50 per year during his life is a personal contract, and the rights of the father under the contract cannot be subjected by a court of equity to the payment of a judgment against him.

[Ed. Note.—For other cases, see *Creditors' Suit*, Cent. Dig. §§ 12-41; Dec. Dig. § 8.*]

2. FRAUDULENT CONVEYANCES (§ 52*)—PROPERTY TRANSFERRED—HOMESTEAD.

In such case, if the consideration for the contract on the part of the father was the conveyance of his homestead of the value of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

\$3,000, which is exchanged for a home for the husband and wife upon which the father retains a lien to secure the performance of the contract, the father's interest in the property so conveyed to the husband and wife will not be subjected to the payment of a judgment upon an indebtedness incurred after the transfer of the property to the husband and wife.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 118-127; Dec. Dig. § 52.*]

3. HOMESTEAD (§ 13*)—PROPERTY CONSTITUTING—TENANCY IN COMMON.

The homestead of a family may be taken in property of either the husband or wife, and if their home is owned by them equally as tenants in common, and is of the value of the homestead exemption, neither can claim other real estate exempt.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 14; Dec. Dig. § 13.*]

4. FRAUDULENT CONVEYANCES (§ 52*)—PROPERTY TRANSFERRED—HOMESTEAD.

If the husband and wife own two town lots equally as tenants in common and reside on one of them as their home which is of the full value of the homestead exemption, the undivided one-half interest of the husband in the other lot will not be exempt from a judgment against him. The transfer by him of such interest to his wife without consideration, to hinder or delay his creditors, will be set aside as fraudulent.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 118-127; Dec. Dig. § 52.*]

Appeal from District Court, Saunders County; Good, Judge.

Action by the Valparaiso State Bank against Christian J. Schwartz and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

E. J. Clements, of Lincoln, for appellant. G. W. Simpson and G. H. Simpson, both of Wahoo, for appellees.

SEDGWICK, J. In August, 1909, the plaintiff recovered a judgment against the defendants, Jacob Schwartz and Christian J. Schwartz, in the county court of Saunders county, and caused a transcript of the judgment to be duly filed in the office of the clerk of the district court for said county. Execution was issued thereon and returned wholly unsatisfied, and this action was brought in the district court for Saunders county in the nature of a creditor's bill to subject the interests of the defendants in certain property to the payment of the judgment. The district court found in favor of the defendants, and dismissed the case, and the plaintiff has appealed.

In January, 1907, the defendant Jacob Schwartz, who was a widower, owned 80 acres of land in Seward county, which was his homestead, and which he had occupied as such for many years. He then conveyed this land to one Scott who was the owner of lots 14 and 15, in block 3, in the village of Valparaiso, in Saunders county, and Scott

conveyed the two lots to the defendants Christian J. Schwartz and Betty Schwartz, his wife, who took the lots as tenants in common. Christian J. Schwartz is the son of the defendant Jacob Schwartz. The consideration paid for these lots conveyed to Christian and Betty Schwartz was \$4,500. Christian and Betty Schwartz both testified that the homestead of Jacob Schwartz was exchanged for the lots and the lots given to them for supporting Jacob Schwartz during life. There was a mortgage of \$1,000 on the farm, and its actual value above the mortgage was \$3,000. Christian and Betty Schwartz paid the remaining \$1,500 for the lots. At the same time and as a part of the same transaction, Christian Schwartz and Betty Schwartz entered into a contract with Jacob Schwartz in which they agreed to "board, clothe, and furnish him with one room," and to pay him \$50 in cash each year during his natural life. This written contract gave Jacob Schwartz a lien upon the two lots as security for the performance thereof on the part of Christian and Betty Schwartz. The parties then made their home in the building upon one of these lots, in which there was also a restaurant kept by Christian and Betty Schwartz. The value of this lot and building is variously estimated by the witnesses from \$1,500 to \$2,500. From a consideration of this evidence we think the value should be found to be \$2,000. The building on the other lot was rented for a barber shop and other purposes. After incurring the indebtedness upon which the said judgment was rendered, Christian Schwartz conveyed to his wife, Betty Schwartz, his undivided one-half interest in the said lots. This conveyance is conceded to have been without consideration.

Plaintiff contends that the interest of Jacob Schwartz in the lots in question under the said contract should be subjected to the payment of the judgment against him, and that the one-half interest in the lot not occupied as a home, which was conveyed by Christian Schwartz to his wife, should also be subjected to the payment of the judgment against him. It is insisted that, as the parties have always resided together in the building upon the one lot and as Christian Schwartz is the head of the family, the defendant Jacob Schwartz has no homestead interest in the property in which he resides, and that his interest therein is therefore not exempt.

[1, 2] 1. The arrangement between Jacob Schwartz and his son and daughter-in-law is peculiarly a personal arrangement. Jacob Schwartz himself could not transfer his rights under this contract to a stranger, and clothe that stranger with the power to demand these services and a fulfillment of this contract on the part of Christian Schwartz and his wife. Under such circumstances, a court of equity will not attempt to appropri-

ate the interests of Jacob Schwartz under this contract for the benefit of his creditors. Ordinarily an order to that effect could not be enforced. There are considerations arising out of the relationship of the parties and their mutual undertakings for the benefit of each other that are wholly personal and are incompatible with the substitution of a stranger in the place of either party. See *Hilton v. Crooker*, 30 Neb. 707, 47 N. W. 3; *Zetterlund v. Texas Land & Cattle Co.*, 55 Neb. 355, 75 N. W. 860, and cases there cited. It is suggested that these reasons do not apply to the money consideration of \$50 a year, but the contract is entire and the consideration going to Jacob Schwartz under it cannot be separated. The inducement to take one's father into a family and make him a member thereof conferring and receiving reciprocal advantage from the relation may be and perhaps generally is much more than \$50 a year. It cannot be supposed that the same contract would have been made with a stranger, or that the \$50 a year for expenses any more than measures the difference between taking one's own father into the family and performing the same services for a stranger. We do not think that this contract shows such a financial advantage to Jacob Schwartz as a court of equity can appropriate to the payment of a judgment against him.

[3, 4] 2. We think the second claim of the plaintiff has more merit. When Christian Schwartz and Betty Schwartz took the title of this property and began occupying it as their home, they acquired a homestead interest in it. A homestead may be taken in the property of either husband or wife, and, as the title to this property was taken by the husband and wife in common, the homestead exemption would apply to their joint ownership, the lot which they occupied as a home being of the value of the homestead exemption. The interest of the defendant Christian Schwartz in the other lot would, as against his creditors, be no part of the homestead and would be liable for his debts. When Christian Schwartz transferred this interest in the remaining lot to his wife without consideration, the indebtedness upon which this judgment was rendered existed, and the transfer was in fraud of his creditors. Christian Schwartz furnished \$1,500 of the purchase price of the lots. He and his wife therefore obtained not more than a two-thirds part of the property from Jacob Schwartz, and, if they fail to perform their contract, should return the same to him. The district court should have subjected an undivided one-half interest in the lot not exempt to the payment of this judgment.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

DINEEN v. LANNING. (No. 16,855.)

(Supreme Court of Nebraska. Nov. 27, 1912.)

(Syllabus by the Court.)

1. DEEDS (§ 105*) — PARTIES—PARTNERSHIP.

A deed to a partnership in its firm name is not void, but vests an equitable estate in the firm for the benefit, first, of the partnership business and creditors; and, second, of the members of such partnership.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 278-291, 372-374; Dec. Dig. § 105.*]

2. PARTNERSHIP (§ 203*)—DEATH OF PARTIES —MEMBER OF PARTNERSHIP.

And where a mortgage antedating such deed is foreclosed, and in the suit for foreclosure the partnership, and all of the members thereof are made parties, and summons is served upon such members, and after such service one of the members dies, the suit does not thereby abate, but may be prosecuted to final decree against the other members as surviving partners.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 375; Dec. Dig. § 203.*]

3. PARTNERSHIP (§ 203*)—DEATH OF PARTIES —MEMBER OF PARTNERSHIP.

Nor does the fact that at the time of entering the decree plaintiff requests and obtains an entry of dismissal as to such deceased member operate as an abatement of the suit.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 375; Dec. Dig. § 203.*]

4. PARTNERSHIP (§ 219*) — ACTION—SERVICE OF SUMMONS.

Nor would the fact that the partnership, as a separate entity, had not been served with summons, affect the validity of the decree in such suit as to the equitable interest of the members of the partnership who were served. Such members would be bound by the decree, and a sale of the real estate thereunder, duly confirmed, would divest them of such interest, and the same would pass by the sheriff's deed to the purchaser at such sale.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 429-445; Dec. Dig. § 219.*]

Appeal from District Court, Box Butte County; Westover, Judge.

Action by John M. Dineen against W. H. Lanning. From a judgment for defendant, plaintiff appeals. Affirmed.

M. S. McDuffee, of Madison, for appellant.
A. W. Crites, of Chadron, for appellee.

FAWCETT, J. From a judgment of the district court for Box Butte county dismissing plaintiff's suit for a partition of the northeast quarter of section 30, township 26, range 47, west of the sixth P. M., in said county, plaintiff appeals.

On February 1, 1888, one William H. Wareham, who was the then owner of the land in controversy, his wife joining him, executed and delivered to defendant, Lanning, a mortgage upon the land. Thereafter, by mesne conveyances, the title reached one Harvey Myers, who on February 27,

1892, by warranty deed, conveyed the land to Job Hathaway & Co., subject to defendant's mortgage. The company failing to pay the taxes, the county treasurer sold the same for delinquent taxes to one Virgil Young. On October 4, 1902, Young commenced suit to foreclose his tax lien, in which suit "Job Hathaway & Co., a firm * * * composed of Job Hathaway and Emma C. J. Austin," and Job Hathaway, Emma C. J. Austin, and the present defendant, William H. Lanning, with others, were made defendants. Defendant, Lanning, filed an answer and cross-petition in that suit for a foreclosure of his mortgage. The files of the district court in that case were introduced in evidence in this. They show that due service was had upon Job Hathaway and Emma C. J. Austin, but the return of the officer does not show any attempt at a formal service upon Job Hathaway & Co., as a separate entity. The uncontradicted evidence shows that the copartnership of Job Hathaway & Co. consisted of Job Hathaway and Emma C. J. Austin, as equal partners. The decree entered in that case contained the following recital: "Be it remembered, that on this 18th day of February, 1903, this cause came on to be heard before the court, the plaintiff appearing by Wm. Mitchell, his attorney, the defendant, W. H. Lanning, appearing by W. G. Simonson, his attorney, the plaintiff asks to dismiss this case against Job Hathaway and Annie L. Hathaway, wife of Job Hathaway, a member of defendant firm Job Hathaway & Co., and wife of Job Hathaway, defendant, defendants, and same is hereby dismissed." Thereupon a default was entered against all of the other defendants named in plaintiff's petition, except defendant Lanning. The decree found the proceedings in the case to be regular; found the lien of plaintiff under his tax sale certificate to be a first lien, and the mortgage of defendant Lanning to be a second lien; decreed a foreclosure of the same, and awarded an order of sale therefor. The sale was duly advertised and made. Defendant, Lanning, was the purchaser at the sale, and upon due confirmation of the sale received the sheriff's deed for the land. At the time of entering the decree above referred to Job Hathaway was dead; his death having occurred during the interval between the service of summons and the date of the entry of the decree.

The main contentions by plaintiff for a reversal are: A copartnership as such cannot take title to real property; that the copartnership, as such, was not served with summons in the foreclosure suit; that the conveyance from Myers to Job Hathaway & Co. was a conveyance to Job Hathaway, individually, clothed with a trust in favor of the copartnership; that upon the dissolution of the copartnership Job Hathaway became

the owner of one moiety and trustee for the other moiety; that in land purchased by partners with partnership funds partners are tenants in common, unless real estate is needed for partnership purposes; that real estate belonging to a partnership, but standing in the name of one partner only, may be partitioned; that the heirs of Job Hathaway could have partitioned unless there is a good defense appearing affirmatively, and so can the appellant, who has succeeded to all rights of the heirs of Job Hathaway; that the copartnership was dissolved in 1892, and that by the recital in the decree in the foreclosure suit, above set out, the action was dismissed as to Job Hathaway, and that when he died in October, 1902, after service had been had upon him, the action abated and, never having been revived, his heirs, after his decease, were necessary parties to that action. We will not attempt to discuss the above points seriatim, but will consider them together.

[1] We do not think the deed to the copartnership was a conveyance to Job Hathaway, individually. Conceding that the deed to Job Hathaway & Co. was ineffective to lodge the legal title to the land in the copartnership (*Barber v. Crowell*, 55 Neb. 571, 75 N. W. 1109), it did vest an equitable estate in the firm (30 Cyc. 431, 432, and authorities cited in notes 42, 43).

[2] The death of Job Hathaway after service upon him and prior to the decree did not abate the suit. *Union P. R. Co. v. Metcalf*, 50 Neb. 452, 69 N. W. 961, was an action by Metcalf & Wood, a firm composed of Metcalf and Wood. On page 457 of 50 Neb., on page 962 of 69 N. W., it is said: "Finally, it was pleaded that if there was any such firm as Metcalf & Wood it had since the commencement of the action been dissolved by the death of Lafayette Metcalf, and that by reason thereof the action had abated." On page 458 of 50 Neb., on page 963 of 69 N. W., it is said: "We have quite recently held, following well-established principles, that on the death of a partner the assets and choses in action of the partnership vest in the survivor. *Lindner v. Adams County Bank*, 49 Neb. 735 [68 N. W. 1028]. It is therefore the surviving partner who has in such case a right to proceed with the action." In the syllabus we held: "That the surviving partner was already a party to the action, and that on the death of the other partner the action could properly be continued in the name of the survivor alone." The principle is the same, whether the partners are plaintiffs or defendants.

[3] The fact that plaintiff in the tax foreclosure suit, on the date the decree was entered, saw fit to dismiss his suit as to Job Hathaway, who was then dead, did not deprive the court of jurisdiction to determine all of the questions involved in that suit,

for the reason that if Job Hathaway were then dead, as the pleadings in this case show, then Emma C. J. Austin, as the sole surviving partner of Job Hathaway & Co., was vested with the equitable interest as fully and completely as she and her copartner were prior to his decease. Hence the status of the res had not been changed, and the court could proceed to determine all of the issues precisely as if the formal dismissal of Job Hathaway by plaintiff had not been made. His dismissal, therefore, did not affect the rights of either the plaintiff or cross-petitioner Lanning. In addition to this, we are inclined to think (although as the question has not been argued, we do not so decide) that the dismissal of the suit as to Job Hathaway by plaintiff operated only as a dismissal of the suit so far as plaintiff was demanding any relief against him, but did not operate as a dismissal of Job Hathaway as to the relief demanded in the cross-petition of defendant Lanning. Such a dismissal could only be made upon Lanning's motion.

[4] Even if the failure to serve the copartnership by leaving a summons at its usual place of business, with a member thereof, rendered the decree void as to the copartnership as a separate entity, it did not affect the validity of the decree as against the equitable interest of the members of the copartnership who were served. The interest of the copartnership in the land being an equitable interest, held by the firm, first for the benefit of its creditors, and second for the members of the firm, the decree bound the latter and the sale of the property under such decree foreclosed their individual interests; and the fact, if it be a fact, that the creditors of the copartnership might assail the decree, is immaterial so far as plaintiff here is concerned, for the reason that he, as the grantee of the heirs of Job Hathaway, is bound by such decree. He bases his action upon rights which he alleges he obtained from the heirs of Job Hathaway. The interest of their ancestor having been foreclosed by the decree, they had no interest which they could convey to plaintiff.

Plaintiff's suit is therefore without equity, and was properly dismissed.

Affirmed.

LUCAS et al. v. ASHLAND LIGHT, MILL & POWER CO. (No. 16,347.)

(Supreme Court of Nebraska. Nov. 27, 1912.)

(Syllabus by the Court.)

1. STATUTES (§ 123*)—TITLES—INCLUSION OF SUBJECT IN TITLE—"MILLS."

The title of the act of 1873 (Gen. St. 1873, c. 44; Comp. St. 1911, c. 57), "An act relating to mills and milldams," is sufficiently broad to admit of legislation in regard to mills of all

kinds that are of public utility and having "machinery to be propelled by water."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 176-183; Dec. Dig. § 123.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4506-4508.]

2. TITLE OF STATUTE—NATURE OF MILLS.

Whether the provisions of that act extend to mills such as "saw, carding, or fulling mills," when wholly private in their nature, quære.

3. EMINENT DOMAIN (§ 67*)—EXTENT OF RIGHT—PUBLIC USE.

Whether an undertaking is for the benefit of the people at large, and should be regarded as of public utility, must necessarily be largely within the discretion of the Legislature to determine, and, unless it is clearly private in its nature, the court will not interfere with this legislative discretion.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 165-167; Dec. Dig. § 67.*]

4. EMINENT DOMAIN (§ 85*)—EXTENT OF RIGHT—PUBLIC USE.

The use of water power to generate electricity to supply a city and its inhabitants with light and power is a public use, and the act should be construed to apply in such case.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 80; Dec. Dig. § 85.*]

5. EMINENT DOMAIN (§ 823*)—NATURE OF RIGHT—CHANGE OF USE.

When the right of flowage of private lands has been acquired under the ad quod damnum act for a public purpose, if the use of that right is changed to an entirely different and private purpose, it will amount to an abandonment of the right, but a change from one public use to another, which is within the purview of the act, will not amount to an abandonment of the right.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 860-864; Dec. Dig. § 823.*]

6. EMINENT DOMAIN (§ 276*)—REMEDIES OF OWNERS—NATURE AND FORM.

Owners of riparian lands which are injured by flowage, and were not included in the original ad quod damnum proceedings, may proceed under section 14 of the act. Gen. St. 1873, c. 44; Comp. St. 1911, c. 57. After the dam has been built at great expense and the mill has been in operation for many years, they cannot maintain an action in equity to abate the dam as a nuisance or to restrain the use thereof until their alleged damages are adjusted.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 774; Dec. Dig. § 276.*]

7. EMINENT DOMAIN (§ 271*)—REMEDIES OF OWNERS—DAMAGES.

In an action in equity by the owners of riparian lands to enjoin the use of the water power and remove the dam as a nuisance, and for general equitable relief, the trial court should adjust the rights of the several parties, and, if the injunction is refused, should allow plaintiffs such damages as they are entitled to.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 725-736, 741; Dec. Dig. § 271.*]

8. EMINENT DOMAIN (§ 802*)—REMEDIES OF OWNERS—DAMAGES.

In such action, plaintiffs, whose lands were not included in the original ad quod damnum proceedings, should be allowed such damages as are caused by maintaining the dam; and those whose lands were included in the original proceedings should be allowed such damages, if any, as the new and additional use of

the dam and power cause to their lands over and above the damage caused by the dam and the use thereof as allowed in the original proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 815, 819; Dec. Dig. § 302.*]

Rose and Fawcett, JJ., dissenting.

Appeal from District Court, Saunders County; Corcoran, Judge.

Action by William Lucas and others against the Ashland Light, Mill & Power Company. From a judgment for defendant, plaintiffs appeal. Reversed in part and remanded.

John J. Sullivan, of Omaha, and Louis Lightner, of Columbus, for appellants. Hainer & Smith, of Lincoln, and G. W. Simpson and H. Gilkeson, both of Wahoo, for appellee.

SEDGWICK, J. In 1873 Oscar M. Carter prosecuted proceedings in ad quod damnum in the district court for Saunders county, and in the following year obtained a judgment in that action, establishing his right to erect and maintain a dam across Wahoo creek on certain lands then owned by him near the town of Ashland, in said county. This dam by the judgment was not to be maintained more than 15 feet high above low-water mark, and damages were allowed to the owners of certain riparian lands which it was found would be injured by raising the water to that height. This defendant succeeds to these rights by mesne conveyances. The petition in ad quod damnum showed that the "petitioner is erecting a grist mill on his said land and is constructing a dam across said Wahoo creek * * * and is excavating a mill race for his said mill," and prayed "that he may have leave to proceed to the construction of his said improvements." The order of the court recited that the petitioner had asked "for leave to build and continue in his milldam at the point described in his said petition." The jury by their verdict found that "by reason of construction and continuance of the milldam built 15 feet high above low-water mark (the defendants, naming them, would be damaged in certain amounts specified), and * * * that the said flouring mill erected by the plaintiff will be of public utility." This verdict was approved by the court, and it was ordered, among other things, that "the plaintiff be and is hereby authorized to build and continue his said mill and milldam as prayed in his said petition." Mr. Carter thereupon built a small mill and erected a dam, and afterwards other dams which appear to have been unsubstantial and of a temporary nature. In 1889 a substantial dam was begun, which was completed in the following year. This dam was built at considerable expense. Many

car loads of rock were used, and this dam has continued in service and has proved to be a substantial and suitable structure. Prior to the erection of this dam, it would seem that the power had been used principally, if not entirely, for grinding grain. In 1890 electrical machinery was installed, and the power was used for furnishing electric lights for the city of Ashland and its inhabitants. In May, 1907, the mill and a large part of the machinery were destroyed by fire, and the owners of the property immediately rebuilt the building and power house, and installed new machinery therein. Since that time the power has been used for generating electricity for the city of Ashland and its inhabitants. In December, 1907, these plaintiffs began this action in the district court for Saunders county, alleging that they were owners of riparian lands damaged by the maintenance of the defendant's dam and asking that the dam be "adjudged to be unlawful and a nuisance, and that it be abated and the defendant perpetually enjoined from maintaining it or any other dam on Wahoo creek, whereby said lands or any of them may be flooded," and for general equitable relief.

The plaintiffs also alleged that the dam was being maintained at a greater height than allowed by the ad quod damnum proceedings, and asked for an injunction restraining the defendants from so maintaining the dam. A temporary restraining order was issued restraining the defendant from raising or maintaining the dam above the top of the solid masonry thereof by means of flashboards, or otherwise. The defendants answered, alleging special matters in defense, which will be stated, so far as may be necessary, in the discussion of the questions of law and fact presented in the briefs. Upon the trial the court found generally in favor of the defendant, and dismissed the plaintiffs' proceedings. The plaintiffs have appealed.

The plaintiffs insist that the dam is not now being devoted to a public use, and that "an easement for a particular purpose ceases when the purpose no longer exists," and that, "in any event, the dam can only be maintained 15 feet above actual low-water mark"; that the dam has been substantially raised above the prescribed limits by use of "flashboards," which, in effect, added something like two feet of height to the dam. It is also insisted that some of the plaintiffs in this case are the owners of riparian lands which were not included in the ad quod damnum proceedings, and which are injured by this dam, and that such plaintiffs are entitled to relief, although others are not found to be so. The case is an important one and some of the difficult questions presented are without precedent in this state. A reargument was allowed, and we have

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

had the assistance of a thorough and able presentation of the case from both points of view.

[1] 1. The principal discussion has been in regard to the nature of the rights conferred in ad quod damnum proceedings, and in that connection, also, in regard to the limitations placed upon the Legislature by the Constitution. The Constitution has placed certain limitations upon each of the three departments of government. Whether an attempted act of legislation is beyond its power is a question of law. The Constitution makes it the duty of this court to determine questions of law that arise in litigation before it, and, when an act of the Legislature is drawn in question as beyond its power, we cannot avoid the determination of the question so presented. The courts have no doubt in some instances interfered unjustifiably with legislation. This power should be carefully guarded and judiciously used, avoiding any tendency to restrict legislation to the limits that the judges think are beneficial and desirable. This, of course, the courts have no power to do. In all questions of doubt the Legislature should determine the matter. When there is substantial and reasonable doubt, the act of the Legislature must be upheld. Two objections are urged against the constitutionality of the act. The first is that the title of the act is not broad enough to admit of legislation concerning "machinery to be propelled by water," and that, therefore, that clause in the first section of the act has no force. The title of the act is, "An act relating to mills and milldams." Gen. St. 1873, c. 44. If we consider the word "mill" in its original and first meaning, there is no doubt that it would not include "machinery to be propelled by water," unless that machinery was to be used in grinding; the word "mill" originally meaning to grind or make fine. This word has, however, been used for many years, and has now acquired a variety of uses. Webster's Unabridged Dictionary, after defining the word "mill," uses this language: "In modern uses the term 'mill' includes various other machines or combinations of machinery * * * to some of which the term manufactory or factory is also applied." And in the New International Dictionary this statement is changed, and the fifth definition of the word "mill" is: "A building or collection of buildings with machinery by which the processes of manufacturing are carried on." The Standard Dictionary gives, among others, the following definitions: "(2) Any one of various kinds of machines that transform raw material by other processes than grinding into some other form; as, a sawmill; planing-mill. * * * (5) An establishment for reducing ores by a process other than smelting. An ironworks where the metal in the cruder forms is converted into merchant iron. (6) A building fitted up with the machinery requisite for a factory; as, a cotton-mill; woolen-mill.

* * * (10) (Slang.) A pugilistic combat; set-to." And it is stated that "mills are named from their action on the substance operated upon, and from the material or substance that they operate upon or prepare for use," citing between 40 and 50 kinds of mills. In Colorado their Constitution (art. 2, § 14) provides that private property might be taken for private use without the consent of the owner "for private ways of necessity, and * * * for reservoirs, drains, flumes or ditches, on or across the lands of others, for agriculture, mining, milling, domestic, or sanitary purposes," and the Supreme Court of that state held that, under the provision of the Constitution, land could be condemned to carry water to operate an electric light plant. The court held: "The term 'milling,' as used in the Constitution, is synonymous with the word 'manufacturing,' and an electric light plant is a manufacturing establishment." *Lamborn v. Bell*, 18 Colo. 346, 32 Pac. 989, 20 L. R. A. 241. Our constitutional provision, that the subject of legislation must be expressed in the title of the act, is supposed to be to prevent inserting foreign matters in pending bills and so securing ill-considered legislation. "An act relating to mills and milldams" is a comprehensive title. It permits of legislation regarding any kind of mill that uses "machinery to be propelled by water." We think this objection cannot be sustained.

The second constitutional objection which the plaintiffs urge against the construction of the statute contended for by the defendants is that the Legislature has no power to condemn private property for private use. The ad quod damnum act involves the exercise of the right of eminent domain, and it is contended that to generate electricity to be furnished to a city and its inhabitants is not a public use, and beyond the power of the Legislature to authorize the damaging of private property for such purpose, and therefore to make such use of the right obtained by ad quod damnum is to abandon the right which was originally given and was within the power of the Legislature. The Massachusetts court, construing the statutes of that state, appears to have held the provisions of the milldam act extend to mills for mechanical and manufacturing purposes, as well as to those intended to serve the public for a stipulated toll, and this appears not to violate the fourteenth amendment of the federal Constitution. *Otis Co. v. Ludlow Mfg. Co.*, 201 U. S. 140, 26 Sup. Ct. 353, 50 L. Ed. 696. We do not find it necessary to determine or discuss this question.

Is the use that is being made of this power a public use? There is an interesting discussion of this question in 3 *Farnham, Waters and Water Rights*. The author severely criticises the decisions of several courts, and especially the Supreme Court of Massachusetts. He does not agree with that court in upholding the constitutionality of acts which

allow the flowage of lands for the purpose of constructing private mills, and says: "The only thing that will justify such a taking is the intention to use the power for the direct benefit of the public, as by the erection and operation of a public mill, where every one will have a right to have his work done upon payment of a toll, and which will always be under control of the Legislature." Section 697. In discussing the question how far a water power can be taken under the power of eminent domain for the purpose of generating electricity, this author says: "If the electricity generated is to be subject to the common use of all who apply for it upon making reasonable compensation, it is more nearly a public use than is any other connected with the generation of power." Section 697b. The Supreme Court of Minnesota has decided that "the generation of electricity by water power for distribution and sale to the general public on equal terms, subject to governmental control, is a public enterprise, and property so used is devoted to public use." *Minnesota Canal & Power Co. v. Koochiching Co.*, 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638, 7 Ann. Cas. 1182. It was said by the Supreme Court of Vermont, in *Re Barre Water Co.*, 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195: "But to say what a public use is with sufficient comprehensiveness and accuracy to meet the exigencies of all cases is, to say the least, difficult. Nor is it easier to define the limit of legislative power in respect of the right of eminent domain. This power must have some degree of elasticity, that it may be exercised to meet the demands of new conditions and improvements, and the ever varying and constantly increasing necessities of an advancing civilization. The circumstances and requirements of the particular case and the practice of other states and governments where constitutional limitation is placed on legislative action in this respect must be our guides in determining what is and what is not a public use. It is sometimes easier to say what is not than to say what is." In *Traver v. Merrick County*, 14 Neb. 327, 15 N. W. 690, 45 Am. St. Rep. 111, this court quoted from the Massachusetts statute and the decisions of that court apparently with approval, and it was held that bonds given in aid of a water mill were valid. It appears from the syllabus in the case, and perhaps from some of the expressions in the opinion, that the mill in question was a public mill, intended to grind for toll, but this is not treated in the opinion as necessarily a controlling matter. The case has been cited by text-writers as following the Massachusetts rule. 15 Cyc. 598. In the later case of *Getchell v. Benton*, 30 Neb. 870, 47 N. W. 468, it is held that a beet sugar manufactory, which does not manufacture sugar from beets for toll, although propelled by water power, is not within legislative control by virtue of any

law of this state, and is not a work of internal improvement. The opinion seems to put this holding upon the ground that it is not a work of public utility. Whether an undertaking is for the benefit of the people at large, and is so general in its nature that it should be regarded as a public utility, must necessarily be within the discretion of the Legislature to determine, and, unless it is clearly private in its nature, the courts will not interfere with this legislative discretion. Under such circumstances, it becomes a question of ascertaining the intention of the lawmakers.

[4] The evidence shows that this defendant is using this power to furnish the city of Ashland and its inhabitants with electricity for lighting and power purposes. It was organized for that purpose. The law requires it to furnish all applicants upon equal terms. Its business, including its rates, are subject to legislative regulation. This would seem to be a public use.

[3] 2. It is contended that the statute cannot be construed to authorize this use of the right obtained by *ad quod damnum* proceedings. The language of the first section of the act is a sufficient answer to this objection. "If any person, desiring to erect a dam across any water course for the purpose of building a water grist, saw, carding, or fulling mill, or of erecting any machinery to be propelled by water * * * he may file a petition," etc. Comp. St. 1911, c. 57, § 1. The last Legislature enacted a statute providing that cities and villages can acquire milldam sites for municipal purposes. Laws 1911, c. 83. This is a legislative construction that such use of the power is a public use, and clearly contemplates that rights of flowage acquired by *ad quod damnum* proceedings may be used for such purposes. Unless this is true, the act in its most common application would be unconstitutional.

[6] 3. It is said that "an easement for a particular purpose ceases when the purpose no longer exists," and *Gross v. Jones*, 85 Neb. 77, 122 N. W. 681, 32 L. R. A. (N. S.) 47, is cited as supporting this proposition. In that case the principal question determined was whether the dam and the power generated thereby had been abandoned. It is assumed in the opinion that to maintain the dam and millpond for the purpose of furnishing ice would not be such a use of the right acquired as to prevent the loss of the right by abandonment for nonuser. It may be conceded that, having obtained the right of flowage of these lands for a specified public purpose, it cannot be devoted to an entirely different and private purpose, and an attempt to do so would be an abandonment of the right obtained. The question is, What must be regarded as a different purpose within the meaning of this rule? In *Chicago & E. I. R. Co. v. Clapp*, 201 Ill. 418, 66 N. E. 223, the Supreme Court of that state held: "Where a

railroad company has ceased to operate a branch to a coal mine after the mine was exhausted, had taken up the tracks and nearly all the ties, removed all the crossing signs and all the cattle guards but two or three, taken out the switch ties and bridge timbers, allowed the right of way to grow up with weeds, and failed to keep the fences in repair, it was proper to submit to the jury whether there was an intention on its part to abandon the branch." And the court in the opinion stated the law as follows: "When a corporation, in the exercise of the right of eminent domain, acquires for a public purpose a mere easement in land, its right and title to the property so acquired are dependent upon the use of the property for public purposes, and when such public use becomes impossible, or is abandoned, its right to hold the land ceases, and the property reverts to its original owner." There must be necessarily some substantial basis upon which to determine the character of the purpose for which the right is used. The right obtained in this case was to raise the dam to a given height for milling purposes. A change from the exclusive grinding of wheat into flour to the grinding of corn, barley, and other grains might be in some sense applying the power to a different purpose, but clearly not within the meaning of the limitation that we are considering. One who objected to such a change of the purpose to which the power was applied should suggest some substantial basis for such a distinction. *Hathaway v. Mitchell*, 34 Mich. 164. See, also, note 67 L. R. A. 390. We have seen that the Legislature has in the most solemn form authorized the application of rights so acquired to municipal purposes. The change is from one public use to another, and not a change from a public to a private use. The present use of the power is not such a change from that authorized by the ad quod damnum proceedings as to amount to an abandonment and justify the destruction of the property. The owners of property included in the ad quod damnum proceedings should be allowed to recover from defendants all damages which their property has sustained by the new use of the water power, if any, over and above the damages caused by the use authorized by the ad quod damnum proceedings.

[6] 4. It is urged that some of these plaintiffs were not parties to the ad quod damnum proceedings, and their lands which are injuriously affected by the flowage were not included in those proceedings, and that the trial court therefore erred in not granting such plaintiffs any relief. The fourteenth section of the act authorizes any one whose land is overflowed or injured by the maintenance of a milldam to begin proceedings under the act. Perhaps the court intended to indicate in *Kyner v. Upstill*, 29 Neb. 768, 46 N. W. 281, that he might maintain an

action for damages. This would seem to be in harmony with the holdings in *Chicago, B. & Q. R. Co. v. Englehart*, 57 Neb. 444, 77 N. W. 1092, *Blakeley v. Chicago, K. & N. R. Co.*, 25 Neb. 207, 40 N. W. 956, and *Bronson v. Albion Telephone Co.*, 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426, 2 Ann. Cas. 639. He could not maintain an action to enjoin the use of the dam, and abate the same as a nuisance after so long acquiescence under the circumstances in this case. If lands not included in the ad quod damnum proceedings are damaged by defendant's dam and the use thereof, the owners of such land should be allowed to recover such damages.

[7] 5. The plaintiffs contend that the evidence establishes that the defendant's dam is more than 15 feet above low-water mark, and that the use of flashboards raises the water to a greater height than is permitted by the rights obtained by the defendant's grantors. They do not attempt any analysis of the evidence, but they allege that the defendant's recital of the evidence upon these points is incomplete and unfair. A large number of witnesses were examined, and the bill of exceptions is quite bulky, presenting some conflict in the testimony. It does not seem advisable to enter upon a discussion of this evidence. It seems to support the conclusions reached by the trial court. The contention of the defendant that the plaintiffs and all parties interested have consented to the use of these flashboards, and so are now estopped to complain, does not seem to be quite consistent with the position that the defendant has taken in urging that the use of these flashboards has not raised the water above the prescribed limit. The defendant does not seem to be in a position to insist upon any greater rights than those acquired through the ad quod damnum proceedings. The judgment in this case is without prejudice to a future action if it should be found that the defendant is exceeding those rights.

[9] The writer would have affirmed the judgment of the trial court as rendered, but upon consultation we concluded that the trial court, having jurisdiction of the matter, should have retained the action for all purposes, and should have allowed the plaintiffs whose lands were not included in the ad quod damnum proceedings to recover their damages, and the plaintiffs whose lands were included in the ad quod damnum proceedings to recover such damages, if any, to the lands as were caused by the new and additional use of the dam and water power.

The judgment of the district court dissolving the injunction is affirmed, and the judgment is in other respects modified, and the cause remanded to the district court, with instructions to allow the parties to amend their pleadings, if so advised, and take further evidence, if necessary, and de-

termine the plaintiff's damages as indicated in this opinion.

Reversed in part and remanded.

REESE, C. J., not sitting.

HAMER, J. (concurring). I agree in the conclusion reached by Judge SEDGWICK that the dam should not be destroyed, but I only partly agree to the things said in the main opinion, and I wish to give my understanding of what I conceive to be the principle which should be applied. Flour may be manufactured by an aggregation of capital applied to the development of water power and machinery. A private person may not manufacture flour for his own use because of lack of capital and lack of machinery. The manufacture of flour by private persons or corporations for commercial purposes would seem to be a private use for a public purpose. When each person who comes to mill pays for his grinding by a toll taken from the grist, the mill is then a gristmill. This was the old method. It has been in a very large degree, perhaps entirely, superseded by the method of barter and exchange; that is, the man who comes to mill brings a load of wheat and takes away a certain amount of flour which he receives in exchange for the wheat. This would seem to be the method in vogue at the present time. We have outgrown the ways of our grandfathers, and, according to the standard which existed in earlier times, the flouring mill of to-day is a commercial enterprise for a commercial use in which the public is interested because the public demands that the flour shall be manufactured and placed upon the market where it may be purchased for the general use of the people, as nearly everybody uses flour.

The thing that justifies the taking of the land and submerging it by water is the creation of a water power to be used in the interest of the public in the conduct of an enterprise to manufacture flour. The mill is for the benefit of the public, and it matters not if the old method of taking tolls out of the grists has been superseded by the new method of exchanging so many bushels of wheat for so many sacks of flour. When the wheat is exchanged for the flour, that is a matter in which the public is interested, although the actual grinding of the flour is a private enterprise conducted by the miller. It is a public utility because it is a necessity to the public, and the creation and maintenance of the power which creates the flour in order that the public may purchase it is clearly a public utility. The actual manufacturing of the flour is a private enterprise, although the flour when manufactured is for the public use. Is there any serious distinction between the manufacture of flour for the use of the public and the generation of electricity for the use of the public? Do we deceive

ourselves with words when we call the manufacture of flour for the public a private enterprise because it is conducted by private capital? And is the generation of electricity by private capital for public use forbidden because the capital used in developing electricity is private capital? Is it the way the thing is manufactured that determines whether it is for the public use, and whether the business is a public utility, or is it the necessity of the thing that is manufactured for the public? May it not be said that, because the public demand the use of the flour and also demand the use of electricity, the manufacture of the flour and the generation of the electricity are both public utilities? In Massachusetts all sorts of mills are treated as public utilities. The rule adopted in Massachusetts consults the welfare and benefit of the public. The millstreams are there lined with cotton factories, woolen factories and shoe factories, and, while these enterprises are conducted by private capital, the right to dam up the streams and to utilize the power in these various manufactories is for the betterment of the whole people. These occupations give employment to thousands of people. They permit the investment of millions of dollars. These enterprises are held to be public utilities because of the great public interest in them and because of the great public benefit received by the people.

Section 13 of the Bill of Rights of the Constitution of 1866 provides: "The property of no person shall be taken for public use without just compensation therefor." The foregoing declaration of rights was in force when the property in question was taken. The Constitution itself does not specify a particular use as the manufacture of flour alone or corn meal or feed or lumber, but it is just the taking of the property for "public use." The provision of the Constitution of 1866 was followed by section 21 of the Bill of Rights in the Constitution of 1875, and that section contemplates the taking or damaging of property for "public use," and does not provide that after the property is taken for public use that it shall be used for any special purpose. Chapter 57, Comp. St. 1911, contains the original section as it is now amended. This section contemplates erecting "a dam across any water course for the purpose of building a water grist, saw, carding, or fulling mill, or of erecting any machinery to be propelled by water." Section 1. The section appears to have been intended to cover the things known when the act was passed, and then seemingly as an afterthought there is added "erecting any machinery to be propelled by water." I am unable to conceive of language broader than that employed in the section, and there is seemingly nothing in the Constitutions of 1866 and 1875 to forbid the use of the language employed. It is apparent from this language that the makers of the Constitution intended to compel the

payment to the private owner of the amount of his damages before the property could be taken for public use. As that has been done once and the property has actually been taken for public use, is there any reason why there should be a second payment when the private owner has been paid once for the taking of his property? Is not that enough? To meet the new conditions of advancing civilization, should the courts say that the narrowest possible construction should be put upon the language used, and that the Legislature intended that the power once acquired could only be used for the least number of purposes to which it might be applied? Is it not better that the courts should be liberal in the construction of statutes like this? Is it not better that there should be a degree of elasticity in limiting the legislative power in respect to the right of eminent domain? Section 15, c. 57, Comp. St. 1911, contemplates the bringing of a petition to obtain leave to build a mill or milldam. By this language it would seem that the Legislature intended that there might be either a mill or milldam or both. "Milldam" would seem to be a general term by the construction of which power is obtained and not necessarily to run any particular kind of mill. Section 24 of the same act seems to contemplate a "milldam belonging to any mill or machinery." It authorizes the owner of the mill to enter upon lands contiguous for the purpose of repairing embankments to prevent the water from breaking through in case of flood. Section 27 of the same act makes those mills which grind for toll public mills. Section 33 of the same chapter provides for changing a public mill into a private mill. This may be done by posting a notice on the mill and in two other conspicuous places within the county, and by reimbursing those people who have assisted in the erection of the public mill. It is not, however, contemplated that because the mill becomes a private mill the milldam shall be abandoned or destroyed.

It will be seen by this that the Legislature did not contemplate the exclusive application of the power to a mill grinding for toll. Putting it the other way, the Legislature contemplated the ad quod damnum proceedings and the payment of damages and the use of the power obtained for the running of a private mill. It is undoubtedly a public utility to build a dam and a mill for the manufacture of flour. To build such a mill and to manufacture flour is a private enterprise conducted with a public purpose. It may be a private enterprise to generate electricity for the use of the public with which the public may light its streets and buildings. Is the use of the power to manufacture flour more a private enterprise than the use of the power to generate electricity? By virtue of the ad quod damnum proceedings, the plaintiffs in this case sold to the original proprietors the right to flow their lands. Their lands were

originally overflowed for the purpose of furnishing power to run the mill. The thing that the plaintiffs parted with was the right of the petitioner in the ad quod damnum proceedings to overflow their lands along the creek in consideration of the money which he paid to them for that privilege. They have been paid once. Can it be of any serious moment to them whether their lands are overflowed for the purpose of furnishing power to a mill that grinds flour which the public purchases and uses, or a mill or machinery that provides something else which the public need and purchase and use? The people who own these lands agreed that their lands might be submerged, and they were submerged. They are only submerged yet.

It is contended with ingenuity and force that only the things can be done which were in contemplation of the original jury that sat in the ad quod damnum proceedings. The theory is that there can be no growth or change. The theory is that it must be a "gristmill," and that it cannot be anything else. It would hardly seem that this contention is fair in view of the provisions of the Constitutions and in view of the provisions of the statute. The words used, "erecting any machinery to be propelled by water," certainly suggest that it was in contemplation of the Legislature that something else might be done in addition to running a flour mill. If this be not so, then is there any purpose in using the words "erecting any machinery to be propelled by water"? If the right was granted for the purpose of using power, what difference can it make to the grantors whether the power is applied to one purpose or another? They have consented that the water may be backed up the stream, and that their lands may be submerged so that the power may be created. What difference can it make to them whether the power is applied to one legitimate purpose or another? They have recognized the principle that the power may be created and applied. When the power is created and has been applied, why should they seek to destroy it?

In view of the able opinion delivered by Judge SEDGWICK, I hesitate to write anything in addition, and I only do so because of the fact that the main opinion does not seem to me to fully give the reasons which I believe should be given to justify the conclusion reached.

LETTON, J. I concur in the opinion subject to the principles of law announced in *Znamanacek v. Jelinek*, 69 Neb. 110, 95 N. W. 28, 111 Am. St. Rep. 533; *Arterburn v. Beard*, 86 Neb. 733, 126 N. W. 379.

ROSE, J. (dissenting). As I see the merits of this case, the affirmance of that part of the lower court's decree denying an injunction to prevent defendant from overflowing the lands of plaintiffs deprives them of con-

stitutional rights, and leaves portions of their real estate in control of a trespasser. Entertaining this view, I am compelled to dissent. In giving the reasons by which I am guided I prefer to state in my own way what I find in the record and the questions presented for determination.

The relief sought by plaintiffs is a perpetual injunction to prevent the maintaining of a dam across Wahoo creek near Ashland. They are upper riparian proprietors whose lands are damaged by overflowing water. Defendant is a corporation. It maintains the dam and uses the water power of the stream to generate electricity for lighting purposes in the city of Ashland, Neb., and in Pacific Junction, Iowa. The trial court dismissed the case after a trial on the merits, and plaintiffs appealed to this court for the equitable relief denied below.

One of the grounds urged by plaintiffs for an injunction may be stated in this form: Defendant never had any right to maintain the dam except for the purpose of operating a gristmill; the right has been lost by abandonment or nonuser, and defendant is unlawfully overflowing the lands of plaintiffs for the purpose of running an electric light plant. On the other hand, defendant, through an easement of flowage acquired by condemnation, asserts the right to use the water power to propel the machinery installed in its power house. In determining the merits of these contentions the privilege under which defendant assumes to act must be traced to its source. By a judgment rendered May 28, 1874, in *ad quod damnum* proceedings in the district court of Saunders county, Oscar M. Carter was authorized to construct and maintain a dam on the present site and he promptly exercised the right thus granted. It is stipulated by the parties that defendant, through mesne conveyances, succeeded to the rights of Carter. On the face of his petition in the condemnation proceeding, the enterprise originally undertaken, in addition to the construction and maintenance of the dam, was the operation of a "gristmill." In performing their duties the jury, selected under the writ of *ad quod damnum*, among other things, found: "Said 'flouring mill' erected by the plaintiff will be of public utility." And it was adjudged by the court "that the plaintiff be and is hereby authorized to build and continue his said mill and milldam as prayed in his said petition." On the right thus acquired defendant attempted to justify the overflowing of plaintiffs' lands to generate electricity for lighting purposes alone. Is that position tenable? A finding by a jury that the mill will be of public utility is by statute made an essential part of the proceeding to condemn lands under the act of 1873. The finding of the jury was limited to the public utility of a flouring mill, and the decree of the court in the *ad quod damnum* proceeding went no further. Is defendant now lawfully exercising the

original easement of flowage? Since 1896 no flour has been manufactured, and one of defendant's officers admitted on the witness stand that the establishment could not during that period be considered a "flouring mill." The original building was old and dilapidated in 1904. During the fall of that year and the ensuing year, it was torn down, and the flouring machinery removed. The old structure was replaced by a power house in which electrical machinery for a lighting plant was installed. The flouring machinery was nearly all sold, and there was no attempt to replace it. A corn burr, however, was retained, and there is convincing proof that defendant intended to use it for the purpose of preserving the original easement of flowage, instead of operating a gristmill in good faith. The remaining operations of the gristmill, so far as disclosed, consisted of grinding a sack of grain for one customer, five or ten bushels for another, and a car load for the owner of the mill. The plant was destroyed by fire May 8, 1907, and since that date no grain of any kind has been ground, nor has defendant installed any machinery for that purpose. The electric power house, however, was promptly restored and equipped for the utilization of both steam and water power. The truth of the record is that electric lighting is the soul of defendant's enterprise. To that business it has devoted its capital and energy. Neglect, nonuser, and abandonment of the milling enterprise, for which alone the right of flowage was established, are shown with equal certainty. It abandoned its gristmill and lost the incidental easement of flowage. It is settled law in this state that the condemnation did not vest in Carter or in his grantee the right of flowage in perpetuity. What he procured was the mere privilege of exercising his easement during its existence. *Gross v. Jones*, 85 Neb. 77, 122 N. W. 681, 32 L. R. A. (N. S.) 47. The original easement of flowage for gristmill purposes, therefore, cannot be successfully interposed as a defense to the action of plaintiffs to enjoin defendant from overflowing their lands for the sole purpose of utilizing the water power for an electric light plant. After abandonment of the particular use for which a mere easement in land is established, it cannot be lawfully devoted to a different purpose without payment of additional compensation or recondemnation. *Heard v. City of Brooklyn*, 60 N. Y. 242; *Campbell v. City of Kansas City*, 102 Mo. 328, 13 S. W. 897, 10 L. R. A. 593; *Pittsburgh & L. E. R. Co. v. Bruce*, 102 Pa. 23. Having lost the original easement by abandonment and nonuser, having made no effort to condemn the lands of plaintiffs for the new and different purpose of obtaining water power to generate electricity, and having failed to pay for, or otherwise acquire, an additional right of servitude, defendant is a trespasser, and should be enjoined as such.

The deduction I make from the facts and the law cannot be avoided by merely pointing to the milldam act of 1873, and asserting that its title is broad enough to include legislation relating to the procuring of easements of flowage for the purpose of generating electricity by water power, that the purpose named is a public one, and that the act authorizes such easements. If the title is as broad as the description of the majority, and if the act contains provisions for the condemnation of land for an easement of flowage for the purpose of generating electricity by water power, defendant is still a trespasser for the following reasons: It abandoned the mill and lost its incidental right of flowage. It did not in a new ad quod damnum proceeding under the act of 1873, or in any other manner acquire the right to use plaintiffs' lands for electric lighting purposes. It did not pay for such different and additional use. No jury ever found, as required by the milldam act, that the new enterprise is a public utility. No court ever so held in an ad quod damnum proceeding. The original judgment rendered in 1874 did not extend to the new enterprise. Damages therefor were never estimated or paid. The lighting of cities by electricity was unknown in 1873, when the milldam act was passed. An easement of flowage to supply an electrical plant with power was not at that time in the mind of the Legislature or of the jury or of the court or of the parties. In the ad quod damnum proceeding, therefore, Carter acquired no electric lighting easement. The method of appropriating private property for a public purpose is defined by statute. There is no pretense that defendant pursued the statutory method after it lost its original easement. If defendant had a right under the act of 1873 to acquire a new easement applicable to the new use, without the consent of plaintiffs, that right has never been exercised. Since defendant never acquired an electric lighting easement under the milldam act, I decline to express an opinion on the breadth of its title or on the scope of its provisions.

I do not find in the record any substantial proof of the acquiescence suggested by the majority as a reason for denying equitable relief. The power house and other improvements were constructed on land to which defendant owned the fee. The power plant is equipped to utilize both water power and steam power. By the latter the lighting enterprise can be carried on without the right of flowage. Improvements for utilizing steam power did not concern plaintiffs. As long as the gristmill was operated in good faith, plaintiffs were not injured by the maintenance of the dam at the lawful height. Defendant at all times claimed the right to maintain the dam under the original easement. It now asserts that right in this court. It kept a corn burr for the ostensible pur-

pose of exercising its gristmill easement, while its real business was electric lighting. Under the circumstances of this case, plaintiffs should not be deprived of their property, because they did not discover, at an earlier date, contrary to the continuous assertions of defendant, that the gristmill had been abandoned. If I apprehend the import of the majority opinion, cases are cited to sustain the proposition that a chancellor should not inconvenience the public or interfere with a public utility by granting an injunction which would interrupt public service. It may be conceded that a landowner who knowingly permits a railroad company to build and operate a highway on his land, or a telephone or telegraph company to proceed under like circumstances, is sometimes limited to the remedy for damages. That rule, however, has no application here. Defendant's power house is equipped to utilize as much steam power as water power. The granting of an injunction would not interfere with the public service, but would permit plaintiffs to control their own property until such a time as defendant acquires by lawful means the easement it now exercises in violation of law.

FAWCETT, J., concurs in the dissenting opinion.

SCHENCK et al. v. STERLING ENGINEERING & CONST. CO.

(Supreme Court of Wisconsin. Dec. 10, 1912.)

Dissenting opinion.

For majority opinion, see 138 N. W. 637.

WINSLOW, C. J. (dissenting). I respectfully dissent in this case, because I think too limited a construction has been given to section 2610, Stats., a construction which is not in harmony with the fair meaning of the words or the unquestioned intent of the Code makers. That intent was to make it possible for the trial court to grasp all branches of a single controversy in one action and dispose of it, thus saving time and money, and making it impossible for contradictory and unjust results to be reached by the verdicts of independent juries in separate actions. So the section says that other parties shall be brought in "when a complete determination of the controversy cannot be had" without their presence. The opinion of the court goes upon the theory that there are two controversies here, one between the defendant and the plaintiffs and one between the defendant and Feasley, which are separate and distinct, and that the presence of Feasley is not necessary to a complete determination of the controversy between the plaintiffs and the defendant.

The reasoning is faultless if the court's construction of the word "controversy" be

right. Here is where it seems to me the court goes astray. A broad and liberal meaning should be given to the word if it be necessary to give effect to the paramount purpose of the act. The facts are that a piece of land belonging to the defendant was sold, and that both the plaintiffs and Feasley claim to have procured the purchaser, while the defendant denies that either of them procured the purchaser. So far as the defendant is concerned, both claims are part of one fundamental question or controversy, namely: Did any person procure the purchaser? While this controversy is three sided, as many controversies are, it is in its largest aspect one, namely: Was the sale in question a sale procured by agents, and, if so, by which agent? Giving the word "controversy" a reasonably liberal construction, it seems to me to cover the case, and to require that both parties claiming the credit of the single sale be brought before the court in this action in order that there may be no possibility of a duplication of liability. The fact that the action is an action at law interposes no obstacle, in view of the fact that nothing in the nature of equitable relief is involved in either claim, but simply claims for money judgments which are peculiarly within the province of actions at law, and can be easily disposed of in a single trial and by a single verdict.

SIEBECKER, J., concurs in the foregoing opinion.

WUNDER v. TURNER.

(Supreme Court of Minnesota. Dec. 13, 1912.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 104*)—SPECIFIC PERFORMANCE (§§ 120, 121*)—CONTRACT—EXISTENCE—FINDINGS—NEWLY DISCOVERED EVIDENCE.

Action to enforce specific performance of an alleged oral contract with reference to an invention relating to reinforced concrete construction and the assignment of an interest in patents to be obtained therefor. The trial court found that in fact the contract was never made. *Held*, that the evidence sustains the court's finding of fact; that it did not err in sustaining an objection to offered evidence of prior art patents, nor in denying plaintiff's motion for a new trial on the ground of newly discovered evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218-220, 228; Dec. Dig. § 104.* Specific Performance, Cent. Dig. §§ 384-386, 387-395; Dec. Dig. §§ 120, 121.*]

(Additional Syllabus by Editorial Staff.)

2. TRIAL (§ 395*)—TRIAL TO COURT—FINDINGS—EVIDENTIARY FACTS.

The trial court, being required only to find ultimate facts, did not err in refusing to make requested findings of fact which were strictly evidentiary.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 927-934, 939; Dec. Dig. § 395.*]

3. APPEAL AND ERROR (§ 996*)—REVIEW—FINDINGS BY TRIAL JUDGE.

The rule that findings of fact by a trial judge are entitled to the same weight on appeal as the verdict of a jury, and will not be reversed unless they are manifestly contrary to the evidence, applies to inferences from undisputed facts, to documentary evidence, and to cases submitted on depositions, or on the report of a referee appointed to take and return the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3908-3911; Dec. Dig. § 996.*]

Appeal from District Court, Hennepin County; Wilbur F. Booth, Judge.

Suit by John Wunder against Claude A. P. Turner. From an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

A. C. Paul, of Minneapolis (Emanuel Cohen and A. B. Jackson, both of Minneapolis, of counsel), for appellant. Frank R. Hubachek and Frank W. Booth, both of Minneapolis, and Charles J. Williamson, of Washington, D. C., for respondent.

START C. J. This is an action in equity brought by the plaintiff in the district court of the county of Hennepin to enforce the specific performance of an alleged oral contract with reference to an invention useful in connection with reinforced concrete construction and patents to be obtained covering such invention. The complaint alleged the making of the oral contract, and that it was thereby agreed that the defendant should invent and devise a method of construction which would provide a reinforced concrete structure having flat slab floors, thereby dispensing with the use of girders or beams, for supporting the floors; that patents upon the construction were to be obtained in the defendant's name, the plaintiff paying the cost of securing them; that defendant and plaintiff should share equally in all profits to be derived from such patents, or any one thereof; and, further, that defendant should, on plaintiff's request, assign to him an undivided one-half interest in each of the inventions and patents; that the invention was made and patents secured therefor in defendant's name; and, further, that the alleged contract was broken by the defendant. The plaintiff prayed for judgment for an accounting of profits, and that the defendant assign to him an undivided one-half interest in the patents. The answer denied the making of the alleged oral contract.

The cause was tried by the court without a jury. At the close of the evidence the argument of the cause was postponed until a later date; but the judge was then unable, by reason of his illness, to hear arguments and finish the trial. Thereupon, by agreement of the parties, the case was argued and submitted, upon the evidence, which was typewritten, to another judge of the court. Hon. Wilbur F. Booth, hereafter referred to

for convenience as the trial judge. He found, with other facts not here material, the ultimate facts following: "The alleged contract set out in plaintiff's complaint was never in fact entered into, and * * * no contract relating to said alleged invention, or relating to any patent issued or to be issued therefor, either in the United States or elsewhere, was ever made or entered into between the parties to this suit." As a conclusion of law it was found that the defendant was entitled to judgment in his favor on the merits. Thereupon the plaintiff made a motion for additional findings of fact, which was denied. He also made a motion for a new trial, which was denied, and the plaintiff appealed from the order denying it.

[2] The plaintiff's assignments of error in this court raise the questions whether the ultimate and controlling finding of fact, which we have quoted, is sustained by the evidence, and whether the court erred in its rulings as to the admission of evidence, or in denying the motion for a new trial on the ground of newly discovered evidence. The plaintiff also assigned 12 other alleged errors, all relating to the refusal of the trial court to make, as requested, 12 additional findings of strictly evidentiary facts—for example, whether the defendant testified falsely in material particulars in respect to a certain exhibit. A trial court is only required to find ultimate facts, and in this case it rightly refused to make the findings requested. *Butler v. Bohn*, 31 Minn. 325, 17 N. W. 862.

[3] The principal question presented by the record for our decision is whether the finding of fact, that the alleged oral contract was never made, is sustained by the evidence. The plaintiff urges in this connection that inasmuch as the evidence was not taken by the judge who made the finding, and the case was submitted to him on the report of the stenographer of the evidence in the form of a typewritten copy thereof, he was in no better position than this court to arrive at the real weight of the evidence and the merits of the respective contentions; hence the rule applicable ordinarily to cases of this kind should be relaxed. The finding was made by the trial court in the exercise of its original jurisdiction; but the jurisdiction of this court in reviewing the finding is purely appellate, and we must determine the question of law whether the finding in question is sustained by the evidence within the rule, which is this: Findings of fact by a trial judge are entitled to the same weight as the verdict of a jury, and will not be reversed on appeal, unless they are manifestly contrary to the evidence. The rule applies to inferences from undisputed facts, to documentary evidence, and to cases submitted on depositions, or on the report of a referee appointed to take and return the evidence. *Dunnell's Digest*, § 411; *Cornish Co. v. Antrim Association*, 82 Minn. 215, 84 N. W. 724; *Treat*

v. Kellogg, 104 Minn. 54, 115 N. W. 947; *Northwestern Co. v. Conn. Co.*, 105 Minn. 483, 117 N. W. 825.

[1] This rule does not relieve the appellate court from the duty of giving the evidence in every case a careful examination and consideration as a basis for its determination of the question whether the evidence fairly brings the case within the rule. We have so examined and considered the evidence in this case, aided by the able memoranda of the learned trial judge and the exhaustive and efficient briefs of respective counsel, and have reached the conclusion that the evidence sustains the finding in question. The evidence is voluminous, filling some 2,000 pages of the printed record, which makes this case a proper one for the application of the rule that it is not the duty of an appellate court to demonstrate, by a review of the evidence, the correctness of findings of fact by the trial court. *Carver v. Bagley*, 79 Minn. 114, 81 N. W. 757.

The next contention of the plaintiff is that the court erred in sustaining defendant's objection to the admission of evidence of prior art patents offered by him. A consideration of this claim requires a brief reference to the conflict in the testimony of the respective parties. They were alone at the time plaintiff claims that the oral contract alleged in the complaint was made. The plaintiff testified to conversations between the parties tending to show that the contract was made as claimed by him. The defendant testified to the effect that no contract, relating to the invention and the patents therefor, known as the flat slab or mushroom construction, alleged in the complaint, was ever made. There was, therefore, no direct evidence as to whether the alleged contract was made by the parties, except their respective testimony, which was in this respect radically conflicting. Such being the case, evidence of collateral facts having a direct tendency to show that the testimony of the one was more reasonable and credible than that of the other was admissible, subject to the exercise of a fair discretion of the trial court in the premises. *Philips v. Mo*, 91 Minn. 311, 97 N. W. 969.

A great volume of evidence of such collateral facts was offered by the respective parties in the case, and rightly received, in view of the importance of this case and the sharp conflict in the direct evidence relevant to the issue whether the alleged oral contract was ever made. It is claimed by the plaintiff that it was reversible error to sustain the defendant's objection to the admission of evidence of the prior art patents, for the reason, with others of like kind, that it was necessary for the court to understand exactly the patentable features of the flat slab or mushroom invention at the time the alleged oral contract was made, in order to apply the testimony to the oral contract.

We are unable to concur in this view of the offered evidence, for the scope or validity of the invention and patent therefor which it is claimed constituted the subject-matter of the alleged contract, or the scope or character of prior art patents, has but little, if any, relevancy to the question whether the oral contract was made as plaintiff claimed. In any event we are of the opinion that in the last analysis the question in this connection is whether the court abused its discretion in rejecting the evidence. We hold that the ruling of the court in sustaining the objection was not reversible error.

The last contention of the plaintiff is that the trial court erred in not granting a new trial on the ground of newly discovered evidence. The alleged newly discovered evidence related to collateral facts. It was cumulative, and some of it newly remembered. We are of the opinion that the trial court did not abuse its discretion in denying the motion for a new trial on the ground of newly discovered evidence.

Order affirmed.

GALBRAITH v. WHITAKER et al.

(Supreme Court of Minnesota. Nov. 29, 1912.)

(Syllabus by the Court.)

1. BANKRUPTCY (§ 166*)—PREFERENCES—PROCURING OR SUFFERING JUDGMENT.

Under section 60, subds. "a" and "b" of the Bankruptcy Act as amended (Act June 25, 1910, c. 412, § 11, subds. "a," "b," 36 Stat. 842 [U. S. Comp. St. Supp. 1911, p. 1506]), where an insolvent debtor procures or suffers a judgment to be entered against himself within four months before the filing of the petition in bankruptcy, and the judgment then operates as a preference, the preference is not voidable by the trustee, unless it appears that the creditor, at the time the judgment was entered, had reasonable cause to believe that the enforcement of the judgment would effect a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-258; Dec. Dig. § 166.*]

2. BANKRUPTCY (§ 166*)—PREFERENCES—TRANSFER OF PROPERTY.

Where, under the same sections, an insolvent debtor makes a transfer of any of his property, and the effect is a preference of any creditor, such preference is voidable by the trustee, and the amount thereof may be recovered, if it appears that the creditor receiving the preference had, at the time of the transfer, reasonable cause to believe that such transfer would effect a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-258; Dec. Dig. § 166.*]

3. BANKRUPTCY (§ 163*)—PREFERENCES—"TRANSFER"—EXECUTION SALE.

Where a creditor procures a judgment against an insolvent debtor, and thereafter procures execution thereon to be issued and levied on personal property of the debtor, and at the execution sale such property is sold and the proceeds of the sale paid to the creditor in satisfaction of the debt, it is held that such execution sale and payment of the proceeds thereof constitutes a transfer of his property by the

debtor, within the meaning of those words as used in the act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. § 163.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7065-7070.]

4. BANKRUPTCY (§ 166*)—PREFERENCES—REASONABLE CAUSE TO BELIEVE—INTENT.

In determining whether the creditor had reasonable cause to believe a transfer by the debtor would effect a preference, facts which are sufficient to put an ordinarily prudent man upon inquiry as to his debtor's solvency charge such person with all the knowledge he could have acquired by the exercise of reasonable diligence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-258; Dec. Dig. § 166.*]

5. BANKRUPTCY (§ 303*) — PREFERENCES — QUESTION FOR JURY.

The evidence did not conclusively show that defendants, at the time of a transfer by their insolvent debtor of his property, had reasonable cause to believe that such transfer would effect a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

(Additional Syllabus by Editorial Staff.)

6. BANKRUPTCY (§ 166*)—PREFERENCES—STATUTORY PROVISION—"THEN."

In Bankr. Act, § 60, subds. "a," "b," as amended by Act June 25, 1910, c. 412, § 11, subds. "a," "b," 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1506), providing that if at the time of transfer by an insolvent debtor or entry of judgment against him, the judgment or transfer "then" operates as a preference, and the person receiving it shall then have reasonable cause to believe that it would effect a preference, etc., the word "then" refers to the time the judgment was entered.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-258; Dec. Dig. § 166.*]

For other definitions, see Words and Phrases, vol. 8, pp. 694-694b, 7815.]

Appeal from District Court, Ramsey County; Frederick N. Dickson, Judge.

Action by John P. Galbraith, as trustee in bankruptcy of the Washington County Co-operative Company, against J. L. Whitaker and another, copartners as John B. Hoxie & Co. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, plaintiff appeals. Reversed, and new trial granted.

A. E. Boyesen and H. H. Flor, both of St. Paul, for appellant. T. P. McNamara, of St. Paul, for respondents.

BUNN, J. This action was brought by plaintiff as trustee in bankruptcy of the Washington County Co-operative Company to recover an unlawful preference alleged to have been received by defendants. The issues were tried and submitted to a jury, which returned a verdict in favor of defendants. Plaintiff appeals from an order denying his motion for judgment notwithstanding the verdict or for a new trial.

The assignments of error raise the questions of whether the trial court erred in refusing to direct a verdict for plaintiff, or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in its instructions to the jury, and whether the verdict is sustained by the evidence. The uncontroverted facts are as follows:

Defendants are in the commission business in St. Paul, and sold merchandise to the Washington County Co-operative Company on credit. This corporation was engaged in the retail business at Stillwater. On August 22, 1911, being unable to pay its debts, it executed an assignment of all its property for the benefit of creditors to John P. Galbraith. On August 8, 1911, defendants commenced an action in the Stillwater municipal court against the Co-operative Company to recover the sum of \$220.60, the amount of their claim for merchandise sold. An answer was interposed, and a trial resulted in a judgment against the Co-operative Company in the full amount of the claim. The judgment was entered September 16, 1911. Execution was issued on the judgment, and levied on September 19, 1911, on certain personal property in the possession of the assignee, which was, on October 3, 1911, sold on the execution sale for \$254.70. This amount was applied by the sheriff to pay defendant's judgment and costs. On September 20, 1911, one day after the levy, and two weeks before the execution sale, other creditors of the Co-operative Company filed a petition against it for adjudication in bankruptcy. On October 6, 1911, the company was adjudicated bankrupt. Plaintiff was appointed and qualified as trustee.

Plaintiff's claim is that defendants had reasonable cause to believe, at the date the judgment was entered and at the date of the levy and sale on execution, that the company was insolvent, and that the judgment and the sale constituted a preference, which is voidable by the trustee under section 60, subdivisions "a" and "b," of the Bankruptcy Act. This section is as follows:

Sec. 60, subd. "a": "A person shall be deemed to have given a preference if, being insolvent, he has within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

Sec. 60, subd. "b": "If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of

the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent, and the judgment or transfer then operate as a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value for such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

From this section, it is seen that a preference is recoverable by a trustee when the following elements exist: (1) The insolvency of the debtor. (2) A preference obtained within four months prior to the filing of the petition in bankruptcy. (3) The debtor has suffered or procured a judgment to be entered against himself, or had made a transfer of any of his property, which operates as a preference. (4) The person receiving such preference, or to be benefited thereby, or his agent acting therein, has reasonable cause to believe that the enforcement of such judgment or transfer will effect a preference.

That the debtor was insolvent at the time the judgment was entered, and at all times thereafter, was established. That a preference was obtained by defendants within four months prior to the filing of the petition is also clear. The trial court held that the debtor had "suffered or procured a judgment to be entered against himself," and that the only issue for the jury was as to whether defendants had, at the time the judgment was entered, reasonable cause to believe that the enforcement of the judgment would effect a preference. The case was submitted to the jury on this theory. Plaintiff contends that the execution sale and payment of the proceeds to the creditor constituted a "transfer," within the meaning of that term as used in the section quoted, and that if defendants, at the time of such sale, had reasonable cause to believe that such transfer would effect a preference, plaintiff is entitled to recover the amount thereof in this action.

[8] If the trial court was correct in holding that the debtor had "suffered or procured" this judgment to be entered, and if there was no "transfer" by the debtor of his property, it was probably correct to instruct the jury that it must be shown that defendants, at the time the judgment was entered, had reasonable cause to believe the enforcement of the judgment would create a preference. The law is somewhat blind on this point. It says in substance: "If at the time of the transfer, or of the entry of judgment,

the bankrupt be insolvent, and the judgment or transfer *then* operate as a preference, and the person receiving it, or to be benefited thereby, shall *then* have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable," etc. The word "*then*" apparently refers to the time the judgment was entered. It would seem that a creditor may enforce a judgment entered at a time when he has not cause to believe the debtor is insolvent, though at the time he enforces it he has such cause to believe or has actual knowledge that the enforcement of his judgment will give him a preference. But this may have been the intention of the act.

[1] It is only judgments which the debtor "suffers or procures" to be entered that are condemned by the law. As to other judgments, or as to judgments entered when the creditor has not reasonable cause to believe the debtor is insolvent, there is no preference by their enforcement that is voidable, unless it can be held that a sale of the debtor's property on an execution under any such judgment, and the payment to the creditor of his claim out of the proceeds of such sale, constitutes a transfer of his property by the debtor.

[2] If it can be so held, it is clear under the terms of the act that if the creditor has, at the time of such transfer, reasonable cause to believe that it will effect a preference, the trustee may recover the amount thereof. The importance of this question in the case at bar is clear, because of the evidence of facts which came to the knowledge of defendants after the judgment was entered and before the execution sale.

[3] The law deals with transfers by the insolvent of his property, as well as with judgments suffered or procured to be entered against him. A judgment is not a lien on personal property of the debtor. It is only the enforcement of such judgment that can possibly create a preference. The mere entry of the judgment cannot. Then, as before stated, judgments against the insolvent which he does not "suffer or procure" to be entered are not within the act. These considerations are helpful in determining the intent of Congress in using the word "transfer." The law seems inefficient to accomplish the result clearly intended—the prevention of preferences—unless it can be held that a sale on execution of personal property of the insolvent and the payment from the proceeds of the creditor's claim, is a "transfer." That there is a "transfer" of property when it is sold and delivered to a purchaser at the sale, or when the proceeds of the sale are turned over to the creditor, is quite apparent. The property sold is transferred to the purchaser; the proceeds of the sale are transferred to the creditor. Prior to the sale, the property be-

longs to the debtor; after the sale the proceeds belong to the debtor, until the sheriff pays therefrom the creditors' claim. They then belong to the creditor. Strictly speaking, the transfer is not made by the debtor; it is not his voluntary act. But the word "transfer," as used in the act, has a wide meaning. It is defined in the act itself as follows: "Transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." It has been held that the words "as payment, pledge, mortgage, gift or security" are illustrative only, and do not qualify the language "sale and every other mode of disposing of or parting with property." In re Stege, 116 Fed. 342, 54 C. C. A. 116.

The Supreme Court of the United States, in Carson, Pirie, Scott & Co. v. Chicago Title Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, in discussing the above definition of a transfer, said: "All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished; i. e., 'a preference enabling a creditor to obtain a greater percentage of his debt than any other creditors of the same class.'" It seems entirely reasonable to say, and we hold, that the sale on execution and payment of the proceeds to the creditor was a "means and manner by which property passed from the ownership and possession of the debtor," and that it constituted a transfer from and by the debtor of his property within the meaning of the act, as construed in the cases cited. Any other holding would permit just what the act is designed to prevent—a preference of one creditor over the others. A judgment could be procured at a time when the creditor has no reason to believe the debtor is insolvent. And then, when the creditor learns of the insolvency of his debtor, and of threatened bankruptcy proceedings, or the actual institution of such proceedings, he may collect his claim, without fear of an action to recover the amount of the preference so obtained. We cannot believe that this result was ever intended.

In view of this conclusion, it is clear that the case was submitted to the jury under an erroneous theory, and under wrong instructions on the pivotal question at issue. Exceptions were taken to the instructions given, and to the refusal to give requested instructions which stated the law as we hold it to be. There must, therefore, be a new trial.

[4] We are asked to order judgment in

favor of plaintiff, on the ground that the evidence conclusively shows that defendants, at the time of the execution sale, had reasonable cause to believe it would effect a preference. The evidence tending to show reasonable grounds for such belief on the part of defendants is to our minds quite persuasive. The rule is that facts which are sufficient to put an ordinarily prudent man upon inquiry as to his debtor's solvency charge such person, when they come to his notice, with all the knowledge he could have acquired by the exercise of reasonable diligence. *McElvain v. Hardesty*, 169 Fed. 31, 94 C. C. A. 399.

[5] Defendants found it necessary to bring suit against their debtor, a customer in active business, to collect an indebtedness incurred in the ordinary course of business, to procure a judgment and enforce it by execution. Their Mr. Whitaker admits that he was asked by Mr. Bristol and Mr. Rodgers, acting for plaintiff, at the time or shortly after the judgment was entered, not to levy execution, and was told that, if they did "execute the judgment," bankruptcy proceedings would be begun. Mr. Whitaker communicated this threat to his attorney in Stillwater, but took no steps to ascertain if the insolvency necessary to justify bankruptcy proceedings in fact existed. The petition in bankruptcy was filed one day after the levy, and two weeks before the sale. It is strange, indeed, if St. Paul creditors of the debtor proceeded against did not learn of the filing of the petition. There was evidence, however, which perhaps would justify submitting this question to the jury. On the whole we do not think it is a case where judgment absolute should be ordered.

Order reversed, and new trial granted.

SCHMEISSER v. ALBINSON.

(Supreme Court of Minnesota. Nov. 29, 1912.)

(Syllabus by the Court.)

1. FRAUD (§ 58*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action for damages on the ground that defendant had made false representations regarding the condition, soil, and previous crop of a farm traded by defendant to plaintiff, *held*, that the evidence sustains the verdict.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

2. FRAUD (§ 65*)—ACTIONS—INSTRUCTIONS.

There was no error in an instruction to the jury that representations made to the wife of plaintiff would be the same as if made to the plaintiff, if they found that plaintiff was a man that listened to and was governed by his wife's directions, and that the defendant knew or had reason to believe such to be the situation.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 72-74; Dec. Dig. § 65.*]

3. TRIAL (§ 237*)—ACTIONS—INSTRUCTIONS.

In actions to recover damages for fraud and deceit, an instruction that plaintiff is en-

titled to recover upon establishing the cause alleged by a fair preponderance of the evidence *held* correct.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 542, 548-551; Dec. Dig. § 237.*]

4. RECEPTION AND EXCLUSION OF TESTIMONY—NO ERROR.

No prejudicial error appears in the rulings of the court on the reception or exclusion of testimony at the trial.

Appeal from District Court, Nobles County; L. S. Nelson, Judge.

Action by George Schmeisser against John A. Albinson. From an order denying a new trial after verdict for plaintiff, defendant appeals. Affirmed.

George W. Wilson, of Worthington, and E. H. Canfield, of Luverne, for appellant. J. A. Town, of Worthington, for respondent.

HOLT, J. Action in deceit for damages resulting from misrepresentations as to the soil and condition of a farm traded to plaintiff by defendant. Defendant appeals from the order denying a new trial after verdict for plaintiff.

The errors assigned here relate to the sufficiency of the evidence to support the verdict, to the charge of the court, and to rulings upon the admissibility of testimony. Plaintiff, a farmer, owned and resided on a 160-acre farm in Nobles county, Minn. The defendant was in the real estate and lumber business at Worthington, Minn., and owned a 320-acre farm in Sherburne county. A mortgage of \$2,500 was on plaintiff's farm, and one of \$4,000 on defendant's. For some weeks prior to February 12, 1908, negotiations had been pending for an exchange, and during that time defendant took plaintiff to Sherburne county to see the farm. On the date mentioned the trade was made and the deeds delivered, subject to the stated mortgages.

[1] The false representations alleged to have been made by defendant, and on the strength of which plaintiff claims he traded farms, relate to the market value of the Sherburne county farm, its soil, its crop the year previous, and the condition of the buildings. The claim of the plaintiff was that defendant represented the farm to be of the value of \$29.50 per acre, that the soil was black loam on a clay subsoil, that the one-third of the previous year's crop netted defendant \$900, and that the buildings were in good repair. We may dismiss the misrepresentation as to the market value as being mere trade talk, for apparently that issue was not submitted to the jury. The evidence of plaintiff was to the effect that the farm was represented to be good farming land, that defendant the year previous realized \$900 for his share of the crop, that the soil was black loam on a clay subsoil,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

or, as plaintiff expressed it, black clay soil, and that the buildings were in good condition. If these representations were made, there is no doubt that they were false in this respect; that the farm was run down, so that only poor crops could be raised; that, instead of receiving \$900 for his one-third share of the crop the year previous, defendant received nothing, and permitted the tenant to retain the insignificant crop then raised; that the soil, instead of being black clay, had scarcely a trace of clay anywhere, and was a light, sandy loam; and that the roofs of certain of the buildings were out of repair.

Of course, defendant's contention was that he never represented the soil other than sandy, said nothing about the previous crop, or the buildings, but that plaintiff examined carefully both buildings and soil, the ground being then bare, and after such examination made the deal. Plaintiff contended that there were some two or more inches of newly fallen snow when he got to the farm, so that the condition of the roofs of the buildings or the character of the soil could not be ascertained. He also says defendant supplied him with liquor on the way out to look at the farm, and when once there hurried him away. A reading of the printed record gives the impression that plaintiff knows the English language imperfectly and is rather dull of comprehension; that his experience and mental capacity is such that he might readily fall a victim to the plausible and designing. At any rate, his wife, who ought to know him, seemed to entertain well-grounded fears on that score, and so stated to defendant. Defendant, on the other hand, appears to have been an experienced business man, keen, alert, and coherent in his testimony, and apparently able to appreciate its effect on the issues involved. In any business deal he would undoubtedly have a great advantage over plaintiff, were he disposed to use it to plaintiff's loss. Notwithstanding that defendant's testimony appears plausible on the printed page, the jury found that of plaintiff and his wife the more credible. The trial court, who had the opportunity of observing the witnesses and their manner of testifying, considered the verdict righteous. We have read the record with care, and find no valid reason for holding that the evidence fails to sustain the verdict by a fair preponderance.

[2] It appeared that defendant talked over the proposed trade with both the plaintiff and his wife on more than one occasion before it was made. After the husband had been to see defendant's farm, and before the deeds were passed, the wife saw defendant alone, and stated that she was afraid the defendant would cheat or beat plaintiff, that defendant then said his land was good, clay soil, and that if her husband "don't do that

deal it is her fault, because he got a chance to get a good deal." When asked to state all that was said, she answered: "Well, I say that if he do that deal we take it on your word, after your statement, and not on account of him being up there and look after the land, because there was snow on the ground, and if it is so good as you say we come up to-morrow and make the papers, and Albinson say, 'You find it better than what I stated to you, and I am sure you will like yourself up there.'" The next day the deeds were exchanged. Other parts of the evidence also contained suggestions that the wife was brighter and less confiding than her husband, and probably was at the helm. The court in this respect said to the jury: "I instruct you on that point that if you find from the evidence that the plaintiff was a man that listened to and was governed by his wife's directions, and that defendant knew or had reason to believe that, any statement made to the plaintiff or his wife, or to either of them, would be the same as if it had been made to the plaintiff." The defendant challenges this instruction as being without basis in the evidence. To us it seems otherwise. Apart from the momentous occasion to this husband and wife, trading off the farm which gave the family the only shelter and livelihood it had for another to serve the same purpose, it is but natural that both should take a keen and united interest therein and exert an influence upon each other. Add to that the manifest inequality of mental make-up between the wife and husband, and we fail to see wherein the instruction was not both appropriate and correct.

[3] The defendant also assigns as error the refusal to instruct that the burden was on plaintiff to prove the alleged misrepresentations by clear and satisfactory evidence. The court did instruct thus on that proposition: "In determining these questions you are instructed that fraud is never presumed, but must always be proven by clear and satisfactory evidence. In this case the burden of proving the alleged fraudulent representations by a fair preponderance of evidence is upon the plaintiff. The evidence in support of the alleged fraudulent representations must outweigh the opposing evidence." The rule is general that in actions to set aside and annul a written instrument on the ground that it was procured by fraud the evidence must be clear and strong. *Jumiska v. Andrews*, 87 Minn. 515, 92 N. W. 470; *Dart v. Minn. Loan & Trust Co.*, 74 Minn. 426, 77 N. W. 288; *Oxford v. Nichols*, 57 Minn. 206, 58 N. W. 865; *Maxfield v. Schwartz*, 45 Minn. 150, 47 N. W. 448, 10 L. R. A. 606; *McCall v. Bushnell*, 41 Minn. 37, 42 N. W. 545. But we think that in actions founded on fraud and deceit, where no formal written instrument is assailed, the rule is established in this state that a fair preponderance of the evidence will warrant a finding

in favor of the litigant, upon whom is the burden of proof. Of course, the one accused of fraud and deception has always the benefit of the presumption of honest and fair conduct, so that his adversary, in order to prevail, must adduce testimony not only to bear down this presumption, but such other evidence as the one accused of fraud may offer in denial of the charge. That such is the holding of this court appears from *Martin v. Hill*, 41 Minn. 337, 43 N. W. 337, and in *Berkey v. Judd*, 22 Minn. 287, where it is said "that fraud is never to be presumed, but must be proved, yet this rule does not require direct, positive proof in all cases, but is satisfied if the facts and circumstances surrounding the alleged fraudulent transaction are such as reasonably point to the conclusion that a fraud was intended and actually perpetrated; and where such facts and circumstances exist, their force and effect in determining the question is a matter peculiarly within the province of the referee to settle and decide."

Where the issue of fraud is submitted to a jury, it is within their province to draw conclusions from facts established by a fair preponderance of the evidence. That the profession understand that in ordinary actions for fraud and deceit a fair preponderance of the evidence establishing the charge is sufficient to warrant a recovery may be inferred from the fact that many cases have come to this court wherein instructions of that tenor have been given to the jury without objection, and Dunnell's Minnesota Digest, note 8339, states the law to the same effect. We see no reason to depart from this rule. Those bent on overreaching others by fraud and deceit usually are proficient in planning and carrying out the scheme, so as to give the false representations the semblance of truth, and also to circumvent responsibility for the wrong. Clear and satisfactory evidence in such cases is, in the nature of things, almost impossible to produce, if we consider the versatility and unscrupulousness of one guilty of planned deceit to fabricate and present a plausible story on the witness stand. *Stocks v. Scott*, 188 Ill. 286,[†] which defendant places reliance on, states the rule to be that fair preponderance of the evidence is all that is required to establish fraud. See, also, note to *Lepley v. Anderson*, 33 L. R. A. (N. S.) 836, where, on page 837, the cases holding the same as we are cited.

The rulings on the introduction of evidence assigned as error we do not feel called upon to discuss, because counsel, neither in the brief nor in the oral argument, pointed out or suggested wherein error lay, and upon such examination as we have been able to give these rulings we find none that appear wrong or prejudicial to defendant.

The order must therefore be affirmed.

OPPENHEIM et al. v. FIREMAN'S FUND INS. CO.

(Supreme Court of Minnesota. Nov. 29, 1912.)

(Syllabus by the Court.)

1. INSURANCE (§ 500*)—AMOUNT OF LOSS—VALUED POLICY.

Where the coinsurance clause permitted by Rev. Laws 1905, § 1642, as amended by Gen. Laws 1907, c. 446 (Rev. Laws Supp. 1909, § 1642), is attached to a policy of fire insurance, and the insured maintains insurance on the building to the amount which he is by such clause required to carry, in case of a total loss the insurable value as stated in the policy, and not the actual value at the time of the fire, is the basis of determining the amount of recovery on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1275, 1276; Dec. Dig. § 500.*]

2. INSURANCE (§ 668*)—ACTIONS ON POLICIES—QUESTION FOR JURY.

In this case the question of whether the loss was total or partial was, under the evidence, one of fact for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.*]

3. INSURANCE (§ 500*)—AMOUNT OF LOSS—VALUED POLICY.

It is only where a loss on buildings is total that the insurable value as stated in the policy forms the basis of determining the amount of a recovery. Where the loss is partial, the insured is entitled to recover the actual amount of his loss, and this cannot be based on the insurable value.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1275, 1276; Dec. Dig. § 500.*]

4. INSURANCE (§ 612*) — ADJUSTMENT OF LOSS—NECESSITY FOR ARBITRATION.

If the actual loss is proved to be greater than the amount of the insurance, a reference to arbitrators is not a condition precedent to recovery; but if the actual loss is less than the amount of the insurance, such reference is a condition precedent to recovery.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1520-1528; Dec. Dig. § 612.*]

(Additional Syllabus by Editorial Staff.)

5. INSURANCE (§ 504*) — "CONCURRENT INSURANCE"—"COINSURANCE."

There is a wide distinction between "co-insurance" and "concurrent insurance"; the latter term being used to designate insurance placed in other companies covering the same risk, while there is no "coinsurance" where the insured does not bear a proportion of the risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1285-1290; Dec. Dig. § 504.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1247, 1391, 1392.]

Appeal from District Court, Ramsey County; Frederick N. Dickson, Judge.

Action by Josie Oppenheim and others against the Fireman's Fund Insurance Company. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appeals. Reversed, and new trial granted.

Morphy, Ewing & Bradford, of St. Paul, for appellant. M. D. Munn, of St. Paul, for respondents.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

PHILIP E. BROWN, J. This is an action on a policy of fire insurance. At the close of the testimony the trial court directed a verdict for the plaintiffs. The defendant moved for judgment notwithstanding the verdict or for a new trial, and from an order denying this motion appealed to this court.

The policy sued on was issued upon a building in St. Paul owned by the plaintiffs, was for \$5,000, and was one of six policies identical in form, making a total insurance of \$20,000. While these policies were in force a fire occurred, which damaged or practically destroyed the building. The plaintiffs furnished proofs of loss, claiming a total loss. The defendant insisted that the loss was not total, and demanded that the question of the amount of the loss and damages be referred to referees, as provided in the policy in case of a disagreement upon such question. The plaintiffs refused to comply with this demand, and, the defendant refusing to pay, brought this action as for a total loss, and in their complaint alleged that the loss was total, and prayed judgment for the total amount of the policy sued on, to wit, \$5,000. The defendant, in its answer, admitted the issuance of the policy, that the insurable value of the property, as stated in the policy, was \$25,000, and that the total insurance on the property was \$20,000, but alleged that the entire risk covered by the policy amounted to more than \$20,000, and that the other companies carrying insurance on the said property were "coinsurers" with the defendant by reason of the fact that the policy contained the following so-called "coinsurance" clause: "In consideration of the acceptance by the assured of a reduction from the established rate of 1.05 per cent. to 89 per cent., it is hereby agreed that the insured shall maintain insurance during the life of this policy upon the property hereby insured to the extent of at least 80 per cent. of the actual cash value thereof at the time of the fire, and that, failing so to do, the insured shall be a coinsurer to the extent of such deficit, and to that extent shall bear his, her, or their proportion of any loss; and it is expressly agreed that in case there shall be more than one item of division in the form of this policy this clause shall apply to each and every item. This clause, at the request of the assured, is attached to and forms part of policy No. C—118167 of the Fireman's Fund Insurance Company of California, and shall in no case apply to dwellings or farm property, nor to any risk wherein the total insurance shall be less than \$20,000, except grain elevators and warehouses and the contents of same." As a further defense, it was alleged that the loss was not total, but partial only, and that for this reason the reference demanded by it and refused by the plaintiffs was a condition precedent to the right to sue on the policy, and

that the actual loss from the fire did not exceed \$11,000.

[1] 1. The first proposition of the defendant is that by reason of the "coinsurance" clause of the policy, and under R. L. 1903, § 1642, as amended by G. L. 1907, c. 446 (Rev. Laws Supp. 1909, § 1642), the actual value of the insured property at the time of the fire is the basis for determining the amount of the loss, notwithstanding the agreed valuation of the property as evidence by the "insurable value" stated in the policy. But the trial court ruled that the "coinsurance" clause, under the law referred to, had no effect, it being admitted that there was concurrent insurance which brought the total insurance up to 80 per cent. of the insurable value stated in the policy; and in this we agree with the trial court. We hold that the mere attaching of the "coinsurance" clause to the policy, though with the consent of both parties to the contract, did not wipe out the "insurable value" stated in the policy, and render the policy an open one, and that under such a clause the insurer becomes a coinsurer within the purview of G. L. 1907, c. 446, only where he fails to take out concurrent insurance to the amount specified and required by such clause.

The statute under consideration provides: "Any policy where the entire risks covered by the same amounts to more than \$20,000 may contain a coinsurance clause, if the insured requests the same in writing, of which fact such writing shall be the only evidence, and if in consideration thereof, a reduction in the rate of premium is made by the company. When so demanded and attached to the policy, said agreement shall be binding upon both the insured and the company, and in case of loss the actual cash value of the property so insured at the time of the loss, including buildings, shall be the basis for determining the proper amount of such coinsurance and the amount of loss, notwithstanding any previous valuation of such building."

It appears that the insured in this case requested a coinsurance clause, and that pursuant to such request the clause above quoted was included in the policy. Looking, then, to this clause, it is quite clear that it was simply an agreement by the insured to maintain insurance on the property to the extent of at least 80 per cent. of the "actual cash value thereof at the time of the fire," in default of which the insured would themselves become coinsurers to the extent of the deficit. Since, therefore, it is admitted that the insured maintained insurance covering 80 per cent. of the "insurable value," which amount, according to the defendant's own contention hereinafter referred to, even exceeded the amount which the plaintiffs were required to carry under a literal interpretation of that provision of the coinsur-

ance clause specifying that 80 per cent. of the "actual cash value" of the property "at the time of the fire" should be covered by insurance, it would also seem very clear that the plaintiffs did not become coinsurers, and that, so far, at least, as the coinsurance clause is concerned, the policy was not an open one, under which the loss was determinable with reference to the cash value of the property at the time of the loss, as distinguished from the "insurable value" stated in the policy.

[5] There is a wide distinction between "coinsurance" and "concurrent insurance." The latter term has been used from time immemorial to designate insurance placed in other companies covering the same risk. The standard policy permits concurrent insurance, and it was permitted in the policy in this case. We venture to say that it is rare indeed that there is not concurrent insurance whenever the risk is a large one. Coinsurance, on the other hand, is a creature of modern invention, at least in this state. When the standard policy law was enacted, and for a long time thereafter, it was expressly provided that there should be no coinsurance or other clause in the policy which would reduce the amount payable to the insured in the event of loss to less than the amount of the loss, so long as there was insurance to cover the same. In 1903 a coinsurance clause was permitted at the option of the insured, where the total insurance was not less than \$25,000 on one risk. Since then, while there has always been in the insurance laws a provision forbidding the insertion in a policy of a condition limiting the amount to be paid in case of a total loss on buildings to less than the amount of insurance on the same, a coinsurance clause has been permitted. It is clearly the settled policy of the state to avoid controversy over the amount of a loss in case of a total loss on buildings. To adopt the rule contended for by the defendant would be to create this controversy in every case where the risk was over \$20,000, and the coinsurance clause was attached, no matter whether the actual insurance maintained was under or over the amount which by the terms of the coinsurance clause the insured is required to carry. We hold that there is no "coinsurance" where the insured does not bear a proportion of the risk himself. When he procures concurrent insurance, and the total amount of all the policies on the property is equal to or greater than the amount which the insured agrees to carry, there is no coinsurance, and the insurable value stated in the policy is the only basis for determining the amount to be paid in case of a total loss on buildings.

[2] 2. The second contention of the defendant is that this was a partial loss, and not a total one, and therefore that the insured is entitled to recover on the basis of the actual loss, which should be determined with

reference to the actual value of the property at the time of the fire, as distinguished from the "insurable value" stated in the policy. The first question here is whether the loss was total or partial. An examination of the record leads us to the conclusion that the evidence on this point was conflicting and that the question was for the jury. Witnesses for the defendant testified that the walls of the building, and certain iron posts, trusses, and joists, could be used in place in reconstruction. Witnesses for the plaintiff testified to the contrary. We are unable to say that it conclusively appears that the loss was total under the decision in *N. W. Mutual Life Ins. Co. v. Rochester German Ins. Co.*, 85 Minn. 48, 88 N. W. 265, 56 L. R. A. 108. For the purposes of this appeal, therefore, we must treat the loss as partial.

[3] This brings us to the second question on this branch of the case, namely, whether in case of a partial loss the insurable value agreed upon in the policy is to be taken as the basis of determining the actual loss, or whether such loss must be calculated with reference to the actual value of the property at the time of the fire. The trial court, in directing a verdict for the plaintiffs, adopted the theory that the defendant was bound by the insurable value as stated in the policy, and that the amount of the actual loss should be determined by deducting from the insurable value the value of the portion of the building which could be used in place in reconstructing the building. Upon this basis it was found that the result was a loss in excess of the total insurance on the building, and under the doctrine of *Ohage v. Union Ins. Co.*, 82 Minn. 426, 85 N. W. 212, *Moore v. Sun Fire Office*, 100 Minn. 374, 111 N. W. 280, and *Moore v. Phoenix Ins. Co.*, 100 Minn. 393, 111 N. W. 263, the defendant was held liable for the full amount of the policy sued on. The defendant on the trial offered to prove that the total value of reconstructing the building was \$20,500. This evidence was excluded, on the theory that the defendant was bound by the insurable value stated in the policy, namely, \$25,000. We must assume that, if this evidence had been admitted, it would have been shown that the amount of the actual loss was less than the total insurance; for it was found by the trial court that the value of the portion of the building remaining in place was nearly \$5,000. Hence the correctness of this ruling whereby the above-mentioned evidence was excluded, and of the order directing a verdict depends wholly upon whether the amount of the insurer's liability is, in case of a partial loss, to be arrived at with reference to the insurable value, as stated in the policy or by disregarding such value and looking to the actual value at the time of the fire.

The valued policy provision of the statute contained in *R. L. 1905, § 1642*, as amended

by G. L. 1907, c. 446, after providing that every company insuring any building shall cause its insurable value to be fixed and stated in the policy, declares that in the absence of change increasing risk, or of fraud, "the whole amount mentioned in the policy upon which the insured receives a premium shall be paid in case of total loss, and in case of partial loss the full amount thereof." There can be no doubt that this language means that in case of a partial loss the full amount of such partial loss shall be paid. Before the revision, the language was: "And in case of a partial loss the full amount of the partial loss shall be paid." It is plain that the revisers did not intend to change the law on this point, but only to eliminate what they considered to be superfluous words. It is quite evident, furthermore, from this statute, and from other provisions of the law and of the standard form of policy—and a policy in such form must be construed as the voluntary contract of the parties (*Kolitz v. Equitable, etc., Ins. Co.*, 92 Minn. 234, 99 N. W. 892)—that it was intended that in case of a total loss on buildings the recovery shall be on the basis of the insurable value as stated in the policy, but that in the case of a partial loss on buildings, or a total or partial loss on other property, the amount of the loss shall be recovered, without reference to the insurable value as stated in the policy. For instance, the law as well as the policy provides that, except in case of a total loss on buildings, the amount of the loss shall be submitted to arbitrators, if not agreed upon. It is also provided, in the standard form of policy prescribed by the statute, that the amount of the loss or damage is to be estimated, except in the case of a total loss on buildings, "according to the actual value of the insured property at the time when such loss or damage happens," and the standard form also provides that, except in case of total loss on buildings, the proofs of loss shall state the value of the property. Indeed, we do not understand that it is directly contended by counsel for plaintiffs that the insurable value of the building as stated in the policy is to be used as a basis for determining the amount of the recovery where the loss is clearly not total.

[4] The basis of the plaintiff's contention, and of the trial court's ruling, seems to be the rule announced in *Ohage v. Union Ins. Co.*, supra, that, where the loss is greater than the amount of total insurance, arbitration is not a condition precedent to recovery on the policy. But it is not said, either directly or by implication, in the *Ohage* Case, that the insurable value stated in the policy is the basis for determining the amount of the loss, in case of a partial loss. It is said in that case that it was practically conceded that the loss was greater than the insurance, and therefore that a verdict was properly directed. The building insured in the *Ohage*

Case was totally destroyed, except the foundation, and while not, strictly speaking, a total loss, yet it was total as far as the superstructure was concerned, and it was considered a useless thing to submit the amount of the damages to referees. In the present case, as we have said, it was seriously contended by the defendant that the actual loss was considerably less than the insurance, and this it was not allowed to show. Had it appeared by the evidence here, or had it been conceded, that the actual loss was greater than the insurance, the rule of the *Ohage* Case would apply.

In *Moore v. Sun Fire Office*, supra, the complaint alleged a total loss, and also alleged the actual amount of the loss. The defendant denied both of these allegations, and denied all liability on the policy. It was held that the right of arbitration was waived, and also that, as it appeared conclusively that the amount of the loss exceeded the total amount of the insurance, therefore that no appraisal was required. That it was not held, either in this case or the *Ohage* Case, that the insurable value controls in case of a partial loss, is clearly apparent from the following language from the opinion, written by Mr. Justice Elliott: "The statute provides for the recovery of the full amount of the valuation in case of a total loss, and the amount of damages in case of partial loss. In one case, the amount of recovery is determined by proof of the fact of the total destruction of the building, and in the other by proof of the actual amount of the damage." To like effect is the language of Mr. Justice Lewis in *N. W. Mutual Life Ins. Co. v. Rochester German Ins. Co.*, 85 Minn. at page 53, 88 N. W. at page 267, 56 L. R. A. 108: "If the loss occasioned by the fire was total, the stipulated value put an end to any inquiry as to the amount of the loss. The provision was adopted for the purpose of avoiding the uncertainty of determining the value after the fire. For the same purpose, a speedy method by means of arbitration is provided for determining the amount of damage in cases where the loss is only partial."

Our conclusion is that it was error to direct a verdict for the full amount of the policy. The question of whether the loss was total or partial should have been submitted to the jury, with instructions to return a verdict for the full amount of the policy in case the loss was found to be total, but if the loss was found to be partial, and less in amount than the total insurance, to return a verdict for the defendant. If the actual loss, though partial, was found to be greater than the amount of the insurance, however, the plaintiffs would be entitled to a verdict for the full amount of the policy under the rule in the *Ohage* Case.

In determining the actual amount of a partial loss, the insurable value as stated

in the policy should not be used as a basis; but the question should be decided upon the evidence before the jury that tends to prove what is the amount of the actual loss and damage sustained by the insured from the fire, the actual value of the building at the time of the fire, cost of reconstruction, cost of removing the debris, and amount of salvage, all being proper subjects of inquiry.

Though the ruling is not involved on this appeal, we have some doubt whether the trial court ruled correctly in excluding the ordinance relating to the duties of the building inspector and the order of that official requiring the plaintiffs to take down the walls of the insured building after the fire. This question should be carefully considered on a new trial, in the light of the decision in *Larkin v. Glens Falls Ins. Co.*, 80 Minn. 527, 83 N. W. 409, 81 Am. St. Rep. 286. We do not decide it here, the record being insufficient to enable us to do so; nor do we intimate what our decision would be, were the question before us.

Order reversed, and new trial granted.

McKINNON et al. v. RED RIVER LUMBER CO.

(Supreme Court of Minnesota. Dec. 6, 1912.)

(Syllabus by the Court.)

1. LOGS AND LOGGING (§ 26*)—LIEN—"MANUAL LABOR OR OTHER SERVICES."

The owner of horses, who hires them to a contractor, the latter using the horses in aid of hauling and banking logs, and the owner performing no "manual labor or other services" in connection with the logs, is not entitled to a lien on such logs, under Rev. Laws 1905, § 3524.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 60-66; Dec. Dig. § 26.*]

For other definitions, see *Words and Phrases*, vol. 5, p. 4343.]

2. JUDGMENT (§ 739*)—RES JUDICATA.

A prior judgment in an action by the owner of the horses against the contractor to recover a personal judgment for the agreed price of their services, and against defendant in this action to establish and foreclose a lien claimed by such owner, is *held* not to estop defendant from now claiming that plaintiffs acquired no lien on the logs; the judgment being merely a personal one against the contractor, and it appearing that the court in such action did not and could not adjudicate such lien.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1267; Dec. Dig. § 739.*]

Appeal from District Court, Hubbard County; B. F. Wright, Judge.

Action by Naish McKinnon and others, doing business as McKinnon & La Palm, against the Red River Lumber Company. Verdict for defendant. From an order denying motion for judgment notwithstanding the verdict or for a new trial, plaintiffs appeal. Affirmed.

Charles W. Scrutchin, of Bemidji, for appellants. P. V. Coppernoll, of Park Rapids, for respondent.

BUNN, J. Plaintiffs brought this action to recover the sum of \$1,296, the amount of a claimed lien on logs which had been sawed and converted into lumber by defendant. At the close of the evidence each party moved for a directed verdict. The court granted defendant's motion. Plaintiffs afterwards moved for judgment notwithstanding the verdict or for a new trial, and appeal to this court from an order denying this alternative motion.

There are two main questions for our consideration: (1) Did plaintiffs have a valid lien on the logs in question? (2) If not, is defendant estopped from denying the validity of the lien by reason of a former judgment?

The facts are as follows: John Sibley was engaged in logging and lumbering in the second lumber district under contract with defendant. Plaintiffs entered into a written contract with Sibley, by the terms of which they hired and let to him 12 teams of horses at the agreed price of \$26 per month for each team. These teams worked for Sibley in hauling and banking the logs he was under contract to haul and bank for defendant. La Palm, one of the plaintiffs, worked for Sibley in caring for the horses, and drove one of the teams on the work. He was to receive \$40 per month for his services, which was paid by defendant. The contractor, Sibley, became insolvent. Plaintiffs, after demanding payment for the services of their horses, both of Sibley and of defendant, filed a lien on the logs for such services. The lien statement, as well as the evidence, shows that the amount claimed was only for the labor of the horses, at the contract price, and did not include anything for the personal services of La Palm, which had been paid for.

The facts in relation to the claim of *res adjudicata* are these: Within three months after filing their lien statement, plaintiffs brought an action in the district court for Hubbard county against the defendant in this action, the Red River Lumber Company, and John Sibley. The relief demanded was a personal judgment against Sibley for the amount of plaintiffs' claim for the services of the horses, and a judgment adjudging the lien and directing the sale of the logs to satisfy the same. Neither defendant answered. The court made findings of fact to the effect that the work had been done by the horses at the request of Sibley; that plaintiffs had filed a lien statement, and had thereafter sued out a writ of attachment, and placed the same in the hands of the sheriff, but that said writ was not returned, for the reason that the lumber company had theretofore sawed the logs involved into lumber. As con-

clusions of law, it was determined "that plaintiffs are entitled to judgment against the defendant John Sibley in the sum of \$1,296 damages, together with the costs and disbursements of this action." The judgment against Sibley was entered pursuant to this decision.

[1] 1. If plaintiffs' lien was valid, it is clear they are entitled to recover in this action in conversion. The question is whether, under the statute, one who hires horses to a contractor is entitled to a lien on logs, when under the contract of hiring the owner is not to render personal services in connection with the horses. The statute (R. L. 1905, § 3524), so far as material here, is as follows: "Whoever performs manual or other services for hire, in or in aid of the cutting, hauling, banking, driving, rafting, towing, cribbing or booming any logs * * * shall have a lien thereon for the price or value of such labor or services." This statute should be construed liberally; but we must not, by construction, do violence to the plain meaning of the language used. Were the services performed by the horses hired to Sibley "manual or other services" performed by plaintiffs? In *Martin v. Wakefield*, 42 Minn. 176, 43 N. W. 966, 6 L. R. A. 362, it was held that "manual labor," as those words were used in the log lien statute then in force, "includes the use and earnings of all implements, instrumentalities, or agencies, such as ax, cant hook, team, or the like, which are actually used in and necessary to the performance of such labor by the lumberman or logger." Applying this rule to the facts in that case, it was decided that where a man and a team are employed, at a gross price for both, to haul or bank logs, his lien on the logs extends to the use of his team. This was followed in *Breault v. Archambault*, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545, in which case it was also decided that one who furnishes a team and a teamster to a contractor, at a gross price for both per month, to haul or bank logs, is entitled to a lien. *Carver v. Bagley*, 79 Minn. 114, 81 N. W. 757, was decided after the law was amended so as to give a lien to one who performs "manual or other services for hire," and is important in this connection only as it again announces the rule that the statute is a remedial one and should be given a broad and liberal construction.

It is clear that the present case is not controlled by *Martin v. Wakefield*, *Breault v. Archambault*, or by any decision of this court. Here the contract was only for the use of the teams at an agreed price for each team per month. It did not provide for the services of teamsters, or of men to care for or shoe the horses. The fact that one of the plaintiffs was employed by Sibley under a separate contract to care for and attend to the shoeing of the horses does not bring the case within either of those cited. In addi-

tion to the fact that this employment of La Palm was under an entirely separate and distinct contract, the lien statement shows that no lien was claimed for his services, and the evidence shows that they had been paid for before the lien was filed. The case must be treated, therefore, as if plaintiffs had performed no personal services.

The question has been decided adversely to plaintiffs' contention in Wisconsin, Maine, and Michigan, under statutes identical with ours. *Lohman v. Peterson*, 87 Wis. 227, 58 N. W. 407; *McAuliffe v. Jorgenson*, 107 Wis. 132, 82 N. W. 706; *Edwards v. H. B. Waite Lumber Co.*, 108 Wis. 164, 84 N. W. 150, 81 Am. St. Rep. 884; *Richardson v. Hoxie*, 90 Me. 227, 38 Atl. 142; *Mable v. Sines*, 92 Mich. 545, 52 N. W. 1007. Each of these cases is absolutely in point, and no authority to the contrary is known to us. Indeed, we do not see how an opposite conclusion could be reached, except by a main strength construction of the words of the statute. The owner of horses, machinery, or tools, who leases his equipment to a contractor, certainly does not "perform manual labor or other services for hire" in aid of the cutting, hauling, or banking of logs, which the contractor by himself and his servants does under his contract. The contractor has a lien for his own and his employes' labor, and for the use of all instrumentalities, including teams, which are actually used in and necessary to the performance of such labor by the contractor and his employes. Sibley doubtless would have a lien upon the logs for his own and his employes' services, including the services of the teams with which they worked. This is the rule of *Martin v. Wakefield* and *Breault v. Archambault*, supra, and is also the rule in Wisconsin, Michigan, and Maine. But we must hold that the owner of teams or instrumentalities, who leases or hires them to a lumberman, or logger, and who does not, by himself or by his servants, perform manual labor or other services, is not entitled to a lien on logs for the services of such horses or instrumentalities. A contrary holding would not only be against the plain words of the statute, and the decisions, but it would open the door to abuses. If an owner of horses leased to a logger is entitled to a lien, so is the owner of any equipment, machinery, or tools leased to a logging contractor. And why not the grocer or butcher, that supplies the camp of the contractor? Or the merchant, that sells the men their clothing?

[2] 2. The claim that defendant is estopped by the judgment in the former action is wholly untenable. While in that suit plaintiff claimed a lien on the logs, and asked to have it established and the logs sold to satisfy it, it is perfectly clear from the judgment and findings that the matter of the lien was not and could not be litigated. The judgment, which followed the conclusions of law, was simply a personal judgment against

John Sibley. The decision does not find that plaintiffs had a lien which was valid; indeed, it finds the contrary, as it is recited that an attachment was issued, but not returned, because the logs had been sawed into lumber. An attachment of the logs was necessary to an adjudication that plaintiffs had a lien which they were entitled to enforce. *Griffin v. Chadbourne*, 32 Minn. 128, 19 N. W. 647.

We find no other points that require discussion. The decision of the trial court was correct.

Order affirmed.

TAYLOR v. FIRST NAT. BANK OF MINNEAPOLIS.

(Supreme Court of Minnesota. Dec. 6, 1912.)

(Syllabus by the Court.)

BANKS AND BANKING (§ 139*)—CHECKS—EFFECT—ASSIGNMENT OF DRAWER'S FUNDS—RIGHT TO STOP PAYMENT.

The answer of a bank to a suit brought by the payee of a check drawn on ample funds on deposit averred that before the check was presented for payment the drawer notified the bank that the check was without consideration and was obtained by fraud, and directed the bank not to pay the same, and that during all the time that the drawer had had funds on deposit, and long prior thereto, the custom and usage prevailed among banks and their depositors in the city and state where were all the parties that before a check is presented for payment the drawer has the right to revoke the authority of the bank to pay, *held* not demurrable.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 406-409; Dec. Dig. § 139.*]

Appeal from District Court, Hennepin County; E. F. Waite, Judge.

Action by Sam Taylor against the First National Bank of Minneapolis. From an order overruling a demurrer to defendant's answer, plaintiff appeals. Affirmed.

Frank E. Clinite, of Minneapolis, and Eugene Bryan, of St. Paul, for appellant. Lancaster, Simpson & Purdy, of Minneapolis, for respondent.

HOLT, J. The complaint alleges and the answer admits the execution and delivery of the check, its indorsement and presentment for payment by plaintiff, and the refusal of the defendant bank to pay, although it had sufficient funds of the drawer on deposit with which to pay. The answer, by way of defense, alleges that the drawer of the check, before plaintiff presented the same to the bank for payment, ordered payment stopped, and directed defendant not to pay the same, on the ground that plaintiff obtained it from the drawer by fraud and without consideration. It is also averred that at the time the check was drawn, and for a long time prior thereto, a custom and usage prevailed between the banks and their depositors through-

out the state that a bank withhold and refuse payment of a check drawn for a part of the amount on deposit, whenever the drawer thereof notified the bank so to do prior to the presentation of the check for payment.

This court, in *Wasgatt v. First Nat. Bank*, 117 Minn. 9, 134 N. W. 224, held that a check is a pro tanto assignment of the funds of the drawer on deposit with the drawee bank, so that, if the bank refuses payment when it has sufficient funds of the drawer on deposit, the payee may maintain an action against the bank upon the check. Plaintiff insists that it necessarily follows that the drawer cannot stop payment, or revoke the authority of the bank to pay; for, as far as he is concerned, the money belongs to the payee. We do not think the decisions of this court point to the conclusion contended for by appellant, nor do those of any other court committed to the doctrine that a check is an assignment pro tanto of a depositor's funds, unless it be that of Illinois. We are now speaking of a check in the hands of the payee, and not of one that has in due course of business been transferred to a bona fide holder for value. It is manifest that the execution and delivery of a check to the payee does not, of itself, transfer the amount of the deposit, represented by the check to the payee, so that, without more, the bank holds the funds for the payee. Therefore the courts which have adopted the rule that a check is a pro tanto assignment of the drawer's funds also recognize the fact that the assignment does not become fully consummated until the check is presented for payment. Before that is done the depositor may in various ways make nugatory the tentative assignment made by the check against the funds on deposit. For instance, he may go to the bank before the check drawn by him is presented and withdraw the whole deposit, or he may have exhausted the same by subsequent checks presented and paid before the one upon which the right to hold the bank is sought. In the decision in *Wasgatt v. Bank*, supra, it is clearly intimated that between the execution of a check and its presentment for payment occurrences may intervene to prevent the consummation of the assignment.

This is in line with the language of the court in *Northern Trust Co. v. Rogers*, 60 Minn. 208, 62 N. W. 273, 51 Am. St. Rep. 526, wherein the status of the bank with relation to a checkholder is thus stated: "Before a demand for payment no assignment exists, no obligation has been created, no privity has grown up, and the very right of the bank to pay may be taken away by any one of a great number of occurrences; that the act of presentment and demand, before any of these occurrences has taken place, is that which creates at once, by the usage of business and understanding of all concerned, the obligation, the privity, and the appropriation, or at least the right to claim an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appropriation." In the well-considered case of *Raesser v. Nat. Exchange Bank*, 112 Wis. 591, 88 N. W. 618, 56 L. R. A. 174, 88 Am. St. Rep. 979, by a court which, prior to the enactment of the uniform negotiable instrument law, adopted and adhered to the same rule as this court in the *Wasgatt Case*, supra, it is said that, if a bank is notified by the drawer of a check not to pay because the payee therein procured it without consideration or by fraud, the bank pays at its peril. In *Weiland's Adm'r v. State Nat. Bank*, 112 Ky. 310, 65 S. W. 617, 66 S. W. 26, 56 L. R. A. 178, the court concludes that there "is no good reason why, as between the immediate parties to the check, where innocent parties are not affected, the drawer may not revoke or countermand" a check. And neither do we see any good reason for either a rule of business or law which will throw the risk upon a depository or bailee holding a fund under a contract or obligation with the depositor alone to determine at his peril who is entitled to part thereof after notice from the depositor that the instrument by which another claims the right to such part is for some reason invalid.

Nor can it be said that by the decisions in this state, or by deductions therefrom it is settled law that the drawer of a check may not, before the same is presented for payment, revoke the bank's authority to pay; hence there is nothing to prevent the business custom and usage pleaded in the answer from controlling the disposition of the case. The general custom and usage, according to which a business, as, for instance, that of banking, is carried on in a state, becomes in the nature of a law pertaining thereto, so that parties may be said to contract with reference to it. *Clarke v. Hall & Ducey Lumber Co.*, 41 Minn. 105, 42 N. W. 785. Mr. Justice Mitchell, in *Northern Trust Co. v. Rogers*, supra, with regard to the matters here involved, suggests "that this entire question is one which should be determined more upon considerations of business usages and business policy than of mere theoretical knowledge." Applying the rule indicated, the solution is clear; for the answer alleges that the custom and usage prevails between all banks in the state, including the city wherein is defendant's bank, and their depositors, that before a check is presented for payment the drawer has the right to stop payment thereof. Since a depositor of a bank may at any time, by drawing out his whole deposit, prevent payment of a check previously drawn by him, so that no claim whenever could be made by the payee against the drawee bank, we apprehend no inconvenience or injustice will result from a recognition by the court of the business usage pleaded in the answer and admitted by the demurrer. The practice and usage pleaded becomes part of the legal contract or obligation between the depositor and the bank un-

der which the funds deposited are to be paid out, so that the checks drawn against the deposit necessarily become subject thereto, at least so long as such checks remain in the hands of the payees.

The defendant asks us to go further, and determine that a depositor may stop payment of a check after it has passed into the hands of a bona fide innocent holder. We deem it inexpedient to discuss or determine that question on this appeal, for it is not involved in the demurrer.

This cause having been set down for oral argument in violation of rule 15 (44 N. W. iv), no costs will be allowed.

Order affirmed.

OIL WELL SUPPLY CO. v. MacMURPHY.
(Supreme Court of Minnesota. Dec. 6, 1912.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 85*)—DRAFTS—CONTRACT TO HONOR.

One Hukill, residing in Pittsburgh, Pa., sent a telegram to the defendant, a resident of this state, reading: "Will you wire me that you will honor draft for \$300?" Defendant telegraphed back, "I will." Thereupon Hukill presented draft for \$300, drawn on defendant to Hukill's order, and the two telegrams, to plaintiff, which purchased the draft on the strength of the telegrams. *Held*, that the telegrams created an agreement on the part of defendant to honor the draft.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 149-162; Dec. Dig. § 85.*]

2. BILLS AND NOTES (§ 369*)—DRAFTS—CONTRACT TO HONOR—PAROL EVIDENCE.

As against plaintiff, the purchaser of the draft, defendant could not show that Hukill had failed to comply with the condition upon which defendant had consented to telegraph his agreement to honor Hukill's draft; there being no proof, or offer to prove, that plaintiff knew of the arrangement between Hukill and defendant.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 951; Dec. Dig. § 369.*]

Appeal from District Court, Big Stone County; S. A. Flaherty, Judge.

Action by the Oil Well Supply Company against George MacMurphy. From an order directing a verdict for plaintiff, and from an order denying a new trial, he appeals. Affirmed.

Ray G. Farrington, of Ortonville, for appellant. Cliff & Purcell, of Ortonville, for respondent.

HOLT, J. The action is for a breach of an alleged agreement to honor a draft. The court directed a verdict for plaintiff, and defendant appeals from an order denying him a new trial.

These are the uncontroverted facts: One Hukill, residing and doing business at Pittsburgh, Pa., applied to plaintiff to cash or buy a sight draft for \$300 drawn by Hukill payable to his own order upon defendant,

a relative of Hukill residing at Ortonville, Minn. Plaintiff promised to do so, if defendant, by telegram, would agree to accept the draft. Thereupon, on the same day, to wit, December 30, 1907, Hukill sent a telegram to defendant at Ortonville, reading: "Will you wire me that you will honor draft for \$300?" The same day, in response to said message, defendant sent a telegram from Ortonville to E. M. Hukill at Pittsburgh, which reads: "I will." Hukill thereupon presented the draft and the two telegrams to plaintiff, which bought the draft, and in due course of business caused it to be presented to defendant for acceptance and payment. Defendant refused. When plaintiff learned this, it wrote defendant as follows: "Oil Well Supply Co., Pittsburgh, Pa., January 7, 1908. Subject, E. M. Hukill draft. Mr. Geo. MacMurphy, Ortonville, Minn.—Dear Sir: On December 31st, we cashed for Mr. E. M. Hukill a sight draft drawn on you for \$300, which has been returned to us under protest, marked 'Payment refused'; the fees amounting to \$3.08. We advanced said money on the strength of the telegram from you to Mr. Hukill, dated December 30th, reading 'I will,' which he told us was in reply to a telegram sent to you by him on December 30th, reading, 'Will you wire me that you will honor draft for \$300?' We would like to know at once your reason for not honoring the draft; also whether or not your telegram reading, 'I will,' was in answer to a telegram sent by Mr. Hukill to you, as quoted above. Trusting to hear from you by return mail, and thanking you in advance, we remain, yours truly, [Signed] Louis Brown, Treas." To this letter defendant appended this reply: "Louis Brown—Dear Sir: I will say, in reply to the above, that my telegram, 'I will,' was in answer to above telegram from Mr. Hukill on December 30th. I was out of funds myself, and tendered a check from Mr. H., and it was not accepted; hence the protest. I presume this is all cleared up ere this. Yours truly, [Signed] Geo. MacMurphy."

[1] It seems to us that the two telegrams constitute a clear and definite contract on the part of defendant to honor a draft for \$300. The manifest purpose of Hukill's telegram was to get defendant to agree to honor or accept a draft. It was not to ask for a telegram, except as a means of conveying an agreement or refusal to honor the proposed draft. There can be no doubt that plaintiff took the telegrams to be an agreement by defendant to honor the draft. Defendant appears to be an intelligent professional man, and it is safe to assume that he was not unacquainted with business methods. Hence he must have inferred from the telegram that Hukill wished to negotiate the draft on the strength of defendant's agree-

ment to honor it. That defendant so understood the purport of the telegram admits of no doubt, when the subsequent correspondence between him and plaintiff is considered. In construing written contracts, the meaning of the language employed, taken in its ordinary and popular sense with reference to the matter in hand, controls unless, when so viewed, an ambiguity still remains. If there be uncertainty after thus examining the agreement, the situation of the parties and the circumstances surrounding the transaction may be considered in order to arrive at the true and intended meaning of the ambiguous expressions used. However, we cannot find any ambiguity in the telegrams constituting the agreement here when applied to the subject-matter. In contracts made by telegrams, the fewest possible words are used, and often omitted words in a message are to be supplied from the sense or context of a message to which it is an answer. This is so usual an occurrence in the business world that courts must take notice of the fact. Upon the undisputed facts, plaintiff was entitled to recover, and the court rightly directed the verdict, unless there was error in excluding certain evidence offered by defendant.

[2] The defendant offered to prove that long prior to December 30, 1907, he had been in the habit of honoring drafts made upon him by Hukill; that during such time defendant was in possession of valuable stock pledged by Hukill to secure defendant against loss from such acceptances; that prior to said date, after he had surrendered this stock, Hukill requested defendant to honor further drafts, whereupon defendant stated he would not do so unless his (defendant's) financial condition at the Bank at Ortonville was such that he could conveniently do so, and that Hukill should also again pledge with defendant the securities he before had; that he told Hukill not to draw any drafts on the defendant until he had first wired to determine whether defendant would honor them, and that no such telegram or request should be sent to defendant unless Hukill should at the same time place the said securities with defendant; and, further, that when defendant received the telegram, and he answered the same, it was with the expectation that the security would be sent him, that such security was not sent, and defendant was in such financial condition in his accounts at the bank that he could not conveniently honor the draft. We fail to see how the proffered proof could affect the plaintiff, which bought the draft on the strength of the telegrams. Defendant did not offer to show that plaintiff had any knowledge of either the first arrangement, under which defendant honored Hukill's drafts, or this last one.

The order must be affirmed.

AMES v. BRANDVOLD.

(Supreme Court of Minnesota. Dec. 6, 1912.)

*(Syllabus by the Court.)***1. PLEADING (§ 350*) — CONSTRUCTION — JUDGMENT ON PLEADINGS.**

In deciding whether a complaint states a cause of action, when the question is raised for the first time at the trial on a motion for judgment on the pleadings, plaintiff is entitled to every intendment and inference which a jury might legitimately draw from its allegations, and the motion should be denied, if the complaint can be sustained by the most liberal construction.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1053, 1054, 1070-1077; Dec. Dig. § 350.*]

2. LANDLORD AND TENANT (§ 164*)—DEFECTIVE PREMISES—INJURIES TO LICENSEE—LANDLORD'S LIABILITY.

If, at the time of a lease, the demised premises are in a defective and dangerous condition, which is known to the landlord, and concealed from the tenant, the former is liable to the tenant, or his licensee, who, without negligence on his part, is injured by reason of such dangerous condition, although the landlord does not covenant to make repairs.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 630-641; Dec. Dig. § 164.*]

3. LANDLORD AND TENANT (§ 169*)—DEFECTIVE PREMISES—INJURIES TO LICENSEE—COMPLAINT.

Complaint in this case construed, and held, as against an objection raised for the first time on a motion for judgment on the pleadings, to state a cause of action.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 644-646, 663-667, 681-684; Dec. Dig. § 169.*]

*(Additional Syllabus by Editorial Staff.)***4. LANDLORD AND TENANT (§ 164*)—DANGEROUS PREMISES—LANDLORD'S LIABILITY—PROMISE TO REPAIR.**

Where there is no agreement by a landlord to repair the demised premises, and he is not guilty of fraud or concealment as to their condition and defects, and the defects are not secret, but obvious, the landlord is not liable to the tenant, or to any person entering under his title or by his invitation, for injuries sustained by reason of their unsafe condition.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 630-641; Dec. Dig. § 164.*]

5. LANDLORD AND TENANT (§ 164*)—DEFECTIVE PREMISES—PROMISE TO REPAIR.

Where a landlord has agreed to repair, he is liable for injuries caused to the tenant or his licensees by reason of the defective condition of the premises.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 630-641; Dec. Dig. § 164.*]

6. LANDLORD AND TENANT (§ 170*)—DEFECTIVE PREMISES—NUISANCE—INJURIES TO THIRD PERSONS.

Where a landlord demises premises with a nuisance on them, he is presumed to authorize its continuance, and is liable to third persons subsequently injured thereby.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 685-690; Dec. Dig. § 170.*]

Appeal from District Court, Rice County; Arthur B. Childress, Judge.

Action by Etta M. Ames against A. T. Brandvold. From a judgment for defendant on the pleadings, plaintiff appeals. Reversed.

Robert Mee, of Faribault, for appellant. Thos. H. Quinn, of Faribault, for respondent.

BUNN, J. This is an action to recover for personal injuries sustained by plaintiff while a guest of a tenant of defendant. Defendant interposed an answer, which was, in substance, a general denial. The court, on defendant's motion, granted judgment on the pleadings, and from the judgment entered on this order plaintiff appealed.

[1] The question here is whether the complaint states a cause of action, under the very liberal rules of construction that must be adopted when the objection is raised for the first time on the trial, on a motion for judgment on the pleadings. There is no doubt that on such a motion plaintiff is entitled to every intendment and inference which a jury might legitimately draw from the allegations of the complaint. The test is not whether a demurrer would be sustained. The motion should be denied if the complaint can be sustained by the most liberal construction. Dunnell's Digest, § 7694, cases in note. This clearly ought to be the rule. A judgment on the pleadings may foreclose the plaintiff absolutely, though he in fact have a good case; while a ruling against the complaint on a demurrer is not ordinarily final, because of the right usually granted plaintiff to amend.

The complaint in substance is as follows: Defendant owns a lot in Faribault, on which he maintains a dwelling house and appurtenances, including an outhouse. During all the times mentioned in the complaint this lot, house, and appurtenances were and are leased to a tenant, who occupies the premises as a home. The outhouse was placed over a deep excavation, an abandoned well, contrary to an ordinance of the city. Defendant carelessly and negligently allowed the timbers supporting the floor to become rotten and unsafe, and carelessly and negligently failed to repair the same. These timbers were concealed from view, and the rotten and unsafe condition thereof could not be discovered by persons using the outhouse. Plaintiff was a guest of the lessee, and in using the outhouse the floor gave way, owing to the rotten condition of the timbers supporting it. Plaintiff thereby sustained injuries, for which she seeks to recover damages in this action.

[4] The trial court held that in the absence of allegations of an agreement by the landlord to repair, or that he knew of the dangerous trap on the premises and concealed its existence from the tenant, the complaint stated no cause of action. The proposition is well settled in this state, as it is else-

where, that where there is no agreement by the landlord to repair the demised premises, and he is not guilty of any fraud or concealment as to their safe condition, and the defects in the premises are not secret, but obvious, the tenant takes the risk of their safe occupancy, and the landlord is not liable to him, or to any person entering under his title or by his invitation, for injuries sustained by reason of their unsafe condition. *Harpel v. Fall*, 63 Minn. 520, 65 N. W. 913; *Wilkinson v. Clauson*, 29 Minn. 91, 12 N. W. 147; *Krueger v. Ferrant*, 29 Minn. 385, 13 N. W. 158, 43 Am. Rep. 223. We have no desire to depart from the doctrine of these cases; but their authority should be confined to the principles they decide, and not extended.

[5] For instance, when there is an agreement by the landlord to repair, he is liable for injuries caused to the tenant or his licensee by reason of a defective condition of the demised premises. *Barron v. Liedloff*, 95 Minn. 474, 104 N. W. 289; *Good v. Von Hemert*, 114 Minn. 393, 131 N. W. 466.

[6] So, also, where the landlord demises premises with a nuisance upon them, he is presumed to authorize its continuance, and is liable to third persons subsequently injured thereby. For example, when a house is in such a ruinous condition at the time of the demise that it subsequently falls upon and injures an adjacent building, or persons or property lawfully therein, he is liable for the injuries. *Start, C. J.*, in *Harpel v. Fall*, *supra*. This is substantially the "concealed trap" doctrine, and has abundant support both in reason and authority.

[2] If there is a concealed danger on the premises, known to the landlord and unknown to the tenant at the time of the lease, the landlord is liable to the tenant or to his licensees, who may without negligence be injured thereby, though the landlord does not covenant to make repairs. *Kayser v. Lindell*, 73 Minn. 123, 75 N. W. 1038; 24 Cyc. 1114. *Moore v. Parker*, 63 Kan. 52, 64 Pac. 975, 53 L. R. A. 778, and *Coke v. Gutkese*, 80 Ky. 598, 44 Am. Rep. 499, are cases in their facts very similar to the case at bar, in which the above doctrine was applied.

[3] If, therefore, in the instant case, the complaint can reasonably be construed as alleging the dangerous condition of the premises at the time of the lease, and that this was concealed from the tenant, it states a cause of action. It is alleged that the out-house was placed over a deep excavation, and that defendant allowed the timbers supporting the floor to become rotten, and neglected to renew or repair the same, though he knew or should have known they would soon become "decayed, rotten, and weakened." It is alleged that these timbers were concealed from view, "that the condition

thereof could not be discovered by a person ordinarily using the same," and that the place was a "concealed and dangerous trap." It is not clear that the pleader intended to allege that the conditions were known to the landlord and concealed from the tenant at the time the lease was entered into; but, as against a motion for judgment on the pleadings, we think the complaint may fairly be so construed. It appears that there had been a trial of the case, resulting in a verdict for plaintiff, and that the trial court granted a new trial. It is very likely that, in granting the subsequent motion for judgment on the pleadings, the decision was influenced by the court's recollection of the evidence on the former trial. We have not the benefit of this knowledge, and, of course, could not use it, if we had. The case must be decided here, as it should have been below, solely on the complaint, and giving the pleader the benefit of every intendment and inference which a jury might legitimately draw from its allegations. It may appear on a trial that no case can be made; but we think the complaint is, as against this motion, sufficient to permit the introduction of evidence which would make a case for a jury. Even if it should be determined that any particular item of evidence was inadmissible under its allegations, there is always the chance that plaintiff may be permitted to amend his pleading, so as to make the evidence admissible.

Judgment reversed.

HASKELL v. HASKELL

(Supreme Court of Minnesota. Dec. 6, 1912.)

(*Syllabus by the Court.*)

1. DIVORCE (§ 280*) — ALIMONY—MODIFICATION—APPEAL.

An order, made upon the merits, denying an application for a reduction of alimony previously awarded, on the ground of the changed financial condition of the parties, *held* appealable.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 764; Dec. Dig. § 280.*]

2. DIVORCE (§ 245*) — ALIMONY — CHANGE — DETERMINATION.

While an application for the revision of a judgment for alimony, on the grounds of changed financial condition of the parties, should be entertained with great caution, nevertheless, where the change is not willfully brought about by the applicant, the motion should be disposed of under the same rules applicable upon an original application to fix the amount of alimony, and a modification of the former judgment may be made on account of the changed financial condition of either or both of the parties.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 691-695; Dec. Dig. § 245.*]

3. DIVORCE (§ 245*) — ALIMONY—REDUCTION—DENIAL OF APPLICATION.

An order denying an application for a reduction of alimony, on the ground of the change-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed financial condition of the parties, held erroneous.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 691-695; Dec. Dig. § 245.*]

(Additional Syllabus by Editorial Staff.)

4. DIVORCE (§ 231*)—"ALIMONY."

In general, alimony is not awarded as a penalty, but as a substitute for marital support; the right thereto being wholly statutory and subject to revision as provided by Rev. Laws 1905, §§ 3590, 3592.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 658-661, 664; Dec. Dig. § 231.*]

For other definitions, see Words and Phrases, vol. 1, pp. 307-311; vol. 8, pp. 7571, 7572.]

5. DIVORCE (§ 238*)—ALIMONY—PROPERTY OF DEFENDANT.

Alimony may be awarded a wife against her husband, even in the face of a showing of total lack of present property and income on his part out of which to pay the same.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 670-672; Dec. Dig. § 238.*]

Appeal from District Court, Hennepin County; William E. Hale, Judge.

Action by Olga Von W. Haskell against William E. Haskell. From an order denying defendant's motion for reduction of alimony, he appeals. Reversed, and motion granted.

See, also, 116 Minn. 10, 132 N. W. 1129.

Kerr & Fowler, of Minneapolis, for appellant. Koon, Whelan & Hempstead and A. B. Jackson, all of Minneapolis, for respondent.

PHILIP E. BROWN, J. This is an appeal from an order of the district court of Hennepin county, entered March 14, 1912, denying the appellant's motion for reduction of the amount which the appellant is under obligation to pay to the respondent annually as alimony under and by virtue of a judgment, entered January 22, 1903, whereby the respondent was granted an absolute divorce from the appellant on the ground of desertion. The motion is the second one made in this case seeking the relief indicated, and likewise the second time that the matter has been before this court; the order of the district court denying the appellant's former motion having been reversed, and the cause remanded, November 3, 1911. See Haskell v. Haskell, 116 Minn. 10, 132 N. W. 1129, where the provisions of the judgment concerning alimony are set out in full. The present motion is based upon the files and proceedings in the divorce action above mentioned, upon the appellant's affidavit presented in support of his former motion, and upon additional and supplementary affidavits. The motion, as stated in the notice thereof, is "for an order modifying the judgment and decree heretofore entered in said action in respect to alimony, and relieving defendant from the payment of the alimony at present required, and reducing the alimony required to be paid by defendant to plaintiff to the sum of \$600 per quarter or \$2,400 per year";

the grounds of the motion being "that the financial condition of the defendant has materially changed since the entry of judgment herein, that he is now without property or income, or means wherewith to pay the alimony required by the judgment, and that the plaintiff is possessed of a large amount of property of large value, and that she does not need the alimony provided for by said judgment, and that defendant is unable to pay the alimony in said judgment provided."

Opposing affidavits were filed, and the court, after a hearing, found, in substance: (1) That since the rendition of the judgment herein involved the appellant had lost all his property, was indebted in a sum exceeding \$600,000, and was insolvent, but that for many years he had earned and received a large income in his business and profession as a newspaper man, and that he is still capable of doing so, notwithstanding that his latest affidavit supporting the application stated that he was then temporarily out of employment; (2) that there has been no substantial change in the plaintiff's financial situation or needs since the rendition of the judgment, but, on the contrary, that she is still wholly dependent upon the payment of the alimony for the support and maintenance of herself and children and their education, they being still dependent upon her; that the alimony is no more than is reasonably required to enable the plaintiff suitably to maintain herself and children, who are still dependent upon her, and to maintain her home and household in a manner comporting with her station in life, and in which she and her children are entitled to be maintained; and that a reduction of the alimony would be unjust to her. Wherefore the court denied the appellant's motion, for the reason, as indicated by its memorandum, that: "While the defendant has since (the rendition of the judgment) lost his property and become bankrupt, that circumstance does not, in my judgment, furnish sufficient grounds for modifying the judgment in plaintiff's favor, unless such a change in plaintiff's circumstances has taken place as would make such modification just to her, as well as advantageous to the defendant. This does not appear to me to be the case, and on the whole showing I think it would be a manifest injustice to the plaintiff to modify or disturb the judgment."

[1] 1. At the outset we are met with a motion to dismiss the appeal, on the ground that the order denying the appellant's motion to reduce the alimony awarded by the judgment of divorce is not appealable. In Smith v. Smith, 77 Minn. 67, 79 N. W. 648, and also in Bowlby v. Bowlby, 91 Minn. 193, 97 N. W. 669, the appealability of such an order was questioned. After considering the question, however, we have concluded that the order is appealable.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

[2] 2. Coming, then, to the merits of the appeal, the trial court's reason for its denial of the appellant's application, as indicated by its memorandum recited above, requires some consideration of the nature of applications of the character here involved, with the view of ascertaining the rule under which the contentions of the parties are to be determined; for we think the attitude of the trial court, as expressly indicated by the reason assigned for its decision, was erroneous.

[4] Speaking generally, alimony is not awarded as a penalty, but as a substitute for marital support. *York v. York*, 34 Iowa, 530; *Harris v. Harris*, 72 Va. 13; *State v. King County Super. Ct.*, 55 Wash. 347, 104 Pac. 771, 25 L. R. A. (N. S.) 387; *Thomas v. Thomas*, 41 Wis. 229. It is wholly statutory, as is also its modification; its allowance in the first instance being governed by R. L. 1905, § 3590, and revision of judgments for alimony being governed by section 3592. The principles governing the alteration of adjudged alimony were summarized by Mr. Justice Simpson on the former appeal (see *Haskell v. Haskell*, supra) as follows: "Under the statute of this state the court awarding a judgment for alimony, whether such alimony be payable in a gross amount or in installments, has undoubted authority to revise or modify such judgment. This power may be exercised upon the application of either party for good cause shown. A substantial change from the situation that prompted or made proper the terms of the original decree justifies a change in those terms. An application for such change or modification is addressed largely to the discretion of the trial court." In addition to what we have quoted from the opinion cited above, it should be stated that motions of the character referred to, based upon the ground of changed financial condition of either of the parties, should be entertained with great caution. Nevertheless, we think that, where the change is not willfully brought about by the applicant, the motion should be disposed of under the same rules applicable upon an original application to fix the amount of alimony in the first instance, and upon the same considerations, so far as concerns the determination of the amount to be allowed, if a change is made. Upon an original application the amount which may be awarded is limited by the statute (section 3590), and in no event can it exceed one-third in value of the husband's personal and real property, and a portion of his earnings and income not exceeding in present value the same proportion thereof. So, also, upon an application for a change of alimony, the wife is entitled to receive so much, and only so much, as she would reasonably have been entitled to receive from her husband, had the change in his financial condition come immediately before the original award. While the necessities

of the wife constitute an important consideration, there must also be considered, in determining the amount of alimony, either upon an original application therefor or upon a motion to increase or decrease, the financial ability of the husband to pay. Furthermore, while applications of the character here under consideration, or for an increase of alimony, are addressed "largely to the discretion of the trial court," as above declared, the discretion referred to is not arbitrary, but judicial, and must be exercised in harmony with the rule stated. Of course, in the practical application of the rule, we do not mean to say that it must be applied with mathematical certainty, but merely that the standard with reference to which the amount to be allowed the wife for support and maintenance after the severance of the matrimonial bonds is practically the same, both on the original award and on any subsequent judicial change thereof. The rule followed by the trial court contravenes the one here stated, and also the holding in *Bowlby v. Bowlby*, supra, to the effect that the changed circumstances of either party may warrant a change. The sanction and application of such a rule would, we think, frequently prevent any reduction of awarded alimony, although subsequent events occurring without the fault of the husband had materially altered his financial standing for the worse, and even though he were then so circumstanced that it would be impossible for him to continue to pay the sums adjudged payable to the former wife.

[3] 3. Applying the rule above announced to the present case, the final question for our determination is: Was the order of the trial court correct, notwithstanding the erroneous rule under which the decision was reached? As we have already stated, the present motion is predicated upon the defendant's affidavit, which constituted the basis of the defendant's former motion, together with additional affidavits, and we have also counter affidavits filed by the plaintiff. Upon the showing made by the affidavit on the former motion, no counter affidavits having been filed thereon, this court has declared that the appellant was entitled to have the amount of the annual allowance reduced. See *Haskell v. Haskell*, supra, where the recitals of such affidavit are set forth in detail in 116 Minn. at page 13, 132 N. W. at page 1131: "It is clear, therefore," declared Mr. Justice Simpson, "that facts were shown making a modification of the judgment, not only justifiable, but required, under the established rule." It is true, as contended by the respondent, that the case on that appeal was treated as involving certain formal questions not affecting the merits as between the parties to this appeal; but the above-quoted language indicates the attitude of the court upon the showing there made, and, moreover, we think that such attitude was entirely justified.

Unless, therefore, there is something in the defendant's additional affidavits, or in the counter affidavits offered by the plaintiff, to weaken the showing made by the affidavit on the former motion, it follows that the defendant was entitled to a reduction upon his present application. The findings, above referred to, of the trial court, purport to represent the total showing upon which the order here appealed from was based; but, in our opinion, they do not present the appellant's showing as strongly as the allegations of the various affidavits before the court would seem to have warranted. But we will assume that such findings correctly show the plaintiff's financial status at the time of the hearing, except that it should have been made to appear thereby that the plaintiff had failed to get any other than temporary employment for a number of years, and this at a salary such that nearly four-fifths of the same was consumed by the alimony paid to the defendant, and that he had diligently and continuously tried to get steady employment, and, further, that his condition was not due to any intent or attempt to defraud the respondent, or to evade the payment of alimony to her, and, finally, that he was, at the time of the application, 49 years old. We will likewise assume that the finding as to the financial situation of the respondent fairly represents the showing made by the parties, and that she is as fully dependent as ever she was upon her allowance of alimony, though here, again, it might well have been made to appear, from the proofs before the court, that two of the four children, the custody and care of which were awarded to the respondent by the divorce judgment, had, since such judgment, become of age; one, moreover, being self-supporting, and the other partly so. But, even upon the finding made, we think that the trial court erred in denying the defendant relief; for it is apparent that the plaintiff could not have been legally awarded the sum as alimony which is here involved, if the defendant's financial condition had been the same then as it was at the time this application was made.

[5] It does not follow, however, that the respondent's allowance is to be entirely cut off, or that it is even to be reduced to the figure specified in the appellant's motion for reduction. The appellant's prospects are to be considered (*Muir v. Muir*, 92 S. W. 314, 28 Ky. Law Rep. 1355, 4 L. R. A. [N. S.] 909, and note), and alimony may be awarded even in the face of a showing of total lack of present property and income (2 Am. & Eng. Law [2d Ed.] 123; *Snedager v. Kincaid*, 60 S. W. 522, 22 Ky. Law Rep. 1347; *Canine v. Canine*, 16 S. W. 367, 13 Ky. Law Rep. 124).

Upon the showing made, therefore, including the admission of undisclosed resources

involved in the appellant's offer to pay \$2,400 a year, we deem it equitable and just that he should be required to pay \$3,000 annually to the respondent as alimony, in lieu of the \$5,000 which he has heretofore been under obligation to pay.

Other contentions urged upon this appeal were fully disposed of on the former appeal, and need not here be discussed.

Ordered, that the order appealed from be and it is hereby reversed, and that the cause be remanded, with instruction to modify the original judgment herein as to alimony, so as to reduce the amount to be paid annually by the defendant to the plaintiff, in equal quarterly payments, from \$5,000 to \$3,000.

LANGDON v. MINNEAPOLIS ST. RY. CO.

BLAKELEY v. SAME.

(Supreme Court of Minnesota. Dec. 13, 1912.)

(Syllabus by the Court.)

1. STREET RAILROADS (§ 114*)—INJURIES TO TRAVELERS—CROSSING ACCIDENT—NEGLIGENCE—EVIDENCE.

In an action for damages for injuries received by plaintiffs as a result of a collision between one of defendant's street cars and plaintiffs' carriage or cab, the evidence is held sufficient to sustain a verdict of negligence against defendant.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-250; Dec. Dig. § 114.*]

2. STREET RAILROADS (§ 117*)—CROSSING ACCIDENT—WILLFUL INJURY—QUESTION FOR JURY.

There was evidence tending in a measure to support the charge of willful negligence, and it is held, though the evidence in this respect left the question in some doubt, that there was no reversible error in its submission to the jury.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

3. TRIAL (§ 84*)—RECEPTION OF EVIDENCE—OBJECTIONS—SCOPE.

The general objection that certain documents prepared by defendant's motorman, offered in evidence by plaintiffs, were immaterial and incompetent, and not impeaching, held not to raise the question whether the documents were privileged communications between defendant and its employee.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 211-218, 220-222; Dec. Dig. § 84.*]

(Additional Syllabus by Editorial Staff.)

4. APPEAL AND ERROR (§ 207*)—QUESTIONS NOT PRESENTED IN TRIAL COURT—MISCONDUCT OF COUNSEL.

Alleged misconduct of plaintiffs' counsel in addressing the jury is not ground for reversal, where it was not directly called to the trial court's attention, and a ruling invoked and an exception taken.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1500; Dec. Dig. § 207.*]

5. STREET RAILROADS (§ 81*)—OPERATION—DUTY OF MOTORMAN.

A motorman of a street car is bound to anticipate the probable presence of pedestrians or vehicles at street crossings in the built-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

up portions of a city, and is therefore required to so manage his car that a collision with a vehicle, should one appear on the crossing, could, if possible, be averted, and also to give the usual warnings of the approach of the car, and to limit the speed to that prescribed by law.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172-177; Dec. Dig. § 81.*]

Appeal from District Court, Hennepin County; Horace D. Dickinson, Judge.

Actions by Cavour S. Langdon, as guardian of Bertha Shaw Blakeley, and by Frank D. Blakeley, against the Minneapolis Street Railway Company. From an order denying defendant's alternative motion for judgment or for a new trial, it appeals. Affirmed.

John F. Dahl and W. O. Stout, both of Minneapolis (N. M. Thygeson, of Minneapolis, of counsel), for appellants. Butler & Mitchell, of St. Paul, for respondents.

BROWN, J. These two actions, brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant, were consolidated and tried together in the court below, resulting in verdicts for plaintiffs. Defendant appealed from an order denying its alternative motion for judgment or a new trial.

On November 20, 1908, at about 7 o'clock in the evening, plaintiffs, husband and wife, were proceeding from their residence in the city of Minneapolis, in a cab or closed carriage hired by the husband for the particular occasion, to the residence of a neighbor residing a short distance away, and while crossing Nicollet avenue, along and upon which defendant operates its line of street railway, at the intersection thereof with Franklin avenue, the cab was struck by a street car with such force and violence as to totally demolish the vehicle and inflict upon plaintiffs serious and permanent injuries. Plaintiffs charged in their complaints that the accident and resulting injury to them was caused solely from the negligent operation of the street car, in this: (1) That it was run at an excessive and unlawful rate of speed; (2) that no warning of the approach of the car was given by sounding the car bell or otherwise; (3) that the car was not under proper control as it approached the street crossing; and (4) that defendant was guilty of willful negligence, in that the motorman in charge of the car failed to exercise reasonable care to avert the collision after discovering plaintiffs' peril. Defendant by its answer put in issue the charge of negligence on its part, and affirmatively alleged that the accident was occasioned by the negligence of plaintiffs and the driver of the cab, who, the answer further alleged, was their agent and servant. The trial below centered around the question of defendant's negligence in the respects alleged in the complaint, and the damages suffered by

plaintiffs. There was no evidence of negligence on the part of plaintiffs, and the court instructed the jury that the negligence of the cab driver was not imputable to them; so that the defense of contributory negligence was eliminated from the case. The jury returned verdicts for both plaintiffs.

It is contended on this appeal, in support of the claim that the court below erred in denying defendant's motion for judgment notwithstanding the verdict, that the evidence wholly fails to make a case of negligence on the part of defendant in any of the respects alleged in the complaint. In support of the motion for a new trial it is contended: (1) That the court below erred in certain of its rulings on the admission and exclusion of evidence, and in its charge to the jury; and (2) misconduct on the part of plaintiffs' counsel.

[1] 1. We find no difficulty in concurring with the trial court that the evidence made the question of defendant's negligence one of fact for the consideration of the jury. The street car causing the injury to plaintiffs was being operated upon Nicollet avenue, over and across which are extended numerous streets and avenues much frequented and used by the public, though the evidence of the motorman was to the effect that there was little travel upon the side streets at that particular hour of the day. The car was proceeding south, and at the intersection with Franklin avenue, the place of the accident, and for some distance below, up a grade. The evidence tends to show that the car was being run at an excessive rate of speed; the witnesses differing in their estimates all the way from 15 to 33 miles an hour. It also tends to show that the motorman in charge failed to sound the gong or bell of his car, or otherwise give warning of the approach of the car, as he neared the street crossing; that the same speed of the car was maintained up to the time of the collision; hence that the car was not under proper control. This evidence, if satisfactory to the jury, justified the conclusion of a negligent operation of the car, and that such negligence was the proximate cause of the injury to plaintiffs. *Shea v. Railway Co.*, 50 Minn. 385, 52 N. W. 902; *Holmgren v. Railway Co.*, 61 Minn. 85, 63 N. W. 270; *Smith v. Railway Co.*, 95 Minn. 254, 104 N. W. 16.

[5] A further discussion of the evidence upon this subject would serve no useful purpose. There is nothing unusual in the facts presented, or which differentiates the case from the ordinary case of a collision at a street intersection between a street car and a passing vehicle. The evidence tended to show the excessive speed of the car, the failure to give the usual warnings of its approach, and the failure of the motorman to have proper control of the car, where con-

trol was necessary. The motorman was bound to anticipate the probable presence of pedestrians or vehicles at street crossings of the location and character of this one, and it was incumbent upon him to so manage his car that a collision with a vehicle, should one appear, could if possible be averted. It was also his duty to give the usual warnings of the approach of the car, and to limit the speed thereof to that prescribed by law as not dangerous or excessive. It is urged that the signals alleged to have been omitted by the motorman would have been unavailing, had they been given; that it was not negligence to fail to give such warning, for the approaching car could plainly have been seen by the driver of the cab long before he reached the car track. It is probable, had the action been by the driver of the cab to recover for his injuries, defendant's contention would be well founded; but the cab driver's conduct is not involved in the action. The court below charged the jury that his negligence could not be charged to plaintiffs, and of that instruction no complaint is made. Plaintiffs, within the closed carriage, had the right to assume that defendant would discharge its full duty to the traveling public; that it would give timely warning of the approach of its cars at street intersections, operate its cars at a proper rate of speed, and keep them under reasonable control at points where pedestrians or vehicles might be expected to suddenly emerge from side streets. The negligence of the cab driver may be conceded, but that does not relieve the defendant from its negligence, under the law of the case as stated in the instructions of the court.

[3] 2. Defendant complains of the reception in evidence of Exhibits I and J. Exhibit I was a report of the accident made by the motorman to defendant the day following, and stated from the viewpoint of the motorman the facts and conditions surrounding the same. Exhibit J was a chart or plat made by the motorman showing the situation, the location of the car following the collision, the location of the cab and the bodies of the injured parties, and, as we understand it, the point at which the motorman first noticed the oncoming cab. It was brought out on the cross-examination of the motorman that these documents had been made by him or under his direction; and, upon request of counsel for plaintiffs, counsel for defendant produced them. They were made the basis of some further cross-examination, and were then offered in evidence. They were objected to by defendant as incompetent and immaterial, and not impeaching in character. We think the documents, as against the particular objection, were properly received in evidence. They were in substance and effect declarations of the witness made soon after the accident, and were in some respects at least at variance with the testi-

mony given by him at the trial. Exhibit I, the report of the accident, contained no reference to the claim made by the witness on the trial that the horses attached to the cab were running away, or approaching the street on "the jump," and tended to contradict him in that respect. If the horses were in fact running away, it is fair to assume that witness would have referred to that fact in his written report to the company. We hold that the documents were, as against the particular objection, properly received in evidence. The further contention that they were inadmissible, because in the nature of a confidential communication, and therefore privileged (*Booth, Street Railways, 399*), was not included in the objection made on the trial, and cannot, therefore, be considered. The objection that the documents were "incompetent and immaterial, and not impeachment," did not call to the attention of the trial court the point now made that they were privileged. *Graves v. Bonness, 97 Minn. 278, 107 N. W. 163.*

[2] 3. The question whether the court erred in submitting to the jury the issue of willful negligence presents the only other subject requiring special mention. Our examination of the record discloses no error of a character to justify a new trial, unless it be this particular instruction. We have given this feature of the case careful consideration, and as a result thereof hold, conceding the doubtfulness of plaintiffs' claim that they were entitled to a submission of the question to the jury, that no prejudice resulted therefrom. There was some evidence tending directly to show a failure on the part of the motorman to exercise reasonable care to avert the collision after discovering plaintiffs' peril. He discovered the carriage coming toward the car track on a run, a clear indication that the driver thereof did not intend to stop for the car to pass, if he noticed it coming, or could not do so because the horses were running away, as the motorman supposed, and it was, in view of the situation, incumbent upon the motorman immediately to take measures to avoid a collision, or in some manner draw the attention of the cab driver to the fact that the car was approaching. The precise distance between the cab and car when the motorman was first apprised of the situation was a question in some dispute on the evidence. But there was evidence that no effort to stop the car was made until the time of the collision. Passengers on the car testified that efforts to stop the car were made at the moment the collision occurred, and not before. The witnesses so testifying, particularly one of them, who through the car window noticed the approaching cab, were in position to judge with some degree of accuracy whether the efforts to stop the car and the collision were simultaneous. The force and effect of this evidence, considered in connection with

the circumstances presented, and the testimony of the motorman on the subject, was for the jury to determine. It may be conceded that the evidence, taken as a whole, does not leave the question entirely free from doubt.

But since the negligence of defendant in other respects charged in the complaint was, as to plaintiffs, shown by ample and sufficient evidence, it seems beyond question that no prejudice resulted from the submission of the particular question. It is not at all probable that the jury considered that feature of the case; the evidence upon the other branches of negligence, as to plaintiffs, who were not responsible for the conduct of the cab driver, being so clear and free from doubt. Had the evidence of negligence in the other respects been doubtful, an entirely different question would be presented. There was no fair doubt in that respect. The case of *Bloomquist v. Railway Co.*, 113 Minn. 12, 129 N. W. 130, is not in point. The trial court there refused to submit the question of willful negligence, and the refusal was sustained. Willful negligence was in that case the only basis upon which plaintiff therein could recover; the jury having found adversely to him upon all other questions. That is not the situation in the case at bar. We therefore hold that there was no error in the submission of the particular question to the jury. There was some evidence to support it, and, in any event, we are clear that it was not prejudicial.

[4] 4. We find no ground for reversal in the alleged misconduct of plaintiffs' counsel in his address to the jury. The attention of the trial court was not directly called to any prejudicial statements, no ruling invoked, nor exception noted, and the case comes within the rule applied in *State v. Frelinghuysen*, 43 Minn. 265, 45 N. W. 432, *Corrigan v. Elsingner*, 81 Minn. 42, 83 N. W. 492, and *Ludwig v. Spicer*, 99 Minn. 400, 109 N. W. 832.

This covers all the assignments calling for special mention, and results in the conclusion that no reversible errors were committed on the trial, and the order appealed from must be affirmed.

Order affirmed.

SEEVERS v. CLEVELAND COAL CO.

(Supreme Court of Iowa. Nov. 20, 1912.)

1. BROKERS (§ 88*)—ACTIONS FOR COMMISSION—SUFFICIENCY OF EVIDENCE.

In an action for commissions for finding a purchaser of coal lands owned by defendant, evidence *held* to make it a jury question whether plaintiff procured a purchaser for the land under an alleged agreement with defendant to do so for a compensation.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.*]

2. APPEAL AND ERROR (§ 1002*)—FINDINGS—CONCLUSIVENESS.

The Supreme Court will not pass upon the weight of conflicting evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

3. TRIAL (§ 337*)—INSTRUCTIONS—BINDING EFFECT.

It is the duty of the jury to follow an instruction, whether it be right or wrong.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 790; Dec. Dig. § 337.*]

4. TRIAL (§ 252*)—INSTRUCTIONS—CONFORMITY TO CASE.

Where the petition alleged that there was no agreement as to the amount plaintiff was to receive as compensation for procuring a purchaser of land, and there was no evidence that the customary or reasonable value of such services was 5 per cent., and the evidence showed that less than that amount, as well as that percentage, had been paid in such cases, it was error to instruct in an action for commissions that the measure of plaintiff's recovery was 5 per cent. of the purchase price, with interest.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

5. BROKERS (§ 88*)—ACTIONS FOR COMMISSIONS—INSTRUCTIONS.

In an action for commissions for procuring a purchaser for coal lands, where it was admitted that the price was not fixed, and that plaintiff did not have the exclusive right of sale, it was error to instruct that the fact that defendant did not know that the purchaser had been corresponding with plaintiff about the lands was not controlling, and that plaintiff had only to find a purchaser ready, able, and willing to buy in order to recover his commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.*]

6. BROKERS (§ 53*)—CAUSE OF SALE.

If, when defendant's president, and a purchaser of coal lands claimed to have been procured by plaintiff, met to consider the question, the president had no knowledge that plaintiff had corresponded with the purchaser or had been instrumental in calling the lands to his attention, and the prospective purchaser did not know that the coal field about which he and plaintiff had corresponded was that defendant offered for sale, it could not be said that plaintiff was the procuring cause of the sale to such purchaser.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 74; Dec. Dig. § 53.*]

7. TRIAL (§ 202*)—INSTRUCTIONS.

If the court attempts to instruct upon an issue, it should give a proper instruction.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 474, 477, 482; Dec. Dig. § 202.*]

8. MASTER AND SERVANT (§ 72*)—COMPENSATION—IMPLIED CONTRACT.

While an employer could contract with an employé for additional compensation for doing particular work for the employer, mere knowledge by the employer that the employé was doing the work and expected additional compensation would not raise an implied promise to pay such compensation.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 87, 88; Dec. Dig. § 72.*]

9. PRINCIPAL AND AGENT (§ 189*)—ESTOPPEL (§ 115*)—PLEADING—RATIFICATION.

A contract by ratification or perhaps estoppel may be proved under a general allega-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion that the contract was executed, notwithstanding that an estoppel must ordinarily be pleaded.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 713-717; Dec. Dig. § 189; * Estoppel, Cent. Dig. § 306; Dec. Dig. § 115.*]

10. EVIDENCE (§§ 222, 263*)—DECLARATIONS AGAINST INTEREST — ADMISSIONS — ENTIRE CORRESPONDENCE.

Declarations against interest or the admissions of an adverse party may always be shown, whether written or oral, and the other party may introduce all of the correspondence on the subject if they are shown.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 800, 803-808, 1022-1027; Dec. Dig. §§ 222, 263.*]

11. EVIDENCE (§ 271*)—SELF-SERVING DECLARATIONS.

As a rule, self-serving declarations, whether oral or written, are not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.*]

12. EVIDENCE (§ 271*)—SELF-SERVING DECLARATIONS.

A letter written by a party is not admissible for himself, except as a notice or a demand.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.*]

13. EVIDENCE (§ 220*)—ADMISSIONS.

That letters received are not answered is not evidence of acquiescence by the party receiving them in the facts stated therein.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 771-785; Dec. Dig. § 220.*]

14. EVIDENCE (§ 271*)—SELF-SERVING DECLARATIONS.

In a broker's action for commissions for procuring a purchaser, letters written from plaintiff to defendant after the sale, which were self-serving, were not admissible in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.*]

15. EVIDENCE (§ 220*)—LETTERS—PAST TRANSACTIONS.

Unanswered letters from plaintiff to defendant, written many months after plaintiff had quit defendant's employment, which merely narrated past transactions, were not admissible in evidence in an action for money claimed to be due from defendant as salary, and for commissions, etc.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 771-785; Dec. Dig. § 220.*]

16. TRIAL (§ 412*)—RECEPTION OF EVIDENCE—WAIVER OF OBJECTIONS.

Defendant, by introducing letters written by its president to plaintiff in response to letters from plaintiff, improperly admitted in evidence, did not waive the objections to the incompetency of plaintiff's letters as evidence, being required to meet the case as best it could after the incompetent letters were admitted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 182, 974-977; Dec. Dig. § 412.*]

17. JUDGMENT (§ 203*)—SEPARATE JUDGMENT ON COUNTERCLAIM.

Defendant was not entitled to separate judgments on the two items of its counterclaim found in its favor; the trial court having properly directed the jury to credit the amount

of such items on the sum found due to plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 361, 984; Dec. Dig. § 203.*]

Appeal from District Court, Wapello County; Frank W. Eichelberger, Judge.

Action to recover an alleged balance due on salary for certain alleged reductions obtained by plaintiff on coal options secured for defendant, and commissions for the finding of a purchaser for certain lands owned by the defendant in this state. Defendant filed an answer tendering an issue on each of these claims and setting forth certain counterclaims against the plaintiff. This counterclaim was in two counts or divisions, and thereto plaintiff filed a reply in which he admitted part of the items thereof and denied and explained certain others. On these issues the case went to a jury; the court instructing that plaintiff had not shown himself entitled to anything for salary. On the other issues, the jury found for defendant on plaintiff's claim to reductions from option prices; for the plaintiff on his claim to commissions, and for defendant on the two items of counterclaim, although the allowance on the second count was for less than was claimed. Defendant moved for judgment on the items found in its favor on the counterclaims, but these were overruled, although the court deducted the amount of these allowances from the amount awarded plaintiff as commissions, and rendered judgment for plaintiff for the amount of these commissions so found, less the allowances to defendant on its counterclaims. Defendant alone appeals. Reversed and remanded.

McNett & McNett and J. C. Mitchell, all of Ottumwa, for appellant. S. V. Reynolds and John N. McCoy, both of Oskaloosa, and Jaques & Jaques, of Ottumwa, for appellee.

DEEMER, J. As plaintiff has not appealed, the first two counts of his petition are eliminated; the first by direction of the trial court, and the second by verdict of the jury. The jury found for plaintiff on the third count, and for the defendant on the two items of counterclaim, and, after deducting the allowances on the counterclaim, judgment was rendered against defendant in the sum of \$15,357.86. Defendant's motion for a new trial was overruled, and the court taxed one-half the costs to each party. The appeal challenges many rulings of the court during the trial, and it is claimed that defendant was entitled to separate judgments on the two items allowed it by the jury on its counterclaim. That the exact issues on the third count of plaintiff's petition may be understood, it is necessary to refer to that pleading and its numerous amendments at some length. In the original petition, plaintiff alleged that, in virtue of an oral agree-

ment between him and the defendant made on or about May 23, 1904, he was to have a 5 per cent. commission on any sale or for the procuring of a purchaser for any of the coal lands belonging to defendant; that he found a purchaser for certain tracts in Marion and Lucas counties which he had optioned for the defendant, and that defendant made sales to this purchaser in September of the year 1905 for \$302,150, and that his commission thereon amounted to \$15,107.50. In an amendment to this count, he averred that his contract for commissions was made with one Glenn W. Traer, president of defendant company at Chicago, as alleged in his petition; that he procured the Consolidated Indiana Coal Company as a purchaser of the coal lands, or was instrumental in bringing purchaser and seller together; that, he interested Robert Lee and Carl Scholz, representing the purchasing company, in the lands; and that by means of his efforts with them the sales were made. In another amendment to this count he averred in substance that he, beginning in the year 1903 and continuing down to September 15, 1905, when the contract of sale was closed, was engaged in trying to find a purchaser, and that he finally succeeded in doing so, and that defendant sold the lands to the purchaser procured by him, to wit, the Consolidated Indiana Coal Company. He also averred, in this connection, that these services were extra and not covered by his regular contract of employment with defendant, and that the reasonable value of his services was 5 per cent. on the purchase price, or \$15,107.

Defendant denied that it employed plaintiff to find a purchaser for its coal lands, and further pleaded settlements with and payments to the plaintiff for services performed by him of every kind and character. It also pleaded an accord and satisfaction. In its counterclaim it asserted that plaintiff had collected \$700 in rentals for lands belonging to defendants, for which he had not accounted, and it asked judgment for that amount, less the sum of \$13.71, paid by plaintiff on account of some repairs. In another count it pleaded that plaintiff, while taking options for coal lands in Marion county for one Osgood, had wrongfully appropriated to his own use, between January and October, the sum of \$3,600, which amount was repaid by means of a loan received by plaintiff upon a note signed by a farmer with whom he had been negotiating for lands as security, but that plaintiff failed and neglected to pay the interest on the amount used by him, which amounted to the sum of \$263.50, and as assignee of Osgood's claim for interest it asked judgment for the amount thereof. Plaintiff admitted the receipt of the rents and said that he retained them to apply on his claim for commissions, etc. As to the second count of the counterclaim, he admitted that he borrowed the money to re-

place the amount retained by him because he discovered this amount was a special fund, but he denied that he should be charged with interest.

In an amendment to his petition, and doubtless to meet some of the issues tendered by the answer, plaintiff averred: "That during the time that he was performing the services earning the commissions and the rebates for which this suit is brought, Glenn W. Traer was president of the Cleveland Coal Company, and also president of the Whitebreast Fuel Company of Illinois, both of which companies were owned by the same stockholders, managed by the same board of directors, and were in fact a corporation within a corporation. So far as plaintiff understood it, the Whitebreast Fuel Company was the holding company or the agent of the defendant company, and that, while the services for which he brings this suit were rendered, as claimed by him, for the Cleveland Coal Company, whatever amounts of money were paid him for wages, commissions, or rebates were paid through the Whitebreast Fuel Company of Illinois, and receipts and vouchers were made by him to that company, but as a rule the vouchers and receipts showed the proportion of the money so paid on behalf of the Cleveland Coal Company, the defendant herein. This amendment is made simply for the purpose of more clearly getting before the court and jury the exact situation." To this defendant answered as follows: "It admits that, during the period for which plaintiff claims additional amounts for services rendered, the said Glenn W. Traer was president of the Cleveland Coal Company, defendant, and was also president of the Whitebreast Fuel Company of Illinois, but expressly denies each and every other averment stated in said amendment to petition, except that it further admits that the plaintiff was paid for his services in full by the Whitebreast Fuel Company of Illinois, by which company he was employed and paid, and to which company he executed his receipts and vouchers for his services."

That one of defendant's pleadings may be better understood, we here quote therefrom as follows: "The defendant says that plaintiff was paid for his services, covering the period for which he sues, by the Whitebreast Fuel Company of Illinois, by whom he was employed. * * * Defendant says that plaintiff's contract with said Whitebreast Fuel Company of Illinois for services performed by him, and for which he was paid, at the rate of \$5 per day, was in parol, and was also implied from his acceptance and receipt from said Whitebreast Fuel Company of Illinois from month to month at the rate of \$5 per day, and his statements of account rendered therefor. * * * The defendant says that between March 3, 1904, and April 3, 1905, no moneys were sent by either J. C.

Osgood or the defendant to the plaintiff, but between said dates the Whitebreast Fuel Company of Illinois sent the plaintiff for and on its account with such J. C. Osgood about \$59,000, and about \$13,650 for or on its account with defendant. * * * Defendant says that at the time, and for the period stated, Glenn W. Traer was the president, and J. M. Blee was the treasurer and assistant secretary, of the defendant."

In this manner we have endeavored to extract the substance of pleadings covering about 38 printed pages of the abstract. In some respects the issues are simple; but in going to the record which consists of an abstract of 739 pages, amended abstracts of a few pages, and briefs and arguments aggregating over 400 pages, that which might otherwise be regarded as simple becomes exceedingly complex. Involved in the transactions disclosed by the testimony are the following organizations: The Whitebreast Fuel Company of Illinois, an Illinois corporation, the St. Paul Coal Company, an Iowa corporation, the Cardiff Coal Company, an Illinois corporation, the Crestline Syndicate, a group of individuals operating in Polk county, or what is known as the Des Moines field, the defendant, the Cleveland Coal Company, an Iowa corporation, and the Rock Island Railway Company had a mining department and it cuts some figure in the case. In addition to these there was what is known as the Consolidated Indiana Coal Company, a corporation, the major part of whose stock and securities were held by the Rock Island Railway Company. This consolidated Indiana Coal Company was the purchaser of the lands for the sale of which plaintiff asks a commission. The deed of the lands to this company was made in September of the year 1905. Chas. A. Goodnow was general manager of the Rock Island Company. Mr. Matters was president, and a Mr. Reid was the chairman, of its board of directors, Chas. Scholz was manager of the mining department of the railway company and general manager of the Consolidated Indiana Coal Company. G. W. Traer was president of the Whitebreast Fuel Company of Illinois, and J. M. Blee was its treasurer, and that company owned property both in Illinois and Iowa, and operated the mines of both the St. Paul Company and the Cleveland Company, but each owned separate properties which were not being operated. Neither the St. Paul nor the Cleveland Company operated any mines in Iowa; the actual operation of their mines being carried on by the Whitebreast Company of Illinois. Traer was also president and general manager of the defendant company, and one Blee was treasurer. It seems that the Whitebreast Company, the St. Paul Company, and the defendant, Cleveland Company, were owned by the same parties, managed by the same board of directors, and had the same

general offices. The Whitebreast Company seems to have been the operating company, and it seems that everything was cleared through the Whitebreast Company, Traer, the president, said in his testimony: "All the companies (referring to the Whitebreast Fuel Company of Illinois, the Cleveland Coal Company, the St. Paul Company, and the Crestline Syndicate), were paid by or through the Whitebreast Fuel Company of Illinois; its vouchers were used; and the other companies were all operating through the Whitebreast organization, and the Whitebreast kept their bank account. All the expenses of the different companies were paid on Whitebreast vouchers, and we then charged to each company whatever was expended on its account. The Whitebreast Company from time to time had settlements and adjustments with these other companies on the amounts that were paid out for them; the entries were made right along from time to time, and the books balanced every month."

One John C. Osgood was a stockholder, probably the principal one, in both the Whitebreast and the defendant companies from the beginning down to the year 1906, and during part of the time was director and nominal treasurer; but, as already indicated, Traer was president of both companies, and had charge of the business thereof. It would seem that Osgood and Traer at one time owned practically all the stock in both companies. Osgood was a witness in the case, and he testified in part as follows: "As a result of a number of interviews and considerable correspondence with Glenn W. Traer, I authorized him to proceed to procure options in the so-called 'Belinda-Dallas field' to prospect the land if it proved valuable for coal to purchase the same, telling him that I would provide funds necessary for the expenses and purchase price of the property; the details of optioning and prospecting the property were left in Mr. Traer's hands, he reporting to me the progress of the work from time to time, and conferring with me frequently in personal interviews. In the first instance, it was my expectation to open a mine on the land, but later on I decided to dispose of my coal interests in Iowa as opportunity offered, and authorized Mr. Traer to find a purchaser for the various properties, including the 'Belinda-Dallas field.' He advised me of negotiations he had with Carl Scholz, and I authorized him to sell the 'Belinda-Dallas field' to Carl Scholz, or the company he represented, at a price to net \$300,000. * * * I had nothing to do with the employment of Byron V. Seevers in any capacity, but was advised by Mr. Traer that Mr. Seevers was employed by the Whitebreast Fuel Company of Illinois to procure options, and that he was using him in the 'Belinda-Dallas' field at a compensation of \$5 per day and his expenses. * * * I had

no personal knowledge of the employment of Byron V. Seevers, except as I was informed by Glenn W. Traer. I was not informed that he had anything to do with the prospecting or with the payment for said lands or coal rights. * * * The optioning, prospecting, purchasing, and sale of the so-called 'Belinda-Dallas' coal field was a personal operation of my own, which I conducted with my capital, with the assistance of my business associate, Glenn W. Traer, utilizing the employes and other facilities of the corporations in Iowa in which I was interested, in the Cleveland Coal Company, and the Whitbreast Fuel Company of Illinois. I did not authorize or consent to the employment of the plaintiff in the matter of negotiating a sale or finding a purchaser for the property. I sold the property myself to Daniel G. Reid in New York without any knowledge on my part as to whether the purchase was made for himself personally or for any of the corporations in which he was interested. * * * I understood from Mr. Traer that plaintiff was employed, under his direction, to procure options on lands. I am not positive whether in the years 1903 to 1906 I held any official position with either the Cleveland Coal Company or the Whitebreast Fuel Company of Illinois. I may have been a director of one or both of those companies for a portion of the time named. * * * Glenn W. Traer resided in Chicago during that time, I think; my residence was in Redstone, Colo. The companies during the time referred to maintained their offices in the Rookery building in Chicago. Glenn W. Traer was president of both companies and had general charge of their operations. He had charge of the business of said companies in Iowa and Illinois. I have no personal knowledge of who took options in 1903, 1904, and 1905 on the coal rights in Marion county, sometimes called the Belinda-Dallas field, or who did the fieldwork, but was informed by Mr. Traer that Byron W. Seevers was employed, under his direction, to do some of this work. My best recollection is that the options were taken in the name of Glenn W. Traer, and that property, when purchased, was deeded to him. Q. Do you know that when the deeds to these properties were made by the landowners they were made to Glenn W. Traer as grantee, and that Glenn W. Traer at a later date deeded them to the Cleveland Coal Company, and that the Cleveland Coal Company at a still later date deeded them to the Consolidated Indiana Coal Company? A. I have no personal knowledge, but have been so informed. Q. Please state who signed the deeds to the property in question when it was deeded to the Consolidated Indiana Coal Company, and what official position the signers occupied with the Cleveland Coal Company. A. I cannot answer this question as I never saw the deed, but presume it was signed by the proper officers of the Cleveland

Coal Company. The Cleveland Coal Company did not sell the Belinda-Dallas field in Marion county direct to the Consolidated Indiana Coal Company. I sold the property to Daniel G. Reid. I cannot give the exact date the sale was made, but to the best of my recollection it was some time the latter part of July or August 1905. Q. Did the plaintiff, Byron W. Seevers, have charge of the optioning and purchasing of the property in question in the said Belinda-Dallas field for the defendant's company during the years in question? A. He did not. Glenn W. Traer had charge of the optioning and purchasing of the property for me. I was informed by Glenn W. Traer that Seevers was in his employ for the purpose of doing fieldwork in connection with securing options. * * * Under my direction, Glenn W. Traer had charge of the operations referred to, and, as already stated, advised me that plaintiff was in his employment, and was used by him in connection with procuring options in the Belinda-Dallas field." This much by way of introduction.

Plaintiff claims that he made an oral contract with Traer as president and manager of the defendant company, whereby the said company agreed to pay him a commission for finding a purchaser for the options on the coal lands in Marion and Lucas counties, known as the Belinda-Dallas field, and so testified while on the witness stand. He also introduced some letter from Traer which he claims corroborated his testimony. He claims that the arrangements were made early in the year 1903, and were brought about because of his offer from other men to enter into their employ. He further says that, pursuant to the contract, he interested the officers of the Rock Island Railway in this field and brought about a meeting between Traer and these officers, which finally resulted in a sale of the property to the Consolidated Indiana Company, that company being practically owned by the Rock Island Company, and that the price obtained was something like \$302,000, and he asks either the sum of 5 per cent. as an agreed commission for his work or the reasonable value thereof, which he stated in his petition to be the same amount. On the other hand, defendant denies that it ever employed the plaintiff in any capacity. It says that he was employed by the Whitebreast Company at an agreed compensation for his services, which did not include anything by way of commissions; that he has been paid his salary and has receipted for the same. That the land which was sold did not belong to the defendant, but to Osgood, and that neither Osgood nor any one for him ever employed plaintiff or agreed to give him any compensation for finding a purchaser for the land. It is agreed that the corporate records show a purchase of the lands in controversy by the defendant company

from Osgood in October of the year 1904. But Osgood said, as will be remembered, that he used the employes of the Iowa companies in securing his options, and some of the records show that certain payments for options were charged on the books of the Whitebreast Company to the defendant company. There can be no doubt, under the testimony, that some time in the year 1903 plaintiff undertook to interest the Rock Island Railway Company, through its officers, in the coal field in question, and that he had considerable correspondence with these officials; that this continued down until the time of a meeting of Traer with these officials, some time in March of the year 1904, when it is claimed plaintiff directed the railway officials to take the matter up with Traer for the reason that they had officers in Chicago. However this may be, Traer met these officials at the time stated at Indianapolis, during a miner's convention, and then had with him maps and plats of the field, and then entered into negotiations to sell the land. Traer says in his testimony that he never knew that plaintiff had had any correspondence with these people, and that he was not advised of that fact by the plaintiff. It is conceded by plaintiff that the price for the lands was not fixed, and that this matter was left open for negotiations between vendor and purchaser. It is significant, however, that, when representatives of the railway company came to Iowa to personally look over the property, they were met by plaintiff, or at least were accompanied by him during a part of the time they were making their investigations. There is a sharp dispute in the testimony regarding Traer's knowledge of plaintiff's efforts to induce the railway people to buy the land. But, however this may be, defendant insists that the original negotiations never amounted to anything, were entirely broken off, and were thereafter resumed without any help from plaintiff, and the sale actually made at a much lower figure than was first proposed. This much of the testimony will be sufficient to indicate in a general way the points relied upon for reversal. To be accurate, these are 37 in number, but they are finally reduced to seven or eight principal points.

[1, 2] 1. It is argued that there was not enough testimony to take the case to the jury, and that in any event there should have been a verdict for the defendant upon plaintiff's claim for commission. We have set out enough of the record to indicate that we think the question was for a jury, and it is well established that we should not attempt to pass upon the weight of the testimony where there is a conflict therein. It may be that the preponderating weight thereof on the cold page is apparently with the defendant, but this is not enough to justify in reversing the case for want of evidence to sustain the verdict. In this con-

nection, the trial court gave the following, among other, instructions: "(17) Before plaintiff can be allowed a commission on the sale of the Belinda coal field, he must not only prove, by a preponderance of the evidence, that he was the cause of Traer and Scholz being brought together and entering upon negotiations, each with the other, with reference to the field, but he must also prove, by a preponderance of the evidence, that defendant had authorized him to find a purchaser for the field alone and by itself, and had agreed to pay him a commission if he would find a purchaser therefor—that is, though plaintiff may have been authorized to find a purchaser for, or to sell, the field in question along with and in connection with other fields all in a lump and not separately, yet in no event can he recover a commission on the separate sale of the field in question, without first proving, by a preponderance of the evidence, that the defendant authorized him to find and produce a purchaser for the field in question alone and by itself, and agreed to pay him a commission if he should find and produce a purchaser therefor." We have looked in vain for any testimony which would justify a verdict for plaintiff under this instruction, and plaintiff's counsel have not pointed out any such testimony.

[3] We do not now see why this instruction was given; but, right or wrong, it was the duty of the jury to follow it, and, had it done so, plaintiff would not have been entitled to the verdict. *Crane v. Railroad Co.*, 74 Iowa, 330, 37 N. W. 397, 7 Am. St. Rep. 479; *Eggert v. Templeton*, 113 Iowa, 266, 85 N. W. 19; *Nichols v. Railway Co.*, 69 Iowa, 154, 28 N. W. 571; *Mahoney v. Dankwart*, 108 Iowa, 321, 79 N. W. 134.

[4] In another instruction the court said: "(24) If you find the plaintiff entitled to recover on the third count, the measure of his recovery will be 5 per cent. on whatever amount you find the purchase price to have been, with interest at 6 per cent. from the date of the sale, and, if you so find, you will compute the interest and return your verdict for said sum in one lump sum, as to count three of plaintiff's petition, not exceeding amount claimed in petition." This instruction cannot be sustained. It is true that plaintiff testified to an oral agreement to pay him 5 per cent. commission upon the purchase price, but he also alleged in his petition that there was no agreement as to amount, but that the reasonable value of his services was 5 per cent. There was testimony from which a jury might have found that no rate of compensation was fixed; but there was no testimony that the usual or customary rate or the reasonable value of these services was 5 per cent. True there was testimony of other sales where 5 per cent. was paid, but there was also testimony as to sales where less was paid. The question was, in any event, one for a jury, and

the trial court was not justified in instructing, as a matter of law, that plaintiff was entitled to 5 per cent. on the amount of the purchase price.

[§] 2. In its sixteenth instruction the court said: "The fact, if it be a fact, that the defendant or its president, Traer, did not know that Scholz and the Rock Island people had been corresponding with Seever's about the sale of the lands is not controlling. It was no part of the contract. All he would be required to do, if you find that he was employed to find a purchaser for the lands, was to find some one who desired to purchase it, and who was ready, able, and willing to buy, or would in fact buy, and, if he did, the contract was fulfilled, regardless of defendant's information of what he had done." Under the facts disclosed and practically conceded that the price for the land was not fixed and that plaintiff did not have the exclusive right of sale, this instruction was clearly erroneous.

The law on this subject is announced in the recent case of *Gilbert v. McCullough*, 146 Iowa, 333, 125 N. W. 173, and is as follows: "The question presented is whether, conceding the facts to be as recited, the plaintiff found a purchaser within the terms of his employment. In *Rounds v. Alee*, 118 Iowa, 345 [89 N. W. 1098], an agent, having been employed to find a purchaser for land at a specified price, was held to be entitled to his commission if the efficient cause in procuring a purchaser, at the price named, to whom the principal sold, even though the principal knew nothing of what had been done; the agent not having had an opportunity of informing him. And this ruling is amply sustained by authority. *Lloyd v. Matthews*, 51 N. Y. 124; *Craig v. Wead*, 58 Neb. 782, 79 N. W. 718; *Hovey v. Aaron*, 133 Mo. App. 573, 113 S. W. 718; *Graves v. Bains*, 78 Tex. 92, 14 S. W. 256; 19 Cyc. 264. This case is to be distinguished from *Rounds v. Alee*, in that the sale was for a price less than that named to the agent, and, though the latter had submitted an offer equal to that received by the owner, he had withheld the name of the proposed purchaser. Had he submitted such name, there might be some question as to defendant's liability for the agent's commission, for the circumstance might be such that the owner might not avoid such liability by reducing the price to the customer furnished. *Steward v. Mather*, 32 Wis. 344. By withholding the name of the purchaser proposed, the agent voluntarily kept from his principal the knowledge which would have enabled the latter to protect himself as well as the agent, and therefore the latter, rather than the principal, was at fault. Even though the defendant may have agreed to employ no other agent, he retained the right himself to dispose of the property. *Ingold v. Symonds*, 125 Iowa, 82 [99 N. W. 713]. This right was

not obviated by the circumstance that another may have assisted him in effecting the sale, providing it was consummated before the plaintiff found a purchaser, or the agency of the plaintiff was thereby revoked. *White v. Benton*, 121 Iowa, 354 [96 N. W. 876]. Possibly the party having the exclusive agency might have a cause of action for damages flowing from the breach of contract in employing another agent, but no claim of that kind is made. The action is for commission earned, and not for damages, because of the owner's lapse from his agreement in other respects. The sale was consummated by defendant prior to ascertaining that the purchaser was the same person as the one for whom the offer had been submitted. As that offer was \$75 less than the price at which he was to procure a purchaser, he did not thereby so perform as to entitle him to a commission. *Ryan v. Page*, 134 Iowa, 60 [111 N. W. 405]. And as the sale was at a less price or one not specified in the agency agreement, and without knowledge that the purchaser was the person whose offer had been submitted by plaintiff, the defendant did not become liable to the latter for a commission. In *Boyd v. Watson*, 101 Iowa, 214 [70 N. W. 120], the price of the land for the sale of which the agency existed was not specified, and the court approved of an instruction that in these circumstances a sale to a customer of the agent, without knowledge of that fact, would not render the principal liable, for the commission claimed was approved. The distinction between the above case and *Rounds v. Alee* is that, in the latter, the price was named, and the sale effected at such price, while in *Boyd v. Watson* the consideration was a matter of negotiation. See, also, *Blodgett v. Railway*, 63 Iowa, 606 [19 N. W. 799]. Power to fix the price is incident to the right retained by the owner to sell, and an agent necessarily must take this into account, and, unless he cares to assume the risk of a sale by the owner to a prospective purchaser on terms different than those specified, he must disclose such purchaser's name in submitting his proposition. Indeed, there is an element of bad faith in withholding this information from the principal, with whom the agent is required to deal with candor and fairness, and it must not be understood from the discussion that recovery might have been had, had the sale been at the price specified in the employment of plaintiff as agent." See, also, to the same point, *Boyd v. Watson*, 101 Iowa, 214, 70 N. W. 120; *Blodgett v. Railroad Co.*, 63 Iowa, 606, 19 N. W. 799. Also the following from Indiana which seems to be a well-reasoned opinion: *Mullen v. Bower*, 22 Ind. App. 294, 53 N. E. 790.

[§] The following instruction asked by defendant on this same proposition should have been given: "(1a) Before plaintiff can recover a commission on account of the sale of

the coal field in question, he must establish, by a preponderance of the evidence, that he produced, as a prospective purchaser, to the defendant the party that did purchase; that is, that it was through his efforts that Mr. Traer and Mr. Scholz were brought together to enter upon negotiations as to the purchase and sale. Hence if in March, 1904, Mr. Traer and Mr. Scholz met and took up the consideration of the field in question, Traer acting for the defendant in offering to sell, and Scholz acting for his company as a prospective purchaser, and if at that time Mr. Traer had no knowledge that the plaintiff had been in correspondence with Mr. Scholz concerning a coal field in Marion county, and had no knowledge that plaintiff had called, or had been instrumental in calling, Mr. Scholz's attention to a coal field for sale in Marion county, and if at that time Mr. Scholz had no knowledge that the coal field he and the plaintiff had been corresponding about was the same coal field Mr. Traer was offering for sale, then you must find that plaintiff did not bring Traer and Scholz together, and was not the producing cause of the sale in question."

[7] The issue was in the case by reason of testimony having been introduced pro and con on this proposition, and the trial court, when it attempts to instruct upon a matter which the parties have made by the testimony, must give a proper instruction. *Hanson v. Kline*, 138 Iowa, 101, 113 N. W. 504.

[8] 3. The trial court also gave the following instruction: "(11) One acting without any authority therefor, from the owner of lands in finding a purchaser for such lands, is a mere volunteer, and in such case would not be entitled to a commission for such sale, even though his efforts may have been the efficient cause of bringing about the sale. But if the broker reports to the owner that he had begun such negotiations, and the owner of the lands knows that the broker expects a commission for obtaining such purchaser and approves the same, and makes the sale to such person with whom the broker had commenced such negotiations, then the broker, although a mere volunteer at the commencement of the proceeding, would be entitled to a commission." As applied to the facts, we do not think this instruction can be sustained. According to plaintiff's own testimony he was, during all the time when claiming commissions for sales, in defendant's employ, and doubtless owed it his entire time and energies. Of course his employer could contract with him to pay additional compensation for finding purchasers for his coal lands; but, from mere knowledge that he was doing the work and expecting compensation, no implied promise would, as we think, arise. This proposition is ruled, we think, by *Welch v. Collenbaugh*, 150 Iowa, 695,¹ wherein we said: "The ac-

tion of plaintiff is necessarily based upon the alleged contract of employment. His petition alleged such employment. The defendant's answer denied it, and his testimony clearly negated it. There could be an employment without any express agreement as to the rate of compensation. The contract of employment being proved, the rate of compensation could be determined on quantum meruit. But this right of compensation at all was dependent upon the question whether there was any employment of the plaintiff by the defendant to procure a purchaser for him. The defendant asked no aid of the plaintiff, and refused all his solicitations for employment. Upon such a state of facts, employment cannot be implied from the mere fact that defendant knew that plaintiff was about to take a customer to see the farm with a view of making an offer for it. A property owner is not precluded from engaging in conversation with an agent who solicits an agency from him, nor is he bound to forbid an agent to look at his property or to show it to a customer, in order to protect himself against liability." This thought was recognized by plaintiff in his pleading, for he expressly averred that his services were extra and not covered by his contract of hiring, and that the reasonable value of his services were, etc.

[9] A contract by ratification, or perhaps estoppel, may doubtless be proved under a general allegation that such a contract was made. *Long v. Osborn*, 91 Iowa, 160, 59 N. W. 14. This is true, notwithstanding the rule that an estoppel must ordinarily be pleaded. The question is really not one of estoppel, but of the character of testimony to prove a contract. This may be done by conduct, and facts may be shown, under a general allegation of contract, to show an implied one or one growing out of conduct, or by ratification of the acts of another. See, to the same point, *Smith v. Bank*, 107 Iowa, 624, 78 N. W. 238; *State Bank v. Kelley*, 109 Iowa, 546, 80 N. W. 520; *Lull v. Bank*, 110 Iowa, 542, 81 N. W. 784; *Fritz v. Grain Co.*, 138 Iowa, 705, 114 N. W. 193. The trouble with the instruction lies, not in the fact that there was no pleading, but because, under the facts disclosed, it was erroneous as a proposition of law, for the very fundamental reason that plaintiff, as he claims, was then employed by defendant, and to recover commissions it was necessary for him to show an agreement for extra compensation.

4. For the errors already pointed out, the judgment must be reversed, and we need not consider many of the other propositions relied upon. A vast number of letters passing between the parties named were offered and received in evidence, and to many of these defendant objected because self-serving in character and not in the form of admissions.

¹ 130 N. W. 793.

Some of these letters were part of the res gestæ of the sale or of the efforts put forth by the plaintiff in his claimed efforts to find a purchaser. Others were explanatory of letters received by plaintiff from various parties, and essential to a complete understanding thereof, because they were a part of the correspondence with reference to a given subject, and were admissible as a part of the correspondence about the matters referred to. Some letters written by plaintiff were introduced, over defendant's objections, which contained nothing more than narratives of past transactions and, so far as shown, were never answered by the parties to whom they are said to have been addressed. So, too, letters from plaintiff to various parties were put in which purported to be answers to letters addressed to him without producing these letters or accounting for their loss or destruction in order that secondary testimony as to their contents might be given.

[10] Of course declarations against interest or admissions of an adverse party may always be shown, whether in the form of letters or made orally. And in such cases the other party may introduce all the correspondence with reference to that subject.

[11] But, as a general rule, self-serving declarations, whether in the form of letters or other statements, are not admissible. And the rule seems to be that the fact that an addressee fails to answer a letter does not make the letter admissible as containing admissions by silence. *Commonwealth v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; *Learned v. Tillotson*, 97 N. Y. 1-12, 49 Am. Rep. 508.

[12, 13] The general rule with reference to the admission of letters is as follows: "A letter written by a party is not admissible in his own favor, except as a notice or a demand." 13 Am. & Eng. Ency. of Law, p. 259. Letters, written by the contractors to the city officials, did not tend to prove or disprove any issue in the case, and were clearly inadmissible. Such testimony tended to prejudice the minds of the jury against the city and in favor of the contractors. "The mere fact that letters were received and remain unanswered has no tendency to show an acquiescence of the party in the facts stated in them. A party is not to be driven into a correspondence of that character to protect himself from such consequences. In the case of *Firbee v. Denton*, 3 C. & P. 103, the plaintiff had sent a letter to the defendant, demanding a sum of money as due to him, to which no answer was returned. On the offer to prove its contents, * * * Lord Tenterton, C. J., observed: "I am slow to admit that. What is said to a man before his face, he is in some degree called on to contradict, if he does not acquiesce in it; but the not answering the letter is quite different, and it is too much to say that a man, by omitting to answer a letter, at all events admits the truth

of the statements that letter contains. I am of opinion," he observed, "that this letter cannot be read." *Hill v. Pratt*, 29 Vt. 119. In *Bank v. Dalasfield*, 126 N. Y. 410, 27 N. E. 797, it was said: 'We can see no ground upon which the letter is admissible. It is not in the nature of a declaration, which the defendant admits by not answering; nor is it on the same plane as an oral declaration to the same effect, made in the presence of the party to be charged, and who may be regarded as admitting its truth by failing to deny it. This letter is a mere declaration of the writer, assuming in his own behalf to characterize and determine the nature of a past transaction, and it does not demand an answer, and is not admissible in evidence against the defendant. *Learned v. Tillotson*, 97 N. Y. 1, 49 Am. Rep. 508; *Talcott v. Harris*, 93 N. Y. 567.' In *Fearing v. Kimball*, 4 Allen [Mass.] 125, 81 Am. Dec. 690, it was said: 'The general rule that a party cannot make evidence for himself by his written communications addressed to the other party as to the character of dealings between them, or the liability of the party to whom they are addressed, in the absence of any reply assenting to the same, is well settled.

* * * Omitting to answer a written communication is not evidence of the truth of the facts therein stated, nor is a party under ordinary circumstances required to reply to a letter containing false statements of facts.

* * * A party cannot make evidence for himself by his own declarations. * * *

The omission to answer letters written to a party by a third person does not show an acquiescence in the facts there stated, as might be authorized to be inferred in the case of silence where verbal statements were made directly to him.' *Waring v. United States Tel. Co.*, 4 Daly [N. Y.] 233; *Child v. Grace*, 3 C. & P. 193; 1 *Greenleaf on Evidence*, § 199; *Moore v. Smith*, 14 Serg. & R. [Pa.] 393; *Robinson v. Fitchburg & W. R. Co.*, 7 Gray [Mass.] 92. In *Hammond v. Beeson*, 112 Mo. 190, 20 S. W. 474, it was said of the contents of such a letter: "These were declarations of a party in his own interest, and should not have been read in evidence to the jury. A party is not allowed in that manner to make evidence for himself." In *Dempsey v. Dobson*, 174 Pa. 122, 34 Atl. 459, 32 L. R. A. 781, 52 Am. St. Rep. 816, it was said: "The letter written after the plaintiff's color books had been returned to him, demanding that the copy that had been made should be given up to him, was inadmissible. It was an argumentative presentation of his view of his rights as an employé, and of the grievances of which he complained. It was unanswered. It was the declaration of the plaintiff in his own behalf, and was no more admissible because reduced to writing than it would have been if delivered orally." *City v. McKechney*, 205 Ill. 372, 68 N. E. 954.

[14] Under these rules it is clear that Ex-

hibit 84, a letter from plaintiff to Traer, written September 12, 1905, should not have been admitted. It was written after the sale was closed, and was simply self-serving in character.

[15] The entire group of unanswered letters from plaintiff to Traer, written many months after plaintiff had quit his employment with any and all of the companies and which were narrations of past transactions, should not have been admitted. We shall not undertake to point out all the objectionable letters. It is sufficient to state the rule that the parties may be guided thereby upon a retrial of the case.

[16] Defendant did not waive the objections by introducing letters which were written by Traer in response to some of these. It had to meet the case as best it could, and, by introducing letters of the same import, it did not make plaintiff's letters competent. *Metropolitan Bank v. Commercial Bank*, 104 Iowa, 682, 74 N. W. 26.

[17] 5. Defendant was not entitled to separate judgments on the two items of counterclaim found in its favor. The trial court correctly directed the jury to credit the amount thereof on the sum found due the plaintiff. Whether or not upon remand, in view of plaintiff's failure to appeal, defendant is entitled to judgment on these two items allowed it on its counterclaim, we shall not now determine. As the case stood when the matter was passed upon by the trial court, defendant was not entitled to judgment on these items. The trial court has not yet been called upon to say whether defendant is entitled to judgment because of plaintiff's failure to appeal from this allowance made by the jury on defendant's counterclaims. It will be time enough to consider that matter after the trial court has had an opportunity to pass upon it. As has already been stated, the record before us is very large, and the facts complicated. We have done our best to grasp the salient points, and conclude that there must be a reversal for the reasons stated. However, it is practically conceded that the abstract is much longer than there was any necessity for, and we have concluded to tax 100 pages of printed matter to appellant, and it is so ordered.

The judgment must be reversed, and the cause remanded for a retrial.

Reversed and remanded.

BUFFALO PITTS CO. v. DEEG.

(Supreme Court of South Dakota. Dec. 3, 1912.)

1. NEW TRIAL (§ 123*)—TIME TO MOVE—EXTENSION.

The trial court may, for cause, extend the time within which to serve notice of intention to move for new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 276-281; Dec. Dig. § 123.*]

2. APPEAL AND ERROR (§ 634*)—DISMISSAL—GROUNDS.

That both the bill of exceptions and motion for new trial have been stricken out is no reason for dismissing an appeal regularly taken otherwise, as the case may stand for review on the judgment roll alone.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2775; Dec. Dig. § 634.*]

3. CHATTEL MORTGAGES (§ 41*)—PAROL AGREEMENT.

Under Civ. Code, § 2001, requiring delivery of a copy of a chattel mortgage to the mortgagor, and section 2002, relating to filing of such mortgages and providing the form thereof, a chattel mortgage cannot be created by nor exist in parol, and a parol agreement to execute such a mortgage cannot itself create a mortgage lien.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 84; Dec. Dig. § 41.*]

4. PLEDGES (§ 11*)—AGREEMENT TO EXECUTE A CHATTEL MORTGAGE—POSSESSION.

A parol agreement to execute a chattel mortgage does not create a lien by way of pledge, where the property gets into the hands of the alleged pledgee unknown to the owner, and not in pursuance of the agreement.

[Ed. Note.—For other cases, see *Pledges*, Cent. Dig. §§ 28-35; Dec. Dig. § 11.*]

Appeal from Circuit Court, Beadle County; Alva E. Taylor, Judge.

Action by the Buffalo Pitts Company against William Deeg. Judgment for defendant, and plaintiff appeals. Reversed.

Chamberlain & Hall, of Huron, and William A. Kerr, of Minneapolis, Minn., for appellant. C. A. Kelley and James Byrnes, both of Huron, for respondent.

SMITH, J. This is an appeal from the circuit court of Beadle county. Preliminary to consideration of the case on its merits respondent moved the court to strike out the bill of exceptions, and dismiss the appeal for the reason, among other things, that appellant did not within 20 days after the verdict of the jury serve a notice of intention to move for a new trial. The record discloses that the verdict of the jury was returned and entered on the 31st day of December, 1910, and that no notice of intention to move for a new trial was served until the 31st day of July, 1911.

[1] It is well settled, however, that the trial judge for sufficient cause may extend the time within which notice of intention may be served. The record in this case discloses that Judge Taylor, the trial judge, allowed five extensions of time within which to serve such notice of intention. So far as the record before us is concerned, no reasons whatever for granting these extensions appear. However, respondent in this motion does not raise any question as to the grounds upon which these various extensions were granted, and for that reason we are not called upon to consider whether the trial court was or was not justified in granting this large number of extensions. It is only necessary to note that the last order of exten-

sion is dated July 3, 1911, and was for a period of 30 days from that date, thus extending the time of service of the notice beyond the 31st day of July, 1911, at which time the notice was served. The time for settling the bill of exceptions was likewise extended by the same orders. It follows that neither the bill of exceptions nor the motion for a new trial can be stricken out upon the grounds urged.

[2] And, even though both were stricken out, the motion to dismiss the appeal would have to be denied, as no question is raised as to the regularity of the appeal itself, and the case would be before the court for review upon the judgment roll. The action is claim and delivery by the Buffalo Pitts Company against William Deeg to recover possession of a Buffalo Pitts special traction engine. The evidence tends to show that plaintiff sold and delivered the engine to Jacob and Joseph Wollman on August 19, 1910, at which time the Wollmans gave plaintiff a chattel mortgage on the engine and on certain live stock to secure payment of the purchase price, which chattel mortgage was duly filed on the 26th day of August, 1910, and contained a provision that, in case of default, plaintiffs were authorized to take possession of the mortgaged property for the purpose of foreclosure. Previous to the purchase of this new engine, the Wollmans had purchased a threshing outfit, consisting of a Nichols and Shepard engine and separator, from the defendant Deeg, and had executed to William Deeg a chattel mortgage on the Nichols and Shepard engine in the sum of \$800 to secure a part of the purchase price. Some time prior to August, 1910, the Nichols and Shepard engine was injured by an explosion which rendered it useless without extensive repairs and made it necessary for the Wollmans to purchase a new engine in order to continue threshing grain. Before the purchase of the new engine by the Wollmans, the plaintiff was told by them that Deeg would release his mortgage on the old Nichols and Shepard engine in order that they might turn it in as part of the purchase price on the new engine, and it appears that Deeg had told the Wollmans that he would release the mortgage on the old engine if the Wollmans desired to trade it in on the new engine. Under this arrangement, the new engine was delivered to the Wollmans on August 19, 1910, and on August 20, 1910, one Rosing, an agent of plaintiff, went to the home of defendant, Deeg, and procured from him a release of the mortgage on the old Nichols and Shepard engine, and some time thereafter the plaintiff shipped the same to their St. Paul agency. About one month after the new engine was delivered to the Wollmans, for some reason not clearly disclosed by the record, they turned over possession of the new engine to the defendant, Deeg, and it remained in his possession un-

til after default in the condition of the plaintiff's mortgage. Upon default plaintiff sought to take possession of the engine for the purpose of foreclosure, and demanded possession from Deeg, who refused to surrender it. Plaintiff thereupon instituted this action. The complaint is in the ordinary form, alleging all the facts necessary to entitle plaintiff to possession for the purpose of foreclosure upon default. Plaintiff appeals from the judgment and an order overruling motion for a new trial. At the trial plaintiff offered in evidence the chattel mortgage executed by the Wollmans to plaintiff, evidence of default in the conditions of the mortgage, demand and refusal of possession, together with certain alleged damages for wrongful detention, and rested its case. The answer alleges defendant is entitled to possession of the engine by virtue of an agreement with plaintiff, by which defendant was given a first lien on the engine, to secure payment to defendant of \$800 which Wollman Bros. owed defendant; that defendant, prior to these transactions, had a first mortgage for the sum of \$800 on a threshing engine which he had theretofore sold Wollman Bros.; that plaintiff's agent told defendant he desired to trade to Wollman Bros. a new engine for the one defendant had sold them, and that, if defendant would release his mortgage on the old engine, plaintiff would give him a first lien for the amount due on his mortgage on the new engine which they proposed to trade to Wollman Bros. for the old engine; that defendant agreed that, as soon as plaintiff gave him a first lien on the new engine, he would release the mortgage on the old engine, and plaintiff stated that they would give him a first lien on the new engine; that the plaintiff wished at once to repair the old engine, and asked defendant to sign a paper to give plaintiff the privilege of repairing the old engine, and which plaintiff represented would not in any way release or affect defendant's rights under the first mortgage on the old engine; that defendant, relying on these statements, which were false and fraudulent, was induced to sign a paper without reading or ascertaining what said paper contained, believing it was a paper authorizing plaintiff to repair the old engine, and would not in any way affect plaintiff's rights under his mortgage on the old engine, or release said mortgage; that defendant afterward ascertained that the paper he signed was a release of his mortgage on the old engine, or was changed, after he signed it, to a release, which was thereafter filed in the register of deeds office, and through which plaintiff wrongfully and fraudulently secured a release and cancellation of the first mortgage on the old engine; that plaintiff then took said old engine into its possession and appropriated it to its own use. Wherefore defendant prays that plaintiff's complaint be dismissed, and that de-

fendant be adjudged and decreed to have a first lien upon the engine described in plaintiff's complaint for the sum of \$300, and be awarded possession of said engine, together with costs and damages. At the trial defendant did not attempt to sustain the allegations of fraud contained in the answer, and the cause was tried upon the theory that plaintiff had given defendant a first lien on the engine, by virtue of which defendant became entitled to possession.

At the trial defendant as a witness in his own behalf testified that he signed a release of the old mortgage, and further testified as follows: "Q. Did he [plaintiff's agent] agree himself that he would see that you got this first mortgage on this engine? A. Yes, sir. Q. He took that responsibility himself, guaranteed that to you? A. Yes, sir. * * * Q. Did the Buffalo Pitts Company give you a first mortgage on this engine? A. No, sir; they did not. Q. And that was the reason you have refused to turn this engine over at Broadland, at the time this other man came out? A. Yes, sir. Q. And you never received from them yet a first mortgage on this engine for \$800 or any other sum? A. No, sir. Q. Have they taken possession of this (old) engine and taken it away? A. Yes, sir; they have. Q. And what was this engine they took, what was the name of it? A. Nichols and Shepard 25 horse engine. Q. That was the one that you had sold to Wollman Bros.? A. Yes, sir. Q. And which you had a first mortgage on? A. Yes, sir." From this testimony of the defendant himself it conclusively appears that no mortgage in fact was ever executed or attempted to be executed by the agent of plaintiff or by plaintiff.

[3] The utmost effect which could be given this evidence would be to treat it as an agreement on the part of plaintiff's agent to execute a mortgage to defendant. In the case of *Walklin v. Horswill*, 24 S. D. 191, 123 N. W. 668, this court held that, under the provisions of the statutes of this state, a chattel mortgage could not be created by parol. Section 2091 of the Civil Code provides: "Every mortgagee of a chattel mortgage shall, at the time of its delivery, make and deliver to the mortgagor a full true and complete copy of such mortgage." Section 2092 reads: "No register of deeds shall receive or file any chattel mortgage which does not contain a receipt over the signature of the mortgagor, to the effect that a copy of such mortgage has been received by him, and every chattel mortgage not containing such receipt shall be null and void." Under these sections of the Code, it is plainly evident that a chattel mortgage can neither be created by nor exist in parol. It is equally clear that a parol agreement to execute a chattel mortgage cannot itself create a mortgage lien.

[4] It is respondent's contention, however, that the alleged agreement for the execution of a mortgage to defendant, together with possession in him, are sufficient to create a lien by way of pledge of personal property. The evidence, however, conclusively shows that plaintiff delivered the engine to Wollman Bros. and not to defendant, and that the Wollmans, without the knowledge or consent of plaintiff, delivered possession of the engine to defendant, Deeg, and that plaintiff had no knowledge of such transaction whatever until after default in the mortgage, and possession was sought for purposes of foreclosure. It is plain, therefore, even if it be assumed that plaintiff's agent agreed to execute a first mortgage to Deeg, that possession of the property was never turned over to defendant by plaintiff under, or pursuant to, any such agreement, and no lien by way of pledge was or could have been created by the unauthorized act of the Wollmans in delivering possession of the engine to the defendant, Deeg. The trial court therefore erred in denying plaintiff's motion to direct a verdict at the close of all the evidence.

In the view we take of the case, it is unnecessary to discuss other assignments of error. The judgment and order of the trial court are reversed, and the cause remanded for further proceedings according to the law.

FOTHERINGHAM v. LOCKHART.

(Supreme Court of South Dakota. Dec. 3, 1912.)

1. REFORMATION OF INSTRUMENTS (§ 40*)—AMENDMENT OF ANSWER—DISCRETION.

In replevin, where the defendant answered that the property was his by exchange with plaintiff, but the court ruled that conversations or matters leading up to the written contract could not be admitted, it was proper to allow him to amend the answer so as to show fraud by plaintiff, and to pray reformation; such amendment being within the discretion of the court.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. § 152; Dec. Dig. § 40.*]

2. REFORMATION OF INSTRUMENTS (§ 20*)—UNILATERAL MISTAKE—FRAUD.

A contract is reformation when by the mistake of one party and the fraud of the other there is omitted therefrom property which it was agreed should be transferred thereby.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 79, 80; Dec. Dig. § 20.*]

3. CONTRACTS (§ 99*)—EVIDENCE—MISTAKE—FRAUD.

In an action to reform a contract, evidence held to show mistake on the part of defendant and fraud on the part of plaintiff, entitling defendant to a reformation.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 448-453, 1197-1199, 1799, 1800; Dec. Dig. § 99.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. REPLEVIN (§ 10*)—POSSESSION OF DEFENDANT.

Replevin will not lie unless the defendant is in actual or constructive possession of the goods.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 69-82; Dec. Dig. § 10.*]

Appeal from Circuit Court, Douglas County; R. B. Tripp, Judge.

Action by Thomas W. Fotheringham against Frank M. Lockhart. Judgment for defendant, and plaintiff appeals. Affirmed.

Walker & Gurley, of Armour, for appellant. El. P. Wanzer, of Armour, for respondent.

McCOY, P. J. This is an action in replevin instituted by plaintiff to recover from defendant the possession of certain articles claimed by plaintiff to be personal property, consisting mostly of shelving, show cases, tables, etc., which were situated and had been used in a certain store building owned by defendant at the time of the commencement of this action in April, 1911. The complaint is the ordinary form used in replevin, or claim and delivery, alleging that plaintiff is the owner of the property described therein, and that defendant wrongfully took said possession from plaintiff and now wrongfully withholds the same from plaintiff, and also alleging the value thereof and demanding judgment that plaintiff recover possession of said property from defendant, or the value thereof in case such delivery of possession could not be had, and for damages. To this complaint defendant originally made answer denying plaintiff's ownership and right of possession to said property, except as to a small portion thereof; denying that all said property was personal property, but alleging that a greater portion thereof was attached to the building in which the same was located as a part thereof, denying that he wrongfully took possession of said property, but alleging the fact to be that about October, 1910, he took peaceable possession thereof and ever since, to the commencement of this action, had been in the quiet and peaceable possession thereof; and defendant by way of answer further alleged that on October 20, 1910, plaintiff was the owner of certain lots in Armour, together with the property described in the complaint, and that at said time plaintiff and defendant exchanged properties, the defendant trading to plaintiff certain farm lands in Pennington county for the said real estate of plaintiff including all the property described in the complaint, excepting some small portion thereof, and that ever since said exchange of properties defendant has been the owner of said property described in the said complaint; that at the time of said exchange of properties one Ferguson was occupying the two-story brick building situated on said lots so traded by plaintiff to defendant in Armour, and

in the possession, occupancy, and use of all said property mentioned in plaintiff's complaint under a lease in writing between plaintiff and said Ferguson, and was paying by virtue thereof to plaintiff \$150 per month as rent for said real estate and said property described in the said complaint, and that at the time of said exchange of properties the plaintiff sold, assigned, and transferred to defendant all his right, title, and interest in and to said lease, and that thereafter from October, 1910, to April, 1911, the expiration of said lease, said Ferguson paid to defendant the said monthly rental for said property. There was a special verdict and findings by the court by stipulation made in favor of defendant and judgment thereon rendered. Plaintiff appeals, alleging various errors.

[1] During the progress of the trial the court ruled that any conversation or other matters which led up to and culminated in the written contract made by plaintiff and defendant in relation to their said exchange of properties would not be admitted, but that the written contract alone must determine what property passed by the agreement and the rights of the parties. Defendant thereupon asked permission of the court to amend his answer by alleging that it was the agreement and understanding of both plaintiff and defendant at the time said contract was made that the property described in the complaint was to be transferred to, and become the property of, defendant as a part of the consideration for said exchange; and that defendant at the time said contract was drawn up and executed understood and believed that said property was included in the said contract and assignment of lease, and that at the time of the execution and delivery thereof plaintiff acted in bad faith with full knowledge that the instrument did not express the contract between plaintiff and defendant previously agreed upon, and well knew that defendant understood and believed that by the terms of said contract and assignment he was to receive title to all the said property mentioned in the complaint, and prayed judgment that said contract be reformed to include all said property described in plaintiff's complaint. Defendant also moved the court for a postponement of the trial for the purpose of preparing said amended answer and procuring his evidence, and also for the purpose of making his showing by affidavit on which to base his application to amend his answer and continue the case to procure the evidence of one Buell, of Rapid City, who drew the contract between said parties. The court denied the motion to continue on the ground that there was no showing by affidavit, as required by the rules of the court, but granted to defendant sufficient time to make such presentation by affidavit. It was thereupon agreed between the par-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ties in open court that defendant might make his showing for continuance and right to amend his answer by oral statement entered upon the record instead of by affidavit, in order to save time. Defendant then, in substance, stated that he would be able to show by the evidence of defendant and one Dilger, upon an application to reform said contract, that at the time plaintiff showed him the property which defendant subsequently traded for, that plaintiff showed him, and told him he was the owner of, the building, all furniture and fixtures therein, and everything except the goods upon the shelves, which belonged to Ferguson who occupied the building and was then conducting a department store therein; and that it all went in the deal at a valuation of something like \$35,000; and that it was all included in the trade, and that at the time the contract was made defendant believed and understood that the property he was getting included all the property in dispute. The defendant also stated that he expected to prove by one C. J. Buell in whose office the contract was drawn, and at which time the assignment of lease was made, that he, Buell, stated to defendant, in the presence of plaintiff, that a bill of sale for the property in dispute was not necessary, as the assignment of the lease was sufficient to carry with it title to the property involved in this action, they being fixtures in the store building. The plaintiff then objected to the amendment of said answer as indicated by said statement, for the reason that the application to amend came too late; that defendant knew all said facts prior to the beginning of this suit; that there was no showing on the part of defendant that there was any fraud on the part of plaintiff or any mutual mistake between plaintiff and defendant; that part of the proposed proof is of facts which occurred after the contract was drawn; that there was no showing of diligence on the part of defendant, and the proposed facts do not entitle him to the relief asked, either by way of amendment or continuance. These objections were overruled, and exception duly taken thereto. Counsel for plaintiff then admitted for the purposes of the trial that said Buell, if present, would testify as stated by defendant. Defendant was permitted to amend his answer as indicated by said showing, and the trial then proceeded without further objection as to the sufficiency of the amended answer as a pleading in the case. Plaintiff now urges as error the ruling of the court in permitting defendant to so amend his answer on the ground that the application came too late, and that the showing was insufficient to permit such an answer. We have been unable to find in the record any demurrer to said amended answer on the ground that the same did not contain a statement of facts sufficient to constitute a defense. We are of the opinion that the

learned trial court did not abuse his discretion in permitting such amendment. Such amendments, in the furtherance of justice, are permissible and within the discretion of the trial court. We are also of the opinion that the showing was sufficient to warrant such amendment.

The jury found, and the court adopted the finding, that the plaintiff agreed to transfer and turn over the said property described in the complaint, together with the said real estate, to defendant, in exchange for defendant's said land. The plaintiff contends that the evidence was insufficient to justify such finding. We are of the opinion that the evidence was amply sufficient in such particular. It will serve no useful purpose to incorporate such testimony herein. The court also found that the written contract as actually made by said parties did not in fact express the intention and agreement of both parties thereto, in that it directly made no mention of the property in question therein, that plaintiff acted in bad faith with full knowledge that the said contract did not express the intention of said parties as previously agreed upon, and plaintiff well knew that defendant understood and believed that by the terms of said contract and the assignment of said lease he was to receive title to said property in question, described in the complaint; and the court further found as a conclusion of law that the said contract should be reformed so as to include therein the said property described in the complaint. It is urged that the evidence is insufficient to justify such findings, and that the same are contrary to the law. We are of the opinion that plaintiff's contentions in this regard are not well taken; that the evidence justifies the findings of fact, and the law justifies the conclusion.

[2, 3] It is the contention of appellant that the evidence fails to show that the mistake was mutual, that it was a unilateral mistake for which equity will not reform a contract; that, while defendant was mistaken, there was no mistake on the part of plaintiff. There is testimony in the record to the effect that defendant was told and informed in the presence of plaintiff at the time the contract was drawn up that a bill of sale of the property mentioned in the complaint was not necessary, as the same was covered by the contract, deed, and assignment of lease. If this were true, and for the purposes of this decision it must be taken as true, because the findings of the court and jury settle whatever conflict there was in the evidence, then it constituted mistake on the part of defendant, and, if plaintiff then knew that said property mentioned in the complaint was not covered by said lease and contract, then it constituted fraud and bad faith on his part. If he did not know it, then it constituted a mistake on his part also. A contract is reformatory when by the mistake

of one party and the fraud of the other there is omitted therefrom property which it was agreed should be transferred thereby. *McCormick v. Woulph*, 11 S. D. 252, 78 N. W. 939; *Cox v. Beard*, 75 Kan. 369, 89 Pac. 671. In this last-cited case the Supreme Court of Kansas said: "It is contended that the deed is not reformatable because the minds of the parties did not actually meet; that, while there was misapprehension and mistake on the part of the grantee as to the extent of the land conveyed, the mistake was not mutual, as the grantors did not intend to convey more than the lots described in the deed, and they insist that a unilateral mistake is a ground for rescission, but not for reformation. The equitable remedy of reformation is not confined to cases of mutual mistakes. It is true that when mistakes, unmixed with fraud, are a basis of the relief asked it must be a mistake common to both parties; but it is well settled that the remedy is available where there is a mistake on one side accompanied by fraud or other inequitable conduct on the other. It is argued by the grantors that they at least did not intend to convey more than was described, and that, therefore, a reformation will effect what was not intended and will amount to the making of a new contract. According to the testimony, it was the intention of Mrs. Beard to buy and the express purpose of the Coxes to sell and convey the entire tract, and, having led the grantee to believe the deed would convey it, they cannot well insist that equitable relief should be barred, because they did not mean what they said, and that their expressed intention was not their honest intention. They knew the correct description of the land sold, and that the description employed in the deed did not cover or convey it. They also knew that the grantee understood that she was buying all the tract within the designated boundaries, and that it fronted on a street, as the walks and other improvements indicated. They led the grantee to believe that the description in the deed conveyed all that was purchased, and took advantage of the mistake into which she was led by inducing her to accept the deed for a less quantity than was agreed to be conveyed and for which a consideration was paid. The case comes fairly within the well-established rule that a deed is reformatable when, by the mistake of one party and the fraud of another, there is omitted from it land which it was stipulated should be conveyed." Then follows a long citation of authorities, including *McCormick v. Woulph*, *supra*. In principle this case is on "all fours" with the case at bar. The evidence shows that plaintiff expressly agreed and necessarily intended to transfer to defendant the property described in the complaint as a part of the trade and consideration for the exchange of properties; that when the contract, deed, and assignment of lease were being drawn up defendant

mentioned the fact that a bill of sale should be made for the property which is the subject of this action, and that defendant was informed, in the presence of plaintiff, that a bill of sale was not necessary, as the deed and assignment would transfer such property to defendant without a bill of sale. If plaintiff then thought the contract, deed, and assignment of lease were not sufficient to transfer said property described in the complaint to defendant, it was his plain duty to speak out and say so. It was bad faith and fraudulent concealment on his part not to rightly inform defendant, or, at least, it was such inequitable conduct on his part that would render a reformation of said contract proper. The greater portion of the property described in the complaint was fixtures and passed by said deeds as a part of the real estate, but it is questionable as to some portions of said property in dispute being fixtures, and under the evidence in this case it is immaterial whether the whole of said property were fixtures or not, as the same, under the evidence, and under the contract, as reformed, would pass to and become the property of defendant.

Some of the assignments of error relate to the rulings of the court in overruling and sustaining objections to testimony and to certain instructions to the jury, all of which have been considered, and we are of the opinion that no prejudicial error exists therein.

[4] One of appellant's assignments and specifications of error is "that the court's finding of fact No. 5 is wholly unsupported by the evidence, and is contrary thereto, in that the undisputed evidence shows that defendant was never in the possession of the property in litigation prior to the commencement of this action, but that it was at all times in the possession of either plaintiff or D. A. Ferguson." If this statement were true, "that defendant was never in possession of said property in litigation prior to the commencement of this action," we are at a loss to understand why or how this action in replevin, or claim and delivery, might or could be sustained at all. It is one of the fundamental and elementary propositions that the action of replevin will not lie at all where the defendant was not in the actual or constructive possession of the property sought to be replevined at the time of the commencement of the action. *Timp v. Dockham*, 32 Wis. 146; *Longerbeam v. Huston*, 20 S. D. 254, 105 N. W. 743; 1 *Wait's Prac.* 716. If we were to take plaintiff at his word, no matter what the other evidence in the case might be, defendant would be entitled to judgment in any event, and which of itself would necessarily require an affirmance of the judgment. Plaintiff evidently overlooked the complaint in this action, verified on plaintiff's oath, to the effect that defendant wrongfully took possession of said property and withholds the same from plaintiff, and that

prior to the commencement of the action plaintiff demanded of defendant the possession of said property, but that defendant refused to deliver the same to plaintiff, and still withholds and detains the same. The only allegation of the complaint, aside from value, that was admitted by defendant, is that defendant was in possession of the property in dispute at the commencement of the action. There was ample evidence that defendant was in actual possession and had been since October, 1910.

After careful consideration of each and every assignment of error, the judgment appealed from is affirmed.

DORSETT v. BLACK HILLS TRACTION CO.

(Supreme Court of South Dakota. Dec. 3, 1912.)

1. SPECIFIC PERFORMANCE (§ 29*)—EASEMENTS—CONTRACTS.

A contract whereby plaintiff deeded to defendant a strip of land in consideration that defendant would construct a canal and build and operate a trolley line within three years, and that in case of the completion of said canal and failure to build the railroad he would give permanently to plaintiff from said canal 125 miner's inches of the water free of cost for use on his farm, gave plaintiff a right in the water in the nature of a perpetual easement which is sufficiently described to be specifically enforced; the defendant having completed the canal, but having failed to construct the railroad.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 69-82; Dec. Dig. § 29.*]

2. SPECIFIC PERFORMANCE (§ 43*)—ORAL CONTRACTS—PART PERFORMANCE.

Under an oral contract to build a canal and give a certain amount of water as consideration for a deed to a strip of land across plaintiff's farm, a delivery of the deed, the construction of the canal, and the conveyance of water therein was such part performance as to justify specific performance of the oral contract to furnish water.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 125, 130, 131, 134-139; Dec. Dig. § 43.*]

3. CORPORATIONS (§ 388*)—ULTRA VIRES—CONTRACTS—ESTOPPEL.

Where a traction company agreed to furnish plaintiff with water from a canal perpetually as consideration for a deed to a strip of land on which it constructed a canal to convey water to its power plant, it will be estopped from setting up, as a defense to an action to compel it to furnish the water, that the contract was ultra vires.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1556-1567; Dec. Dig. § 388.*]

Appeal from Circuit Court, Lawrence County; Wm. G. Rice, Judge.

Action by David M. Dorsett against the Black Hills Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Stewart & Hodgson and Martin & Mason, all of Deadwood, for appellant. Hayes & Heffron, of Deadwood, for respondent.

McCOY, P. J. Plaintiff, by his last-amended complaint, in substance alleged that on and prior to May 29, 1905, the defendant had surveyed and definitely located a line or route along the Redwater river in Butte county for the purpose of constructing a canal for carrying water for the purpose of generating electric power and light, and of utilizing the electricity in the operation of a trolley or electric railway; that for more than a half mile the said line or route for canal crossed the farm and lands of plaintiff; that at said time the defendant, by its officers and agents agreed with plaintiff that defendant would build, complete, and operate a trolley or electric line of railway along said route from Spearfish to Belle Fourche, and extend the same into Lawrence county, and that, if said trolley line had been so constructed according to said agreement, it would have been of great use and benefit to plaintiff, and enhanced the value of plaintiff's lands; that on the 29th day of May, 1905, plaintiff and defendants, by its duly authorized officers and agents, entered into an oral contract whereby plaintiff deeded to defendant a strip of land 100 feet in width across his land in consideration that defendant would construct said canal and build and operate said trolley line of railroad within three years, and that, in case defendant failed to so construct and build said canal and trolley line within said time, defendant would reconvey said strip of land to plaintiff, or that, in case of the completion of said canal by defendant and the failure to build or operate said railway within the time aforesaid, the defendant would then furnish and give permanently to plaintiff from said canal, at a suitable place on said strip of land, 125 miner's inches of the water thereof free of cost to plaintiff for use on said farm; that, in pursuance of said agreement, plaintiff did on said date, in writing, deed to defendant said strip of land, which deed also contained the provision that, in case said defendant constructed said canal, but failed to construct and operate said railway, then defendant would give and furnish to plaintiff 125 miner's inches of water from said canal free of cost to plaintiff; that defendant has constructed said canal and utilizes the same for generating electricity for light and power, but has failed to construct or operate any part of said railway, and that more than three years have elapsed since the making of said agreement, and plaintiff has demanded said water, and defendant has at all times refused to give or furnish 125 miner's inches of water, or any part thereof, to plaintiff; that defendant took possession of said deed and recorded the same, and took possession of said strip of land so deeded.

ed to it by plaintiff, and ever since has been and now is in the exclusive possession, use, and enjoyment thereof, and is now conveying more than 5,000 miner's inches of water through the canal thereon. Plaintiff, among other things, prayed judgment that defendant specifically perform said contract and agreement on its part, and that defendant be required to give and furnish permanently to plaintiff from said ditch said 125 miner's inches of water, and that plaintiff's title to said 125 miner's inches of water, and the right to use the same permanently, be quieted, and plaintiff be decreed the owner thereof. Defendant demurred to said complaint on the ground that the same did not contain facts sufficient to constitute a cause of action, which demurrer was overruled, and exception taken by defendant. To what are denominated the first five affirmative defenses and answers, the plaintiff demurred on the ground that the same did not contain a sufficient statement of fact to constitute a defense, which demurrers were sustained. Trial was had on the issues presented by the remaining portions of the answer, and findings and judgment rendered in favor of plaintiff requiring defendant to give and furnish to plaintiff said 125 miner's inches of water. Defendant appeals, alleging various errors.

[1] The first assignment of error relates to the overruling of defendant's demurrer to plaintiff's last amended complaint. It is contended by appellant, first, that the contract set out in the complaint is too indefinite and uncertain to be specifically enforced; second, that the contract requires the continuous exercise of duties, continuous exercise of personal services, skill, and judgment, and the constant supervision thereof by a court of equity to enforce its decree; and, third, that the said contract involves a forfeiture. We are of the opinion the demurrer was properly overruled. The plaintiff's right to said 125 miner's inches of water from said canal is in the nature of a perpetual easement and is sufficiently described according to the allegations of the complaint. The right to this amount of water from said canal is the purchase consideration or price for the title to said strip of land according to the terms of the contract.

[2] Under the allegations of the complaint, whether the contract was in writing or oral, specific performance would have been proper, because there had been such part performance as would have justified specific performance of an oral contract. Plaintiff on his part had performed by the execution and delivery of the deed and surrendering of possession of the strip of land. Defendant had performed on its part by accepting the deed and taking possession of the land, constructing the canal thereon, and conveying the water therein. The principle involved in this case is very similar to that of *Lothrop v.*

Marble, 12 S. D. 511, 81 N. W. 885, 76 Am. St. Rep. 626; section 1311 Civil Code. It will be observed that this assignment of error, seeking to review the sufficiency of said contract as to uncertainty and indefiniteness, is based upon the allegations of the second amended complaint. The evidence and findings of fact are not questioned by this assignment of error, which is based solely upon the allegations of the complaint.

[3] Appellant further contends that said contract to furnish water to respondent for irrigation purposes was an act ultra vires of the corporation, and therefore a nullity and void. We are of the opinion this contention is not tenable. "The great mass of judicial authority seems to be to the effect that when a private corporation has entered into a contract in excess of its granted powers, and has received the fruit or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it. The principle is that the rule requiring good faith and fair dealing is just as applicable to corporations as to individuals, and that neither can involve others in onerous engagements, and, with the consideration of the contract in their possession, disavow their acts to the damage and discomfiture of others, unless it clearly appears that there has been an absolute want of capacity to make the contract. The simplest illustration of this doctrine will be found in cases where the corporation has acquired money or property by means of a contract in excess of its powers, and then, when the other party to the contract seeks to enforce against the corporation the obligation which it has assumed therein, pleads that it had no power to enter into the contract, and at the same time keeps the money or the property." 10 Cyc. 1157-1158. The foregoing language of the learned author meets with our approval as being directly applicable to this case. *Thompson, Com. on Corporations*, §§ 8318-8321; *Sweeney v. United Underwriters Co.*, 137 N. W. 379.

Finding no error in the record, after a consideration of each and every assignment of error, the judgment appealed from is affirmed.

HOUSE v. CHICAGO & N. W. RY. CO.

(Supreme Court of South Dakota. Dec. 3, 1912.)

1. CARRIERS (§ 408*)—LOSS OF BAGGAGE—ACTIONS—CONDITIONS PRECEDENT.

Pol. Code, § 442, requiring demands in writing to be made on common carriers for damages sustained before bringing suit, has no application to an action for the loss of baggage of a passenger while being transported between interstate points, in view of section 431, providing that that article applies only to the transportation of passengers and property, etc., of property solely within the state, and also to shipments from a point within the state to an-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

other point within the state, whether the transportation is wholly within the state or partly within the state and partly within an adjoining state or states.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1557-1571; Dec. Dig. § 408.*]

2. CARRIERS (§ 406*) — LOSS OF BAGGAGE — CONNECTING CARRIERS.

Under the act of Congress of June 29, 1906, known as the Carmack amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. Supp. 1911, p. 1307]), amending the interstate commerce act of 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), a carrier receiving baggage for transportation to a point in another state beyond its own line is liable for its loss occurring upon the lines of a connecting carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1550-1553; Dec. Dig. § 406.*]

3. APPEAL AND ERROR (§ 179*)—RESERVATION OF GROUNDS OF REVIEW.

In an action against a carrier for loss of baggage, where defendant moved to strike out evidence on the ground that certain articles did not constitute baggage, but did not object to instructions assuming that the property was baggage, request the submission of the question whether it was baggage, or ask any instructions as to whether it was baggage, the only question open to review on appeal was whether such articles could, under any circumstances, constitute baggage.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1137-1140; Dec. Dig. § 179.*]

4. EVIDENCE (§ 47*)—JUDICIAL NOTICE—ADMINISTRATIVE RULES AND REGULATIONS.

The courts will take judicial notice of the extensive powers in regulating interstate commerce given by the federal statutes to the Interstate Commerce Commission, but will not take judicial notice of the definition by that Commission of the term "baggage," nor that it has prescribed what shall be included in that term.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 69; Dec. Dig. § 47.*]

5. CARRIERS (§ 391*) — "BAGGAGE" — WHAT CONSTITUTES.

The term "baggage," within the rule determining a carrier's liability, includes whatever the passenger takes with him for his personal use and convenience, either with reference to the immediate necessities or the ultimate purposes of the journey. Whether or not certain articles are within the term "baggage" is to be determined from the character and length of the journey, its purposes and objects, the owner's station in life, and the habits and uses of the class of travelers to which he belongs.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1520-1528; Dec. Dig. § 391.*]

For other definitions, see Words and Phrases, vol. 1, pp. 663-670; vol. 8, p. 7586.]

6. CARRIERS (§ 391*) — "BAGGAGE" — WHAT CONSTITUTES.

The guns of a hunter, the fishing tackle of a fisherman, while on a hunting expedition, or the cooking utensils and blankets of a party bent upon a camping expedition, are "baggage."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1520-1528; Dec. Dig. § 391.*]

7. CARRIERS (§ 391*) — "BAGGAGE" — WHAT CONSTITUTES.

The tools of a mechanic taken by him in his trunk when going on a journey to perform the work of his trade are "baggage."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1520-1528; Dec. Dig. § 391.*]

8. CARRIERS (§ 391*) — "BAGGAGE" — WHAT CONSTITUTES.

Where passengers contemplate a short sojourn at their destination where they, for the time being, will keep house, and take with them, in their trunk, bedding, dishes, and cutlery, these articles are "baggage" if it is customary for people going upon such a journey to take such articles.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1520-1528; Dec. Dig. § 391.*]

9. CARRIERS (§ 391*) — "BAGGAGE" — WHAT CONSTITUTES.

Where passengers making a permanent change of abode take with them, in their trunks, household articles such as dishes, cutlery, etc., such articles are "baggage," if it is customary to take them under such circumstances.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1520-1528; Dec. Dig. § 391.*]

10. CARRIERS (§ 408*)—BAGGAGE—QUESTIONS FOR JURY.

Whether it is customary for passengers making a permanent change of abode to take with them, in their trunks, household articles such as dishes, cutlery, etc., thus making such articles baggage, is a question for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1557-1571; Dec. Dig. § 408.*]

Corson and Haney, JJ., dissenting.

Appeal from Circuit Court, Pennington County; Levi McGee, Judge.

Action by Frank A. House against the Chicago & Northwestern Railway Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Buell & Gardner, of Rapid City, for appellant. Boyd & Soule, of Rapid City, for respondent.

WHITING, J. This is an appeal from a judgment in favor of the plaintiff and from the order denying a new trial. It is alleged in the complaint, in substance, that on December 10, 1908, at Blunt, S. D., the defendant, in its capacity as common carrier, undertook and agreed to transport the plaintiff and his baggage from said Blunt to Sioux City, in the state of Iowa, and then and there, for the purpose of transportation, received the plaintiff into its care with his baggage, consisting of one trunk and contents, of the alleged value of \$488.30; that the defendant failed and neglected to transport said trunk safely and deliver same to the said plaintiff at Sioux City or at any other place, but negligently lost the same with its contents to the damage of the plaintiff in the sum above stated. By way of answer the defendant denied generally the allegations of the complaint except that it was and is a railway corporation and was and is a common carrier of passengers. In addition it alleged that, if at any time it accepted any trunk or baggage of the plaintiff for transportation from Blunt, S. D., to Sioux City, at such time the said Sioux City was and still is a place situated beyond the usual route of this defendant, and that

this defendant transported and delivered said trunk and baggage at the end of its route at Alton, Iowa, in the direction of Sioux City, to another competent carrier, namely, the Chicago, St. Paul, Minneapolis & Omaha Company.

[1] At the commencement of the trial the defendant objected to the introduction of any evidence by the plaintiff upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and the defendant contends that: "Defendant's objection that the complaint did not state facts sufficient to constitute a cause of action should have been sustained for the reason that it was necessary for plaintiff to plead and prove a demand, in writing, upon the defendant for the money damages claimed to have been sustained, as a condition precedent to the right to commence this action." The contention of counsel is based upon the proviso contained in section 442, Pol. Code, which reads as follows: "Provided, that in all cases demand in writing on said common carrier shall be made for the money damages sustained before the suit is brought for recovery under this section, and no suit shall be brought until the expiration of thirty days after such demand." We are of the opinion that this contention is untenable for the reason that chapter 7, containing the section referred to, provides: "Sec. 431. The provisions of this article shall apply to the transportation of passengers and property, and to receiving, delivering, storage and handling of property wholly within this state, * * * and shall also be held to apply to shipments of property made from any point within the state to any point within the state whether the transportation of the same shall be wholly within the state or partly within this state and an adjoining state or states." It will thus be seen that the act is expressly limited to transportation between points within this state, and has no application to interstate commerce between this state and other states, and, in the case at bar, the contract was to transport the plaintiff and his luggage from a point in this state to a point within the state of Iowa.

[2] An examination of the record herein shows that the main contention of the appellant in the trial court was that, inasmuch as it delivered the trunk to the Omaha railroad company at Alton, Iowa, for transportation to Sioux City, it was not liable in this action to the plaintiff, and hence that the admission of a certain folder or timetable introduced by the plaintiff, over the objections of the appellant, to show that the Omaha road was controlled by the appellant, and the charge of the court with reference thereto, constituted error for which the judgment should be reversed. We are of the opinion that this contention is untenable as the act of Congress of June 29, 1906, known as the Carmack amendment to the

act of 1887 providing for the Interstate Commerce Commission, imposed upon the carrier which accepts the property for transmission the liability of a common carrier for the entire distance so far as the party who has sustained the loss is concerned, whether that loss occurred upon the line of the original or primary carrier or upon the connecting line. This amendment received construction in *Atlantic Coast Line Railway Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7. In the opinion the court says: "In substance, Congress has said to such carriers: 'If you receive articles for transportation from a point in one state to a place in another, beyond your own terminal, you must do so under a contract to transport to the place designated. If you are obliged to use the services of independent carriers in the continuance of the transit, you must use them as your own agents, and not as agents of the shipper.' It is therefore not the case of making one pay the debt of another. The receiving carrier is, as principal, liable not only for its own negligence, but for that of any agency it may use, although, as between themselves, the company actually causing the loss may be primarily liable."

Under the United States law, as construed in that decision, the defendant in this action was primarily liable for the loss of the trunk and contents notwithstanding the same may have occurred after the trunk was transferred to the Omaha road. It will not be necessary, therefore, in view of the decision of that learned court, to pass upon the question as to the admissibility of the timetable or folder as the court's charge and ruling, even if erroneous, would not constitute reversible error.

[3] As above stated, the chief contention of the appellant in the trial court was that it was not liable for the loss of the trunk and contents after same had been by it turned over to the connecting line. Appellant also contends, as stated in its brief, that "the various articles in the trunk, * * * not being articles intended for the use of the plaintiff while traveling, or for his personal equipment, did not constitute baggage, and the defendant is not liable for their loss." The articles objected to consisted of table cutlery, napkins, table cloths, curtains, pillowcases, pyrography outfit, as well as a shotgun and guncase.

In order to understand the real question before us, it is necessary to notice the record made upon trial. The appellant, defendant below, at no time, except by certain objections which would really go to the order of proof, raised the question that the plaintiff had not proven facts which showed the property lost to be baggage. The defendant moved to strike out the evidence that had been received in relation to the above-mentioned articles, and based its motion solely upon

the ground that such items were not baggage within the meaning of the law; but such motion in no manner raised the question of the facts proven being insufficient to show that, under the facts surrounding plaintiff's journey, the articles were baggage. The real contention of defendant, as shown by the objections interposed and said motion to strike out evidence, was that the property above referred to, from its very nature, could not, under any circumstances, become baggage. Furthermore, in its instructions to the jury, the court virtually assumed that the property in question was baggage, and the defendant neither objected to the instruction upon the ground that the court had failed to submit the question of whether these goods were, under the facts in the case, baggage, nor did the defendant ask the court to give to the jury any instructions directing them to find whether or not such goods were baggage, and laying down the rule which should govern them in making such finding. It must be conceded that the question was one which should have been submitted to the jury, under proper instructions, unless it is true that the property in question would not, under any circumstances, be baggage. We are therefore confronted with the fact that, unless appellant's contention that the property would not, under any circumstances, be baggage is correct, the judgment must be affirmed for the reason that the appellant raised no question at the trial upon which it is entitled to a reversal.

[4] Can, then, articles such as those mentioned ever become baggage? We think that, under all the authorities, there can be but one answer to this question, and that in the affirmative. While this court will take judicial notice that, by federal statutes, the Interstate Commerce Commission has been given extensive powers in the regulation of interstate commerce, yet neither this nor the inferior courts of this state should take judicial notice of whether, in the exercise of such power, the Interstate Commerce Commission has in any manner prescribed what shall be included in the term "baggage" when applied to interstate commerce, and certainly no state court should take judicial notice of what definition, if any, has been given to such term by such Commission. *Thompson v. San Antonio & A. P. Ry. Co.*, 11 Tex. Civ. App. 145, 32 S. W. 427. No evidence was offered to prove any action upon the part of such Commission. We have in this state a statute defining what shall be considered as baggage. There is nothing in the wording of this statute that would give to the term "baggage" any meaning different than the generally recognized meaning of that term. We can therefore look to the decisions of other courts as to what should comprise the term "baggage." Certain rules seem to be established by the universal authority of the courts of this country and England. The

only trouble seems to flow from the application of the rule to the facts in a given case.

[5] The following rule is uniformly sustained: "The term 'baggage,' within the rule determining the carrier's liability, is defined to include whatever the passenger takes with him for his own personal use and convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purposes of the journey. Whether or not certain articles are within the term 'baggage' is to be determined from the character and length of the journey, its purposes and objects, the owner's station in life, and the habits and uses of the class of travelers to which he belongs."

[6] Applying this rule, it is uniformly held that the guns of a hunter or the fishing tackle of a fisherman is properly a part of the baggage of the owner while on a hunting or fishing expedition. It must necessarily follow that the cooking utensils and the blankets of a party bent upon a camping expedition are baggage.

[7] It was held in *Missouri, etc., v. Meek*, 33 Tex. Civ. App. 47, 75 S. W. 317, that the valuable tools belonging to a mechanic, shipped by him in a trunk when going on a journey whose mission was the doing of some work requiring the use of such tools, might be baggage, and that this was a question that should have been left to the determination of the jury. In the early case of *Oulmit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 648, it was held that, under certain circumstances, beds, pillows, bedquilts, etc., might be baggage.

[8-10] We are of the opinion that two things should control in the determination of what is baggage: (1) The purpose of the journey; (2) the prevailing custom. Under the first of these, as heretofore stated, a camper might take, as his baggage, a camping outfit, including dishes and cutlery, the mechanic his tools when going to perform the work of his trade. If persons making a journey contemplate a short sojourn at some point where they, for the time being, will keep house, perchance in a furnished dwelling, but where they will need some of their own bedding, dishes, or cutlery, and they take the same in their trunk, it certainly is baggage, providing it is customary for people going upon such a journey to take such articles in their trunks, and providing the articles taken are such as will be reasonably needed for the purpose of so keeping house. Following the same rule, if it is customary for people when making a permanent change of abode (and whether or not it is customary is a question solely for the jury) to take with them, in trunks, various household articles such as dishes, cutlery, etc., then such articles, when so taken are baggage. Some decisions have seemed to imply that the value of the property so taken is material; but there certainly is no foundation for such a rule, except as it is controlled by the uni-

versal rule that the property must conform in amount of value to the condition in life of the party taking the same. This rule should be applied to those classes of articles which are infrequently shipped as baggage, as well as to those classes, such as clothing, which are universally regarded as proper baggage.

It cannot be held that baggage is only such articles as are needed during the journey itself, because this would exclude all articles placed in a trunk and checked through to the destination, and would exclude any person taking a single article as baggage if his journey was between points close together. *Dexter, etc., v. Railway Co.*, 42 N. Y. 326, 1 Am. Rep. 527. We therefore hold that the question of baggage depends upon the purpose of the journey, and upon the customs of the country—the customs as they relate to both the class of articles shipped and the class to which the shipper belongs. *Lawson on Bailments*, § 273, says: "The usages and customs of carriers and travelers must be considered in ascertaining what is baggage, and it is clear that the legal meaning of the word 'baggage' may be enlarged or restricted by such usages or customs. The free carriage of baggage, as we have seen, arose from the custom of the carrier, and not from any law or rule of public policy requiring baggage to be carried free. It has been often held that, in determining what kind of goods a carrier is obliged to carry and is responsible for as a common carrier and an insurer, the custom of the carrier is looked to; and, it being proved that it was his custom to receive and carry certain property for hire, his calling as a common carrier of such property becomes established, and his extraordinary liability as such attaches. Therefore, if it should appear that things not heretofore considered by the courts as 'baggage' have, by the usage of the time, of the carrier, and of his patrons, come to be considered as baggage, they will be so treated."

The trial court not having erred in the receipt of evidence, the question of the sufficiency of the evidence to support the verdict not being raised, the evidence having gone to the jury under instructions which virtually assumed that the entire contents of the trunk was baggage, the instructions not having been excepted to for this reason, and no instruction submitting to the jury the question of whether or not the articles lost were baggage having been requested, the judgment must be, and is, affirmed.

CORSON, J. (dissenting). I am unable to concur in the views expressed in the majority opinion of this court, and I will briefly state my reasons for dissenting therefrom.

There was included in the list of articles claimed to constitute baggage in this case articles to the value of \$228 consisting of household goods, silverware, table linen, etc., and a gun and guncase, which in my opinion,

under the evidence, did not constitute baggage or luggage within the meaning of the law. It seems to be claimed in the majority opinion that the question as to whether or not the articles constituted luggage is not properly raised in the case, and hence is not before the court for its decision. I am of the opinion, however, that the question is very fully presented as the counsel for the defendant objected to proof as to each one of the articles, its value, etc., on the ground that it did not constitute luggage under the law, and the objection in each case was overruled and the ruling excepted to. Subsequently, at the close of the plaintiff's evidence, counsel for the defendant made the following motion: "The defendant at this time makes a separate motion as to each item, and moves the court to strike out the testimony as to each item objected to, for the reason that each and all of the items objected to are not baggage or luggage within the meaning of our laws—the same not being intended for the use of a passenger while traveling, or for his personal equipment—which items are as follows: (Specifying the various articles)." This motion was overruled by the court, to which ruling the defendant excepted. It will thus be seen that the court by overruling the defendant's motion, held, in effect, that, under the evidence, the articles mentioned did constitute luggage or baggage for which the plaintiff was entitled to recover. The defendant, by its objections and motion, therefore, fully presented the question to the trial court, and no further requests on the part of the defendant could have been properly made with due respect to the court.

The evidence before the court upon this subject is as follows: The plaintiff testified on cross-examination: "We had sold our house and moved into a little office I had for a real estate office. I left Blunt on the morning of December 11, 1908. These items I have mentioned were part of my household goods and furnishings and clothing I had been using at Blunt. I was expecting to engage in business. We did not take exactly all our household goods and furnishings. We took what stuff we could in the trunk that was valuable. * * * I went to Blunt once, just long enough to pack up and move to Rapid City." Mrs. House testified on cross-examination, after describing the various articles: "(They) were part of our household furnishings at Blunt. We were taking them on account of leaving Blunt, and did not consider them safe in the building where we were." This was practically all the evidence relating to the articles objected to and which the defendant moved to strike from the list. It will be observed, therefore, that there was no evidence to be submitted to the jury, as the evidence of the plaintiff and his wife was undisputed that they were moving from Blunt to Sioux City, and that the articles objected to were taken

by them for the reason that they were moving from Blunt to Sioux City where the plaintiff intended to engage in business, and that the items mentioned constituted the valuable part of their household goods and furnishings. In my opinion, therefore, the trial court should have held, as a matter of law, that the articles objected to did not constitute luggage or baggage, and that the motion of the defendant, made at the close of plaintiff's evidence, should have been granted.

The court in the majority opinion seems to hold that the question of whether or not articles taken by a person on his or her journey as baggage or luggage is properly taken as such is a question for the jury to decide in all cases, but I am of the opinion that this is an erroneous view, and is not sustained by the authorities.

The case of *Macrow v. Great Western Ry. Co.*, L. R. 6 Q. B. 612, is very analogous to the case at bar, and the Court of Queen's Bench held in that case, as appears by the headnote, as follows: "The plaintiff, a passenger by the defendants' railway from Liverpool to London, took with him in a trunk, as his personal luggage, six pairs of sheets, six pairs of blankets, and six quilts. He had given up his residence in Canada, and these articles were intended for the use of his household when he should have provided himself with a home in London. The trunk having been lost, he sought to recover the value of the articles from the defendants. Held, that the articles, being intended for the use of the plaintiff's household when permanently settled, could not be considered as personal or ordinary passenger's luggage." And Cockburn, C. J., in discussing the question, says: "The term 'ordinary luggage' being thus confined to that which is personal to the passenger, and carried for his use and convenience, it follows that what is carried for the purpose of business, such as merchandise and the like, or for larger and ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage, unless accepted as such by the carrier." The Supreme Court of Tennessee in the analogous case of *Yazoo & M. V. R. Co. v. Baldwin*, 113 Tenn. 205, 81 S. W. 599, held, as appears by the headnote, that: "A married woman traveler is not entitled to recover for the loss of articles constituting household goods which she was carrying in her trunk, though she and her husband were changing their residence by removal from one state to another, where the carrier had no notice of the fact that such goods were being transported as baggage." And that court held, after a very exhaustive discussion, that the judgment should be modified by deducting therefrom the enumerated articles not properly regarded as baggage, and modified the judgment accordingly. As bearing upon the question of what constitutes

baggage, see the following cases: *Choctaw Ry. Co. v. Zwirtz*, 13 Okl. 411, 73 Pac. 941; *Missouri R. Co. v. Meek*, 33 Tex. Civ. App. 47, 75 S. W. 317; *St. Louis R. Co. v. Hardway*, 17 Ill. App. 321; *Mauritz v. N. Y. Cent. Ry. Co. (C. C.)* 23 Fed. 765; *Saunders v. Railway Co.*, 128 Fed. 15, 62 C. C. A. 523; *Giles v. Fauntleroy*, 13 Md. 126; *Connolly v. Warren*, 106 Mass. 146, 8 Am. Rep. 300; *Miss. R. Co. v. Kennedy*, 41 Miss. 671; *Chicago, etc., R. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268; *Oakes v. Ry. Co.*, 20 Or. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. Rep. 126.

It is quite clear from the authorities, both English and American, that the question of what is or is not luggage or baggage is a question of law for the court to decide, and, where the evidence is undisputed, the court must decide this question. It is undoubtedly true that what may constitute luggage or baggage depends largely upon the purpose for which the journey was undertaken and the circumstances connected with the same; but in the case at bar there was no evidence proving, or tending to prove, any facts which would authorize the court to hold that such articles were baggage or luggage.

The judgment of the court below, in my opinion, should be reversed, or at least modified by striking therefrom the value of the articles as proven.

HANEY, J., concurs in the views expressed by Judge CORSON.

DAUDEL v. WOLF.

(Supreme Court of South Dakota. Dec. 3, 1912.)

1. TRIAL (§ 18*)—CONDUCT IN GENERAL—INHERENT POWERS OF COURT.

The conduct and control of trials in relation to the decorum of the parties and counsel to the court and each other are within the discretion of the trial judge. It is necessary to the due exercise of judicial functions that the court possess power to preserve order during a trial, to enforce obedience to its orders and processes, and to punish disobedience of them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 37, 42½; Dec. Dig. § 18.*]

2. APPEAL AND ERROR (§ 969*)—REVIEW—DISCRETION OF LOWER COURT—CONDUCT OF TRIAL.

The trial court has a wide discretion as to the course of trials and conduct of parties and counsel, and its action therein will not be error unless there has been a gross abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3845-3848; Dec. Dig. § 969.*]

3. TRIAL (§ 29*) — DISCRETION OF COURT — CONDUCT OF COUNSEL.

Where defendant's counsel several times, and even after objection to a question as immaterial had been sustained, asked the same question, and the court then ordered him to sit down and had him removed by the sheriff, and informed defendant that his attorney could

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not appear in court until he expressed a willingness to abide by its rules, and gave defendant time in which to procure other counsel, which he refused to do, there was no abuse of discretion preventing defendant from having a fair trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-83, 508; Dec. Dig. § 29.*]

4. APPEAL AND ERROR (§ 882*)—PARTY ENTITLED TO ALLEGE ERROR—PARTY INVITING ERROR.

One who invites or brings error into a case cannot be heard thereafter to complain of it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

5. NEW TRIAL (§ 140*)—DISCRETION OF TRIAL COURT—COUNTER AFFIDAVIT.

Failure to serve a counter affidavit on motion for new trial within 10 days after the service of the moving affidavit, as required by Code Civ. Proc. § 808, is not jurisdictional, but the trial court may permit it to be filed thereafter, if without prejudice to the moving party, who, if he desires time for rebuttal, may move for a continuance.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 284-287, 289, 302, 306; Dec. Dig. § 140.*]

6. APPEAL AND ERROR (§ 1031*)—REVIEW—PRESUMPTIONS—ORDER AS TO NEW TRIAL.

Unless the party moving for a new trial shows that he desires further time in which to file rebuttal affidavits, it will be presumed that the court properly overruled objection to the counter affidavit, and that the moving party was not prejudiced thereby, and the burden rests upon such party to affirmatively show error that would warrant a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038-4046; Dec. Dig. § 1031.*]

7. NEW TRIAL (§ 144*)—MOTION—AFFIDAVIT.

An affidavit accompanying a motion for new trial, which contains no statement of the circumstances under which the court made remarks to appellant's counsel and ejected him from the courtroom, so as to affirmatively show such action to be a gross abuse of discretion, was insufficient.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 298; Dec. Dig. § 144.*]

Appeal from Circuit Court, Brule County; Frank B. Smith, Judge.

Action by C. G. Daudel against J. H. Wolf. Judgment for plaintiff, and defendant appeals. Affirmed.

Emil J. Woerth, of Kimball, for appellant. J. G. Maughan, of Rapid City, E. R. Slifer, of Chamberlain, H. L. Moses, of Rapid City, and J. E. House, of Chamberlain, for respondent.

McCOY, P. J. It appears from the record in this case that during the trial, and when a witness for plaintiff was being cross-examined by counsel for defendant, defendant's counsel asked the witness the question, "During the last seven years, how long have you been away from home?" and to which question the witness answered, "About a year and a half." Counsel for defendant repeated the question, and the same answer was given. Counsel for defendant again repeated the

same question, which was objected to by counsel for plaintiff on the grounds that it had already been answered and that it was immaterial to the issues in the case. The court sustained the objection, and in doing so the court stated: "There is no use to ask the question again, as there is only one point in issue, and that is the identity of the mare." Thereupon counsel for defendant again asked the same question of the witness, to which plaintiff's attorney again made the same objection. The court then made the statement to defendant's counsel, "I will tolerate no justice court practice in this court," to which statement of the court defendant's counsel excepted and asked that the remarks be incorporated in the record. The court then stated: "I will look after the record, but I will have to insist that you live up to the rules and practice of this court, or you cannot proceed in this trial." Counsel for defendant again excepted to the remarks of the court. The court then requested counsel for defendant to sit down, which he refused to do. While conducting the cross-examination of the witness, counsel for defendant had been sitting. The court, upon the refusal of defendant's counsel to be seated, then requested the sheriff to remove defendant's counsel from the courtroom; at the same time the court stating to defendant's counsel that he could not appear in court until he expressed a willingness to conform to the rules of the court. The court then notified defendant that his attorney could not appear in the court until he had expressed a willingness to live up to the rules of the court, and that defendant could have ample time to procure new counsel and proceed with the trial, but defendant stated that he refused to procure other counsel; thereupon the trial was resumed, the plaintiff's evidence submitted, and the jury instructed, and a verdict rendered for plaintiff and judgment entered thereon.

[1, 2] Defendant then moved for a new trial on the ground of "irregularity in the proceeding of the court, and the exercise of arbitrary discretion by which defendant was prevented from having a fair trial." The motion for new trial was overruled, and defendant excepted, and now on appeal urges such ruling of the court as error. We are of the opinion that the contention of defendant is not tenable. The manner of conduct and control of trials in relation to the decorum of the parties and counsel towards the court and each other, and in preserving the dignity of the court, are matters inherently within the discretion of the trial judge, who has a very wide latitude of discretion in this regard; and the action of a trial court in this regard will not constitute error unless it appears there has been a gross abuse of such discretion. It is necessary to the due exercise of the function of a judicial court that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

the judge should possess the power to preserve order while conducting judicial proceedings, to enforce obedience to the lawful orders and process of the court, and consequently to punish disobedience of the same. *Thompson on Trials*, § 124.

[3] For counsel to persistently, over and over again, propound the same question to a witness that has already been once or more times fairly answered is such misconduct that the trial court should reprimand, even without objection from opposing counsel. It is certainly much more flagrant misconduct after an objection has been made thereto and sustained by the court, and especially so when the court has clearly stated to counsel that the question should not again be repeated because it was immaterial. It was the privilege of counsel for defendant to except to the ruling of the court when the court sustained the objection to the question; but, after the court had clearly passed upon the objection, it was misconduct, unbecoming an attorney to thereafter, in such manner, seek to override, trample down, circumvent, and avoid the ruling of the court. Under the circumstances of this case, we are clearly of the opinion that the trial court did not abuse its inherent discretion by causing the removal of defendant's counsel from the courtroom until he should express a willingness to abide by the rulings of the court. The view that the trial court has a wide discretionary latitude in this regard seems to be sustained by the following authorities: *Scott v. Dow*, 162 Mich. 636, 127 N. W. 712; *Felt v. Cleghorn*, 2 Colo. App. 4, 29 Pac. 813.

[4] Again, one who invites or brings error into a case cannot thereafter be heard to complain thereof.

[5] The motion for new trial in this action was based upon the affidavit of counsel for defendant annexed to and served with the notice of intention. At the time of the hearing of the motion for new trial, plaintiff was permitted, over the objection of defendant, to submit a counter affidavit showing what plaintiff claimed to be the circumstances which led up to and under which the court caused defendant's counsel to be ejected from the courtroom. The counter affidavit was not served within 10 days after the service of the moving affidavit accompanying the notice of intention as provided by section 303, Code Civ. Proc. If defendant had desired time in which to rebut said counter affidavit, he

should have moved for a continuance or postponement of the hearing for that purpose. The time for service of the counter affidavit is not jurisdictional, and it is within the discretion of the trial court to permit such affidavit after the expiration of the 10 days provided by statute, where no inconvenience or prejudice would be occasioned thereby to the moving party.

[6] Unless the moving party makes some showing at the time that he desires further time in which to file rebuttal affidavits, it will be presumed that the court properly overruled the objection to the counter affidavit, and that there would be no prejudice to the moving party caused thereby. It does not appear on what ground the court denied the motion for new trial. The presumption is that the ruling of the trial court appealed from was correct, and the burden rests on appellant to affirmatively show and point out error that would warrant a reversal.

[7] The affidavit accompanying the notice of intention, on which the motion for new trial was based, is insufficient in that it does not contain a statement of the surrounding facts and circumstances which led up to and under which the court made the remarks and took the action in ejecting said counsel from the courtroom. One who moves for a new trial by reason of the alleged irregular action of the trial court, in regard to the manner of conducting a judicial trial, must show all the surrounding circumstances, if any, which caused such action on the part of the court, and it must affirmatively appear from such showing that the action of the court was gross abuse of judicial discretion. The affidavit of defendant's counsel presented on the motion for new trial was wholly insufficient in this regard. The mere statement that the trial court performed some act or made some remarks that might be regular or not according to the circumstances would be presumed to be regular in the absence of surrounding circumstances affirmatively showing to the contrary. The matters and things which naturally would have rebutted or denied the counter affidavit, if any, should have been contained in the original affidavit on which the motion was based, and the counter affidavit made in opposition thereto, if the plaintiff wished to dispute or contest the showing so made.

Finding no error in the record, the judgment of the trial court is affirmed.

BUCKEYE TRACTION DITCHER CO. v. SMITH.

(Supreme Court of Iowa. Dec. 14, 1912.)

1. SALES (§ 168½*)—SALE ON TRIAL OR APPROVAL—RIGHT TO REJECT.

Under a contract for the purchase of a machine, "terms cash on trial," the purchaser was not bound to accept and pay for the machine if it did not do the work for which it was wanted, but the sale was conditional only on its ability to do the work, and not on the purchaser's satisfaction therewith.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 409-421; Dec. Dig. § 168½.*]

2. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for the price of property sold, in which plaintiff pleaded a specific contract and also alleged the reasonable value, where the case was tried on the theory that the rights of the parties depended entirely on whether the property had been accepted, the admission of evidence of reasonable value, although erroneous, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

3. SALES (§ 355*)—ACTIONS FOR PRICE—ADMISSIBILITY OF EVIDENCE.

In an action for the price of property, the exclusion of a catalogue from which it was ordered, offered for the purpose of showing that it was not to be paid for until tested, was proper, where there was no question in regard to this.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1025-1043; Dec. Dig. § 355.*]

4. APPEAL AND ERROR (§ 1056*)—REVIEW—HARMLESS ERROR—EVIDENCE.

In an action for the price of property in which defendant counterclaimed for the portion of the price already paid, and in which the jury found that he had accepted the property and was not entitled to recover back anything, he was not prejudiced by the exclusion of evidence to show the freight paid by him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.*]

5. SALES (§ 358*)—ACTIONS FOR PRICE—ADMISSIBILITY OF EVIDENCE.

In an action for the price of property, where the evidence showed an acceptance by the purchaser, evidence to show that the seller's agent stated that the purchaser need not keep the property unless it worked was immaterial, and hence properly excluded whether the acceptance was before or after this promise.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1049-1055; Dec. Dig. § 358.*]

6. SALES (§ 168½*)—SALE ON TRIAL OR APPROVAL—RIGHT TO REJECT.

In an action for the purchase price of a machine sold subject to trial, instructions that the purchaser was entitled to a reasonable time in which to test it before being required to accept or reject it, but that he was bound to test it within a reasonable time, and, if he failed to reject it within a reasonable time, the law would presume an acceptance, were proper.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 409-421; Dec. Dig. § 168½.*]

Appeal from District Court, Harrison County; O. D. Wheeler, Judge.

Suit to recover a part of the price of a ditching machine. Trial to a jury, and ver-

dict and judgment for the plaintiff. The defendant appeals. Affirmed.

J. S. Dewell, of Missouri Valley, and Ross McLaughlin, of Logan, for appellant. C. A. Bolter, of Logan, and John E. Priddy, of Findlay, Ohio, for appellee.

SHERWIN, J. This action was brought to recover the agreed price to be paid the plaintiff for a ditching machine, and for extras ordered therefor. The defense was that said machine was shipped to the defendant on trial, and that, after trial, it was rejected by him. Defendant also pleaded a counterclaim on an alleged breach of warranty, and to recover back the amount paid the plaintiff on the contract, and for freight paid on the machine, and for other items. Plaintiff denied a warranty of the machine, and pleaded an acceptance thereof. After seeing one of the plaintiff's catalogues descriptive of the machine, the defendant sent the following letter to the plaintiff, under date of June 16, 1908: "Gentlemen: Please ship one of your 11½ inch by 4½ ft. Buckeye traction ditchers to California Junction, Iowa. The ground to be ditched is of a gumbo nature and joint clay mixture, no hard pan or hard soil but all sticky. Terms cash on trial of machine." The plaintiff answered this letter on the 18th day of June, asking for more information as to whether the ground to be ditched was very soft or otherwise, and stated that, when the machine was shipped, a man would be sent to start the machine and make settlement therefor. The machine was shipped not long after this, and was tested under the direction of a man sent for the purpose by the plaintiff. This man spent three or four days with the machine, but was unable to make it work well or satisfactorily in gumbo soil. But, on his representations that the machine would work in such soil with a different set of wheels, the defendant paid him \$600 on the purchase price. Further trial was made by the defendant with the aid of men sent by the plaintiff to assist him therein, but the machine never did do satisfactory work in gumbo. The evidence shows that the defendant notified the plaintiff on the 5th day of September, 1908, that he would not accept the machine at the price originally agreed upon, but offered to keep it if plaintiff would accept the \$600 that he had already paid in full payment therefor. There is also evidence tending to show that the defendant authorized others to use the machine long after he had written the letter of September 5th. The case was submitted to the jury on the theory that there was no sale, nor any liability on the part of the defendant, unless it was found that he had accepted the machine after a trial thereof. There was evidence warranting a finding that there was

an acceptance, and we now give our attention to the specific errors complained of.

[1] Much of the appellants' argument is in support of its contention that the sale was conditional, and that defendant was not bound to accept and pay for the machine, if it did not do the work for which it was wanted. There is no question as to the correctness of this position. The defendant was not bound to accept the ditcher, and the court in effect so instructed the jury. The question that was determinative of the rights of the parties was whether or not there had been an acceptance of the machine, notwithstanding its failure to work in gumbo soil. The defendant had work for it in other soil, and, as we have already said, the jury was justified in finding that there was an acceptance after trial. The contract of sale nowhere provides that a sale is conditional on the defendant's satisfaction with the machine. The condition was that it should work in gumbo soil; hence appellant's authorities to the effect that plaintiff might reject it, if it was unsatisfactory to him, are not in point. The defendant's principal objection to the machine was based on the ground that the dirt-carrying buckets would not empty in gumbo without assistance. He knew that such was the case, when he made the payment of \$600 to plaintiff's agent on the condition, as defendant himself states, that other wheels would remedy the difficulty. These wheels were intended to carry the machine over wet ground, and it does not appear that they would, in any way, remedy the fault with the buckets.

[2] Plaintiff pleaded on specific contract, and also alleged that the ditcher was reasonably worth the price charged therefor. The court admitted some evidence offered by plaintiff on the question of value, and rejected evidence offered by the defendant on the same question. As the pleadings stood we think all of this evidence was inadmissible, because the whole case was tried on the theory that the rights of the parties depended wholly on the question whether there had been an unqualified acceptance of the machine by the defendant after trial thereof, and, such being the case, it is manifest that the reception of the evidence complained of was not prejudicial to the defendant.

[3] Further complaint is made, because the court refused to permit the defendant to show the contents of the catalogue that he had ordered from; the evidence being offered for the purpose of showing that the machine was not to be paid for until finally tested. There was no question about this under the contract, and the ruling was therefore correct.

[4] Defendant was not permitted to show what freight he had paid. If the ruling was wrong, a question we do not decide, it could not have been prejudicial to the

defendant, because the jury found that there had been an acceptance of the machine, and that defendant was not entitled to recover back any sum that had been paid on account thereof.

[5] Defendant offered to show that plaintiff's agent, Priddy, stated to him the next morning after the \$600 was paid to him for the plaintiff that, if "we don't make it work, you won't have to pay a cent for it." Priddy had been sent there by the plaintiff to demonstrate the machine, and to settle therefor, and, in the absence of any limitation on his power to settle, it would be presumed that his power was general, and we think the offered testimony was competent, if material. But, if the payment of the \$600 the day before was an unconditional acceptance of the machine, the evidence was immaterial, because it was then too late for the defendant to repudiate it. And, if such was not the case and the acceptance occurred at a later day, it was still immaterial, because the contract was that the machine was not to be paid for unless it was made to work.

[6] The court instructed that, under the terms of the contract, defendant was entitled to receive and test the machine for a reasonable length of time before he would be required to accept or reject the same, and that he would be bound to make a reasonable test thereof within a reasonable time after its receipt, and either accept or reject the same; and, further, that, if he failed to reject within a reasonable time, the law would presume an acceptance. We think the trial court properly construed the contract. The defendant required a trial of the machine, which was to be made by himself, so far as his letter of June 16th indicates, and he did in fact try it in the absence of plaintiff's agents. Under the contract he clearly would have no right to receive the machine and keep it indefinitely without giving it the trial contemplated, and escape liability therefor because he had not tried it.

Criticism is made of the instructions on the question of an acceptance by the payment of the \$600 paid to Priddy, but we think the question was presented in its most favorable light for the defendant, and that the complaint is without merit. Our conclusion is that the case was fairly tried and submitted to the jury without prejudice to any of defendant's substantial rights, and that the judgment should be, and it is, affirmed.

Affirmed.

RAGETH v. BOLIGER.

(Supreme Court of Iowa. Dec. 14, 1912.)

CONTRACTS (§ 245*)—ORAL CONTRACT—MERGER IN WRITTEN CONTRACT.

Where a party agrees orally to leave to his stepson at his decease a 40-acre tract of land as compensation for services rendered,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and subsequently conveys to his stepson by warranty deed three 40-acre tracts, being all the land he possesses, the oral contract is fulfilled, though the stepson pays for the land under the written contract all that it is worth.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1129, 1130; Dec. Dig. § 245.*]

Appeal from District Court, Harrison County; O. D. Wheeler, Judge.

This is a claim against the estate of a decedent for labor and service under an alleged agreement for compensation, "to consist of not less than 40 acres of land in Harrison county." At the close of plaintiff's evidence the trial court directed a verdict for the defendant. Plaintiff appeals. Affirmed.

C. W. Kellogg, of Missouri Valley, for appellant. Tinley & Mitchell, of Council Bluffs, for appellee.

EVANS, J. The plaintiff was the stepson of the decedent, Jacob Rohner. He was 10 years old at the time of his mother's marriage to the decedent in April, 1883. He came into the family with his mother, and so continued until he had attained his majority. His claim as filed with the administrator was stated as follows: "That during the time from April, 1883, to the spring of 1894, the deceased, in his lifetime, became indebted to claimant as follows: That claimant worked for deceased on his farm in Harrison county during those years, and received nothing for his services. That the deceased promised orally to reimburse claimant by leaving him part of his estate at the time of his decease, the said estate to be left to consist of not less than 40 acres of land in Harrison county. That the deceased died in September, 1909, without having provided for claimant as above agreed. That there is due claimant from the said estate \$4,000, or the equivalent of 40 acres of land, with interest thereon at 6 per cent. per annum from the 4th day of September."

The plaintiff became of age in 1894. The decedent was a farmer, and had three 40-acre tracts of land in Harrison county, situated, respectively, in certain sections 3, 4, and 33. The tracts in sections 4 and 33 were contiguous. The other tract was separated from these two. One of the tracts was acquired since the plaintiff became a member of decedent's family; the other two being owned by decedent prior to such time. The record does not disclose which tract was last acquired. The following is the substance of the testimony introduced by plaintiff in support of his claim:

Frank Boehler testified: "Well, we got to talking about the farm, and about his leaving the farm. He said he sold it to his stepson. Through the conversation I asked him what wages he ever paid to his stepson before he sold him the farm. He says: 'He never had any stipulated wages. I never paid him wages.' He said he never paid him

wages, for he was to give him some land, either whenever he died or not. I can't remember now the very words he said; that is the saying of them. That is the substance of it. He said: 'I wish that boy would get married, so I could make a will; but I won't make no will so long as he ain't married, as long as he ain't got any children, for I don't want any of the property to go over to his folks. Whenever he has got a wife and children, I will know what I have got to do then.' He said: 'I told Nick I would give him 40 acres of land, the 40 lying upon the hill.'"

Wohlers testified: "A. When I seen Mr. Rohner down town, he told me that Nick—he was there the day before in his house—and he told me that Nick he had been pretty good on the farm, and he wouldn't beat him, and that he was going to do what was right, and Nick he knows about what he gets. What he got out of him was for his mother."

Mrs. Wohlers testified: "Well, he said that people had told him that he did not have to give Nick anything, and he said he went to several reliable parties, and they said he did not have to give Nick anything; but he said he was going to do what was right by Nick, and he wouldn't beat him out of anything for the sake of his mother."

It is manifest from the foregoing that the evidence on behalf of the plaintiff was very slender indeed. Statements attributed to the decedent are quite consistent with the absence of obligation on his part, and yet with the desire and intent to do something voluntarily. If it can be said that the evidence was sufficient to go to the jury in support of a binding promise, it was a promise to give to him 40 acres of his land. The importance of this conclusion appears from other features of the evidence not quoted above. In 1899 the plaintiff and the decedent entered into a written contract whereby the decedent agreed to convey to the plaintiff *all* his land, consisting of the three 40-acre tracts, and whereby the plaintiff agreed to pay the decedent in installments on long time the sum of \$3,200. Later in 1906 the decedent executed to the plaintiff a warranty deed of all such land, and the plaintiff executed to the decedent a note and mortgage for \$2,165. Other notes appear also to have been executed, which are not further explained in the record. The decedent died in 1909. It is manifest that, if there was an oral agreement or understanding between plaintiff and decedent prior to 1899, it was necessarily merged in the written contract, which included the very subject-matter of the alleged oral contract.

It is urged on behalf of the plaintiff that there was no breach of the oral contract until the death of the decedent, and that the breach occurred by the failure to make provision for plaintiff by will. It is also urged

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

that the execution of the written contract and conveyance did not terminate the obligation of the decedent to render compensation to plaintiff for his services during his minority. It is also urged that the decedent recognized his oral obligation as continuing notwithstanding the written contract, and that some of the alleged admissions above quoted occurred after the execution of the written contract. We do not think the testimony will fairly bear this argument. The decedent may have intended to do more for the plaintiff than he did. But there is nothing in the conversations quoted to indicate that he had bound himself to do so. If the evidence was sufficient to show a promise to convey 40 acres of land in compensation for the work, such promise was literally fulfilled by the conveyance subsequently made. It was none the less fulfilled because other transactions between the same parties were added to it. If the oral contract was binding, the subsequent written contract was clearly so.

It is urged in argument by appellant that the plaintiff paid full value under the written contract. It does not appear from the record whether this be so or not. If it were so, it would hardly aid the plaintiff. If the oral contract was originally binding upon the decedent, the subsequent written contract was thereafter equally binding upon the plaintiff. The appellant urges that his claim is not for 40 acres of land, but for compensation for his work, and that the evidence shows that the decedent intended to compensate him. But, if plaintiff's evidence proves anything, it proves that the form of compensation was specified. From the nature of the case it could not have been ignored or lost sight of when the parties entered into the written contract. If the oral contract was sufficient to confer upon the plaintiff an equitable interest in any part of the decedent's land, then the conveyance to plaintiff by decedent by warranty deed of all his land was a merger of estates. This legal proposition is not disputed. See *Archer v. Jacobs*, 125 Iowa, 468, 101 N. W. 195; *James v. Newman*, 147 Iowa, 574, 126 N. W. 781. The decedent could never thereafter convey to him any greater interest in any of such land than was conveyed to him by the warranty deed.

We think the trial court properly directed the verdict, and such order is accordingly affirmed.

SPENCER v. UPDIKE GRAIN CO.

(Supreme Court of Iowa. Dec. 13, 1912.)

1. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—DEFECTIVE MACHINERY—EVIDENCE.

In an action for injuries to a servant by getting his finger caught in a car puller drum, evidence that on prior occasions defendant's

superintendent had observed the rope on the drum becoming tangled, and had found it necessary to throw out the clutch to stop the drum, which in the proper operation thereof should not have been necessary, was admissible to show that the puller was defective, and on the issue of defendant's negligence in failing to warn plaintiff of the danger.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 913-923, 932; Dec. Dig. § 270.*]

2. EVIDENCE (§ 513*)—OPINION EVIDENCE—DEFECTIVE MACHINERY.

Where plaintiff was injured by getting his finger caught in the rope of a car puller drum while operating the same, evidence of witnesses familiar with the operations of a car puller that the clutch on the puller in question was so placed that plaintiff, in managing the rope on the drum, could not reach it without going round the machine, whereas, if it had been placed on the other side of the machine, and within reach from the place where the operator stood, it could have been thrown out with safety, so as to immediately stop the drum, was admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2317, 2318; Dec. Dig. § 513.*]

3. APPEAL AND ERROR (§ 204*)—REVIEW—ADMISSION OF EVIDENCE—PREJUDICE.

In the trial of an action for permanent injuries to a servant, defendant admitted that plaintiff's life expectancy at the date of the filing of the petition was 15 years, but objected generally to evidence as to expectancy of life as incompetent, irrelevant, and immaterial. *Held*, that defendant could not object for the first time on appeal that the evidence of life expectancy was inadmissible, because not referred to the date of the accident.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.*]

4. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—NEGLIGENCE—FAILURE TO WARN—DEFECTIVE MACHINERY.

Where plaintiff was injured, while operating a car puller drum, by reason of a defect in the machine itself, and not from any negligent act of plaintiff or a coemployee in operating the machine, the court did not err in submitting the question of defendant's negligence in putting plaintiff to work in a dangerous place without warning him of the danger.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

5. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—DEFECTIVE MACHINE—ASSUMED RISK.

Where plaintiff was injured, while operating a car puller drum for the first time, by reason of a defect in the machine, which was not obvious to an ordinary person without experience, and he was not warned of any danger in operating the machine, and did not know that it was defective or unsuitable for the purpose for which it was being used, and in the method in which it was used, he did not assume the risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

Appeal from District Court, Harrison County; E. B. Woodruff, Judge.

Action to recover damages for personal injuries received by plaintiff while in the employment of defendant. There was a ver-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

diet and judgment for plaintiff, from which defendant appeals. Affirmed.

Greene, Breckenridge, Gurley & Woodrough, of Omaha, Neb., and Tinley & Mitchell, of Council Bluffs, for appellant. S. H. Cochran, of Logan, for appellee.

McCLAIN, C. J. Prior to the day of the accident resulting in the injury to plaintiff, he had been in the employment of defendant in unloading grain from freight cars by means of a steam shovel. On that day, for the first time, he was put in charge of a car puller, which was being used at the time to draw cars along the track to the proper place for unloading. The operation involved the use of a long rope, attached by a hook to the car to be moved; the rope being so drawn as to move the car by colling it several times around a revolving drum. The operator would hold the rope taut back of the drum, and its revolutions would cause the car to be drawn along the track as the drum revolved. The method of discontinuing the application of power to the car was usually, not by stopping the drum, but by allowing the rope to become slack, so that it would slip on the drum. While plaintiff was engaged in handling the rope as it came away from the drum, his coemployé, who was managing the car at the end of the rope, directed him to give slack, and this, for some reason, plaintiff was unable to do, as the drum continued to draw the rope. For the purpose of loosening the rope on the drum, plaintiff took hold of the rope with his right hand in front of the drum, and his finger was caught between the portion of the rope which was being drawn in and the portion which was being coiled on the drum, and was so injured that amputation became necessary, and this is the injury for which recovery is sought.

The negligence of the defendant, under the allegations of the petition, which were submitted to the jury, consisted in placing plaintiff in a dangerous place to work, in that the car puller was in such condition that it would not allow the rope to slack, and in placing plaintiff in a dangerous position to work without explaining to him the dangers connected therewith, and in maintaining the car puller without a proper clutch appliance to stop the same. There was an allegation of freedom from contributory negligence, and the defendant, denying all negligence on its part, also alleged assumption of risk.

[1] 1. It was material for plaintiff to show that the car puller was in some way defective, and that the defendant had knowledge, or should have had knowledge, of this defective condition. For the purpose of showing that the car puller did not work properly, and that its condition was in some way defective to defendant's knowledge, the plaintiff was allowed to prove that on previous occasions defendant's superintendent had

observed the rope becoming tangled in some way on the drum, and that he had found it necessary to throw out the clutch and stop the drum. We think that this evidence was competent. It appeared that in the proper operation of the drum it was not necessary to throw out the clutch, in order to stop the pull on the rope; this being accomplished simply by giving slack to the portion of the rope which was being played off from the drum. If the puller did not, in this respect, operate as was intended, it was either defective, or the method of using it which defendant authorized was not a proper method. The evidence was also competent, as we think, on the question whether plaintiff should have been warned of the danger involved in the rope becoming tangled in some way on the drum.

The cases relied upon for appellant on this proposition are not in point. In *Croddy v. Chicago, R. I. & P. R. Co.*, 91 Iowa, 598, 60 N. W. 214, it was held not error to reject evidence of the previous killing of stock at a railroad crossing, in an action to recover for stock killed at such crossing. It is evident that the previous negligent operation of trains at the crossing in question would have no tendency to show that the particular train, the operation of which was complained of, was negligently operated. In *Potter v. Cave*, 123 Iowa, 98, 98 N. W. 569, the question was whether a stairway in defendant's storeroom, down which the plaintiff fell, receiving the injuries complained of, was maintained in a dangerous condition; and it was held error to admit evidence tending to show that complaint had been made to an employé of defendant that it was in a dangerous condition. The complaint was as to the insufficiency of light and of guards, which made the stairway dangerous to persons passing near it. Plainly the actual condition of the stairway as to light and guards was the sole question to be determined in fixing defendant's liability, and warnings as to its dangerous character, conceding that defendant was aware of its condition, need not be shown. The evidence thus offered was prejudicial to the defendant; for evidence as to previous accidents or warnings might be considered by the jury as tending to show that he ought to have adopted precautions which he did not adopt, even though, as a matter of law, the happening of a previous accident, or the giving of warning, would not require any greater care or precaution on his part than that required by the knowledge of the condition of the stairway, with which he was necessarily charged. We think there was no error in the admission of this evidence.

[2] 2. The plaintiff was allowed to introduce the testimony of certain witnesses familiar with the operations of a car puller to show that the clutch was so placed that the plaintiff, in managing the rope on the drum,

could not reach it without going around the machine to do so, whereas, if it had been on the other side of the machine, and within reach from the place where the operator stood in connection with the use of the machine, the clutch could have been thrown out with safety, so as to immediately stop the drum. This evidence, we think, was properly admitted. It would be difficult to describe to the jury the relations of the portions of the machine to each other, so as to enable them to understand whether the machine would have been safer in its practical operation if the clutch had been differently located. The experts were not asked to say that the defendant was negligent, and thus invade the province of the jury; but they were called upon to explain the fact as to whether, in the matter referred to, the machine was as safe for the operator as it might, in the exercise of reasonable care, have been constructed consistently with its proper and efficient use. This consideration disposes of the cases relied upon for appellant, which hold that a question of negligence is not a subject for expert testimony, but should be left to the jury.

[3] 3. As the injury to the plaintiff was permanent, evidence as to his expectancy of life was material. It was contended for appellant that the expectancy of life shown was that of the date of the accident, and not that of the date of the trial, and that the evidence was therefore incompetent, relying upon *Hughes v. Chicago, R. I. & P. R. Co.*, 150 Iowa, 232, 129 N. W. 956. But in that case the question was as to the expectancy of life of a person who was, at the time of the trial, not in the condition of health and bodily soundness which had existed before the injury. In this case there was no evidence whatever tending to show that, save for the permanent loss of his finger, plaintiff was not in as sound condition and having as great an expectancy of life as at the time of the injury. Moreover, the admitted evidence did not relate to the plaintiff's expectancy at the time of the injury, but to a date somewhat subsequent to the injury and only five months preceding the time of the trial. The evidence complained of consisted simply of an admission, on behalf of defendant, that at the date specified plaintiff's expectancy of life was 15 years. Why this date was fixed in the admission does not appear; but we are justified in assuming that by the admission plaintiff's counsel was reasonably led to assume a concession for defendant that the expectancy of life, at the time of the trial, was that specified in the admission. No complaint was made at the time that the expectancy of life referred to was not the proper one to be considered by the jury. As a matter of fact, the date referred to was the date of the filing of the petition. As no future pain or suffering could, under the instructions, be made the basis of the allowance of damages by the jury, and only impairment of future earning

capacity could be considered, we think that the error, if any, was without prejudice; but, whether so or not, the appellant cannot complain, in view of the failure of counsel to object in any way to the admissibility of the evidence that the plaintiff's expectancy of life was 15 years. Counsel for defendant did, in a general way, object to the evidence as to expectancy of life as incompetent, irrelevant, and immaterial, but in no way pointed out that the objection related to the date as to which expectancy of life was admitted. There was no error in this respect of which appellant can complain.

The complaint of an instruction referring to the concession as to expectancy of life is disposed of by what has already been said. And in such instruction the court practically cured any error as to the evidence of expectancy, so far as it related to the date of its computation; for the jury was told that if plaintiff was found to have been permanently disabled, so as to impair his future earning capacity, he should be allowed "such further sum as will reasonably compensate him for such loss in future earning capacity, if any, as he has shown to have sustained by such accident," taking into account, with many other things, "his expectancy of life, which in this case you are instructed is 15 years from October 18, 1910." Evidently the damages from impairment of future earning capacity was to be estimated by the jury from the time of the verdict. And the plaintiff's expectancy of life, estimated at a date five months previous and after he had sustained the injury complained of, could not have been materially different from his expectancy at the date of the verdict. The possible discrepancy was so small that we would not be justified in reversing on account of the alleged error.

[4] 4. The court did not err in submitting to the jury the alleged negligence of the defendant in putting plaintiff to work in a dangerous place without explaining to him the dangers connected with his employment in that place. The alleged unsafety of the work about the machinery did not arise from the negligent act of the plaintiff himself, or of a coemployé in putting the machinery in operation while the plaintiff was in a position to be injured by doing so, but it arose. If at all, from the defective nature of the machinery. Therefore the case of *Peterson v. Chicago, R. I. & P. R. Co.*, 149 Iowa, 496, 128 N. W. 932, is not in point. The same suggestions indicate the inapplicability of what is said in *Galloway v. Turner Improvement Co.*, 148 Iowa, 93, 126 N. W. 1033, where the alleged negligence was not that of the defendant in providing an improper machine, but that of the plaintiff's coemployé in starting it without warning to the plaintiff. In *Sutton v. Des Moines Bakery Co.*, 135 Iowa, 390, 112 N. W. 836, it was conceded by the court, rather than denied, that defective machinery renders the place of work

unsafe, so far as it threatens injury to an employé who is working about it. The question in that case was whether plaintiff had assumed the risk of working about unsafe machinery, or was guilty of contributory negligence in doing so. In none of the cases cited for appellant is there any indication that defective machinery may not be the basis for finding negligence of the employer in putting the employé at work about it, and render the place where he is thus put to work an unsafe place for work.

[§] 5. There was no error in instructing the jury as to the doctrine of assumption of risk and contributory negligence. The plaintiff was not familiar with the dangers incident to the handling of the machine about which he was working on the day of the accident for the first time. He was given no warning with reference to such dangers. Therefore he cannot be said to have assumed the risk, unless such dangers were so obvious as to be patent to an ordinarily reasonable person without experience. He did not know that the machine was defective, or in some way unsuitable for the purpose for which it was being used, and in the method in which it was generally used, and therefore did not assume the risk arising from such unsuitableness or imperfection. These suggestions dispose, also, of what is said in argument in regard to failure of warning and contributory negligence. The question whether the accident happened without fault on the part of defendant was, under the pleadings and the evidence, plainly one for the jury.

The judgment of the trial court is therefore affirmed.

BRADLEY, MERRIAM & SMITH v. GOETSCHKE.

(Supreme Court of Iowa. Dec. 13, 1912.)

1. APPEAL AND ERROR (§ 1140*)—MATHEMATICAL ERRORS—REMITTITUR.

A mere mathematical error in figuring up the amount due can be cured on appeal by ordering a remittitur.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4476; Dec. Dig. § 1140.*]

2. PLEADING (§ 396*)—PLEADING AND PROOF—ISSUES.

Where defendant's counterclaim is distinctly based upon a written contract to sell articles on commission, he cannot show a subsequent oral agreement that he be paid for work done on the articles, having only alleged that he did such work without mentioning any agreement to be paid therefor.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1836; Dec. Dig. § 396.*]

Appeal from District Court, Harrison County; E. B. Woodruff, Judge.

Action to recover for merchandise sold and delivered. Defendant admitted the receipt of part of the goods, but denied that he received other items charged against him. He also

pleaded a settlement and counterclaim. On the issues joined the case was tried to a jury, resulting in a verdict for the defendant in the sum of \$114.32. Plaintiff appeals. Reversed.

H. H. Roadifer, of Logan, for appellant.

DEEMER, J. By written contract plaintiff appointed defendant its agent for the handling of agricultural implements, etc., in the town of Magnolia. By the terms of that agreement defendant was to account for all sales made by him to plaintiff, settling either by cash or notes. We here quote from the contract as follows:

"In consideration of the within special commissions, party of the second part agrees to sell for cash not less than one-third of all the goods sold.

"All purchasers' notes to be indorsed and payments guaranteed at maturity by said party of the second part, and protest demand and notice of nonpayment waived. A full report of sales and settlements made from time to time by party of the first part shall be forwarded to party of the second part the 1st and 15th of each and every month.

"This mode of settlement shall be effective on the respective goods until the following dates: Implements, June 1, 1910; wagons, June 1, 1910; vehicles, June 1, 1910; no additional commission after June 1, 1910.

"Any and all goods of every kind, nature and description on hand and in possession of party of the second part at the last-mentioned dates are subject to reshipment on order of party of the first part. If party of the first part does not decide to reship within ten days thereafter, then it is agreed that party of the second part becomes the purchaser thereof, and said party of the second part agrees to purchase, pay and settle for same in cash with interest at 8 per cent. from date, at option of party of first part, or if party of first part so elects, said goods on hand at that time shall remain in possession of party of the second part on the basis of this agreement, subject to settlement provided for herein as sales are made only. It is fully understood and acknowledged that the title to and ownership of any and all goods shipped on the basis of this contract shall remain absolute in party of the first part, and the title and ownership shall not pass from party of the first part to party of the second part until full and final settlement has been made between said first and second parties.

"All goods shipped by party of the first part to party of the second part during the life of this contract are subject to removal and reshipment without further notice.

"In consideration of party of the first part carrying said stock of goods subject to sale, and at the expense of interest for value and

special terms given, party of the second part agrees to be fully responsible for all damage or loss by fire or otherwise, to any and all goods shipped under this contract. Party of the second part agrees to pay all taxes and insurance on any and all goods shipped under the terms of this contract.

"No settlements made under the terms of this contract are binding on party of the first part until same has been accepted and indorsed at their office in Council Bluffs, Iowa. * * *

"This contract shall remain in force and effect until full and final settlement is made between party of the first part and party of the second part.

"No agreement or conditions, verbal or otherwise, save those mentioned herein shall be considered in any respect except by written notices duly acknowledged and signed by both parties of the first part and second part. * * *

"It is understood and agreed between the parties hereto, provision two, conditions of sale:

"That no allowance will be made for breakage unless they occur from manifest defects in material. Breakages thus caused during the first season's use of the machine will be made good by new parts, which will be charged when sent, and corresponding credit will be made only on return of defective parts to factory. Purchaser agrees to pay transportation charges on parts furnished under this provision."

According to the testimony the jury might well have found for plaintiff on items agreed upon by the parties in the sum of about \$110. As a matter of fact it found for defendant in the sum already stated, thus indicating that it disallowed plaintiff's claim entirely and found for defendant on both items of counterclaim. These items were first 5 per cent. commission on cash sales amounting to \$764.96, or as he claims \$43.44; and to be exact we quote the second count of the counterclaim, which reads as follows: "That this defendant entered into the contract referred to herein, and during the years 1909 and 1910 received from the plaintiff goods, consisting of manure spreaders, agricultural implements, and machinery thereunder. That by reason of faulty construction of said manure spreaders, agricultural implements, and machinery, both as to defective materials and workmanship, this defendant has been compelled to expend large sums of money and devote a great amount of time in furnishing new materials and making repairs to the broken and defective parts of said manure spreaders and machinery, amounting in the aggregate sum of \$70.88, items of which are set out in Exhibit E hereto attached as a part hereof. That the prices charged and value fixed for such labor and materials and money expended are reasonable prices and values. That the same have long since been

due the defendant, but no part of which has ever been paid."

The total amount for which defendant asked judgment was \$114.32. The trial court gave the following instructions with reference to these items of counterclaim:

"(13) The defendant, in addition to his claim that he does not owe the plaintiff on their account, sets up two counterclaims. In count 1 of his counterclaim he says that at the time of the settlement on December 28, 1909, defendant had on hand agricultural implements in about the value of \$764.96, and by the terms of the contract with plaintiff he was entitled to 5 per cent. commission on all cash sales, and that he made sales of said implements and made remittance thereof, either by cash or by notes which were accepted as cash, and that there is now due him as commission on said sales \$43.44, no part of which has been paid him and for which he now asks judgment. The burden is upon the defendant on this counterclaim to show by a preponderance of the evidence relating thereto that he is entitled to a commission of 5 per cent. on said sales, and, if he has failed to show that he is entitled to such commission, you should allow him nothing on this claim, otherwise you should allow him such sum as the evidence shows he is entitled to, if anything.

"(14) The defendant for a further counterclaim says that he received goods from the plaintiff that were faulty in construction and defective in material and workmanship, and that under a parol agreement with the plaintiff, through its Mr. Merriam, he was directed to repair such implements and machinery for which he was to receive a reasonable compensation. He alleges that he performed services and furnished material in the reasonable sum of \$70.88 in the following items: (Here follows list of items amounting to \$70.88.)

"(15) As bearing upon the right of defendant to perform such labor and furnish repairs, you should consider for what length of time he was performing such services, if any, and what knowledge, if any, the agents of plaintiff had that defendant was making a claim to compensate for such services, and you should consider such evidence so far as it may throw light upon the question whether the defendant made such a contract with the said Merriam and whether the said Merriam had authority from plaintiffs to make such contract, and from all the evidence before you it is for you to determine whether defendant is entitled to recover on this counterclaim at all, and, if he is entitled to a recovery, the amount thereof."

[1] Under these instructions the jury evidently allowed the exact amount of defendant's two items of counterclaim, to wit, \$114.32. It is manifest that the trial court was led into two errors:

First. Five per cent. commission on \$764.96 is not \$43.44, but \$38.24. If this were the only error, we might correct it by ordering a remittitur for the difference. But this is not the only trouble in the case.

[2] The second count of the counterclaim is distinctly bottomed upon the written contract of the parties, yet the trial court, over objection, permitted defendant to prove a subsequent oral agreement with one Merriam, a representative of plaintiff, whereby plaintiff was to pay defendant for his services and material furnished in making repairs and gave the instruction which we have quoted. This was entirely outside the issues made by the pleadings, and the trial court erred in receiving the testimony, and in giving the instruction which we have quoted. Again, there was no testimony showing the value of defendant's time or services, and no showing as to the value of some of the articles claimed to have been furnished by him.

For the errors pointed out, the judgment must be, and it is, reversed.

SEE v. CARBON BLOCK COAL CO.

(Supreme Court of Iowa. Dec. 13, 1912.)

1. TRIAL (§ 256*)—INSTRUCTIONS—ISSUES—REQUESTS.

Where, on the issue whether an injured employé had the mental capacity to make a settlement, he testified that he had no knowledge of the making of a settlement until after the bringing of his action, instructions submitting the issue of mental capacity, and stating that if the employé did not possess mental capacity, and had not ratified the settlement, it did not defeat a recovery, but if he accepted the benefits with knowledge of the settlement he could not recover, and that he was not required to return, or offer to return, the benefit received under the settlement while of unsound mind, and the retention of the benefits did not amount to a ratification, unless so retained after he became capable of understanding the settlement, sufficiently submitted the issues, in the absence of any requested instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

2. RELEASE (§ 24*)—FRAUD—RESCISSION—CONDITION PRECEDENT.

Where a release of a claim for damages is procured by fraud, the consideration need not be returned or tendered back as a condition to the maintenance of an action.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 41-46; Dec. Dig. § 24.*]

3. RELEASE (§ 17*)—FRAUD—ACTS CONSTITUTING.

Where one, with knowledge of the mental incapacity of another, procures from the latter a release of a claim for damages, he is guilty of fraud.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 32; Dec. Dig. § 17.*]

4. RELEASE (§ 24*)—MENTAL INCAPACITY—RESCISSION—CONDITION PRECEDENT.

Where one, without knowledge of the mental incapacity of another, procures from the latter a release of his claim for damages, the latter, not knowing of the release until after

bringing an action for the damages, need not return or tender the consideration received; but where the consideration reached him after the restoration of his faculties, and before the commencement of the action, he must return or tender back the consideration as a condition precedent to the maintenance of the action.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 41-46; Dec. Dig. § 24.*]

Appeal from District Court, Appanoose County; C. W. Vermillion, Judge.

Action for damages resulted in judgment against defendant, from which it appeals. Affirmed.

H. E. Valentine, of Centerville, for appellant. Wilson & Smith, of Centerville, for appellee.

LADD, J. The plaintiff was employed in the defendant's mine, and at the time of being injured was riding on the front car, at the right-hand corner, driving a vicious mule named Dynamite. For about 25 feet the entry was low, and in passing through a rock, extending over the rail 8 or 10 inches caught plaintiff on the shoulder, taking him over on his back, and he was rolled along the side of the car and injured. The rulings on the admissibility of evidence are not open to fair criticism, and the evidence, though close on the question of contributory negligence, was such as to carry the issues to the jury. Nothing can be gained from a review of the evidence, and in view of recent decisions covering the questions argued it seems necessary to discuss only one of the errors assigned.

Shortly after the injury a stipulation of settlement was signed by plaintiff, in pursuance of which defendant paid \$50 and, subsequently, the attending physician's charges. In the reply this was alleged to have been procured by fraud, and when plaintiff was mentally incapable of entering into a contract. The court instructed that the evidence failed to show that fraud was practiced, but submitted to the jury, in the sixth instruction, whether plaintiff "was in such a state of mind that he had no reasonable perception or understanding of the nature and terms of said contract of settlement," and instructed if he was in such state of mind, and had not ratified the settlement by accepting the services of the physician after he knew of the terms of settlement and of payment of the physician thereunder, the release interposed no obstacle to recovery; but if not in such state of mind, or he had accepted the services of a physician with such knowledge, the defendant would be entitled to a verdict. In the seventh instruction the jury were told that plaintiff was not bound to return, or offer to return, to defendant any money or benefit received under said contract of settlement at the time it was entered into, or while of unsound

mind, if he was, or so received without knowledge of the terms of said contract, if he was in ignorance thereof before bringing suit; and the acceptance or retention of any money or benefit so received could not amount to a ratification of said contract of settlement, but the acceptance by plaintiff of any benefits under said settlement, after he became mentally capable of a reasonable perception or understanding of the terms of said settlement, with full knowledge of the terms thereof, would amount to a ratification of said settlement, and preclude a recovery by plaintiff in this action.

[1] The plaintiff testified that he had no knowledge of the settlement until after the suit; and if the jury found otherwise this instruction was to the effect that if he accepted, by retaining, the money paid after he regained the possession of his faculties this would amount to ratification of the settlement and defeat recovery. This was not as clearly stated as it might have been, but sufficiently so in the absence of a request; for if he retained it, knowing for what received, before bringing suit he accepted benefits, and this, under the instruction, must have defeated recovery.

[2] Moreover, in view of the finding that plaintiff was mentally incapable, and did not ratify the settlement by accepting the physician's services, there was little room for saying, notwithstanding these conclusions, that he knew of the settlement prior to bringing suit; for his testimony of not knowing was contradicted only by the evidence bearing on these issues. If he did not then know, it was unnecessary in any writ to return or tender the consideration received. *Chicago, R. I. & P. Ry. Co. v. Doyle*, 18 Kan. 58. The result is that if the law is as argued by appellant there was no error. It has long been settled in this state that where a release is procured by fraud the consideration need not be returned or tendered back as a condition to the maintenance of an action for the damages. *O'Brien v. Railway*, 89 Iowa, 644, 57 N. W. 425; *Kelly v. Railway*, 138 Iowa, 273, 114 N. W. 536, 128 Am. St. Rep. 195.

[3] Does the same rule prevail where the release is alleged to have been procured from one mentally incapable? Of course, if such condition were known to the adverse party procuring it, this would constitute a fraud, and no tender would be necessary. *St. Louis, etc., R. Co. v. Sandidge*, 81 Ark. 264, 99 S. W. 68; *St. Louis, etc., R. Co. v. Brown*, 73 Ark. 42, 83 S. W. 332, 3 Ann. Cas. 573.

[4] But if the mental incapacity is unknown to the adverse party, and the release is fairly procured for mental incapacity, the authorities seem uniformly to hold that the consideration, if it has reached the com-

plaining party after the restoration of his faculties, before suit has been commenced, must be returned or tendered back as a condition precedent to the maintenance of the action. *Kelley v. Railway*, 154 Ala. 573, 45 South. 906; *Pawnee Coal Co. v. Royce*, 184 Ill. 402, 56 N. E. 621; *Drohan v. Railway*, 162 Mass. 435, 38 N. E. 1116; *Morris v. Railway*, 67 Minn. 74, 69 N. W. 628; *Gibson v. Railway*, 164 Pa. 142, 30 Atl. 308, 44 Am. St. Rep. 587. This is on the theory that restoration of the property received from the other party, acting in good faith, is essential to rescission, and that the retention of the consideration under these circumstances, with full knowledge of the facts, is a ratification of the contract. As pointed out, the court's instructions were in harmony with this view of the law, and the judgment is affirmed.

OLSON v. MICHENER.

(Supreme Court of Iowa. Dec. 13, 1912.)

PARTNERSHIP (§ 53*) — EXISTENCE OF RELATION—EVIDENCE.

In an action for a partnership accounting of the profits on the sale of horses, evidence held to sustain a finding that the plaintiff was the partner of the defendant.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 76, 79; Dec. Dig. § 53.*]

Appeal from District Court, Pottawattamie County; W. R. Green, Judge.

The facts are stated in the opinion. Affirmed.

Fremont Benjamin and Verne Benjamin, both of Council Bluffs, for appellant. F. E. Gill, of Sioux City, and Geo. H. Mayne, of Council Bluffs, for appellee.

SHERWIN, J. This is an action in equity, brought by the plaintiff against the defendant for a partnership accounting. There was a judgment for the plaintiff, from which the defendant appeals.

At the time of the transaction in question John S. Cooper was engaged in the horse commission business at South Omaha, Neb., and the appellant, Joseph Michener, was employed by Cooper as an auctioneer and solicitor of business. Appellant was also engaged in buying horses on his own account for sale through the Cooper commission house in South Omaha. The plaintiff lived in Sioux City, Iowa, and had been handling range horses for a number of years. In May, 1907, plaintiff and the defendant met in Sioux City, where they had a talk about the purchase and sale of Western horses, and according to the plaintiff's testimony, where they first talked about forming a partnership for the purpose of buying range horses and selling them through the Cooper sales. No definite final arrangement was made at that time, but de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

defendant asked the plaintiff to go to South Omaha at a later time for the purpose of further considering the matter of a partnership, telling the plaintiff that he knew where they could buy horses that would make them money. On the 14th of May, the plaintiff went to South Omaha, where he met the defendant, and they again talked of a partnership. The defendant then told the plaintiff that there were several bands of horses in the Laramie Plains district that could be bought, and particularly spoke of a band of about 3,000 horses called the Smith & Moore horses. This band of horses had been owned by a partnership composed of J. A. Smith and Alexander Moore. Alexander Moore had recently died, and the horses were to be sold by the surviving partner, J. A. Smith. There is evidence tending to show that in the conversation at this time the defendant showed the plaintiff letters that he had received from Sam Moore, who was a son and heir of the deceased, Alexander Moore, in reference to these horses. It was finally agreed between plaintiff and defendant that they would go together to Wyoming for the purpose of looking at these horses and buying them, if they could be bought right. Following out this arrangement, they went to Wheatland, Wyo., for the purpose of buying the Smith & Moore horses, arriving there on the 19th of May. Sam Moore lived in Wheatland, and they at once arranged with him to go with them to the Smith & Moore ranch at Toltec to meet J. A. Smith, look at the horses, and see if they could buy them; Olson hiring a livery team for the trip and paying therefor. The ranch was some 80 miles from Wheatland, as we understand the record, and after these parties had got about half way there they learned that J. A. Smith had already sold the horses to one Gallup, of South Omaha, and they then immediately went back to Wheatland. Sam Moore, who, as one of the heirs of Alexander Moore, had an interest in the horses, was dissatisfied with the sale to Gallup, and there is evidence tending to show that he asked Michener and Olson if they would give more for the horses, and they told him they would pay \$40 a head for them, if that price was necessary to get them.

On the same day a contract was made by Michener & Olson, as a partnership, to buy horses owned by Sam Moore alone, and Olson testified that he told Michener that he would become a partner in the contract with Sam Moore, on condition that all horses that were bought in the Laramie Plains district were to be bought in partnership, and that such agreement was then definitely made. After the purchase of the Sam Moore horses, it was agreed that all three of them would go to Cheyenne and see Mr. J. A. Smith, and, if possible, get him to cancel the Gallup contract for the Smith & Moore horses. They went to Cheyenne, saw Mr.

Smith, and Olson offered him \$40 a head for the horses, as he testifies, acting upon Michener's suggestion. Smith told him that the horses were sold; "that it was too bad, but he couldn't do anything for him." This offer was made on behalf of Michener & Olson. Sam Moore at that time told Smith that he was not satisfied with the sale that had been made to Gallup, and that he would not stand for a sale of the horses at \$35 a head, which was the price that Gallup was to pay. The principal bands of horses in the Laramie Plains district were the Smith & Moore horses, the Sam Moore horses, the Frank Amos horses, the Bowles & Wright horses, and the Qualey horses; and after the meeting in Cheyenne, to which we have referred, Michener & Olson, as a partnership, entered into contracts for and bought the Amos, the Bowles & Wright, and the Qualey horses. The Sam Moore horses they had already bought, and Michener also subsequently bought other horses for the partnership. While Michener claims that their partnership relations ceased about the 15th of June, the defendant's subsequent acts, and a letter written by him to the plaintiff on the 17th of June, sustain the plaintiff's contention that the relationship still continued. We shall again refer to this letter later on.

Plaintiff and defendant met in South Omaha on the 15th of June, and under an agreement then made Olson went back to Wyoming, where he completed the purchase of the Qualey horses for the partnership on the 18th of June. Michener went to Cheyenne for a conference with J. A. Smith and Sam Moore relative to the purchase of the Smith & Moore horses, and on the 17th of June he wrote the plaintiff from Cheyenne as follows: "Will go to Omaha to-night or to-morrow with Smith and Sam to try and get the horses, but keep this to yourself. Think they can get them back. Have you bought anything yet? Did you get the Qualey horses? Let me know at Omaha what you have done. Sam is sober and fine, and is all business now. It makes things quite different. Keep me posted what you buy, so I can arrange accordingly." Michener, Smith, and Moore came together to South Omaha, as it was stated in Michener's letter they would, and there Smith made arrangements with Gallup to cancel his contract with him for the sale of the Smith & Moore horses to him, and paid Gallup \$10,000 for such cancellation; the money being advanced by John S. Cooper. As soon as this was done, on the 24th of June, Smith made a contract with Michener to sell the horses to him at \$40 per head, the \$10,000 advanced by Cooper for Gallup to be the first payment thereon. All of the horses were to be delivered before the 15th of November, 1908. Later in the same day, and without the knowledge of J. A. Smith, a written agreement was made by Michener and Sam

Moore, by which Moore was to have one-half interest in the profits of the deal. At this time Olson was in Wyoming, looking for horses to buy for the firm of Michener & Olson, and he did not learn of the purchase by Michener, of the Smith & Moore horses until he was told thereof by the foreman of the Smith & Moore ranch. Olson did not see Michener until he met him in South Omaha, shortly after, and Michener at first denied having bought the Smith & Moore horses. He afterwards admitted that he had bought them, and said that he had to take Sam Moore in on the deal in order to get it through. Olson made objections to sharing the profits of the transaction with Moore, whereupon Michener assured him that they could buy Moore out for a small sum. Under the contract, the first delivery of the Smith & Moore horses was to be made on the 2d of August, 1907, at Medicine Bow, Wyo. This first shipment was made, and the horses were sold at South Omaha, through Cooper's house. Olson did not know until after this sale that Michener did not intend to share the profits with him, and when he learned the true situation he consulted an attorney, and was by him advised to take no action at once, but to watch the sales, and keep track of the proceeds, and thereafter bring an action for an accounting, all of which Olson did. The profits derived from the sale of the Smith & Moore horses were over \$28,000.

While the defendant denies many of the more important facts recited above, and produces some evidence tending to sustain his denials and his version of some of the transactions, we think such facts are well-established by the record, when the relations of the parties and their several transactions immediately preceding the purchase of the Smith & Moore horses are given their proper weight. The most serious matters, tending to throw suspicion on the correctness of the plaintiff's claim, are his attempt to buy off Sam Moore, and his failure to assert his claimed right as the horses were being sold during the seasons of 1907 and 1908. But as to both of these matters there is a fair explanation. If plaintiff is correct in his statement that Michener assured him that Moore had to be taken into the deal to secure the horses, and suggested to him that Moore could be bought off for a small sum, it explains his action along that line, because he might well deem it wiser to surrender a small part of the profits from the horses rather than a greater sum. He says that Michener told him that Moore could be bought off for \$500 or \$1,000, and that would evidently have been a wise buy. As to the other point, plaintiff consulted a reputable attorney and acted upon his advice, and if he did so honestly, and in the belief that it pointed out the wisest course, the circumstance is entitled to but little,

if any, weight against his present claim. We have given the record careful consideration, in the light of able and full oral argument on both sides, and we are united in the conclusion that the plaintiff has established a partnership in the Smith & Moore horses, and that he is entitled to recover herein. The trial court gave him a judgment for one-fourth of the profits arising therefrom, with interest, and such judgment is affirmed.

Affirmed.

LOW v. YOUNG, MULLARKY & LONG et al.
(Supreme Court of Iowa. Dec. 13, 1912.)

1. CONTRACTS (§ 163*)—WRITTEN INSTRUMENTS—CONSTRUCTION—WRITTEN AND PRINTED PORTION.

Where an instrument is partly printed and partly written, the provisions in writing will be given controlling significance in case of an apparent inconsistency.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 745; Dec. Dig. § 163.*]

2. VENDOR AND PURCHASER (§§ 3, 18*)—CONTRACT—CONSTRUCTION—OPTION.

A contract between plaintiff, a real estate agent, and certain of the defendants for the purchase by plaintiff of a farm provided for payment of \$50 cash, the assumption of a mortgage for \$8,000, the giving of a note for \$3,000, secured by a second mortgage, and another note for the balance, payable on or before 60 days. The contract also provided that if the notes were not paid when due the contract should be void, and plaintiff should forfeit the \$50 paid; the vendor refunding the notes. *Held*, that the contract was a mere option, and not a contract of sale, so that plaintiff's failure to comply with the stipulations for payment terminated his rights as a matter of law; and this notwithstanding that defendants, after plaintiff's breach, served a notice of forfeiture under Code, § 4299, relating to contracts for the purchaser of real estate.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 3, 23; Dec. Dig. §§ 3, 18.*]

Appeal from District Court, Buena Vista County; A. D. Baillie, Judge.

Action in equity to enforce specific performance of an alleged contract to convey land, with the additional prayer that if specific performance is impracticable plaintiff have relief against defendants by way of damages. There was a decree for defendants, from which plaintiff appeals. *Affirmed*.

James Deland, of Storm Lake, for appellant. V. P. McManus, of Manson, Kelleher & O'Connor, of Ft. Dodge, and Faville & Whitney, of Storm Lake, for appellees.

McCLAIN, C. J. On March 17, 1910, the plaintiff, as a real estate broker, entered into a written agreement with the defendants Young, Mullarky, and Long with reference to a purchase, or a prospective purchase, by plaintiff of a farm owned by said defendants as tenants in common. This contract provided for payment of a considerable

portion of the purchase price within 60 days; \$50 being paid in cash. The terms of the contract as to payment were not carried out, and said defendants, in June following, entered into a contract with defendant Wait for the sale of the land to him. It is now conceded for plaintiff that the contract on which plaintiff sues was not recorded until after the contract between Wait and the defendants was entered into, and therefore that Wait, having purchased without knowledge or notice of the contract with plaintiff, must be protected as against it. The sole controversy, therefore, is as to whether plaintiff is entitled to recover damages against the defendants Young, Mullarky, and Long for breach of their contract with him.

Substantially, the controversy between plaintiff and the defendants Young, Mullarky, and Long, who will be hereafter referred to as the defendants, is as to whether the written contract entered into between plaintiff and defendants was a mutually binding agreement of purchase by plaintiff, for breach of which defendants must answer in damages, or whether, on the other hand, it secured to plaintiff only an option to purchase the land, on terms specified, within 60 days, and by its own terms became void and inoperative on the failure of the plaintiff to exercise such option to purchase within the time specified.

The written instrument referred to consisted of a printed blank, embodying the usual provisions of a contract of sale of land, with certain stipulations written in blank spaces left for the purposes of specifying the description of the property, the names of the parties, and the terms of payment. Without setting out the contract in full, it is sufficient to say that the consideration was stated to be \$18,000, of which the plaintiff had paid \$50, and that plaintiff agreed to assume a mortgage on the land for \$8,000, give a note for \$3,000, secured by second mortgage on the land, payable in five years, and another note for the balance of the purchase price, payable on or before 60 days. Following these provisions, there was written into the printed blank the following stipulation: "If said note of nine thousand nine hundred and fifty dollars is not paid when due this contract is null and void. Second party forfeits his fifty dollars paid; and first party refunds notes given by second party. It is agreed that tile now on said land, not laid, shall be property of second party."

[1] Applying the well-recognized rule that in construing instruments partly printed and partly in writing, if there is apparent inconsistency between the printed portions and the portions in writing, the provisions in writing shall be given controlling significance (*Sylvester v. Ammons*, 126 Iowa, 140, 144, 101 N. W. 782), we reach the conclusion that the written stipulation above set out provided for an option only, which plaintiff might exercise within 60 days, and that the printed

portions of the contract having reference to a binding sale by defendants to plaintiff were superseded by this stipulation inserted in writing.

[2] The prior negotiations of the parties, and their interpretation of the contract between them, may, of course, be taken into account in determining the effect of the entire contract as executed, in view of the inconsistency appearing therein; and we have no hesitation in reaching the conclusion that, in view of the circumstances under which the blank contract was filed out and signed, and the subsequent practical abandonment of the written contract by plaintiff, indicated by his proposal to defendants to effect a sale of the land for them to another party on wholly different terms from those embodied in the contract, it was the intention of the parties to enter into an agreement which would give to the plaintiff nothing more than an option—failure to comply with the stipulations being, as a matter of law, an abandonment of all further rights thereunder.

As against this conclusion, which was the one drawn by the trial court from the writing and the oral evidence as to the conduct of the parties, counsel for appellant insists on substantially two propositions of fact: First, that the defendants have by their acts estopped themselves from claiming that the contract provided only for an option by subsequently serving on plaintiff a notice of forfeiture in accordance with provisions of Code, § 4299, relating to contracts for the purchase of real estate, and, further, that such estoppel has arisen in plaintiff's favor, as against defendants, by the action of defendants in allowing plaintiff to incur expense in reliance on the contract after the term of the option had expired; and, second, and without regard to a technical estoppel, that defendants, having elected to treat the contract as one of purchase, cannot now mend their hold by assuming another and inconsistent position with reference thereto.

As to the alleged estoppel, it is sufficient to say that the merely precautionary measure of serving notice, in view of the possible construction which might be contended for by plaintiff, would not, in itself, constitute an estoppel of the defendants to rely upon their construction of the terms of the contract. Such notice was not served until after defendants had, as plaintiff well knew, entered into an agreement for the sale of the land to Wait; and nothing appears to have been done by plaintiff in reliance on such notice, save to attempt to insist upon his own construction of the argument. It nowhere appears that if this notice had not been served plaintiff would have recognized the contract as providing for an option only, and abandoned further effort to enforce the contract under the construction which he placed upon it.

Whatever plaintiff may have done in at-

tempting to effect a sale of the property to another purchaser, and on other terms, was plainly in view of the correspondence between the parties, done in the hope of securing some advantage by way of commission or otherwise in bringing about a sale which would be satisfactory to the defendants. Such negotiations rather confirm than negative the construction of the contract insisted upon for defendants, under which the rights of plaintiff to exercise his option had fully terminated by expiration of time.

The suggestions already made practically dispose of the contention that appellants, having elected their remedy under the instrument, are foreclosed from now taking the inconsistent position that it provided only for an option, which had become forfeited when such election was made. The case is not one involving election of remedies, but one involving the construction of the contract itself, and in view of this situation the doctrine as to election of remedies has no application.

The decree of the trial court was right; and it is therefore affirmed.

BISSELL v. BOARD OF REVIEW OF TOWN OF DUNLAP.

(Supreme Court of Iowa. Dec. 13, 1912.)

TAXATION (§ 76*)—VENDOR AND PURCHASER (§ 3*)—"MONEYS AND CREDITS"—WRITTEN INSTRUMENTS—LEASE OR CONTRACT OF SALE.

Plaintiff executed an instrument purporting to be a lease for ten years, with privilege of extension for five years more at an annual rental, the tenant to pay taxes, keep the premises in repair, and the buildings insured. Plaintiff also agreed to sell the premises to the tenant for \$15,200, provided payment thereof was made on the 1st day of March of any year during the lease, payment of rent on the day being of the essence of the contract, and that, on failure of the lessee to perform, the lease should be canceled, except for rent or taxes due, and the lessee's option lost, and that, on the termination of the lease, the plaintiff agreed to give the tenant a warranty deed on payment of \$15,200. When the contract was made, the tenant paid plaintiff \$3,000 in cash, which, with the \$15,200, made the agreed purchase price of the property, and the rent stipulated for was fixed at 5 per cent. of the deferred payment; the only right of the tenant being to occupy the premises as tenant, unless he exercised his option, and, if he did not, the \$3,000 paid should be lost. *Held*, that the right of the tenant in addition to those acquired as lessee was only an option to buy the property on making payment of \$15,200 without interest, and that the contract was therefore a lease, and not a contract for sale, and plaintiff was therefore not required to pay taxes on such contracts as "moneys and credits."

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 162; Dec. Dig. § 76.* Vendor and Purchaser, Cent. Dig. § 3; Dec. Dig. § 3.*]

Appeal from District Court, Harrison County; O. D. Wheeler, Judge.

In a proper proceeding before the board of review of assessments for taxation in the town of Dunlap, the plaintiff's objections

to the assessment to him for taxation for the year 1911, as moneys and credits of a certain lease made by him to one Koll bearing date of October 10, 1908, were overruled. Plaintiff appealed to the district court, where his objections were again overruled, and he now appeals to this court. Reversed.

H. H. Roadifer, of Logan, for appellant.
S. H. Cochran, of Logan, for appellee.

MCLAIN, C. J. In October, 1908, plaintiff, being the owner of a farm consisting of 280 acres in Monona county, executed with one Koll a written instrument purporting in the main to be a lease of the premises as farm property for a term of ten years, with privilege of extension of five years at an annual rental of \$760, payable on the 1st day of March of each year, Koll as tenant, to pay taxes, keep the premises in repair, and keep the buildings insured. The instrument contained the other provisions of a farm lease with conditions of forfeiture, etc.; but it contained also the following provisions not appropriate to an ordinary lease: "The lessors agree to sell said premises to said Nick Koll, his heirs, executors or assigns for the sum of \$15,200, provided payment thereof is made on the first day of March of any year during the term of this lease. Payment of rent promptly on or before the day it becomes due is the essence of this contract. Upon the failure of the lessee to perform any act of this contract to pay the said rent or the taxes, or any condition therein agreed to be performed, this lease becomes canceled and of no effect, except for rent or taxes due, and the lessee's option of purchase stated above is lost. When the lease is canceled, lessor agrees to give to the lessee a good and sufficient warranty deed to said premises upon the payment of the said sum of \$15,200.00 (fifteen thousand two hundred dollars) as provided above. Abstract to be furnished, showing the title in the grantor." It further appears that by agreement of the parties Koll paid \$3,000 in cash to the plaintiff when the lease was executed, and that this amount, added to the \$15,200 which Koll was to pay plaintiff on electing to purchase the property during the continuance of the lease, made up the agreed purchase price of the property, and that the rent stipulated for was fixed on the basis of 5 per cent. on the deferred payment. It further appears from the testimony of Koll that it was understood between him and plaintiff that the only right he acquired with reference to the property was to occupy it as tenant, unless he exercised his option as specified in the instrument, and that, if he allowed the lease to expire or be terminated without exercising such option, the \$3,000 paid in advance would be forfeited. There was no evidence that there was any agreement or understanding between the par-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ties that Koll should have any other or greater rights in the property than those provided for in the instrument.

We reach the conclusion that the right which Koll acquired in addition to the other rights as tenant for the specified term was an option to buy the property on making an additional payment of \$15,200 without interest; the rental agreed upon being a substitute for interest, and that, on failing to make such payment within the time and in the manner specified in the lease, his option would fully and completely terminate, with the result that plaintiff had no right to compel the payment of the additional \$15,200 by Koll, and that Koll had no right to enforce any contract of purchase otherwise than by exercising the option provided for. Under this view of the relations of the parties, the contract between them was not a contract of purchase in such sense that it could properly be assessed to plaintiff as moneys and credits. *Schoonover v. Petcina*, 126 Iowa, 261, 100 N. W. 490; *In re Assessment of Shields*, 134 Iowa, 559, 111 N. W. 963, 10 L. R. A. (N. S.) 1061.

Appellee relies upon circumstances as tending to show an intent on the part of plaintiff to conceal the real nature of the transaction and to evade taxation; but we find no circumstances which would justify us in holding that there was a binding contract between Koll and plaintiff for the unconditional purchase of the land. The advance payment of \$3,000 would, of course, strongly indicate that Koll intended to exercise his option within the 15-year period provided for in the lease, and that he secured his option partly in consideration of such advance payment; but it does not follow that plaintiff could enforce the payment by Koll of the remainder of the purchase price. Other circumstances such as that Koll made some improvements by putting a new roof on the barn and building a corncrib out of old lumber on the place do not indicate that the contract was not what it purported to be. Koll was under obligation as tenant to keep the premises in repair, and, having a lease for a long term, might very well build a corncrib out of old lumber without indicating any other intention than that to which he testified, the intention to occupy as tenant and exercise his option if he saw fit to do so. The further circumstances disclosed in the record that plaintiff paid a real estate agent \$1 per acre for procuring Koll as a purchaser, and that Koll has since listed the farm for sale, are not in our judgment inconsistent with the conclusion that the written instrument expressed the real intent of the parties. Plaintiff may have been satisfied to pay a commission for procuring Koll as a prospective purchaser with whom such a contract was made, and Koll, having the option to take the title to the property at any

time on paying the balance of the purchase price, may well have assumed that he could sell the farm at such advance in price as would justify him in exercising his option.

Counsel for appellee rely upon the evidence as establishing a fraudulent evasion of taxation. It is true that the terms of the contract are not conclusive, and that, if the real agreement was that Koll should be bound to pay in any event the balance of the purchase price, then plaintiff was assessable for the value of such contract as moneys and credits. *Meyer v. Dubuque County*, 49 Iowa, 193. But the fact that the plaintiff, desiring to avoid the obligation to pay taxes which would rest upon him if he made a binding contract of sale to Koll (notwithstanding the fact that the taxes on the land itself were to be paid by Koll under the terms of the lease), saw fit to enter into a different kind of an arrangement, less favorable to him in some respects which would not involve the payment of taxes on the balance of the purchase price until it was actually paid, would not constitute any fraudulent evasion of taxation. Persons have the right to invest their money in property or to otherwise contract with a view of not assuming the burdens of taxation if they see fit to do so, provided, of course, they act in good faith, and not with the intention of concealing or withholding from taxation that which is in fact or law subject to taxation. *Ottumwa Savings Bank v. City of Ottumwa*, 95 Iowa, 176, 63 N. W. 672. While double taxation effected by exacting a tax upon land and an independent tax upon a contract for the sale of the same land is not unconstitutional, on the other hand, we would not feel justified in branding as fraudulent a transaction made in good faith by which double taxation should be avoided.

The trial court therefore erred in holding that the contract evidenced by the written instrument conferring upon Koll an option to purchase on specified terms gave rise to a taxable credit in the hands of plaintiff; and the decision of the court is therefore reversed.

NELSON v. OMAHA & C. B. ST. RY. CO.

(Supreme Court of Iowa. Dec. 13, 1912.)

1. WATERS AND WATER COURSES (§ 171*)—STREET RAILROADS—RIGHT OF WAY—SURFACE WATER—INJURIES TO LAND.

A street railway company has no right to so construct and maintain its embankments for track purposes as to flood the land above it.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 216-222; Dec. Dig. § 171.*]

2. DAMAGES (§ 174*)—EVIDENCE—VALUE OF CROPS.

In an action by a tenant against a street railway for an injury to crops due to the defendant's construction of an embankment by which the land was flooded and the crops de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & R.P.'r Indexes

stroyed, evidence as to the value of the crops destroyed was admissible.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 462-467; Dec. Dig. § 174.*]

Appeal from District Court, Pottawattamie County; O. D. Wheeler, Judge.

The facts are stated in the opinion. Affirmed.

Tinley & Mitchell, of Council Bluffs, for appellant. George H. Mayne, of Council Bluffs, for appellee.

SHERWIN, J. Action to recover damages claimed to have been suffered by the overflowing of lands occupied by the plaintiff as a tenant during the years 1907, 1908, and 1909; said overflow being caused by an embankment constructed by the defendant on its right of way. The facts in the case, without serious question, show that Nelson, the plaintiff, held a lease during the years 1907, 1908, and 1909 and for several years prior thereto on about 70 acres of land lying west of Thirty-Seventh street and north of the right of way of the defendant, in the western part of the city of Council Bluffs, lying north of the street railway line belonging to appellants, and bounded by the Missouri river on the north. Nelson also owned a tract of land of about three acres, bounded on the north and west by the land which he rented and on the east by Thirty-Seventh street. The south line of the three-acre tract owned by Nelson extended to the west would be the south line of the 70 acres which he leased. The tracks of the street car company run directly west from Thirty-Seventh street for a little over an eighth of a mile, then southwest for about a quarter of a mile to the bridge. The bridge of the street car company is a combined street railway and wagon bridge, and the approach to their wagon bridge is an extension of Broadway to the west and southwest, parallel to the street car track. The evidence shows without dispute that a depression or swale, varying in width from 50 to 300 feet, commencing near the northwest corner of the land leased by Nelson extended irregularly in a southeasterly direction to the south line of the land leased by Nelson, thence in a southerly and southwesterly direction to the Missouri river, and that this swale or depression was the natural waterway for the surface and overflow water from the land in controversy for a period of almost 30 years. The center of this depression or waterway would be at about the point where the turn is made to the southwest in the track and wagon approach of the street car company. When the bridge and street car line was constructed about 1886, the track and the driveway were built over a trestle of several hundred feet in length which spanned this swale or depression, allowing free passage for the surface and overflow water in the same manner as before it was

built. During the years 1902 and 1903, this trestle under the tracks was filled in by a solid embankment of earth, and during the years 1906 and 1907 the trestle under the driveway to the bridge was similarly filled in. At the time this work was done and for the purpose of permitting the surface and overflow water to flow through its former channel, the company put in at the lowest part of said depression two 24-inch tile or pipe, one under the street car tracks and the other under the driveway. There was also put in by the company a 21-inch pipe running from the lowest part of the depression along the northerly side of the street car track to the river. The evidence shows without conflict that prior to the building of the embankment and the stopping up of the trestle the overflow and surface water would pass on through its natural course to the river, and did not gather or stand on the land in controversy.

Plaintiff, Nelson, during the years 1907, 1908, and 1909, as in prior years, put in a crop on the land in controversy, planting about 40 or 50 acres of corn. During the summer of 1907 the Missouri river overflowed its bank at the northwest corner of the land in controversy, and continued high enough to flow over that land for a period of about two days, or a little less. The overflow of water, following the depression before referred to, ran down until it reached the railroad embankment, and this caused it to back up and stand on the land during the balance of the summer, greatly injuring the crop; the pipes under the track being stopped up. Substantially the same thing occurred in 1908. In 1909 the river did not come over, but the water collected to about the same extent as the result of very heavy rains. The evidence shows that there was five or six feet of water north of the grade, and no water on the south side. It is perfectly apparent from the evidence that but for the grade there would have been no water on the land, except for the very short space of time when the river was overflowing its bank at the northwest corner; that but for the stopping of the water by the embankment plaintiff's crop would have been but little, if any, injured. Owing to the water not being able to get away, it stood on the land during a period of several months, totally ruining each year from 20 to 30 acres of the crop, which the undisputed evidence shows was worth at the time of the overflow \$15 per acre. The defendant did not plead, nor is there any evidence tending to show, that it owned any land except the right of way for its track and the approach to the bridge, so there is no question before us touching the defendant's right to dike to protect its own land, and the authorities cited by it in support of such right are therefore not in point.

[1] On this branch of the case but one

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

point is present for determination, and that is whether the defendant has the right to so construct and maintain its embankment for track purposes as to flood the land above it. And this question is settled adversely to appellant in the following cases: *Brown v. Armstrong*, 127 Iowa, 175, 102 N. W. 1047; *Albright v. Railway Company*, 133 Iowa, 644, 110 N. W. 1052; *Keck v. Venghause*, 127 Iowa, 529, 103 N. W. 773, 4 Ann. Cas. 716.

[2] 2. Error is alleged in overruling appellants' motion to strike certain testimony as to the value of crops destroyed. This evidence was evidently admitted under the rule announced in *Harvey v. Railway Company*, 129 Iowa, 465, 105 N. W. 958, 3 L. R. A. (N. S.) 973, 113 Am. St. Rep. 483, (referred to by counsel on both sides without giving the citation), and as competent. See, also, *Jefferis v. Railway Company*, 147 Iowa, 124, 124 N. W. 367, and cases cited therein on this point, and *Blunck v. Railway Co.*, 142 Iowa, 146, 120 N. W. 737.

We find no error in the record, and the judgment is therefore affirmed.

Affirmed.

LANSING v. BEVER LAND CO. et al.
(Supreme Court of Iowa. Dec. 11, 1912.)

1. PARTNERSHIP (§ 219*)—RELATION—STATUS OF PARTNERS.

A partnership is a distinct entity, and a judgment against it is not a judgment against the individuals who compose it.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 429-445; Dec. Dig. § 219.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5191-5202; vol. 8, p. 7746, 7747.]

2. PARTNERSHIP (§ 220*)—PERSONS AGAINST WHOM EXECUTION MAY ISSUE—JUDGMENT DEBTOR.

Where an execution recites a judgment against what appears to be a partnership, a partnership will be inferred, as in such a writ the partnership need not be recited; and where that is all the recital there is, a levy on the individual property of one of the members is not warranted, under Code, § 3960, which provides that an execution must state the names of the parties to the action, and, if it is against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment and interest out of the property of the debtor subject to execution, and section 3969, which requires the officer to execute the writ by levy on the judgment debtor.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 446-465, 467-469; Dec. Dig. § 220.*]

3. PARTNERSHIP (§ 204*)—ACTIONS—APPEARANCE OF PARTNERS.

Though individual partners, on the trial of a counterclaim in an action brought by the partnership, employed counsel, gave testimony, and attended and advised counsel on the trial, such matters were such as might have been done in their capacity as agents for the firm, and were not personal appearances, so as to permit them to be charged individually on a judgment entered.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 376-381; Dec. Dig. § 204.*]

4. PARTNERSHIP (§ 219*)—SUIT AGAINST—LIABILITY ON INDIVIDUAL PARTNER—NECESSITY OF NOTICE OR APPEARANCE.

An individual partner, who is named as a party with the partnership, is not chargeable on a judgment entered, where he is not served with notice of the suit and does not enter a legal appearance.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 429-445; Dec. Dig. § 219.*]

5. JUDGMENT (§ 303*)—AMENDMENT—COLLATERAL PROCEEDING.

A judgment may not be amended to show facts differing from its recitals in a collateral proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 594; Dec. Dig. § 303.*]

Appeal from District Court, Linn County; Milo P. Smith, Judge.

Suit in equity to cancel the levy of an execution upon certain real estate belonging to plaintiff, to enjoin a sale under said execution, and for other equitable relief. To an answer filed by defendants, plaintiff demurred; and from a ruling sustaining the demurrer defendants appeal.

On rehearing. Affirmed.

For opinion on former hearing, see 132 N. W. 177.

Jamison, Smyth & Hann, of Cedar Rapids, for appellants. Rickel & Dennis, and J. H. Preston, all of Cedar Rapids, for appellee.

DEEMER, J. Under a case entitled *Young & Lansing, Plaintiff v. Bever Land Co.*, Defendant, an action at law was brought in the superior court of the city of Cedar Rapids to recover rent paid the defendant, which it is alleged was a corporation, for a building which was destroyed by fire before the expiration of the term for which the rent was paid. In the petition no allegation was made as to the nature of the plaintiff, but it was averred that "the lease was assigned to F. M. Young and T. H. Lansing, the plaintiffs herein." Judgment was asked for plaintiffs in the sum of \$164.59. The defendant, Bever Land Company, appeared to that action, and filed a counterclaim against Young & Lansing, T. H. Lansing, and F. M. Young. A reply was filed to this counterclaim, and upon the issues joined the case was tried, resulting in a judgment for the Bever Land Company against Young & Lansing alone. The exact prayer of the counterclaim was that defendant have judgment against F. M. Young and T. H. Lansing, and against the firm of Young & Lansing, in the aggregate sum of \$6,493.14. So that the judgment on its face denied the relief asked against the two parties named. Upon appeal to this court, under the title given in the original case, the judgment was affirmed. Thereafter an execution issued to the sheriff of Linn county, which contained the following recitations and directions: "Whereas, a judgment against Young & Lansing for the sum of six thousand seven hundred and ninety-eight dollars

and forty-two cents (\$6,798.42) damages, with interest thereon at the rate of six per cent. per annum, and two hundred and sixty-two dollars and thirty-five cents (\$262.35) costs, was rendered by the superior court of the city of Cedar Rapids, Iowa, * * * on the 13th day of February, A. D. 1908, in an action wherein Young & Lansing was plaintiff, and Bever Land Company, defendant, and afterwards on the 17th day of December, A. D. 1908, transcript of said judgment duly certified to by the clerk of said superior court was filed in the office of the clerk of the district court of said county, and a memorandum thereof by said clerk entered in the proper judgment docket of his office, and it appearing from the record of said cause that all of said judgment, the interest thereon, and costs still remain unpaid: These are, therefore, in the name and by the authority of the state of Iowa, to command you that of the goods, chattels, lands, and tenements of the said Young & Lansing, if sufficient be found in your county which are not exempt from execution, you cause to be made the said sum, with interest and costs and accruing costs, by levy and sale thereof, according to law." Pursuant to this execution the sheriff made the following return: "I hereby certify that on the same day I levied upon and attached as the property of Thomas H. Lansing and Thomas H. Lansing & Co., the following property, to wit: * * * Also the stock standing in the name of Thos. H. Lansing and Thos. H. Lansing & Co. in the Allison Hotel Co. of Cedar Rapids, Iowa, and that on the same day I served notice of said levy as shown by return on notices hereto attached. Levy on real estate and the stock in Allison Hotel Co. made this 10th day of December, 1908."

This action was brought to restrain the enforcement of the execution, upon the ground that plaintiff's property could not be taken upon an execution running against Young & Lansing, and the return shows that the property levied upon belonged to Thos. H. Lansing and Thos. H. Lansing & Co. The claim for appellant under this record, and the whole thereof, is as follows: "On February 13, 1908, a judgment was entered in the superior court of the city of Cedar Rapids, Iowa, against Young & Lansing for the sum of six thousand seven hundred and ninety-eight and $\frac{42}{100}$ dollars (\$6,798.42), and cost taxed at two hundred sixty-two and $\frac{35}{100}$ (\$262.35) dollars. Prior to said February 13, 1908, F. M. Young and T. H. Lansing commenced suit in the superior court of Cedar Rapids against the Bever Land Company to recover a sum of money claimed to be due said Young & Lansing on account of a certain building known as the Clifton Hotel in the city of Cedar Rapids, Iowa, becoming untenable by reason of a fire which wholly destroyed the same, and that under and by virtue of the lease of

said building from the Bever Land Company, which required payment in advance for the rent of said building, said Young & Lansing had paid for a portion of a month, and had not had the use of the building which had been destroyed by fire. To this petition the Bever Land Company appeared and answered, and filed in addition to said answer a counterclaim against Young & Lansing, T. H. Lansing, and F. M. Young, constituting a copartnership of Young & Lansing, in a large sum. An answer was filed by Young & Lansing to the counterclaim of the Bever Land Company. A trial was had in the superior court, lasting several days, and which resulted in a verdict of the jury against Young & Lansing on the counterclaim in the sum of six thousand seven hundred ninety-eight and $\frac{42}{100}$ (\$6,798.42) dollars. * * * The judgment of the superior court of the city of Cedar Rapids was transcribed to the district court of Linn county, Iowa, and an execution issued thereon and levied upon certain real estate and personal property of T. H. Lansing to satisfy said judgment. Thereupon T. H. Lansing filed his petition in the district court of Linn county, Iowa, praying for a temporary and permanent injunction to enjoin the enforcement of said execution against his individual property. A temporary writ of injunction was issued. Thereafter the Bever Land Company appeared, filed its answer, set up the proceedings had and done in the superior court of the city of Cedar Rapids, and especially averring that T. H. Lansing had appeared in the superior court of the city of Cedar Rapids, Iowa, and had hired lawyers and conducted the defense made by Young & Lansing, T. H. Lansing, and F. M. Young, and that because of said facts the said execution was valid and enforceable against the individual property of T. H. Lansing. * * *

The ultimate question to be determined under the allegations of the petition of the plaintiff and the answer and amendment thereto of the defendant is as to whether T. H. Lansing's individual property is liable under the execution issued upon a judgment against Young & Lansing."

[1] While some controversy has arisen since the original brief was filed as to the nature of the case, and the claims made by the respective parties, this was the only point relied upon for a reversal when the cause was originally submitted, and we do not think any other question is now involved. Indeed, it is apparent from the counterclaim filed in the original case that defendant, Bever Land Company, was making its claim against a partnership known as Young & Lansing and against the individual members, naming them, and that it obtained its judgment against Young & Lansing alone, which it averred in its counterclaim was a copartnership. No matter, then, what the defects in the original petition filed by "Young & Lansing," the defendant by its

counterclaim introduced an original cause of action, which it claimed to have against three parties, and asked judgment against each. In fact, it recovered against one, and that one was Young & Lansing; and in its counterclaim it averred that Young & Lansing was a partnership. A partnership under our law is a distinct entity, and the judgment against it was not a judgment against the individual members of that entity or artificial person known as a partnership. *Brumwell v. Stebbins*, 83 Iowa, 425, 49 N. W. 1020; *Mason v. Rice*, 66 Iowa, 174, 23 N. W. 384; *Anderson v. Wilson*, 142 Iowa, 164, 120 N. W. 677; *Sullivan v. Nicoulin*, 113 Iowa, 82, 84 N. W. 978; *Graham Co. v. Wohlwend*, 116 Iowa, 358, 89 N. W. 1068.

[2] The judgment, then, was against a partnership as such, and the execution following the judgment recites a judgment against Young & Lansing, and directs that of the goods of Young & Lansing by levy and sale thereof a sufficient amount be raised to pay the aforesaid judgment. From the use of what appears to be a partnership name in an execution, a partnership will be inferred; for there is no necessity of a recital of a partnership in such a writ, although such an allegation may be necessary in a pleading. *D. & S. W. R. Co. v. Akerman*, 2 Ga. App. 746, 59 S. E. 10. As the judgment was against Young & Lansing, and the execution directed a levy and sale of the property of Young & Lansing, the officer was not justified in levying upon the individual property of T. H. Lansing. Code, § 3960, provides that: "The execution must state the names of the parties to the action, and if it is against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment and interest out of the property of the debtor subject to execution." And section 3969 says: "The officer must execute the writ by levying on the property of the judgment debtor."

In *Mason v. Rice et al.*, 66 Iowa, 174, 23 N. W. 386, the court had this exact question before it, and we then said: "The clerk doubtless took this view of the question, for the writ which he issued commands the sheriff to attach the property of I. N. Rice & Co. It contains no reference to the individual members of the firm or their property. The name of defendant Beebe is not mentioned in the writ, nor does it contain any recital which in any manner indicates that he is a partner in the firm. The writ, then, clearly did not empower the sheriff to levy on his individual property. The only power which the officer had in the premises was expressed in the mandate of the writ, and by that he was empowered to attach the property of the partnership alone. The attachment, then, was sued out by plaintiff against the property of the firm, and it empowered the sheriff to levy on the firm property only. But the officer without right or authority attached the individual property of defendant Beebe. The

injury, then, which defendant has sustained, was occasioned, not by the wrongful suing out of the attachment, but by the wrongful act of the sheriff in seizing his property on the writ. As the injury of which he complains was caused by the trespass of the officer, and not by the suing out of the writ, the question as to his remedy is not at all affected by the fact that he is a party to the suit in which the attachment was issued, and that the writ might have been issued on the allegations of the petition against his property, as well as that of the partnership. His right of action is against the wrongdoer by whose trespass he has been damaged, and not upon the bond."

This rule settles, as it seems to us, every question in the case. True, as we shall presently see, defendants contend that, as they might have had judgment against the individual members of the firm because of their appearance in the case, they are entitled to enforce this execution against the separate property of Thos. H. Lansing. But the case just cited clearly negatives this thought, and there is really no need of pressing the inquiry further. Counsel for appellant claim, however, that as the judgment and execution ran against Young & Lansing, without other designation, they are entitled to enforce it against either or both. The difficulty lies in identifying the parties as F. M. Young and Thos. H. Lansing.

[3] II. The real point made for appellant is that although the judgment was against a partnership alone, and the execution also was directed against partnership property, still in virtue of the allegations of the answer, to which the demurrer was sustained, they are entitled to have the execution satisfied out of the individual property of Thos. H. Lansing, because he was one of the partners and entered an appearance in the original case. The only material allegations of the answer in this connection are: "That the plaintiffs were represented by Attorneys John A. Reed, W. E. Steele, and Henry Rickel, of the firm of Rickel & Dennis; that upon issues joined upon said counterclaim a trial was had before the court and a jury, lasting a number of days, and that a verdict was returned by the jury in favor of the Bever Land Company and against the plaintiffs for \$6,798.42; that upon said verdict judgment was entered by the superior court of the city of Cedar Rapids, Iowa; * * * that at the time of the commencement of said suit in the superior court of the city of Cedar Rapids, Iowa, the plaintiff, Thomas H. Lansing, was a citizen and resident of Cedar Rapids, Iowa, and F. M. Young was also a citizen and resident of Cedar Rapids, Iowa; that said plaintiffs Thomas H. Lansing and F. M. Young were both personally present in the superior court of Cedar Rapids, Iowa, and both personally directed the commencement of the suit in said superior court by Young & Lansing, Thomas H. Lan-

sing, and F. M. Young, and both personally took an active part in the trial of said case, and especially of the defense made to the counterclaim of the defendant, Bever Land Company; that the plaintiffs Thomas H. Lansing and F. M. Young were personally present during most of the trial in the superior court of the city of Cedar Rapids, Iowa, and both testified in said case; that the said Thomas H. Lansing employed the attorneys who appeared in said cause and tried said case, and F. M. Young also personally employed said attorneys, or some of them, who appeared in said case and contested said counterclaim; that the principal question involved in said trial was the issue joined upon the counterclaim filed by the defendant claiming damage and attorney's fees growing out of matters connected with the leasing and operation and burning of the Clifton Hotel, when the same was occupied by Thomas H. Lansing and F. M. Young, as Young & Lansing, and that the said Thomas H. Lansing advised with the attorneys conducting the defense in said case, and aided and assisted them, and was personally familiar with all of the proceedings had and done in said case; that after the entering of judgment in said case an appeal was taken to the Supreme Court of the state of Iowa by the said Young & Lansing, at the special instance and request of Thomas H. Lansing, and that said appeal was afterwards dismissed by the Supreme Court of the state of Iowa, and said appeal terminated and ended; that said Thomas H. Lansing employed attorneys to prosecute said appeal, and that in all the defense that was made to said counterclaim and in the trial of said case, and in the appeal thereof, said Thomas H. Lansing employed attorneys, aided and assisted in said case, and was personally present and had full knowledge of all that was done therein; and the defendant avers that, by reason of the fact aforesaid, both members of the firm of Young & Lansing, to wit, Thomas H. Lansing and F. M. Young, were represented in said trial, conducted said trial, and are hereby concluded, not only as a firm, but as individuals, by the said judgment in said proceedings. * * * Defendants, further answering, state that by reason of the pleadings, and by reason of the appearance, and by reason of personally attending upon said trial, and testifying therein, and employing lawyers to contest the matters involved in said counterclaim, the said Thomas H. Lansing was, as a member of said firm of Young & Lansing, in court, and no notice was necessary to be served upon him or upon F. M. Young in reference to said counterclaim, and it was not necessary to serve upon plaintiff a notice of the filing of the counterclaim, for the reason that the said Lansing, as a member of the firm, took issue upon said counterclaim, and testified therein, and employed lawyers to represent the said firm and the said Lansing in said action.

* * * And the said sheriff of Linn county, Iowa, has the right to pursue and subject to the payment of said judgment the individual property of the said Thomas H. Lansing."

[4] Each and all of the matters and things charged against F. M. Young and T. H. Lansing might very well have been done in their capacity as agents for the firm of which they were members, and the record nowhere recites that either entered a personal appearance to the suit. It is true that a belated transcript of the judgment, entitled "Young & Lansing v. Bever Land Co.," shows an appearance for the plaintiff. But this is the only record which shows an appearance for plaintiff, and that appearance is for Young & Lansing. A member of a partnership does not become a party to a suit brought against a partnership alone, by employing counsel, giving testimony, or attending and advising counsel upon the trial. And the same rule obtains, we think, where he is named as a party with the partnership, but not served with notice of the suit. In such cases a regular appearance is necessary. *Nixon v. Downey*, 42 Iowa, 78. It is true that one may sometimes be bound by an adjudication by giving testimony in an action to which he is not a party; but this rule has no application here. The question here is: May an execution issue against one not a party to a suit because he took part in the trial thereof? This is something entirely different from the question as to whether or not one may be bound by an adjudication in a suit to which he was not a party named. But, should we assume that by reason of conduct he was bound by the judgment, we have here a denial by the court of any personal judgment against him, although defendant, in its counterclaim, expressly asked for such a judgment.

[5] It may be that the judgment might be amended to show facts differing from its recitals; but, however that may be, it cannot be amended in a collateral proceeding. Defendant contends broadly for the proposition, however, that a judgment against a partnership alone, in a suit against that entity and no one else, may be enforced by execution against the partnership and its property through the seizure and sale of the property of any individual member who chose to employ counsel, gave him advice, or gave testimony upon the trial. We do not think this is true as a proposition of law. Our Code materially changes the rules of the common law upon this subject. Under the Code provisions, as is said in *Anderson v. Wilson*, 142 Iowa, 158, 120 N. W. 677: "In construing this section, it must be borne in mind that at common law the liability of members of a partnership was joint, and not several, and that all the known partners were necessary parties defendant, and that no judgment could be entered against one until it was entered

against all. One purpose of the statute was to make the liability of partners several as well as joint. Hence the provision that an action might be brought against the partnership as such, and all, or some, or none, of the individual members thereof. We think, therefore, that the true construction of this statute is that a plaintiff may prosecute his case to judgment against the partnership alone, or against the partnership and any member thereof which he chooses to make a party, and that he can enforce his judgment against such defendants without waiting to obtain jurisdiction over other members of the firm, and without losing his right to proceed in a new action on the original cause against 'members not made parties.' If the plaintiff chooses to take his judgment against the partnership alone, a judgment against the partnership alone is all that he has. His execution can be no broader than his judgment, nor can it run, without some special order, against any other property than that of the judgment defendant. If he desires an execution against the property of an individual member of the firm, he must first obtain a judgment in some manner. Under the Revision of 1860, he could obtain it on *scire facias* proceedings if he had failed to obtain it in the original proceeding. By section 3468 of the present Code he can obtain it 'by a new action.' We must hold, therefore, that the Anderson judgment against George W. Wilson & Co. is not a judgment against George W. Wilson."

As already stated, the record nowhere disclosed the personal appearance of either F. M. Young or Thos. H. Lansing, and if it did the judgment was not against either in a personal capacity. In these circumstances we need not inquire whether it is permissible in cases against a partnership to have an execution run, on a judgment against a partnership alone, against an individual member served with notice, or one who personally appears to the suit. We may remark here, however, that if it be proposed to have execution against a member of a partnership not made a party to the proceeding in any event it should affirmatively appear that his appearance was personal, and to defend against his personal liability rather than in a representative capacity as an agent of the partnership. If served with notice of a claim against him in a personal capacity, he must either defend or have judgment go against him by default, and in such case the record discloses all the facts essential to the establishment of personal liability. But not so where he comes into the case to defend for the partnership which is the only party to the suit. *Ogle v. Miller*, 128 Iowa, 474, 104 N. W. 502. A partnership can act only through one of the partners, and a partner, in fulfilling this duty as an agent of the partnership or of his copartner, should not

be held to a personal liability, unless it clearly appears that he, in his individual capacity, made himself a party to the suit.

These considerations rule the instant case, and it follows that the ruling on the demurrer was correct, and the order and judgment are affirmed.

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BAKER v. CLOWSER et al.

(Supreme Court of Iowa. Dec. 14, 1912.)

1. ADOPTION (§ 22*)—INHERITANCE FROM ADOPTED CHILDREN.

If Code 1873, § 2307, authorizing any person competent to make a will to adopt the child of another conferring on it all the rights, privileges, and responsibilities pertaining to a child born to such person in lawful wedlock, and section 2310, providing that the rights, duties, and relations between the parent and child by adoption should be the same in all respects, including the right of inheritance, as existed by law between parent and child by lawful birth, authorized an adopting parent to inherit from the adopted child, it did not authorize the heirs of such adopting parent in the case of his death to inherit from the adopted child; and hence, where a child was adopted and died while that Code was in effect, her natural parents inherited her real estate, under section 2455, providing that the surviving parents of one dying without issue and unmarried become vested in equal shares with the real property of such child, and they were not prevented from inheriting by the fact that the adopted child inherited such real estate from its adopting parent.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 41; Dec. Dig. § 22.*]

2. ADOPTION (§ 22*)—INHERITANCE FROM ADOPTED CHILDREN.

Acts 29th Gen. Assem. c. 132, providing that as between an adopting parent and an adopted child the right of inheritance from each other shall be the same as between natural parent and child, and chapter 136, providing for inheritance on the part of parents by adoption in accordance with the general statutory provision regulating inheritance as between parent and child dying without issue, and also providing that if no heirs are found in the line of the adopting parents the property shall go to the natural parents or if they have died, to those in their line of descent, cannot be considered as a legislative declaration that the law was to the same effect under previous statutes.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 41; Dec. Dig. § 22.*]

3. STATUTES (§ 269*)—CONSTRUCTION—LEGISLATIVE CONSTRUCTION.

The Legislature cannot prescribe or indicate the construction of a previous statute under which rights have already vested.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 362; Dec. Dig. § 269.*]

4. STATUTES (§ 228*)—CONSTRUCTION—STATUTORY EXCEPTIONS.

Code 1897, § 3446, providing that the provisions of the Code shall be liberally construed with a view to promote its objects, was intended to negative the rule that statutes in derogation of the common law are strictly construed, and does not apply in determining the extent of a statutory exception to a general statutory provision, in which case the exception goes no further than the language fairly warrants, and beyond that the general statutory provision applies.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 310; Dec. Dig. § 228.*]

5. TENANCY IN COMMON (§ 15*)—ADVERSE POSSESSION—ACTS CONSTITUTING.

Where a cotenant in possession made no public and notorious assertion of right to the entire property, and the tenant out of possession did not know that improvements on the land were being made under a hostile claim, limitations did not run in favor of the tenant in possession.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

Sherwin and Evans, JJ., dissenting.

Appeal from District Court, Page County; A. B. Thornell, Judge.

In an action for partition of certain real property between the widow and heirs of W. S. Baker, deceased, who was alleged to have died seised of such property, the court was asked to decree that defendants Leander W. Calhoon and his wife, Polly Calhoon, had no interest in said property. By way of resistance to the relief thus asked, Leander W. Calhoon alleged that as the father of one Hattie Calhoon, deceased, who died seised of an interest in the property as coheir by adoption with W. S. Baker of David P. Baker, father of said W. S. Baker, he acquired title to one-half of such interest in the property of David P. Baker. The court held that Leander W. Calhoon acquired no interest in the property through his daughter, Hattie Calhoon, by reason of her adoption by David P. Baker, and from such decree, Leander W. Calhoon and his wife, Polly Calhoon, appeal. Reversed.

W. E. Gray and M. W. Frick, both of Rockwell City, for appellants. H. H. Scott and Parslow & Peters, all of Clarinda, for appellee.

McCLAIN, C. J. As between the plaintiff who is the widow of W. S. Baker, and the defendants (other than Leander W. Calhoon and his wife), who are alleged to have interests in the property in controversy as the heirs of W. S. Baker, no issue is presented on this record. The sole question for determination is whether Leander W. Calhoon has an interest therein, growing out of facts which will now be stated only so far as they are necessary to show what the issue decided by the trial court really was.

In 1885, David P. Baker died seised of the land in controversy. Prior to his death, he adopted as his child, by articles properly executed and filed, one Hattie Calhoon, issue of a marriage between his daughter Frances and the defendant Leander W. Calhoon, who in the meantime had been divorced from his wife, Frances, and had gone to another state to reside, and had there remarried. David P. Baker left surviving him five children and also his adopted child, Hattie Calhoon, and it is agreed that this adopted child became an owner, by virtue of her adoptive relationship to the deceased, of a one-sixth in-

terest in the property in controversy. By various conveyances, W. S. Baker, one of the children of David P. Baker, acquired the interests of his natural brothers and sisters and died seised of the land in controversy, subject only to the interest therein, if any, of Leander W. Calhoon, as father of Hattie Calhoon, who had died in the meantime. The mother of Hattie Calhoon also survived her and is still living (divorced, as already indicated, from the father); but her interest, if any, in the estate of her daughter, has passed to W. S. Baker by conveyance. The plaintiff, as widow, and the other defendants, as heirs through W. S. Baker, now claim the property under W. S. Baker, and seek to quiet the title thereto as against any claim of Leander W. Calhoon, contending: First, that said Calhoon acquired no interest by reason of his relationship to his daughter Hattie Calhoon; and, second, that if any interest ever passed to him by virtue of such relationship, it is now barred by the adverse possession of W. S. Baker and those claiming under him.

[1] I. The first question presented for our determination under this record is whether on the death of Hattie Calhoon, seised of a one-sixth interest in the property in controversy by virtue of her adoption by David P. Baker, the father of W. S. Baker, under whom the other parties to the case claim title, the interest of said Hattie Calhoon passed to her natural father and mother in equal shares, or whether it passed to the other heirs of David P. Baker, her adopted father. Or, to state the question more concretely, it is this: On the death of an adopted child, dying without issue and unmarried, does the property inherited by such child from the adopting parent, who has in the meantime died, pass to the natural parents of such adopted child?

By the statutory provisions in this state regulating the descent of real property, which provisions contain no specific reference to cases of adoption, the surviving parents of one who dies without issue and unmarried become vested in equal shares with all the real property of which their child dies seised; and Hattie Calhoon did, in fact, die seised of a one-sixth undivided interest in the property in controversy. See section 2455 of the Code of 1873, which was in force at the time of the death of Hattie Calhoon, and which remains unchanged in effect in the present Code as section 3379. Therefore, unless the statutory provisions with reference to adoption prevent this result, Leander W. Calhoon is vested with a one-half undivided interest in the one-sixth undivided interest in the property in controversy of which Hattie Calhoon died seised.

The statutory provisions as to adoption which were in force when the adoption took place, and at the death of Hattie Calhoon,

declared that any person competent to make a will might adopt the child of another, "conferring thereby upon such child all the rights, privileges, and responsibilities which would pertain to the child if born to the person adopting in lawful wedlock," and that upon the execution, acknowledgment, and filing for record of the instrument of adoption, "the rights, duties, and relations between the parent and child by adoption, shall, thereafter, in all respects, including the right of inheritance, be the same that exist by law between parent and child by lawful birth." See Code of 1873, §§ 2307, 2310.

Under these statutory provisions, this court expressly refused to decide, in *Burger v. Frakes*, 67 Iowa, 460, 469, 23 N. W. 746, 25 N. W. 735, whether, on the death of an adopted child, the adopting parents surviving became the heirs of such child under the general statutes of inheritance, leaving it an open question whether the adopting parents or the natural parents inherited from the adopted child whom they survive. In *Chehak v. Battles*, 133 Iowa, 107, 110 N. W. 330, 8 L. R. A. (N. S.) 1130, 12 Ann. Cas. 140, the court treated the question of the right of inheritance from the adopted child, as between the surviving foster parents and natural parents, as still open, with the suggestion that the authorities in other states are not harmonious, although in the meantime the Code of 1897 had been enacted, in section 8253 of which the provisions of section 2309 of the Code of 1873 had been substantially incorporated, with the omission, however, of any express reference to the right of inheritance. It is probable that the omission of specific reference to rights of inheritance as between the adopting parent and the adopted child indicated no intention to modify the statutory provision as it previously stood, for the Code Commissioners declare, in effect, that no change in the law was intended. See Code Commissioners' Report 1896, p. 93.

[2] But it is contended for appellants that there has been recently a legislative interpretation of the previously existing statutory law on this subject by the enactment, in 1902, of the statute amending Code, § 3253, by adding the provision that, as between the adopting parent and adopted child, the right of inheritance from each other shall be the same as between natural parent and child (29 G. A., c. 132), and another statute providing for an inheritance on the part of the parents by adoption in accordance with the general statutory provision regulating inheritance as between a parent and a child dying without issue, with the added provision that, if no heirs are found in the line of the adopting parents, the property of the deceased shall go to the natural parents, and, in case they have died, then in their line of descent (29 G. A. c. 136). There is certainly some force in this argument. If, under the existing statutory provisions, the property of an

adopted child would go to its adopting parents or, in case they were already deceased, to their heirs to the exclusion of the natural parents and their heirs, then there was no occasion for the additional legislation to effect the purpose accomplished, save in so far as it was desired to provide for an inheritance by the natural parents or their heirs in the event that no heirs in the line by adoption were found. However this may be, the fact that the Legislature saw fit, in 1902, to expressly provide for the descent of the property of the adopted child in the adopting line, does not constitute a legislative declaration that the previous statute on the subject, which by its terms declared only the relations between the adopting parent and the adopted child, had that effect.

[3] It is plainly not competent for the Legislature to prescribe or indicate the construction of a previous statute under which rights have already vested.

In the absence, therefore, of any controlling construction as to the statute in question so far as it relates to the rights of the heirs of David P. Baker to inherit the interest in his estate which passed to Hattie Calhoun by virtue of her adoption, we look to the decisions in other states relating to the construction of similar statutes so far as they bear on the question, and we find the weight of authority to be to this effect: That the general statutes of inheritance are modified and set aside by statutes regulating the effect of adoption only so far as there is some specific provision in the statutes for adoption inconsistent with the application, in such cases, of the general inheritance statutes. *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802; *Upton v. Noble*, 35 Ohio St. 655; *Hole v. Robbins*, 53 Wis. 514, 10 N. W. 617; *Barnhizer v. Ferrell*, 47 Ind. 335; *Clarkson v. Hatton*, 143 Mo. 47, 44 S. W. 761, 39 L. R. A. 748, 65 Am. St. Rep. 635; *Keegan v. Geraghty*, 101 Ill. 26; *White v. Dotter*, 73 Ark. 130, 33 S. W. 1052.

[4] To apply such a rule in the construction of our own statutes is not in violation of the requirement of our Code (section 3446) that its provisions "shall be liberally construed with a view to promote its objects." That language is used only to negative the rule of the common law that statutes in derogation thereof are to be strictly construed and not with reference to the rule of construction to be applied in determining the extent of a statutory exception to a general statutory provision. Of course, the exception goes no further than the language used in providing for it will fairly warrant, and it must be presumed that, beyond the scope of the exception thus provided for, the general statutory provision shall apply.

From our own decisions some illustrations pertinent to the general subject-matter may be gathered. In the case of *Estate of Sunderland*, 60 Iowa, 732, 13 N. W. 655, it was

held that under an adoption in another state by which, under the statutes of that state, the adopted child became entitled to inherit from the adopting parents, such child was not entitled to inherit through such adopting parents by right of representation. And in *Wagner v. Varner*, 50 Iowa, 532, we held that a child by adoption does not cease to be the child of the natural parent and entitled to inherit from such parent, the necessary implication being that the fact of adoption does not deprive the natural parent of the right to inherit from such child. In that case the court suggests that "heirship is not a natural but a statutory right, arbitrary and general, and therefore exceptional cases of apparent hardship or inequality must occasionally occur." The only cases cited for appellee which seem to run counter to the weight of authority, as above indicated, are those of *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788, and *Paul v. Davis*, 100 Ind. 422, in which it is held that the property inherited by an adopted child from the adopting parent does not, on the death of such child, pass to its natural parents, but goes to the persons who would have inherited it had the adopted child been the natural child of the adopting parents. That is to say, so far, at least, as property inherited from the adopted parent is concerned, the rules of inheritance are exactly the same as those which apply to a natural child. But our statute does not so provide, and to give it such construction would be pure judicial legislation. As indicated in the case of *Estate of Sunderland*, supra, the adopting child does not become in law the natural child of the adopting parent for all purposes unless the statute so provides, and the statute cannot be enlarged or extended in its scope beyond the legal effect of the language used. The theory of the two Indiana cases, last above cited, is that, for the purpose of effecting natural justice, the adopted child may be treated as having a different status with reference to property inherited from the adopting parents than that which attaches to it with reference to property inherited from the natural parents; for the court apparently realizes the absurdity of holding that property inherited from the natural parent (such right of inheritance continuing to exist under the general statute notwithstanding the provisions of the statute as to adoption) shall go, on the death of the child, to the adopting parents or their heirs, rather than to the heirs in the natural line. The Indiana court attempts to sustain this anomalous distinction between property inherited from the adopted parent and that inherited from the natural parent by reference to rules of the civil law. Without discussing the peculiar relation arising by adoption under the civil law, it is sufficient to say that the relation arising by adoption is defined and determined by our own stat-

utes, and it cannot be assumed that the Legislature intended that they should be construed in accordance with civil law rules. In *Reinders v. Koppelman*, supra, the Supreme Court of Missouri discusses the civil law status arising by adoption, and points out that the statutes of that state, quite similar in their general provisions to those of this state, describe the rights arising by adoption as quite different from those which result from adoption under the civil law.

The attempt to introduce a peculiar rule of descent for property acquired by the adopted child from the adopting parents might seem, in particular cases, to be more in accordance with our general notions of natural justice. Such rule would, however, not only be without statutory authority, but in many cases would unnecessarily lead to the greatest confusion in its application. Suppose the adopted child should for many years outlive its adopting parent and also its natural parent, having by inheritance derived property from each, and having also accumulated property of its own. How could any court undertake to determine what portion of the estate finally left by such child should go to heirs in the line of the adopting parent and what portion should go to heirs in the natural line? Suffice it to say that our statutes fix a general rule of inheritance, and that the statutory provisions as to adoption modify that general rule only in specific respects. Even if we should hold that the adopting parent is by statute the heir to the adopted child dying without issue or surviving spouse, still we would find no authority in the statute for holding that the heirs of the adopting parent are the heirs of the deceased adopted child. The statute in its broadest interpretation only attempts to fix the relation between the adopted child and the adopting parent; it does not attempt to indicate who are to be regarded as the heirs of the adopted child if the adopting parent is deceased. Heirship, under such circumstances, must be determined from the general statutory provisions as to inheritance.

[5] II. The contention for appellees that W. S. Baker, under whom they claim, held the property in controversy adversely to any right of appellants derived from their daughter Hattie Calhoun, and that such adverse possession has continued in appellees so that the rights of appellants are barred by the statute of limitations, is not supported by the record. It is conceded that, when W. S. Baker first took possession of the land in controversy as one of the heirs of David P. Baker, he was a tenant in common with the other heirs, including Hattie Calhoun, as heir by adoption, and that she then was entitled to a one-sixth interest in the property. The only claim of an assertion of hostility to her title and that derived by her natural father from her on her death is

based upon improvements made on the land by W. S. Baker during his lifetime. Now it appears from the testimony of plaintiff herself (widow of W. S. Baker) that her husband first went into possession of the land in controversy as tenant of his father, and that he continued to occupy the land as tenant after his father's death and until the death of his mother, and that the improvements relied upon were made before his mother's death. However this may be, there is no evidence that Leander W. Calhoon, after the death of his daughter Hattie, had any knowledge of the making of any improvements under an assertion by W. S. Baker of hostile title to the share of Hattie, and it is admitted that, so long as Hattie lives, her right to an interest in the property was not tolled by any hostile possession. So far as we can discover in the record, there was no public and notorious assertion of right to the entire property on the part of W. S. Baker to the exclusion of the interest of Hattie until, after having acquired by conveyances the interest of his other coheirs, he executed a mortgage on the premises in 1904, which was then recorded. Conceding that the recording of this mortgage constituted notice to Leander W. Calhoon of the assertion of a hostile title so far as his interest in the property was concerned, it is sufficient to say that ten years from such assertion of a hostile title had not elapsed when this action was brought and Leander W. Calhoon interposed his claim of an interest by inheritance from his daughter. Counsel for appellees rely entirely upon the case of *Hanson v. Gallagher*, 134 N. W. 421, in support of their contention; but reference to that case shows that it in no way supports the claim made for it. It was there expressly held that possession was not taken as cotenant, but under an absolute and exclusive claim of right.

The decision of the trial court is therefore reversed.

SHERWIN and EVANS, JJ., dissent.

STATE v. BAKER.

(Supreme Court of Iowa. Dec. 14, 1912.)

HOMICIDE (§ 354*)—PUNISHMENT—EXCESSIVE PUNISHMENT.

Where accused and decedent quarreled in a building, and came out into the street, decedent, considerably the better man, backing away, followed by accused, who suddenly picked up a piece of board and struck decedent on the head, inflicting a fatal injury, the sentence of imprisonment on conviction of accused of murder in the second degree will be reduced to 15 years.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 731; Dec. Dig. § 354.*]

On rehearing. Overruled.

For former opinion, see 135 N. W. 1097.

Wade, Dutcher & Davis, of Iowa City, for appellant. Geo. Cosson, Atty. Gen., and John Fletcher, Asst. Atty. Gen., for the State.

PER CURIAM. On the consideration of appellant's petition for rehearing, the court is of the opinion that the sentence be reduced to 15 years, and it is so ordered; otherwise, the petition for rehearing is overruled.

KELLEY v. DRAINAGE DIST. NO. 60 IN GREENE COUNTY et al.

(Supreme Court of Iowa. Dec. 12, 1912.)

1. DRAINS (§ 82*)—ASSESSMENTS—APPEAL—QUESTIONS RAISED.

Where no appeal is taken from the findings of the board of supervisors overruling objections to the establishment of a drainage district, only those questions which affect the authority of the board to act and those bearing on the assessments are raised by appeal from an order confirming the assessments.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 81, 83-87; Dec. Dig. § 82.*]

2. DRAINS (§ 14*)—DESCRIPTIONS OF DISTRICTS—JURISDICTION.

Where a petition for the establishment of a drainage district merely referred to and adopted descriptions contained in the petition for the establishment of another district which covered exactly the same territory, so that, when followed up, it would enable an engineer to ascertain the lands intended, it was not so defective as to render all subsequent proceedings void under Code Supp. 1907, § 1989a2, providing that the district be described by metes and bounds.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 5, 6; Dec. Dig. § 14.*]

3. DRAINS (§ 15*)—ESTABLISHMENT—TERRITORY INCLUDED.

A drainage district may be established covering precisely the same territory as one previously organized for the purpose of enlarging the outlet under Code Supp. 1907, § 1989a25, permitting establishment of a new district covering and including an old district, if the old district is insufficient.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 7-10; Dec. Dig. § 15.*]

4. DRAINS (§ 52*)—REPAIR—ENLARGING OUTLET.

Under Code Supp. 1907, § 1989a21, relating to repair of drains, the outlet may be enlarged by widening and deepening the existing ditch, or excavating another parallel with it.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 63; Dec. Dig. § 52.*]

5. DRAINS (§ 32*)—ESTABLISHMENT—REPORT OF ENGINEER.

Where a drainage district was being established covering the same territory as one previously established, the engineer still having the field notes, a new survey was not necessary, and a report which did not state the elevations nor the names of the owners of tracts of lands nor describe them, accompanied by the map which had accompanied the report of the old district with red dots clearly identifying the new route, although informal, was sufficient.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 30-33; Dec. Dig. § 32.*]

6. DRAINS (§ 32*)—IMPROVEMENTS—EXPERTS.

The board of supervisors in establishing drains is limited to the adoption of a plan recommended by an engineer as practicable, de-

sirable and likely to be efficient, and, before ordering an improvement, it must conform substantially with the plan recommended by an expert.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 30-33; Dec. Dig. § 32.*]

7. DRAINS (§ 14*)—REPORT OF ENGINEER—NOTICE.

The fact that the report of an engineer on the establishment of a drainage district omitted the description of each tract and names of the owners, as exacted by Code Supp. 1907, § 1989a2, which was for the purpose of serving notice on them, is not jurisdictional, and one who appeared both in resistance to the establishment of the district and to challenge the assessments was not prejudiced.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 5, 6; Dec. Dig. § 14.*]

8. DRAINS (§ 14*)—IMPROVEMENTS—NOTICE—DAMAGES.

In a proceeding to establish a drainage district, the service of notice of the hearing of the petition and claims for damages prior to the adoption of the plan recommended by the engineer was not fatal, where the board did in fact approve the plan.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 5, 6; Dec. Dig. § 14.*]

9. DRAINS (§ 14*)—APPEAL—REMEDIES—WAIVER.

The only remedy of an owner of lands made a party to the hearing on petition for the establishment of a drainage district is by appeal to the district court, and a failure to avail himself of that remedy is waiver of all other remedies under Code Supp. 1907, § 1989a46.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 5, 6; Dec. Dig. § 14.*]

10. DRAINS (§ 71*)—ASSESSMENTS—BENEFITS.

New drains which relieved the main drain in a system by furnishing an additional outlet was of some benefit to all the lands tributary thereto, though they did not touch such lands.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 74; Dec. Dig. § 71.*]

11. DRAINS (§ 72*)—ASSESSMENTS—CLASSIFICATION—METHODS.

Slight variances from the method prescribed for the classification and assessment of lands for drainage purposes, unless prejudice results, are immaterial.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 75; Dec. Dig. § 72.*]

12. DRAINS (§ 71*)—ASSESSMENTS—BENEFITS—INTENT OF LEGISLATURE.

Even though assessments exceeding benefits might be authorized by the Legislature, such was not its intention in enacting the drainage laws of this state.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 74; Dec. Dig. § 71.*]

Appeal from District Court, Greene County; M. E. Hutchinson, Judge.

Appeal by the executors of the estate of James D. Kelley, deceased, from assessments for drainage improvements resulted in the approval of such assessments as made by the board of supervisors. The executor appeals. Affirmed.

W. W. Turner, of Grand Junction, and J. A. Henderson, of Jefferson, for appellant. Wilson & Albert, of Jefferson, for appellees.

LADD, J. Drainage district No. 3, containing 24 40-acre tracts situated in sections

3, 4, 9, and 10, in township 83 N., of range 29 W., of the 5th P. M., in Greene county, Iowa, was established, and the improvement contemplated was completed in 1906. On May 26, 1909, the members of the town council of Grand Junction and many others, after calling attention to the insufficiency of the improvement, and declaring that it did not carry off the water or adequately drain a part of Grand Junction, prayed the board of supervisors of Greene county to give the matter consideration. Thereupon the board directed the engineer who had planned said improvements to investigate, which he did, and in his report recommended that additional tile be laid to carry off the surplus water. Later Geo. Rice and others filed a petition reciting that the improvement in district No. 3 had proved insufficient to drain the lands necessarily tributary, and requested the board for the establishment of a new drainage district "covering and including the said district No. three (3) and for the purpose of giving a description of the land in said district, and the character thereof, these petitioners make all the allegations in the original petition filed for the establishment of said district No. three (3) a part of this petition by reference, with the same effect as if copied and set out herein, and these petitioners ask that a new tile ditch or drain be laid or constructed in said district, commencing at the line of the present tile drain therein, and connecting with the same at a point at or about 25 rods south of the center of section four (4), township eighty-three (83) north, of range twenty-nine (29) west of the 5th P. M., and extending thence in a general northeasterly direction, and following approximately the course of the tile drain now in and constructed under the proceedings in said district number three (3), at an average distance of about one hundred (100) feet north and west of the same across the east half of said section, and also across the northwest forty (40) acres of section three (3) in said township and range, and crossing the right of way of the Chicago & Northwestern Railway Company's right of way at a point about thirty-five rods east of the west line of said section three, and terminating and outletting in an open drain on the public highway immediately north of the point where the same is asked to cross said railway right of way, the same to follow in general and approximately the course of the natural drainage over the land to be crossed thereby, as may be found most practicable by the engineer in charge, also to connect at the upper end thereof with such branch or branches of the said improvement now in and forming a part of said district number three as may by such engineer be found most practicable for the bettering of the outlet of said drainage district number three and ren-

dering the same sufficient to protect and drain in lands therein and tributary to said improvement." This petition was accompanied by bond in proper form and duly approved, and Geo. M. Thompson was appointed engineer to act on the same. On October 22, 1909, the engineer filed his report, reciting therein that he had inspected the land to be affected by the proposed improvement, and that, as he had made the survey and superintended the construction of the improvements in drainage district No. 3, was in possession of the field book and plat of said district, and other matters not necessary to be repeated, he recommended that a drain be constructed substantially as described in the petition. A plat of drainage district No. 3 was made a part of the report, and "the line of the new drains that I recommended to be constructed is shown by a line of red dots, and run parallel to sections 10, 4, and 5A of drainage District No. three (3) as will be seen from an examination of the plat."

Then follows a specific description of four sections of the improvement, one being an open ditch and the others of 14, 18, and 20 inch tile, all at the estimated expense of \$2,515.44. Were a plat before us, we might be able to understand the location of the tile drain and ditch as recommended, but we have nothing but a photograph of the plat, so dim as to be of no service whatever, save as indicating that much of the land has been platted into town lots, as disclosed by the report of the commissioners who assessed the expenses, including all costs against the several parcels of land. We infer from the statements of counsel that the drainage district is bounded on the north approximately by the Chicago & Northwestern Railroad and on the west by the Minneapolis & St. Louis Railroad, these crossing at right angles in the town of Grand Junction. "The east boundary of the district is approximately the east line of sections 4 and 9, except near the outlet two 40's of section 'e' are included. The south boundary of the east part of the district is approximately the center line of section 9, and the south boundary of the west part of the district is approximately Elizabeth street in South Grand Junction. The main line of district No. 3 started at the northeast corner of the district at about the Chicago & Northwestern right of way, and deflected to the west, and then approximately straight south past the center line of section 9 across the lands of Kelley and Scott, and to the land of Rebecca K. Herron. The appellant herein owns certain town lots in South Grand Junction and certain lots in the south of the district. Commencing at the aforesaid main line of the ditch on the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 4," the drain "ran to the west and southwest and ended at the corporation * * * line which is the center line of said section."

This last drain "was connected with an old tile drain in South Grand Junction." The engineer reported that this drain was insufficient to carry off the water from "where the town branch connected into the main," and he recommended that a tile drain entirely independent of drain No. 3 be constructed from the same outlet and parallel therewith to the junction "where the town branch came in and thence past the town branch and to the end at the east line of the corporation of the town approximately to where No. three (3) ends." No description of the several tracts of land contained in the district nor the names of the owners thereof as shown by the transfer books accompanied this report. On the same day the recommendation of the engineer was approved, and the county auditor directed to serve the necessary notice, and it was resolved "that said new drainage district and enlargement of outlet of drainage district No. three (3) for the purpose of convenience and description be known and named as drainage district No. (60) sixty." Subsequently, on January 3, 1910, the board of supervisors adopted a resolution covering all requirements, including those of section 1989a1 of the Code Supplement, and thereafter commissioners were appointed to equitably apportion the costs and expenses, including the cost of construction, fees, and damages among the several tracts of land, and make report, which they did, and the improvement was constructed in pursuance of proceedings of which there is no complaint.

[1] Appellants and others interposed objections to the establishment of drainage district No. 60, but, as no appeal was taken from the findings of the board of supervisors overruling these, only questions affecting the authority of the board to act and bearing on the assessments as made from which appeal was taken can be considered.

1. Appellant challenges the jurisdiction of the board of supervisors to entertain the application for and to order the improvement, for that (1) the law, as is said, does not authorize the establishment of a new drainage district of the same body of land which already constitutes a drainage district previously organized; (2) the petition was insufficient in not describing the district definitely; (3) the plan of the engineer had not been approved by the board when notice of the hearing of the petition and claims for damages was served; and (4) the report of the engineer was not in compliance with the statute.

[2] The petition for the establishment of the district and the improvement merely referred to and adopted the descriptions contained in that for the establishment of drainage district No. 3 of Greene county, and it is said this was not in compliance with section 1989a2. All exacted by that statute is

that the body or district of land to be included shall be "described by metes and bounds, or otherwise so as to convey an intelligent description of such lands." The method adopted is not to be commended, but it did point out a distinct body of land formerly set apart as a drainage district, and precisely where a specific description of the several tracts of land included therein might be definitely ascertained at little inconvenience. The board of supervisors might well have required the petitioners to specify directly the lands proposed to be included, but, though the description was objected to, this was not done, and we are not inclined to say that a description which when followed up will enable an engineer to ascertain precisely the lands intended is so defective as to render all subsequent proceedings illegal and void for want of jurisdiction. See *In re Drainage District No. 3*, Hardin County, 146 Iowa, 504, 123 N. W. 1059.

[3] 2. Counsel contend, however, that a drainage district may not be established covering precisely the same territory as one previously organized. Nothing in the drainage laws expressly prohibits this, and we think it specifically authorized by section 1989a25 of the Code Supplement, which reads: "If any levee, drainage district or improvement heretofore established either by legal proceedings or by private parties, or which may hereafter be established shall prove insufficient to protect or drain all of the lands necessarily tributary thereto, the board of supervisors, upon petition therefor as for the establishment of an original levee or drainage district, shall have the power and authority to establish a new levee or drainage district covering and including such old district or improvement, together with any additional lands deemed necessary; and whenever a new district shall be established as contemplated in this section and the new improvement shall extend into or along the former improvement, the commissioners of classification and benefits shall take into consideration the value of such old improvement in the construction of the new improvement and credit the same to the parties owning the old improvement as their interests may appear."

The suggestion is that this is applicable only to the establishment of a district with territory additional to that of the existing district. The language employed will not bear this construction. "Any additional lands deemed necessary" may be included, but the new district is authorized whenever the existing drains "shall prove insufficient to protect or drain lands necessarily tributary thereto," and all these may be within the existing district. We are of opinion that the proceedings in controversy were authorized by the statute quoted.

[4] It does not follow, however, that relief by way of supplying an adequate outlet for the existing district was not available

under section 1989a21 of the Code Supplement, which declares that, "whenever any levee or drainage district shall have been established and the improvement constructed as in this act provided, the same shall at all times be under the control and supervision of the board of supervisors and it shall be the duty of the board to keep the same in repair and for that purpose they may cause the same to be enlarged, reopened, deepened, widened, straightened or lengthened for a better outlet, and they may change or enlarge the same or cause all or any part thereof to be converted into a closed drain when considered for the best interests of the public rights affected thereby." Whether such enlargement of the outlet be effected by widening and deepening the existing ditch or excavating another parallel with it, or whether this be done by removing tile and replacing it by that of larger size, or by laying another tile drain parallel with that already laid, can make no difference, for, in either event, the result is the enlargement of the outlet which is here authorized, and the costs of which are to be assessed as subsequently directed in the same section. It is enough for the purposes of this case, however, that the proceedings were authorized by and in pursuance of the statute first quoted.

[5] 3. The report of the engineer on which the improvement was ordered by the board of supervisors was somewhat irregular, while he described the tile drains and ditch to be constructed with sufficient accuracy, the elevations "of all lakes, ponds and deep depressions" in the district were not stated, nor did he report "the description of each tract of land therein and the names of the owners thereof as shown by the transfer books in the auditor's office." But his report discloses that he was the engineer who made the report for the improvements by drainage district No. 3, that he still had the field notes of that survey and the plat then returned with his report. Being in possession of the very information required, there was no occasion for a resurvey of the district. Moreover, the purpose of forming the new district was the construction of tile drains and a ditch which would relieve the existing drainage system by affording an additional outlet, and, for this reason, a restatement of the elevations contained in the former report would have been of no advantage. The plat accompanying the report when drainage district No. 3 was organized with the location of the proposed additional drains indicated by red dots, clearly identifying the route, was returned with the report. It was necessary in order to render his report intelligible to indicate the relation of the new drain with that previously constructed, and, though somewhat informal, it furnished the board of supervisors with the necessary data in these respects to enable it to proceed with the performance of its duties in the matter

of establishing the district and ordering the improvement. *Lyon v. Board*, 136 N. W. 324. See section 1989a16, Code Supp.

[6] As insisted by appellant, the board of supervisors is limited to the adoption of a plan recommended by an engineer as practicable, desirable, and likely to be efficient for the purpose intended, and, before ordering an improvement, it must conform substantially with the plan recommended by an expert in such matters. *Zinser v. Board*, 137 Iowa, 660, 114 N. W. 51; *In re Nishnabotna River Improvement District No. 2*, 145 Iowa, 130, 123 N. W. 769; *Hartshorn v. Wright Co.*, 142 Iowa, 72, 120 N. W. 479; *Pritchard v. Board*, 150 Iowa, 565, 129 N. W. 970; *Lyon v. Board*, 136 N. W. 324; *Shaw v. Nelson*, 150 Iowa, 559, 129 N. W. 827. What was said in *Laurence v. Board*, 151 Iowa, 182, 131 N. W. 8, was not inconsistent with this conclusion, for there the engineer had recommended a ditch of a certain width and depth, on the theory that action of the water would widen and deepen it so as to render it adequate, and it was held competent for the board of supervisors to order the ditch excavated of sufficient width and depth therefor in the first instance. But no such question is involved here. The drains were ordered of capacity and at locations precisely as recommended.

[7] The report entirely omitted the description of each tract included in the district and the names of the owners as exacted by section 1989a2. The design of this requirement is to render certain the several tracts included in the district and furnish the names of the owners for the purposes of serving notice on them as prescribed in section 3, c. 118, Acts 33d Gen. Assem. Probably the circumstance that the engineer never woke up to the fact that a new district was being formed explains the omission to include these matters in his report. The several tracts had been assessed for the construction of the former improvement, and he may have relied on the information to be derived from the proceedings in the establishment of drainage district No. 3, though there may have been transfer since. Be this as it may, we are not inclined to regard this feature of the report as jurisdictional, and, as appellant appeared both in resistance to the establishment of the district and to challenge the assessments, these omissions were entirely without prejudice.

[8] The objection with reference to the service of notice of the hearing of the petition and claims for damages prior to the adoption of the plan recommended by the engineer was disposed of adversely to appellant in *County Drains v. Long*, 151 Iowa, 47, 130 N. W. 152.

[9] We have reviewed the proceedings leading up to the order directing the improvement in controversy in response to argument of counsel, and in doing so have construed the drainage statutes somewhat lib-

erally, as required by section 1989a46 of the Code Supplement, but as notice was given as required, and appellant appeared at the hearing of the petition, and did not appeal from the order of the board establishing the district and directing that the improvement be made, our decision might well have rested on the provisions of that section declaring that "the collection of the assessments shall not be defeated, where the proper notices have been given, by reason of any defect in the proceedings occurring prior to the order of the board of supervisors locating and establishing the levee, ditch, drain or change of natural water course provided for in this act, but such order or orders shall be conclusive and final that all prior proceedings were regular and according to law unless they were appealed from. But if, upon appeal, the court shall deem it just and proper to release any person or modify his assessment or liability, it shall in no manner affect the rights or liability of any person other than the appellant; and the failure to appeal from the order of the board of supervisors of which complaint is made shall be a waiver of any illegality in the proceedings and the remedies provided for in this act shall exclude all other remedies." This is tantamount to saying that the only remedy of an owner of lands contained therein made a party to the hearing on the petition for the establishment of the drainage district is by appeal to the district court, and a failure to avail himself of that remedy is waiver of all other remedies. It necessarily follows that the defects to which attention has been directed were waived by appellant, and cannot be considered in passing on this appeal from the assessments levied on the several parcels of land belonging to the estate.

[10] The board of supervisors confirmed the assessments as recommended by the commissioners appointed to make "an equitable apportionment of the costs, expenses, costs of construction, fees and damages assessed for the construction" of the improvement. The appeal is from this order, and the only bearing of much of the evidence was in tending to show that the improvement was of no benefit to some or all of the lots or parcels of land of the estate. Section 1989a12 of the Code Supplement declares that "in no case shall it be competent to show that lands assessed would not be benefited by the improvement." This is for the reason that by including such lands in the district when established the board of supervisors necessarily found that such lands would be benefited by the improvement, and the matter will not be reconsidered in levying the assessments. For other grounds, see *Allerton v. Monona County*, 111 Iowa, 560, 82 N. W. 922; *Ross v. Board*, 128 Iowa, 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431. The evidence in so far as it tended to show that no benefit would be or was derived from the improve-

ment was incompetent, and it furnished little or no aid in the determination of whether the assessments were excessive. See *Camp v. City of Davenport*, 151 Iowa, 33, 130 N. W. 137. The new drains did relieve the main drain in the system as previously constructed by furnishing an additional outlet, and in this respect was of some benefit to all the lands tributary thereto, even though not as near to some of them as the existing main. Nor was the circumstance that it did not touch such lands a valid objection to the assessments, though appropriate for consideration in ascertaining the benefits thereto. Section 1989a13 Code Supp.

[11] Slight variances from the method prescribed for the classification and assessment of lands, unless prejudice result, are immaterial. *Hampe v. Hamilton County*, 146 Iowa, 280, 125 N. W. 225; *In re Seattle*, 54 Wash. 297, 103 Pac. 20.

[12] What should be taken into account in doing so was pointed out in *Zinser v. Board*, 137 Iowa, 660, 114 N. W. 51, and, even though assessments exceeding benefits might be authorized by the Legislature, we are not inclined to the view that such was its intention in enacting the drainage laws of this state. In *re Jenison*, 145 Iowa, 215, 123 N. W. 979; *Pabbeidt v. Hamilton County*, 144 Iowa, 476, 123 N. W. 241. These decisions, though not considering the point, proceed on the theory that the statutes should be so construed. No personal liability is imposed, as in the statute construed in *Farwell v. Brick Mfg. Co.*, 97 Iowa, 286, 66 N. W. 176, 35 L. R. A. 63. See 25 Am. & Eng. Ency. of Law (2d Ed.) 1172; 14 Cyc. 1061; *Rolph v. City of Fargo*, 7 N. D. 640, 76 N. W. 242, 42 L. R. A. 646. But this question is not raised by the record before us. The assessments against the town lots range from a few cents up to \$13.05, and, conceding the improvement to be of some benefit to each lot, it is impossible to deduce from this record that such amount is less and how much less than that assessed. Moreover, an examination of the record as a whole has convinced us that the improvement will prove of substantial benefit to the several lots and much more to the 40-acre tracts than the amounts levied against them. No useful purpose will be served by a review of the evidence, and for this reason we are content in announcing our conclusion without more particularly specifying the reasons which have led thereto.

The judgment of the district court is affirmed.

HERRON v. DRAINAGE DIST. NO. 60 IN GREENE COUNTY et al.

(Supreme Court of Iowa. Dec. 12, 1912.)

Appeal from District Court, Greene County; M. E. Hutchinson, Judge.

Appeal by R. K. Herron from assessments

for drainage improvements resulted in the approval of such assessments as made by the Board of Supervisors. R. K. Herron appeals. Affirmed.

W. W. Turner, of Grand Junction, and J. A. Henderson, of Jefferson, for appellant. Wilson & Albert, of Jefferson, for appellees.

PER CURIAM. This case was consolidated with *A. B. Kelley, Executor*, against the same defendants (138 N. W. 841), decided at the present session, for the purposes of trial, but a separate decree entered. The same questions are involved, though applicable to different lots and lands, and, following the decision in that case, the judgment is affirmed.

In re OLDFIELD'S ESTATE.

BOWIE v. TROWBRIDGE.

(Supreme Court of Iowa. Dec. 14, 1912.)

1. CONTRACTS (§ 346*)—ISSUES AND PROOF—QUANTUM MERUIT.

Where a person suing for services pleaded only an express agreement, she could not recover on a quantum meruit.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1714, 1718-1751; Dec. Dig. § 346.*]

2. MASTER AND SERVANT (§ 80*)—ACTIONS FOR WAGES—SUFFICIENCY OF EVIDENCE.

In an action on an express agreement of employment, direct evidence of such agreement is not required if the facts and circumstances fairly show such agreement.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 107-127; Dec. Dig. § 80.*]

3. EXECUTORS AND ADMINISTRATORS (§ 221*)—ACTIONS FOR WAGES—SUFFICIENCY OF EVIDENCE.

A married woman left her family, and went to live with and work for defendant's testator, to whom she was not related, and with whom she had not been unusually friendly or intimate prior to that time. She thereafter did heavy work of great value for the testator. Some time thereafter her husband died, and her children were brought to live with her. Held, that proof of these facts sufficiently showed an express agreement to compensate her for her services, as it would be presumed that she was working away from home for the common good of the family, and had not deserted her husband and children.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 901-903½, 1858, 1861-1863, 1865, 1866, 1871, 1874, 1876; Dec. Dig. § 221.*]

4. EXECUTORS AND ADMINISTRATORS (§ 221*)—ACTIONS FOR WAGES—SUFFICIENCY OF EVIDENCE.

The fact that one is found doing service for another is prima facie evidence of an employment.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 901-903½, 1858, 1861-1863, 1865, 1866, 1871, 1874, 1876; Dec. Dig. § 221.*]

5. LIMITATION OF ACTIONS (§ 50*)—ACCRUAL OF CAUSE OF ACTION.

Where the services sued for were continuous with the exception of one or two brief periods when plaintiff was absent on visits, limitations did not run against any part of the cause of action.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 273-279; Dec. Dig. § 50.*]

6. LIMITATION OF ACTIONS (§ 83*)—SUSPENSION BY DEATH.

The running of limitations against a cause of action for breach of a marriage promise is not suspended by the death of the promisor.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 426, 431-433; Dec. Dig. § 83.*]

7. TRIAL (§ 251*)—ACTIONS FOR WAGES—INSTRUCTIONS—AMOUNT OF RECOVERY.

A person suing for services alleged that they were worth \$5 a week. The evidence showed that during a part of the time they were reasonably worth \$5.50 a week, and also showed that during several periods of a month or more she performed no services. The court charged to allow her the reasonable value of her services not exceeding the entire amount claimed, which was \$5 a week for the whole time. *Held*, that this was erroneous, since it authorized a recovery of more per week than the amount claimed in the complaint.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

8. APPEAL AND ERROR (§ 1064*)—DISPOSITION—REVERSAL.

In an action for services and for breach of a marriage promise, where an instruction on the amount of recovery for the services was erroneous, and it was impossible to determine how much was allowed on each cause of action, there being no way of correcting the error, it required a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221, 4224; Dec. Dig. § 1064.*]

9. APPEAL AND ERROR (§ 417*)—NOTICE OF APPEAL—SUFFICIENCY.

Under Code, § 319, providing that an attorney has power to execute in the name of his client any written instrument necessary and proper for the prosecution of an action or proceeding about to be or already commenced, a notice of appeal is not insufficient because signed by appellant's attorney; the statute not requiring it to be signed in person.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2140-2143; Dec. Dig. § 417.*]

10. COSTS (§ 255*)—ON APPEAL—EXPENSES OF RECORD.

Where appellee did not number the lines or index his amendment to the abstract, the cost of printing it would be taxed to him.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 967; Dec. Dig. § 255.*]

Appeal from District Court, Carroll County; M. E. Hutchinson, Judge.

The facts are stated in the opinion. Reversed.

Chas. O. Helmer, of Carroll, for appellant. Brown McCrary, of Carroll, for appellee.

SHERWIN, J. Edward A. Oldfield, a resident of Carroll, Iowa, died testate December 2, 1910, and the defendant, Wm. Trowbridge, was later appointed executor of his estate. On January 11, 1911, the plaintiff filed two claims against the estate, and later a petition was filed which embodied the two claims. The first count of the petition alleged a promise of marriage and a breach thereof during the lifetime of the deceased, and asked damages on account thereof in the sum of \$5,000, and the second count

averred that in 1893 the plaintiff went to work for deceased on his farm at his instance and request and under an express agreement so to do; that plaintiff continued in the employment of deceased "from September, 1893, to September, 1910, except when temporarily away on a visit, and that the reasonable value of said services during all of said time was \$5.00 per week." Plaintiff alleged that payments had been made to her from time to time during said period, aggregating about \$230, and she asked judgment for her services in the sum of \$3,975. There was a denial of the allegations of the petition, and the defendant further pleaded that whatever breach there was of the agreement to marry occurred more than two years prior to the commencement of this action, and is barred by the statute of limitations. And, as to count 2 of the petition, the defendant alleged that all of said claim which accrued prior to five years before the commencement of this action is also barred by the statute. The case was tried to a jury, and a verdict was returned for the plaintiff for \$5,000. This verdict was reduced \$4,749.00 by the court, and plaintiff's claim therefore was allowed. The defendant appeals.

[1] 1. The plaintiff alleged that she went to work for the deceased under an express agreement that she should do so, and, as there is no direct evidence of such agreement, the appellant contends that plaintiff is not entitled to recover on that branch of her case. It is the rule in this state that, where the pleadings are based on an express agreement alone, no recovery can be had on a quantum meruit. *Hunt v. Tuttle*, 125 Iowa, 676, 101 N. W. 509; *Leonard v. Leonard*, Adm'r, 134 Iowa, 131, 111 N. W. 406.

[2] Direct evidence of such an agreement for employment is not necessary, however. If from all of the facts and circumstances appearing in the case it can fairly be said that there must have been such an agreement, it is sufficient.

[3] In 1893 the plaintiff's husband was living and she had five minor children. She then and at the time she went to work for the deceased lived with her children, and, so far as the record shows, with her husband also, in Mondamin, Harrison county. Oldfield was then living on a farm in Sac county, with his wife and family, consisting of several children, and it was to that farm that the plaintiff went in the fall of 1893, leaving her family in Mondamin. Plaintiff was in no way related to the deceased, nor does it appear that they had been acquainted prior to 1892, or that their relations were unusually friendly or intimate at the time that she went to work for him. As we understand the record, plaintiff lived in the house with the Oldfield family from the fall

of 1893 until some time in the year 1894, when Oldfield brought her children to her from Mondamin, and thereafter she and her children lived in a small house on the farm for a number of years. Plaintiff's husband died in 1894, but whether before or after the children were taken to the plaintiff in Sac county does not appear. It will be presumed, however, in the absence of any showing to the contrary, that plaintiff's husband had the children with him, and, at least, assisted in their care until his death, and it will also be presumed that plaintiff was at work away from home for the common good of the family, and this because the law will not presume that she had deserted either her husband or her children. The record shows conclusively that plaintiff went to the Oldfield farm for the purpose of working, and that from the first she did do heavy manual labor, and soon became of great value to deceased as a laborer. She worked in the fields, took care of stock, and performed any other work there was to do on the farm.

[4] It is a general rule that the fact that one is found doing service for another is prima facie evidence of an employment. 26 Cyc. 1410; *Perry v. Ford*, 17 Mo. App. 212. And we think the circumstances surrounding the parties and their relationship as practical strangers raise the presumption that the plaintiff went to work for the deceased under an express agreement. It will be observed that there are no allegations in the petition that there was an express agreement as to the compensation that should be paid for such services.

[5] 2. There was no error in overruling the defendant's motion to strike out all evidence relative to services rendered prior to five years before the commencement of this action. The evidence as a whole tended to show that the service was continuous for the entire time up to at least within a year or two of the commencement of this action, with the exception of one or two brief periods when plaintiff was absent on visits, and, such being the case, the statute did not begin to run. *Kilbourn v. Anderson*, 77 Iowa, 501, 42 N. W. 431; *Asher v. Pegg*, 146 Iowa, 541, 123 N. W. 739, 30 L. R. A. (N. S.) 890; 21 Cyc. 975, and cases cited on page 976.

[6] 3. Complaint is made of instructions 10 and 11, because they told the jury, in effect, that plaintiff's cause of action for breach of promise of marriage would be barred, if the breach occurred more than two years prior to Oldfield's death. The death of Oldfield would not stop the running of the statute; and hence it was error to place the time at his death, instead of at the time when the action was commenced. *Widner v. Wilcox*, 131 Iowa, 223, 108 N. W. 238; *Black v. Ross*, 110 Iowa, 112, 81 N. W. 229. But it is doubtful whether this error in the instructions was prejudicial to the defendant, because of the fact that the undisputed evi-

dence shows that there was a breach of a renewed promise within two years prior to the commencement of the action.

4. In instruction 14 the court told the jury that plaintiff might recover on her claim for services, if it was found that she performed labor for Oldfield with his knowledge and consent, but without an express agreement fixing the compensation therefor, and that the law would presume that she was to receive pay for such labor. This instruction was erroneous, because it directed a recovery for plaintiff on the finding that she performed labor for Oldfield, regardless of the express agreement under which alone the plaintiff claimed. *Leonard v. Leonard*, supra; *Hunt v. Tuttle*, supra.

[7] 5. The plaintiff claimed in her petition that her services were worth \$5 per week during the entire time of her employment. On the trial there was evidence tending to show that during a part of the time her services were reasonably worth \$5.50 per week, and in the fourteenth instruction the jury was told that plaintiff should be allowed the reasonable value of her services, not exceeding the entire amount claimed therefor, which was \$3,975, or \$5 per week for the entire time. The instruction was erroneous in this respect, because there was evidence tending to show that plaintiff was not performing service for the deceased during several periods of a month or more, and it is manifest that the instruction authorized a recovery of more than the amount claimed per week. *Miller v. Armstrong*, 123 Iowa, 86, 98 N. W. 561; *Baker v. Oughton*, 130 Iowa, 35, 106 N. W. 272.

[8] It being impossible to determine what amount was allowed to plaintiff for her services and what amount for breach of promise of marriage, there is no way of correcting this error, and it must be deemed prejudicial.

6. Instruction No. 15 presented an issue to the jury that was not in the case, as we understand the record, but it was not in our judgment prejudicial to the estate.

7. Appellant's contention that the evidence is insufficient to sustain the verdict and judgment cannot be sustained. In view of a retrial we shall not discuss this feature of the case, but we are impressed with the merit of both claims made by the plaintiff.

[9] 8. Appellee moves to dismiss the appeal, because the notice thereof was signed by defendant's attorney, and for alleged informalities in the notice itself. The statute provides that an appeal is taken and perfected by serving a "notice in writing on the adverse party, his agent, or any attorney who appeared for him in the court below. * * * There is no requirement that the notice be signed by the appellant in person, nor that his name be signed thereto by his attorney or agent. Code, § 319, authorizes an attorney to execute such notice in

the name of his client, and we think it broad enough to authorize the attorney to sign such notice for his client. We think it the general rule that the attorney for the appellant may sign a notice of appeal as such attorney, where there is no statutory requirement otherwise. There is nothing in this motion and it is therefore overruled.

[16] 9. Appellant's motion to strike appellee's amendment to abstract because the lines thereof are not numbered and because not indexed is overruled, but the cost of printing such additional abstract will be taxed to the appellee. For the errors pointed out, the judgment is reversed.

Reversed.

NAGL v. SMALL

(Supreme Court of Iowa. Dec. 12, 1912.)

1. BROKERS (§ 64*)—COMMISSIONS—WHEN EARNED.

A broker undertaking to sell real estate on specified terms and effect a completed sale is not entitled to his commission, though the purchaser proposed by him enters into a contract with the owner which he is subsequently unable to perform.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 67, 97; Dec. Dig. § 64.*]

2. BROKERS (§ 63*)—COMMISSIONS—WHEN EARNED.

A broker employed to find a purchaser on specified terms is entitled to his commission when he produces a purchaser ready, willing, and able to buy on the terms, though the owner refuses to enter into any contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. § 63.*]

3. BROKERS (§ 64*)—COMMISSIONS—WHEN EARNED.

A broker employed to procure a purchaser on specified terms, who produces a prospective purchaser who enters into a tentative agreement with the owner as to the terms of sale, but who does not perform a condition precedent to the taking effect of the contract, is not entitled to his commission, since the purchaser is not ready, willing, and able to make the purchase on the specified terms.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 67, 97; Dec. Dig. § 64.*]

4. BROKERS (§ 52*)—COMMISSIONS—WHEN EARNED.

Where a broker employed to procure a purchaser produces a purchaser acceptable to the owner, who makes with him a binding contract, providing for the terms on which a conveyance shall be made so that nothing remains as between them save the performance by the purchaser of the terms, the broker is entitled to his commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 73; Dec. Dig. § 52.*]

5. BROKERS (§ 52*)—COMMISSIONS—WHEN EARNED.

Where a broker, employed to procure a purchaser of his principal's farm for a specified sum for a commission of a dollar per acre, procured a purchaser who entered into a valid contract with the principal for the purchase of the farm, on specified terms, calling for payment in installments, and who paid the first installment, the broker was entitled to his commission without proving the terms of

the contract of sale so as to establish the subsequent performance of conditions by the purchaser.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 73; Dec. Dig. § 52.*]

Weaver and Evans, JJ., dissenting.

Appeal from District Court, Carroll County; F. M. Powers, Judge.

Action to recover a commission for the sale of land. At the conclusion of the evidence for the plaintiff, the court, on defendant's motion, directed a verdict in his favor, and, from judgment on this directed verdict, the plaintiff appeals. Reversed.

E. A. Wissler, of Carroll, for appellant. Lee & Robb, of Carroll, for appellee.

McCLAIN, C. J. The evidence introduced for the plaintiff tended to show that in August, 1909, defendant requested the plaintiff to find a purchaser for defendant's farm of 258 acres for \$28,000, agreeing to give plaintiff \$1 per acre if he found such purchaser. Soon after this arrangement was made, plaintiff took a man by the name of Heller out to look at the farm, and he was pleased with the place and was satisfied to buy it if he could raise the money required. The terms of payment fixed by defendant were \$1,000 down and \$18,000 on the 1st of March following, when possession was to be given and conveyance made subject to a \$7,000 mortgage. Heller went to a town in an adjoining county where he had a farm for the purpose of ascertaining whether he could raise the money for the cash payment, and returned on the evening of the same day to the plaintiff's place of business where he met the plaintiff and the defendant, and a contract of sale between the defendant and Heller was executed in duplicate, and the sum of \$1,000 was paid by Heller to defendant. At a later date the defendant and Heller mutually agreed that the written contract above referred to was defective in the description of the property, and another written contract to correct the omission was executed; there being no extension or modification therein of the time for final payment. At some later date Heller and the defendant, apparently by mutual agreement, destroyed the contract and duplicate last executed; but whether this destruction was subsequent to the date on which final payment was to be made and the deed executed does not appear. It does appear, however, that Heller never made any further payments, and never received a deed. The ground on which the court directed a verdict for the defendant on plaintiff's evidence seems to have been that there was nothing in the evidence to show a final and complete performance of the contract by Heller, or an effort to perform, or that he was ready, willing, and able to perform as required by the terms of the written contract which seem

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 138 N.W.—54

to have been in accordance with the conditions of the sale proposed by defendant to plaintiff when the land was placed in the hands of the latter as agent. The simple question is, therefore, whether when the owner of land places it in the hands of an agent for sale on specified terms, and the agent procures a purchaser who enters into a contract to buy the land under the terms and conditions specified, being accepted by the owner as a purchaser on such terms and conditions, the right of the agent to a commission is dependent upon the final performance by the purchase of the terms and conditions of the contract thus entered into.

[1] There is some confusion in our own cases as to what is a sufficient compliance on the part of the agent with a contract to find a purchaser as to entitle him to recover his commission. If he undertakes to dispose of his principal's property on specified terms and effect a completed sale, then we have said that the agent is not entitled to his commission, although the purchaser proposed by the agent enters into a contract with the owner which he subsequently is unable to perform. *Greusel v. Dean*, 98 Iowa, 405, 67 N. W. 275.

[2] On the other hand, if the agent undertakes to find a purchaser who shall buy on specified terms and conditions, he is entitled to his commission when he produces a purchaser who is ready, willing, and able to buy on the terms and conditions proposed, even though the owner refuses to enter into any binding contract with the proposed purchaser. *Iselin v. Griffith*, 62 Iowa, 668, 18 N. W. 302; *Johnson v. Wright*, 124 Iowa, 61, 99 N. W. 103.

[3] Even though the seller and the purchaser enter into a tentative agreement as to the terms of the sale, if a condition precedent to the contract's taking effect, such as a present cash payment, is not performed by the buyer, then the agent is not entitled to this commission, for the purchaser is not ready, willing, and able to make the purchase on the terms proposed. *Dent v. Powell*, 93 Iowa, 711, 61 N. W. 1043; *Tracy v. Fobes*, 182 Iowa, 250, 109 N. W. 772.

[4] It is well settled that when the agent proposes a purchaser acceptable to the owner, who makes with him a binding contract providing for the terms and conditions on which he shall have a conveyance of the property, nothing remaining as between them save the performance by such accepted purchaser of the terms and conditions of the contract thus entered into, the agent becomes entitled to his commission. This rule was settled after a full discussion of the authorities in *Flynn v. Jordal*, 124 Iowa, 457, 100 N. W. 326, and is in accordance with the general weight of authority. Aside from the authorities cited in the opinion in that case, see *Roche v. Smith*, 176 Mass. 597, 58 N. E. 152, 51 L. R. A. 510, 79 Am. St. Rep. 345; also *Clark & Skyles, Agency*, §§ 71,

773; 31 Cyc. 1509; 19 Cyc. 243; 23 A. & E. Enc. L. 917; and note to *Kalley v. Baker*, 28 Am. St. Rep. 542. It was held otherwise in *Riggs v. Turnbull* 105 Md. 135, 66 Atl. 13, 8 L. R. A. (N. S.) 824, 11 Ann. Cas. 783, but in that case the court concedes that the rule adopted in that state is contrary to the weight of authority. The decision in that case is, however, unquestionably in accordance with the weight of authority on the facts actually involved, for the court holds that the prospective purchaser did not comply with a condition to be performed concurrently with the taking effect of the executory contract of sale, with the result that no such contract was actually entered into so as to become binding between the parties. The decision is therefore in harmony with cases in this state already cited.

[5] Now, in the case before us, the making of a written contract in duplicate between defendant and Heller, a purchaser procured by plaintiff, is fully established. It is also shown that Heller paid the first installment of the purchase price required to be paid before the contract should go into effect. If it were necessary to prove the terms of the contract so as to establish the subsequent performance of its conditions by Heller, then perhaps there would be a failure of proof, for the contents of the contract which was destroyed apparently by mutual consent are not in evidence; but, when it appeared that there was a binding contract entered into between the parties, then its contents became immaterial. Defendant became bound to pay the commission when he accepted a purchaser furnished by the plaintiff.

The confusion which has arisen in this state with reference to the application of the rule announced in *Flynn v. Jordal*, supra, seems to have commenced with the case of *Snyder v. Fidler*, 125 Iowa, 378, 101 N. W. 130, in which this court, without reference to *Flynn v. Jordal*, announces the proposition that, if the purchaser does not perform the conditions of the contract entered into between him and the owner, the agent is not entitled to his commission. This proposition was affirmed in the subsequent cases of *McGinn v. Garber*, 125 Iowa, 533, 101 N. W. 279, and *Sherburn Land Co. v. Sexton*, 130 Iowa, 85, 106 N. W. 378, in neither of which cases was there any discussion of the question further than a reference to *Snyder v. Fidler*. Neither of the cases last above cited involved in their facts the point now under consideration, and in *Blackledge v. Davis*, 129 Iowa, 591, 105 N. W. 1000, citing also *Snyder v. Fidler*, it appears that no binding enforceable contract was entered into between the parties. This, then, was the condition of the law in this state when we announced our opinion in *Wenks v. Hazard*, 149 Iowa, 18, 127 N. W. 1099. In that case we held that, under a contract of agency to procure a purchaser on such terms as should be satisfac-

tory to the owner, the agent became entitled to his commission upon procuring a purchaser with whom the owner should make a contract, and that failure of the purchaser thereafter to perform his contract would not defeat the agent's right to his commission. That case was very analogous to the one before us. There the terms and conditions were not specified, but were left to be determined between the owner and the proposed purchaser. If, under such circumstances, the proposed purchaser did not agree to the terms and conditions proposed by the owner, the agent would recover no commission; but it was held that, when the proposed purchaser and the owner did enter into a binding contract, the agent was entitled to his commission notwithstanding the failure of the purchaser to perform the terms of such contract. In the case just cited, the court adopted the rule announced in *Flynn v. Jordal* without citing that case, and it attempted to limit the application of *Snyder v. Fidler*.

It is apparent, therefore, that unless we are now willing to definitely abandon the rule announced after a full discussion of the authorities in *Flynn v. Jordal*, and to abandon also the theory on which the recent case of *Wenks v. Hazard* was decided, and accept as conclusive the rule announced in *Snyder v. Fidler* and cases apparently recognizing it without further discussion, we ought to hold in the case before us, on the general weight of authority in this and other states, that when the owner accepts a purchaser proposed by the agent, and enters into a binding contract with him, the agent is entitled to his commission without regard to whether the terms of such binding contract are subsequently performed by the purchaser. Such a holding is not only in accordance with the weight of authority, but in accordance with reason. No persuasive considerations can be suggested for converting the agent, who procures a purchaser acceptable to the owner, into a guarantor of the performance by such purchaser of the obligations of his contract. It is quite common to provide for payments to be made during a considerable term of years before the purchaser becomes entitled to a conveyance, and we see no reason, in the nature of things, why the agent should be required to wait until the subsequent payments have all been made before recovering the commission agreed upon, unless, indeed, he is bound by the specific terms of his contract to do so. We reach the conclusion that, in the case before us, the plaintiff made out a prima facie case for the recovery of his commission, adhering to the rule announced in *Flynn v. Jordal*, and overruling the case of *Snyder v. Fidler* so far as it is inconsistent with this conclusion.

Judgment of the trial court is therefore reversed.

WEAVER, J. (dissenting). In my judgment the record is barren of evidence showing that any contract of sale was ever made, or, if made, that its abandonment was not strictly in pursuance of some condition or reservation contained therein. No witness has attempted to state its terms. The burden is upon the plaintiff to make a case, and if he sees fit to submit it to the trial court, or bring it to this court upon a showing so lacking in definiteness that the essential facts cannot be found therefrom, this court should not supply his omissions by presumption or conjecture. I also dissent from the principal legal conclusion reached in the opinion as being out of harmony with our decisions heretofore rendered in similar cases and unsound in principle.

EVANS, J. I concur in the foregoing dissent.

KELLY et al. v. KELLY et al.

(Supreme Court of Iowa. Dec. 13, 1912.)

WILLS (§ 427*)—PROBATE—ACTION TO SET ASIDE.

Under Code, §§ 3296, 3447, providing that the probating of a will is conclusive evidence of its due execution until set aside by an original or appellate proceeding, and that an action to set a will aside may be brought within five years, the admission of a will to probate originally without contest is a preliminary order, which effects a prima facie establishment of the instrument, but does not cut off the right of contest in an original action within the period of limitation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 916; Dec. Dig. § 427.*]

Appeal from District Court, Iowa County; R. P. Howell, Judge.

Action to set aside a will. Demurrer to the petition sustained, and plaintiffs appeal. Reversed.

W. J. Baldwin, of Iowa City, and J. M. Dower, of Marengo, for appellants. Yoss & Wallace, of Williamsburg, and Popham & Havner, of Marengo, for appellees.

WEAVER, J. Margaret Kelly died testate October 31, 1910. She was unmarried and childless. Her only surviving heirs were her four brothers, James, Thomas F., John, and Patrick. By the terms of her will she gave the bulk of her property to James and Thomas F., making no mention of either John or Patrick. The instrument having been filed for probate, due notice of the proceeding was personally served in this state upon all the heirs, including John and Patrick. No objections were filed by any of the heirs, and upon the usual proof of its due execution the will was admitted to probate at the January, 1911, term of the district court of Iowa county. On November 18, 1911, John Kelly and Patrick Kelly instituted this action to set aside the will and the probate

thereof on the ground that the testatrix was at the date of said instrument of unsound mind and incapable of making a valid testamentary disposition of her estate, and that the execution of the alleged will was obtained by undue influence. To the petition alleging the foregoing state of facts the defendants demurred on the following grounds: (1) A defect of parties in that the petition fails to make the executor of the will a defendant in the action; and (2) the petition shows upon its face that the plaintiffs were made parties to the probate proceedings and personally served with notice thereof, but failed to appear thereto or to contest the same in any manner whereby they became and are estopped to deny the validity of the will or the sufficiency of the adjudication upon which it was admitted to probate. The demurrer was held by the trial court to be well taken, and, plaintiffs electing to stand upon their petition without further amendment, the action was dismissed at their costs. From this judgment plaintiffs appeal.

Stated briefly, the question thus presented is whether appellants, as heirs of the deceased, after being notified of the proceedings and allowing the will to be probated without objection, may maintain an original action to set aside the probate and contest the validity of such will. The trial court answered this question in the negative, and we are asked to review the record and reverse such decision.

The right to maintain such action must be found, if at all, in the statute. So far as they have immediate bearing upon the question, our statutory provisions are as follows: (1) Any person of full age and sound mind may dispose of all his property by will subject only to the rights of his creditors and of his surviving spouse if any. Code, § 3270. (2) The will must be in writing and duly witnessed. Code, § 3274. (3) The will must be filed in the proper court and a day fixed for the hearing at which any party in interest may appear and contest the probate. Issues so joined are triable to a jury. Code, § 3283. (4) The clerk must give due notice by publication of the time and place of such hearing unless a different notice is prescribed by the court. Code, § 3284. (5) The admission to probate when duly certified renders the will competent evidence in all courts without further proof. Code, § 3286. (6) Such probate is conclusive proof of the due execution of the will *until set aside by an original or appellate proceeding*. Code, § 3298. (7) *Action to set aside a will may be brought within five years from the date when the instrument "is filed in the clerk's office and notice thereof is given."* Code, § 3447.

Were the question one of first impression, the writer of this opinion would strongly incline to the view upheld by the trial court, and say that the right to maintain an original action to set aside a will after due pro-

bate thereof is not available to a party in interest who had due notice of the proceedings and failed to appear or object thereto. To hold otherwise is to complicate the settlement of every estate where a testator has seen fit to exclude an heir from sharing in his bounty and cloud the title to all property so devised by the possibility of a successful contest being instituted at any time during a period of five years. Nor does it seem to the writer that the language of the statute necessarily demands such a construction, but the opposite view seems to have had judicial sanction too long to be unsettled except by legislative intervention. The provision which makes the probate of a will conclusive until set aside by an original or appellate proceeding has been a feature of the statute since early in the history of the state. Code of 1851, § 1297; Revision of 1860, § 2329; Code of 1873, § 2353; Code of 1897, § 3298. It has been quite uniformly interpreted as making the validity of a will the subject of investigation in an original action by a party in interest at any time within five years from the filing of such will for probate and the giving of notice thereof. In accordance with that theory, it has been held that: "Rights of a party claiming a distributive share in his ancestor's estate are not concluded by the order of the court admitting the will to probate. Such party may still, by proper proceedings, have the question, of his right to a portion of his ancestor's estate, determined. The admission of the will decides no question but its due execution and publication." *Lorieux v. Keller*, 5 Iowa, 201, 68 Am. Dec. 696. In *Havelick v. Havelick*, 18 Iowa, 415, the plaintiff brought action to set aside a will which had been admitted to probate, and the court, after quoting the statute last above cited, says: "The petitioners were therefore not confined to their appellate remedy after the allowance of the will by the county court, but could properly commence this their original action to set the same aside." After the transfer of probate jurisdiction from the county court to the circuit court, question was raised involving this statute, and the court said: "It is plain that the effect of the probate of a will in the circuit court is the same as was the effect of a like proceeding under the former practice in the county court. Such a construction works no prejudice to those interested adversely to the will, as it is competent for them, notwithstanding the probate of the will, to institute a direct proceeding to set it aside." *Gilruth v. Gilruth*, 40 Iowa, 348. In *Kelsey v. Kelsey*, 57 Iowa, 383, 10 N. W. 753, the executor of a will which had been duly probated brought an action to construe some of its provisions. To this an heir of the testator appeared and by cross-bill asked to have the will declared void. It was held that this was equivalent to a direct attack upon the will in an original proceeding and as such could properly

be maintained. The rule of the Havelick Case was also affirmed in *Leighton v. Orr*, 44 Iowa, 683. In *Kirsher v. Kirsher*, 120 Iowa, 345, 94 N. W. 946, one of the parties urged the proposition that, when a will has once been duly admitted to probate, the order can only be set aside in an equitable action. To this the court in its opinion responds, saying: "The exact reverse of this contention was held in *Leighton v. Orr*, 44 Iowa, 679, and it has been the practice in this state for more than a quarter of a century; and, even if there were no judicial construction of the statute, we would hesitate long before departing from so venerable a rule."

This is not an exhaustive citation of our precedents upon the point under discussion, but they are sufficient to show their tenor and effect. The only exception to this rule is found in *Gregg v. Myatt*, 78 Iowa, 703, 42 N. W. 461, 43 N. W. 760, where the court, speaking by Beck, J., seem to distinctly hold that admission of a will to probate is final and conclusive as to all parties in interest personally served with notice thereof, and that the provision allowing subsequent original proceedings to set aside the will is for the benefit of those not served with notice or upon whom only constructive service has been had. While this decision has never been expressly overruled, it appears never to have been followed upon this point, and the distinction which it makes has nowhere else been recognized. Certain it is the statute does not in terms declare such distinction. Indeed, the statute provides for no notice other than by publication, though it recognizes the authority of the court by proper order to designate some other method of service. This fact gives color to the theory that the Legislature did not intend to give an order of admission to probate the conclusive effect of a final judgment in an ordinary adversary proceeding. The preservation of the estate and the protection of the interests of all concerned are ordinarily promoted by an early probate of the will and the appointment of an executor authorized to take charge of the property. This is accomplished by the simple and somewhat informal proceedings we have described; but, as construed by the court, the statute at the same time keeps the door of the court open for those who are aggrieved by the terms of the will to sue for its cancellation until the statute of limitations erects a bar to such relief.

The rule thus approved is also applied in other jurisdictions. Thus it has been said by the Illinois court that the original probate of a will "is not designed as a final and conclusive determination of the testamentary capacity of the testator upon all the evidence that may be produced. The purpose is only to establish testamentary capacity prima

facie in order that the will may be recorded, the estate cared for, and administration proceed." *O'Brien v. Bonfield*, 213 Ill. 428, 72 N. E. 1090; *Shaw v. Moderwell*, 104 Ill. 64; *Tate v. Tate*, 89 Ill. 42; *Knox v. Paull*, 95 Ala. 505, 11 South. 156; *Dillard v. Dillard*, 78 Va. 208. It has also been said that probate of a will is an incipient step to give jurisdiction, and the court may thereafter entertain a proceeding to set it aside. *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147.

In short, the accepted doctrine in jurisdictions having statutes similar to our own appears to be that admission of a will to probate originally without contest is a preliminary order or judgment which effects a prima facie establishment of the instrument, and gives the court and executor authority to proceed with the administration and settlement of the estate, but does not operate to cut off the right of contest in an original action within the statutory period of limitation. This court is, as we have already seen, committed to that construction of the statute, and, adhering to that rule, it follows that the judgment appealed from must be reversed. In so far as the decision in *Gregg v. Myatt*, supra, is inconsistent with this holding, it must be considered overruled.

Reversed.

BAILEY v. CITY OF DES MOINES.

(Supreme Court of Iowa. Dec. 12, 1912.)

1. MUNICIPAL CORPORATIONS (§§ 488, 489*)—STREET IMPROVEMENTS—ASSESSMENTS—VALIDITY.

Where the council of a city did not accept the offer of petitioners for a street improvement to waive the benefit of the statutory limitation of the amount of special assessment, but proceeded on its own motion, as authorized by Code, § 793, to make the improvement without reference to the request or consent of the persons interested, the offer could not be relied on as an estoppel against the assertion of the statutory limitation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1147-1152; Dec. Dig. §§ 488, 489.*]

2. EVIDENCE (§ 387*)—PAROL EVIDENCE—VARYING RECORDS OF MUNICIPAL COUNCIL.

The record of the council of a city that a resolution for a street improvement was passed on the council's own motion, without reference to any request or consent of the persons interested, may not be impeached by parol evidence that it was the custom of the council when an improvement was petitioned for and three-fourths of the members were in favor thereof to make the record show that the resolution was passed on the council's own motion to avoid complications arising from any after-discovered defect in the petition for the improvement.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1698-1713; Dec. Dig. § 387.*]

3. MUNICIPAL CORPORATIONS (§§ 488, 489*)—STREET IMPROVEMENT—ASSESSMENT—ESTOPPEL.

The mere fact that an owner of land abutting on a street, improved pursuant to a resolution thereof, was the attorney of the city,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and as such approved the form of contract for the improvement, did not estop his executrix from denying the right of the city to assess the property in excess of the amount of the statutory limitation; the executrix not denying the liability of the property for its proper proportion of the cost of the improvement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1147-1152; Dec. Dig. §§ 488, 489.*]

4. MUNICIPAL CORPORATIONS (§ 502*)—STREET IMPROVEMENTS—ASSESSMENTS—VALIDITY—BURDEN OF PROOF.

A city ordering a street improvement, and seeking to assess the property benefited in excess of the statutory limitation, has the burden of showing some ground entitling it to compel the property or its owner to pay a larger proportion.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1174; Dec. Dig. § 502.*]

5. MUNICIPAL CORPORATIONS (§ 459*)—STREET IMPROVEMENT—"PAVING."

The word "paving," in Code, § 792, giving to cities power to improve any street by grading, parking, curbing, paving, and guttering, and to assess the cost on abutting property, subject to the limitation of a maximum assessment, includes both curbing and guttering when a city undertakes to pave a street not already curbed and guttered; and, where a city curbs, gutters, and paves a street as a part of one improvement, it may not treat the work as independent items, and make them the subject of separate contracts and assessments, though in the outlying parts of a city it may curb or gutter unpaved streets, and thereafter pave the streets when demanded by the growth of the city and increase of traffic.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1101; Dec. Dig. § 459.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5239-5241; vol. 8, p. 7749.]

Appeal from District Court, Polk County; James A. Howe, Judge.

The opinion states the case. Affirmed.

Robert O. Brennan, H. W. Byers, and E. C. Carlson, all of Des Moines, for appellant. Stipp & Perry, of Des Moines, for appellee.

WEAVER, J. Certain special assessments having been levied upon city lots owned by William H. Bailey, since deceased, for expenses incurred in the paving, guttering, and curbing of a street known as Prospect boulevard, the owner appealed therefrom to the district court. Upon a hearing of the evidence the district court modified and reduced said assessments in the manner hereinafter mentioned, and the city appeals from said decision to this court.

The material facts may be stated as follows: Mr. Bailey became purchaser of the lots by contract in June, 1909. Prior to that time in the year 1907 or 1908, the city council had ordered the construction of a combined curb and gutter in front of the property, but the work done under this order had been rejected. A petition in which Mr. Bailey's grantors joined had also been presented to the council for paving the street. In this petition the signers waived, or offered to waive,

the benefit of the statute which limits the liability of adjacent property to special assessment for any street improvement to 25 per cent. of its actual value. Thereafter, in April, 1909, the council, after the usual resolution of necessity, ordered the paving of said street, declaring in the resolution therefor that such order was made "without the petition of property owners." The work of paving thus ordered and the final construction of the curb and gutter were done practically at the same time, but under separate contracts. The schedule of assessments for the curbing was presented to the council on September 15, 1909, and five days later a like schedule for the cost of the pavement was also presented. Further proceedings for the consideration of objections and protests against said proposed assessments were carried along in parallel lines, and they were finally approved and levied at or near the same time. Mr. Bailey appeared at the hearings, and protested against the assessments on several grounds, but two of which are involved in this appeal, and to these alone do we give attention. These objections are (1) that the construction of the pavement, curb, and gutter constitute but a single improvement, and that but one special assessment therefor can rightfully be levied upon the adjacent property for the expense so incurred; and (2) that the assessments levied by the council exceed in amount the one-fourth of the actual value of that part of the lots in question which is legally chargeable with such burden.

The council having overruled these objections, Mr. Bailey appealed to the district court, which, on hearing the evidence, held the objections well taken, and reduced the assessment for the combined improvement to the sum of \$1,200, which it found to be the one-fourth of the actual value of the property. It is from this decision that the city has appealed.

[1] 1. The first question argued by counsel is whether the appellee, as the heir or devisee or executrix of Mr. Bailey's estate, is estopped to claim the benefit of the above-cited statute. It is the contention of counsel that as Mr. Bailey's grantors had signed a petition waiving the benefit of the statutory limitation of the amount of special assessment, and as the proceedings for the construction of the pavement were already in progress when Bailey entered into the contract of purchase, he took the property subject to such waiver, and that neither he nor his heirs or representatives can be heard now to claim the benefit of the limitation. Under our statute the work of street improvement at the expense of adjacent property may be initiated in either of two ways: Upon the petition of the owners of a majority of the lineal front feet of the adjoining property, in which case a majority of the council

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

is sufficient to pass such a resolution, or upon the council's own motion which authority may be exercised only when three-fourths of all the members of the council unite in adopting the proper resolution. Code, § 793. When the final order for such improvement is entered, it is required that the record shall be made to "show whether the improvement was petitioned for or made on the motion of the council." Code, § 811. The authority to levy special assessment for such improvements is subject to the following restriction: "Such assessment shall not exceed twenty-five per centum of the actual value of the lot or tract at the time of the levy, and the last preceding assessment roll shall be taken as prima facie evidence of such value." Code Supp. 1907, § 792a. So far as the city records are concerned, they do not disclose that the petition to which we have referred ever received any consideration at the hands of the council and still less do they show its acceptance or approval. On the contrary, when, in obedience to the statute, the record is made to show upon whose initiation the improvement was undertaken, it is there declared it was "not upon petition of the property owners." For present purposes, it may be conceded that a property owner who petitions for an improvement, and as inducement to favorable action thereon offers to waive the benefits of the statutory restriction, cannot be heard to repudiate his undertaking after his petition has been granted, and the improvement for which he has asked has been made; but it seems to us no less clear that, where the council does not accept the offer of the petitioner, and thereafter proceeds professedly and expressly upon its own motion to exercise its statutory power to make an improvement of that nature without reference to the request or consent of the persons interested, there is no principle of law or equity which will entitle the city to set up the offer or waiver contained in the rejected petition as an estoppel against the property owner's assertion of his statutory rights.

[2] Extrinsic evidence was offered on behalf of the city that it was the custom of the council when an improvement was petitioned for, and three-fourths of the members were in favor thereof, to make the record show that the resolution was passed upon the council's own motion, and that this was done to avoid any trouble or complication which might arise over any after-discovered defect in the petition, although as a matter of fact such petitions were considered and accorded influence in determining that question. In our judgment the trial court correctly refused to regard this testimony as either competent or material. The substance of such showing would be an impeachment by the city of its own records by parol evidence that, while such record expressly states that the action was taken upon the council's own

motion, it was in fact taken upon the petition of the property owners. This, upon familiar principles, it cannot be allowed to do. It is true that persons who have petitioned for street improvements have quite frequently been held estopped to contest the assessments thus resulting because of irregularity in the preliminary proceedings, and it is not unreasonable to suppose that the existence of this rule was one reason for the enactment requiring the city to make of record the fact whether the work had been ordered upon petition therefor or upon the council's own motion. A petition granted is one thing; a petition rejected or not acted upon is quite another. Whether a waiver of this character made by a grantor binds or charges the property in the hands of a grantee who purchases it after the petition has been signed, but before the work has been completed, or any assessment made, is not necessarily involved in this record, and we do not undertake to decide it.

[3] It is further argued that plaintiff is estopped to maintain this action because Mr. Bailey was himself the city's attorney from April, 1908, to December, 1909, and as such attorney, and after he purchased the property, approved the form of contract between the city and the paving contractor who performed the work. We see none of the elements of estoppel in this transaction. His executrix does not now contest or deny the liability of his property for its just and proper proportion of said improvement, and surely the city suffers no wrong in being prevented from exacting more than such proportion.

[4] Again, it is said that the plaintiff does not come into this equitable proceeding with clean hands, and therefore, whatever may be said of her strictly legal rights, she is not entitled to any relief at the hands of the court. We are at a loss to understand upon what principle of equity or of morals it can be said that Mr. Bailey or his executrix is chargeable with any lack of strict rectitude so far as the facts and circumstances are disclosed in this record. The appellant claims the right to assess this property for the expense of making these improvements. The appellee admits that right, and under the decree below her property is taxed for that purpose to an entire one-fourth of its value—the full proportion allowed by statute—but she denies and contests the right to burden her property in excess of that limit. The burden of showing some ground upon which the city may avoid such statutory restriction and compel this property or its owner to pay a larger proportion is upon the appellant. In our judgment that burden has not been sustained, and the district court did not err in so holding.

[5] 2. A somewhat more difficult question is encountered when we come to consider whether the entire work of paving, curbing, and guttering is to be considered as a single im-

provement. The statute gives to cities power to improve any street by grading, parking, curbing, paving, and guttering the same and to assess the cost thereof upon abutting property subject to the limitation upon the maximum assessment hereinbefore mentioned. Code, § 792, and Code Supp. § 792a.

The argument on the part of the city is that this statute makes the work of paving, curbing, and guttering independent items of street improvement, and the council may lawfully so treat them, and make them the subject of separate and distinct contracts. Starting with this construction of the statute, it is insisted that the council did not exceed its powers in making the pavement, and the curb and gutter which border it, the subject of separate contracts, each of which in the matter of assessments upon abutting property is to be considered without reference to the other, and for the cost of either of which assessments may be up to the 25 per cent. limit. If this be true as broadly as claimed, then the owner of a lot abutting upon a city street is indeed in a desperate strait, for such construction would enable the city at one and the same time to park, curb, pave, and gutter the street by four separate contracts, followed by four separate special assessments each up to the full limit of 25 per cent. of the actual value. We cannot believe that such result or such possibility was contemplated by the Legislature. It is doubtless true that in the outlying and less crowded parts of a city it is sometimes found desirable to improve and use streets in an unpaved condition and sometimes to curb or gutter the same, and let the larger enterprise of paving await the growth of the city and the increase of traffic which shall justify it. Under such circumstances, we think there can be no reasonable doubt that the city can order either or any of such improvements, and lawfully provide for assessing the cost upon abutting property. But, when it undertakes to pave a street not already supplied with suitable curbs and gutters, we are of the opinion that "paving," as the word is used in the statute and as understood and employed in ordinary usage, includes both curb and gutter without which a pavement is manifestly incomplete. It has been held that authority to pave includes authority to complete the same by the construction of curbs and gutters because "the curbstones are necessary in order to secure the gutters, and are in this view a part of the pavement of the street." *Warren v. Henly*, 31 Iowa, 31; *Downing v. Des Moines*, 124 Iowa, 289, 99 N. W. 1066. The different powers conferred upon the city for the improvement of streets are designed to meet different conditions and relieve different needs; but from the fact that under appropriate conditions the city may lawfully require either curbing, guttering, or paving it does not follow that, in ordering the paving of an uncurbed or unguttered street, it can

make paving, guttering, and curbing a matter of two or three independent improvements, and thereby avoid the limit which the law places upon the burden cast upon abutting property. A very similar question arose in New York where the limit of a special assessment for any one improvement is one-half of the value of the property. In that case, as in this, the city undertook to levy separate assessments for paving and for curbing and guttering, the aggregate of which assessments was in excess of the legal limit. The work was done under separate resolutions or orders, one of which was dated in the year 1871 and the other in 1872. Of this state of facts the court says: "If these assessments, though resulting from separate apportionments and though confirmed at different times, are for the expense of what is practically and really one improvement, then the phrase from the act of 1840, 'in any one case,' applies, and there was substantial error in the assessment. * * * If the paving of a street is so disconnected from other work upon the street in necessity and effect as to be a different and separate improvement from grading, regulating, setting of curb, and gutter stones and flagging, or if the adoption of a peculiar kind of pavement is so, then there may be said to have been two classes of improvement upon this street. If they are not so disconnected, then it cannot be said that there was that lapse of time between the ordering of them as to make them distinct. * * * That it was not all done at once does not necessarily determine that it was two distinct improvements. Necessarily regulating and grading must precede paving, and so must to some degree the setting of curb and gutter stones. Nor is the fact that there was different kinds of pavement on different parts of the street conclusive that these were distinct improvements. * * * If one improvement, then there should have been but one assessment; and, if but one assessment, it could not have exceeded the half assessed value of the lots, and, as it does exceed that, it is to some extent illegal." In re *Walter*, 75 N. Y. 356. The propriety and justice of such holding is too manifest to require argument in its support. That the paving, curbing, and guttering in cases of this character do constitute a single improvement is quite clear. That it is so regarded by engineers and others skilled in such work appears in evidence, and, even if such evidence be held inadmissible, the fact is one of common observation and common knowledge which the court cannot ignore. See our cases already cited. *Warren v. Henly*, 31 Iowa, 31; *Downing v. Des Moines*, 124 Iowa, 289, 99 N. W. 1066. See, also, *Schenley v. Commonwealth*, 36 Pa. 29, 78 Am. Dec. 367; *Jacquemin v. Finnegan*, 39 Misc. Rep. 628, 90 N. Y. Supp. 207; *Huidekoper v. Meadville*, 83 Pa. 158. In the case before us the curb and gutter were first ordered and a curb and gutter were first constructed, but, being rejected by

the city, they were reconstructed at or about the same time and part of the same general improvement with the paving. As already remarked, the mere difference in time between the orders upon which such work was done is not sufficient to make it anything more or less than a single improvement.

It follows from the foregoing discussion that the trial court did not err in treating the two assessments as constituting a single burden and applying thereto the limit fixed by the statute.

The judgment appealed from is therefore affirmed.

BOICE v. COFFEEN et al.

(Supreme Court of Iowa. Dec. 11, 1912.)

1. MORTGAGES (§ 283*) — CONVEYANCE OF MORTGAGED PROPERTY—PRIMARY AND SECONDARY LIABILITY.

Where a mortgagor sold the mortgaged property to a grantee, who assumed the mortgage, the grantee became the principal debtor, and the liability of the grantor to pay the debt became secondary only; the liability of the mortgaged property remaining the same in the hands of the grantee as in the hands of the first mortgagor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 756-758; Dec. Dig. § 283.*]

2. MORTGAGES (§ 291*) — CONVEYANCE OF MORTGAGED PROPERTY — ASSUMPTION OF DEBT.

Where a mortgagor conveyed the property to a grantee, who assumed the mortgage, and he in turn conveyed to another, who likewise assumed the mortgage, the latter became the principal debtor; the liability of the prior grantors being secondary only, and they being protected by the mortgaged property.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 291.*]

3. MORTGAGES (§ 291*) — CONVEYANCE OF PROPERTY—ASSUMPTION OF MORTGAGE.

Where a mortgagor conveyed the property to a grantee, who assumed the mortgage, and he to M., who likewise assumed, and M. conveyed to L. with full covenants of warranty, the rights of the original grantee to be protected against primary liability were not affected by M.'s conveyance to L.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 291.*]

4. MORTGAGES (§ 491*)—ASSUMPTION—SUBSEQUENT CONVEYANCE.

C., having assumed a mortgage on land purchased by him, conveyed the land to M., who also assumed, and then conveyed to L. with full covenants, who conveyed to J. by deed of special warranty. *Held* that, since J. held his title under M., his rights as against the mortgagee and C. could rise no higher than the rights of M.; and, while J. was entitled to equitable relief as against M. only, such relief must be without prejudice to pre-existing equities of the mortgagee and C.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1434-1437; Dec. Dig. § 491.*]

5. APPEAL AND ERROR (§ 138*)—RIGHT TO APPEAL—RIGHT TO OBJECT.

Where defendant J., the ultimate grantee of certain mortgaged premises, was awarded judgment on a warranty against M., a prior grantor, who had assumed the mortgage, but conveyed the property with covenants of war-

ranty to J.'s grantor, M. having appealed, so that J. was threatened with the loss of the only relief he was granted by the decree, plaintiff mortgagee could not object to an appeal also taken by J., in order that he might obtain a trial de novo on the merits of the case made by his cross-petition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 903, 904, 920, 922; Dec. Dig. § 138.*]

6. EVIDENCE (§ 184*)—BEST AND SECONDARY EVIDENCE—ORIGINAL DEED.

Where a suit to foreclose was brought against defendants O. and M., to whom the property was conveyed, and who respectively assumed the mortgage, and O. testified, with reference to the execution of his deed to M., that the transaction was with him personally, and that it was the only transaction he had had with M., and that he executed only one deed, the evidence sufficiently showed that the original deed was in M.'s possession, and justified the introduction of the record in lieu of the original.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 638-641; Dec. Dig. § 184.*]

7. TRIAL (§ 53*)—PURPOSE FOR WHICH EVIDENCE IS INTRODUCED—LIMITATION.

Where, in a suit to foreclose against defendants O. and M., to whom the property was conveyed, and who in turn respectively assumed the mortgage, O. filed a cross-bill against M., claiming that M. was primarily liable, the record of the deed from O. to M., containing M.'s assumption of the mortgage, having been properly admitted under the cross-bill, was in the case for all purposes, and available to plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 124, 129; Dec. Dig. § 53.*]

8. COVENANTS (§ 130*)—WARRANTY—BREACH—MEASURE OF DAMAGES.

Where there is a failure of title to real property, recovery on a covenant of warranty cannot, in general, exceed the consideration received by the warrantor.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 245-253, 257; Dec. Dig. § 130.*]

9. COVENANTS (§ 127*)—COVENANT AGAINST INCUMBRANCES—BREACH—DAMAGES.

Where a covenant against incumbrances is breached, and the warrantee is compelled to pay an incumbrance in order to protect his title, the amount so paid is presumptively the measure of damages.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 238-242, 258; Dec. Dig. § 127.*]

10. COVENANTS (§ 127*)—COVENANT AGAINST INCUMBRANCES—MEASURE OF DAMAGES.

M., having purchased certain mortgaged property and assumed the mortgage, conveyed the property to L. by a deed with full covenants, after which L. conveyed to J. with a deed of special warranty. *Held* that, in the absence of any claim that the amount of the incumbrance exceeded the amount of the consideration received by M., the trial court, in a suit to foreclose the mortgage, in which J. filed a cross-bill to enforce his covenant, was justified in adopting the amount necessary to be paid in discharge of the incumbrance as the presumptive measure of damages.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 238-242, 258; Dec. Dig. § 127.*]

11. MORTGAGES (§ 291*)—MORTGAGED PROPERTY—CONVEYANCE—ADDITIONAL SECURITY—SURRENDER—EFFECT.

A mortgagor of certain real estate conveyed it to C., who assumed the mortgage, and, after putting up certain additional collaterals, sold the property to M., who also in turn as-

sumed the mortgage; whereupon C. received back his collaterals. *Held* that, since no one but the original grantor stood in the relation of surety to C., and the liability of the mortgaged property was not in the nature of a suretyship, and was not affected by the surrender of such collaterals, neither M. nor his subsequent grantees could complain of such surrender.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 291.*]

12. MORTGAGES (§ 291*) — CONVEYANCE OF LAND — ASSUMPTION OF MORTGAGE — PURCHASE OF DEBT BY PERSON SECONDARILY LIABLE—EFFECT—RIGHT TO COMPLAIN.

C., having purchased certain mortgaged land in controversy and assumed the mortgage, conveyed to M., who likewise assumed, and he conveyed through L. to J. with full covenants of warranty. Thereafter C., who was secondarily liable, procured plaintiff to purchase the mortgage note, which he did for C.'s protection. *Held*, that such purchase, though collusive, did not prejudice any rights of J.; and he was not, therefore, entitled to claim that it constituted a payment of the debt and a discharge of the lien.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 291.*]

13. MORTGAGES (§ 291*)—TRANSFER OF MORTGAGED PROPERTY — ASSUMPTION OF MORTGAGE—MORTGAGE NOTE—ASSIGNMENT WITHOUT RECOURSE—EFFECT.

That a mortgage debt for which C. was secondarily liable was assigned to plaintiff, "without recourse," for C.'s benefit did not preclude plaintiff from suing a subsequent grantee of the mortgaged premises, who last assumed the mortgage, since the words "without recourse" served only to protect the indorser against liability for the debt.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 291.*]

14. MORTGAGES (§ 291*) — CONVEYANCE OF MORTGAGED PROPERTY — ASSUMPTION OF MORTGAGE—COLLATERAL SECURITIES.

Where a grantee of mortgaged property, who had assumed the mortgage and had deposited collaterals with the mortgagee, conveyed the property to M., who in turn assumed the mortgage and conveyed it to others, the liability of the collateral deposited on the conveyance of the property to M. became secondary to the liability of M. and the mortgaged premises, so that its surrender by the mortgagee was not prejudicial to M. or his grantees.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 291.*]

15. COVENANTS (§ 127*)—COVENANT AGAINST INCUMBRANCES—BREACH—DAMAGES.

The rule that a warrantee against incumbrances who has not discharged an incumbrance warranted against, can only recover nominal damages from his warrantor, while applicable at law, is not controlling in equity, where provision may properly be made in the decree for the award of substantial damages, even in advance of actual payment, subject to such proper conditions as will protect the warrantor against double liability, or greater liability than the amount the warrantee must necessarily pay to discharge the incumbrance.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 238-242, 258; Dec. Dig. § 127.*]

16. MORTGAGES (§ 491*) — CONVEYANCE OF MORTGAGED LAND—ASSUMPTION OF MORTGAGE—FORECLOSURE—DECREE.

Where defendant M., after assuming a mortgage on certain land, conveyed the land through L. to J. under a deed containing full covenants of warranty, a decree awarding judgment against M. and in favor of an assignee of

the mortgage for the whole amount of the mortgage debt, and also awarding judgment against him in favor of J. for the full amount of the incumbrance, without some provision that all amounts paid to the holder of the mortgage debt should be credited on the claim of J., was erroneous.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1434-1437; Dec. Dig. § 491.*]

Appeal from District Court, Winneshiek County; L. E. Fellows, Judge.

Suit in equity to foreclose a mortgage on real estate. The original mortgagor was one Steele. Steele conveyed to Coffeen, who assumed the mortgage. Coffeen conveyed to Mullaney, who also assumed the mortgage. Mullaney conveyed with full covenants of warranty to one Loomis. Loomis conveyed by special warranty deed "by, through, or under" him to Jensen, who is the present owner of the property. Loomis and Steele are not parties. Both Coffeen and Jensen filed separate cross-bills. The cross-bill of the defendant Coffeen was directed against his codefendant, Mullaney; that of the defendant Jensen was directed against the plaintiff and against his codefendant Mullaney. There was a decree for the plaintiff, foreclosing the mortgage and charging Mullaney to be personally liable. The decree also awarded relief to Coffeen and Jensen to the extent of holding the liability of Mullaney to be primary as to them. Mullaney appealed. Thereupon Jensen also appealed. Modified and affirmed.

Frank Sayre, of Decorah, for appellant Mullaney. E. W. Cutting, of Decorah, and E. A. Johnson, of Lisbon, for appellant Jensen. C. A. Boice and E. R. Acres, both of Decorah, for appellee. N. Willett, of Decorah, for defendant Coffeen.

EVANS, J. The amount of the mortgage in question was originally \$1,000. Its principal was reduced by payment to \$880. The mortgagee was the Winneshiek County Bank. The plaintiff acquired the note and mortgage by assignment and indorsement "without recourse." The validity of this assignment is assailed by defendant Jensen. We pass that question to a later stage of the discussion; and we will first consider the case as though the plaintiff were the original payee of the note and mortgage. In his cross-bill Coffeen asked that his liability be deemed secondary to that of Mullaney and to that of the mortgaged property. The defendant Jensen asked that the liability of the mortgaged property be deemed secondary to the personal liability both of Mullaney and Coffeen. He also asked relief, as already suggested, on the theory that the plaintiff was not a party in interest, and that the mortgage should be deemed paid.

It will be noticed that all of the defendants appear in the chain of title from Steele to Jensen. Coffeen, as grantee of Steele, assumed to pay the mortgage. Instead of pay-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing it, he conveyed to Mullaney, and Mullaney assumed to pay the mortgage. Loomis, as grantee of Mullaney, did not assume the mortgage. Neither did Jensen as grantee of Loomis. In its essential elements the case would be very simple, were it not that the parties to the appeal have filed seven abstracts and amendments and five briefs.

[1] As between Steele, the mortgagor, and Coffeen, his grantee, who assumed the mortgage, Coffeen became the principal debtor; and the liability of Steele to pay the debt became secondary. *Malanaphey v. Manufacturing Co.*, 125 Iowa, 719, 101 N. W. 640, 106 Am. St. Rep. 332, and cases there cited. The liability of the mortgaged property remained the same in the hands of said grantee as it did in the hands of the first mortgagor. In an equitable sense Coffeen became the mortgagor of his newly acquired property. The existence of the mortgage operated to the protection of Steele on his secondary liability. Upon the conveyance of the property by Coffeen to Mullaney and the assumption of the mortgage by Mullaney, then, as between Coffeen and Mullaney, the latter became the principal debtor, and the liability of Coffeen became secondary.

[2-4] The liability of the mortgaged property was not affected by either conveyance. By the conveyance to Mullaney and his assumption of the mortgage, Mullaney stepped into the shoes of Coffeen. The existence of the mortgage then operated to protect Coffeen upon his secondary liability in like manner as it operated to protect Steele upon his. If this foreclosure had been brought while the mortgaged property remained in Mullaney, there could be no question but that the payee of the note and mortgage could have taken personal judgment against Mullaney, and could have taken foreclosure and special execution against the property. It would be clear, also, that Coffeen, as between himself and Mullaney, would have been entitled to protection as against primary liability. This right was not lost by Mullaney's subsequent conveyance. Jensen holds his title under Mullaney. As against the mortgagee and Coffeen, his rights can rise no higher than Mullaney's. We find him entitled to equitable relief, but only as against Mullaney, his warrantor. Such equitable relief must be awarded to him, but without prejudice to the pre-existing equities of the mortgagee and Coffeen.

These general propositions will suffice as a basis for further discussion of the details of the case as presented by the appeals. The decree entered below awarded the plaintiff a foreclosure of the mortgage and a special execution against the property and a general execution against Mullaney. The decree also awarded judgment in favor of Jensen, with general execution against Mullaney, for the full amount of the incumbrance upon his property. It is made to appear that after

the decree was entered the plaintiff sold the mortgaged property under special execution and bid \$800 therefor and took a general execution against Mullaney for the balance of the debt, amounting to over \$300. The defendant Jensen also obtained a general execution under the decree for the full amount of the incumbrance, viz., \$1,091, and levied the same upon the property of Mullaney. Thereupon Mullaney appealed to this court and filed supersedeas bond. Thereupon Jensen appealed also. The plaintiff has moved to dismiss Jensen's appeal, on the ground that he waived his right to appeal by issuing execution.

[5] We may as well say here that we do not think that plaintiff is in a position to raise this question. The defendant Jensen may have been satisfied to abide the decree as entered and to proceed accordingly. But when Mullaney appealed he was threatened with the loss of the only relief which the decree gave him. That he should have determined then to appeal also is not inconsistent with his previous attitude. In the exercise of fair caution he may well have deemed it necessary, after the taking of Mullaney's appeal, that he should appeal, in order that he might obtain a trial de novo here upon the merits of his whole case as made by his cross-petition. He could properly assume the possibility that this court might find that he was not entitled to the relief actually granted in the lower court, and yet was entitled to other relief which had been refused. The question here raised, however, is rendered of no consequence because of the conclusions we reach upon the merits of the case.

We will now proceed to consider more in detail the questions presented by the appeals.

1. We turn first to the appeal of Mullaney. This presents two branches: (1) An appeal from the decree as entered in favor of the plaintiff; (2) an appeal from the decree as entered in favor of Jensen.

[6] We will give our first attention to the first branch. The plaintiff offered in evidence a certified copy of the record of the deed from Coffeen to Mullaney. This was objected to by Mullaney, on the ground that the evidence was secondary, and that the plaintiff had not sufficiently accounted for the original, under the provisions of section 4630 of the Code. The argument is that the plaintiff should have first testified that he did not have possession or control of the original, as a foundation for the offer of the record in lieu of the original. The trial being had on the equity side, the trial court made no rulings on the admission of evidence. Later Coffeen was examined as a witness in the case. He testified to the circumstances of the execution of the deed in question to Mullaney. The transaction was had with Mullaney personally. Coffeen also testified that it was the only transaction of the

kind that he had had with him, and that he executed only one deed. Coffeen thereupon offered in evidence the same certified copy of the record as had been offered by the plaintiff. This testimony was offered in support of Coffeen's cross-bill.

It is quite manifest that if the plaintiff failed in a showing of foundation there was sufficient foundation in the testimony of Coffeen for the introduction of the same certified copy. The original instrument was thereby traced into the hands of Mullaney himself. The original instrument was not one to which the plaintiff, or those under whom he claimed, were parties. On the face of the instrument Mullaney, and no one else, was entitled to possession of it. It is at least doubtful whether such a showing was not a sufficient foundation for the introduction of the record without the testimony of Coffeen. See *Bixby v. Carskaddon*, 55 Iowa, 537, 8 N. W. 354. Be that as it may, the certified record was properly introduced under the testimony of Coffeen.

[7] It is argued for appellant Mullaney at this point that the defects of plaintiff's case could not be supplied by the testimony of Coffeen on his cross-bill. But if the evidence was properly in the record on behalf of Coffeen it could not be eliminated, even though the plaintiff had failed to introduce it at all. Coffeen was entitled to its consideration, and was entitled to equitable relief because thereof. The right of plaintiff at this point was merely incidental to that of Coffeen, and was consonant with it. The evidence could not be in for Coffeen and out for the plaintiff. The relief sought by Coffeen was that Mullaney should be primarily liable for the debt to plaintiff. We find no merit, therefore, in this branch of the appeal.

2. In the second branch of Mullaney's appeal, he complains of the measure of damages assumed in behalf of Jensen. It will be noted from what has already been said that Jensen took title under special warranty deed from Loomis. Loomis took title under warranty deed from Mullaney, containing full covenants, including a covenant against incumbrances. The cross-petition of Jensen asked to recover from Mullaney upon his covenant against incumbrances, in case the court should find the mortgage to be a subsisting lien. The trial court allowed the recovery, and fixed the amount thereof at the amount of the mortgage incumbrance. It is urged for Mullaney that this was an erroneous measure of damage, and that the recovery should not have exceeded the amount of consideration received by Mullaney. No evidence was offered on that question by either party. It is therefore urged that only nominal damages could be allowed.

[8] It is the general rule in this state that where there is a failure of title recovery upon a covenant of warranty cannot exceed

the consideration received by the warrantor. *Mischke v. Baughn*, 52 Iowa, 528, 3 N. W. 543; *Royer v. Foster*, 62 Iowa, 321, 17 N. W. 516.

[9] It is also the general rule that where a covenant against incumbrances is breached, and the warrantee is compelled to pay an incumbrance in order to protect his title, the amount so paid is presumptively the measure of damages in such a case. *Newburn v. Lucas*, 126 Iowa, 88, 101 N. W. 730; *Knadler v. Sharp*, 36 Iowa, 234.

[10] Whether in such a case the warrantor may show that the amount claimed exceeds the amount of consideration received by him, we need not determine. The record herein contains no evidence or pleading to that effect. In the case before us Mullaney had assumed to pay the particular incumbrance. Later, by his conveyance to Loomis, he covenanted that he had paid it. All that we hold now is that in such a case as here made, in the absence of any claim that the amount of the incumbrance exceeded the amount of the consideration received, the trial court was justified in adopting the amount necessary to be paid in discharge of the incumbrance as the presumptive measure of damage.

Other objection is urged which goes to the form of the decree. We will consider this in a later paragraph and in another connection.

3. We turn now to the appeal of Jensen. It is the theory of Jensen that when Coffeen became primarily liable for the debt Steele and the mortgaged property became secondarily liable. This assumption runs through the entire argument. The further assumption runs through the argument that Coffeen continued at all times primarily liable. The argument is not sound at this point, as we have indicated by the general propositions stated at the outset of this opinion. The fact that Coffeen became primarily liable under his conveyance from Steele, and that Steele became thereby secondarily liable only, did not relieve the mortgaged property from its liability to any extent. Steele was not interested to relieve the mortgaged property from its liability. It was to his interest that the liability should remain for his protection. The same argument will apply in a consideration of the relative rights of Coffeen and Mullaney under the conveyance from the former to the latter.

[11] It is made to appear that when Coffeen became the purchaser of the property and assumed the mortgage the payee bank recognized him as a debtor. They received interest from him, and additional security. It is claimed for Jensen that the payee afterwards released to Coffeen this security, and that thereby all sureties were released, and that the mortgaged property was thereby released as being only secondarily liable and in the nature of a surety. This argu-

ment is not well taken. No one but Steele stood in the relation of surety to Coffeen. As between Coffeen and Mullaney, Coffeen was the surety. If he put up security and received it back again, surely Mullaney was in no position to complain. And this is so whether the security was released before or after Mullaney acquired the property. The liability of the mortgaged property was not in the nature of suretyship. It was as much bound to the payment of the debt in the hands of Mullaney as in the hands of Coffeen or Steele. If Mullaney could not complain of the relinquishment of securities to Coffeen, we see no door open to Jensen to complain, because he holds under Mullaney.

[12] 4. The plaintiff, Boice, is the assignee and indorsee of the original payee of the note and mortgage. It is urged by Jensen that he is not a holder in due course, and that his purchase of the note and mortgage was colorable only, and that it was invalid and ineffective to confer any title upon him. It is urged that the plaintiff, in obtaining such assignment, was acting in the interest of Coffeen, and that his pretended purchase was in fact a payment of the debt by Coffeen, and that by such payment the liability of all parties was discharged in fact, and that the plaintiff took a formal assignment for the purpose of defrauding the other defendants in the case.

It is practically conceded that plaintiff's alleged purchase of the note and mortgage was made for the protection of Coffeen. The payee so understood it and assented to it. Coffeen so understood it and signed an accommodation note to the plaintiff, which the plaintiff indorsed and used in the purchase of the note and mortgage in question. If this purchase operated as a fraud upon the other defendants; if it deprived them, or either of them, of any right which they would otherwise have had, then they are entitled to relief against such purchase.

Granting that the purchase was collusive in the sense that Coffeen and the payee and the plaintiff all agreed to it in advance, and for the purpose of enabling Coffeen to be protected as a debtor who was only secondarily liable, it yet remained for Jensen to show wherein such collusion operated as a fraud upon him. No right of his was violated. His liability was in no manner enlarged by the transfer of the cause of action. The original payee could lawfully have proceeded in precisely the same manner in which the plaintiff proceeded. Coffeen could have obtained the same equitable relief, as against the original payee, which he has obtained in this suit. Of course, if he had actually paid the debt without protecting his equities, he might have put himself at a disadvantage, and such disadvantage might have operated to the benefit of the other defendants. But he vigilantly chose not to pay the debt without guarding his equities. That he should seek to have the papers transferred to a friendly holder was

not in itself a fraud upon any one. He was entitled to the relief awarded to him as against any holder. The alleged scheme, therefore, of which Jensen complains renders it plain that the parties thereto intended a transfer of the paper, and not a satisfaction of it. As between them, therefore, it was not satisfied. As against Jensen, he had no right to demand its satisfaction in such manner. He is therefore in no position to deny the title of the plaintiff, or to assail the same as fraudulent.

[13] 5. As already indicated, the form of the transfer of the paper to the plaintiff was that the note was indorsed to him "without recourse," and a further formal written assignment of both note and mortgage was duly executed, acknowledged, and recorded.

It is urged by Jensen that such assignment carried to the plaintiff nothing but the note and mortgage, and that it carried to plaintiff no right to sue Mullaney on his undertaking. Jensen concedes the general rule that the transfer of such paper as is here involved carries with it presumptively all securities held therefor by the assignor. He urges, however, that such rule is not applicable in this case, because the note was indorsed "without recourse." Mullaney himself set up no such defense. It would seem, on the face of it, that no interest of Jensen could be subserved by sustaining such a proposition. The theory of his argument, however, is that, if the plaintiff did not acquire the right to recover from Mullaney, then the transfer to the plaintiff of the note and mortgage must have operated to release Mullaney as principal debtor, and that such release would further operate to release all those who were secondarily liable.

Neither the premise nor the argument can be sustained. That the indorsement to plaintiff should be "without recourse" served only to protect the indorser against liability for the debt. There is nothing contrary to be found in *Watson v. Chesire*, 18 Iowa, 206, 87 Am. Dec. 382, or *Leach v. Hill*, 106 Iowa, 171, 78 N. W. 667, which are relied upon by Jensen in support of his major premise at this point. The assumption of Mullaney was not an independent contract or cause of action in the sense urged. It was incidental to the particular mortgage debt, and was measured by it. It operated, of necessity, to the benefit of the holder of the mortgage, whoever it might be. The right to sue thereon followed the note and mortgage as a part of the security. And, even though we should hold otherwise as to the liability of Mullaney, it would not affect the validity of the mortgage or the liability of the mortgaged property in the hands of Jensen.

[14] It is also urged that Coffeen put up some collateral security which was released by the original payee at the time of the transfer to the plaintiff. The evidence shows

that the payee bank did hold some collateral of which no account was taken at the time of the transfer to the plaintiff. The collateral was still in the hands of the bank at the time of the trial. There was never any actual release or surrender to Coffeen. It seems to have been forgotten or overlooked at the time of the transfer. Necessarily the payee bank has no further interest in it. Its cashier, testifying as a witness, expressed his willingness to surrender it to Coffeen. Assuming, without holding, that these facts constituted a surrender of security, they furnish no basis of complaint to Jensen.

If plaintiff had successfully asserted a claim to such securities in this suit, it could not operate to the advantage of Jensen or Mullaney or the mortgaged property. The liability of such securities would be co-ordinate with that of Coffeen only, and would therefore be secondary to the liability of Mullaney and of the mortgaged property.

[16] 6. Lastly, we turn again to Mullaney's appeal. It is claimed for Mullaney that, inasmuch as Jensen had not discharged his incumbrance, he was entitled only to nominal damages, and that he was not entitled to recover substantial damages, based upon the amount of incumbrance, or the amount necessary to be paid in discharge thereof, until after he had paid the same. As a legal proposition, this statement of the rule is usually applied in an action at law. In a suit in equity, however, this rule is not controlling. *Duroe v. Stephens*, 101 Iowa, 358, 70 N. W. 610. This is so because a court of equity has larger powers in adapting the remedy to the particular conditions of the case. Provision may therefore be properly made in a decree for the awarding of damages, even in advance of actual payment, subject always to such proper conditions as shall protect the warrantor against double liability, or any greater liability than the amount which the warrantee must necessarily pay in discharge of the incumbrance.

[16] Complaint is made of the form of the decree, in that it holds Mullaney doubly liable for the amount of the mortgage, first to plaintiff, and, second, to Jensen. The decree is not free from ambiguity. It awarded to plaintiff (1) a special execution against the mortgaged property, (2) a general execution against Mullaney, and (3) a general execution against Coffeen. It also awarded to Jensen a judgment for the full amount of the incumbrance. It provided, however, that all collections from Mullaney, whether by execution or performance, should operate as a credit upon the judgment in favor of Jensen. It appears from the record of proceedings subsequent to the decree, and before the taking of appeal, that the mortgaged property was sold under special execution for \$800, and that a general execution was is-

sued for the balance in favor of the plaintiff against Mullaney, and that another general execution was issued in favor of Jensen against Mullaney for the full amount of the incumbrance, \$1,090, and that the same was levied upon Mullaney's property.

It is manifest that there ought to be some modification in the decree, or some control of the process issued thereunder. It is manifest that Jensen ought not to be permitted to collect from Mullaney in greater sum than the amount necessary to be paid to redeem his property from the incumbrance. If by judicial sale Jensen's property is relieved from all liability above the amount of the bid therefor, there is no reason why he should be permitted to recover more. Mullaney's liability for the balance is to the plaintiff and not to Jensen in such case.

In view of the complication which has arisen by the use of process subsequent to the decree, we do not feel warranted in undertaking to formulate a decree here, unless the parties can agree thereto. It will be ordered, however, that the decree be modified to this extent, that jurisdiction will be reserved to the district court to make such further orders, in the light of subsequent proceedings under the process of the court, as shall conform to the views herein expressed. This may be done either by a supplemental decree, or by proper order controlling the process to be issued under the decree. In all other respects the decree entered is affirmed.

TUKEY v. FOSTER et al.

(Supreme Court of Iowa. Dec. 11, 1912.)

1. APPEAL AND ERROR (§ 435*)—JURISDICTION—APPEARANCE.

Where, in a suit to foreclose a mortgage, judgment in rem only was entered, the mortgagor being served without the state, jurisdiction could not be conferred on the Supreme Court over a purchaser of a portion of the mortgaged property, who did not appeal by the attempted appearance of counsel in his behalf.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2184-2190; Dec. Dig. § 435.*]

2. APPEAL AND ERROR (§ 413*)—NOTICE OF APPEAL—PARTIES.

That a mortgagor was served outside the state in foreclosure proceedings did not obviate the necessity of serving a notice of appeal on him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2136-2139; Dec. Dig. § 413.*]

3. APPEAL AND ERROR (§ 415*)—MORTGAGE FORECLOSURE PROCEEDINGS—"COPARTIES PREJUDICIALLY AFFECTED"—NOTICE OF APPEAL—FAILURE TO SERVE.

Where a decree foreclosing a mortgage in rem only was rendered, and a reversal on appeal would continue the obligation without any equities giving rise to subrogation, the mortgagor and purchasers of the mortgaged premises were coparties, who would be prejudicially affected by any change in the decree; and hence

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

were entitled to notice of appeal, as provided by Code, § 4111.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2139; Dec. Dig. § 415.*]

4. COVENANTS (§ 130*) — CONVEYANCE OF MORTGAGED PREMISES — ASSUMPTION OF MORTGAGE—WARRANTY.

Where a purchaser of mortgaged premises conveyed a portion thereof by a warranty deed, he was liable over to his grantee in foreclosure proceedings for the amount the grantee was required to pay to redeem the portion so conveyed from the mortgage.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 245-253, 257; Dec. Dig. § 130.*]

Appeal from District Court, Harrison County; W. R. Green, Judge.

Action to foreclose a mortgage and to redeem from those claiming title under the foreclosure of a prior mortgage resulted in a decree as prayed. Several of the defendants appeal. Affirmed.

L. W. Fallon, of Logan, for appellants Reinholdt, Knapp, and Bennett. C. W. Kellogg, of Missouri Valley, for appellant Peterson. J. S. Dewell, of Missouri Valley, for appellant Smith. Roadifer & Arthur, of Logan, for appellee.

LADD, J. [1, 2] The mortgage sued on was executed by John W. Foster to the plaintiff February 25, 1888, both then being residents of Nebraska, to secure the payment of a promissory note of even date, due five years thereafter. This mortgage was by its terms and in fact subject to a mortgage covering the same land, executed by Foster to Richman & Son, and by that firm assigned to John Prall, bearing date December 17, 1887, which was subsequently foreclosed without making plaintiff a party to the proceedings, and sheriff's deed issued, in pursuance of the decree and sale, to Prall, October 30, 1890. The latter conveyed the land to W. A. Smith, under whom, through mesne conveyances, defendants Peterson, Bennett, Knapp, and Reinholdt owned separate parcels of the land at the time this action to foreclose the mortgage from Foster to plaintiff was commenced. Peterson, in a cross-petition, prayed that he might be allowed to recover from Smith on his warranty deed whatever amount he (Peterson) might have to pay in order to redeem his 40 acres from plaintiff's mortgage or decree foreclosing same. Decree of foreclosure was entered as prayed, and order entered that the purchaser at the sale might redeem from the sale under the former mortgage foreclosure by paying \$3,000, with interest, and also allowed Peterson to recover from Smith, as prayed. Foster accepted service of the original notice in Oklahoma, so that judgment in rem only was entered. Neither he nor Reinholdt appealed, and the attempted appearance of the latter by counsel did not confer jurisdiction on this court. *Ash v. Ash*, 90 Iowa,

229, 57 N. W. 862. Nor was any notice of the appeals of Bennett, Knapp, Peterson, or Smith served on either Foster or Reinholdt. Because of the omission to make these defendants parties to the appeal, appellee has moved that the several appeals be dismissed. Coparties, whose interests will be prejudicially affected by any change in the judgment or decree of the district court, must be served with notice of appeal. Section 4111, Code; *Oliver v. Perry*, 131 Iowa, 655, 109 N. W. 183; *Sullivan v. Sullivan*, 139 Iowa, 679, 117 N. W. 1086, 22 L. R. A. (N. S.) 691. That Foster was served outside the state did not obviate the necessity of serving a notice of appeal on him. *Dillavou v. Dillavou*, 130 Iowa, 405, 106 N. W. 949.

[3] Would a reversal of the decree be prejudicial to him or Reinholdt? The effect of the foreclosure of the mortgage will be the satisfaction of the indebtedness of Foster from the property hypothecated as security to plaintiff; whereas, if such foreclosure is denied, the promissory note will continue an obligation. This seems to be conceded by counsel for appellants; but they say that, even if the indebtedness were to be collected by foreclosure, the defendants could be subrogated to the claim of plaintiff against Foster on the note secured. All they acquired through mesne conveyances under the sheriff's deed by virtue of the sale under the decree foreclosing the first mortgage was the title of the mortgagor and the interest of the mortgagee, subject to the lien, if any, of the second mortgage; and this being so, the enforcement of that lien was merely exhausting security given by the mortgagor, subject to which defendants had acquired the land. Manifestly no equities could arise in these circumstances calling for the application of the doctrine of subrogation. There is no escape from the conclusion that a reversal might prove prejudicial to Foster. Equally conclusive is the record as to Reinholdt. Neither appealing, nor having been made a party to the appeal, the decree as to his land would be unaffected by a reversal as to the tracts acquired by Peterson, Knapp, and Bennett; and for this reason the entire judgment in that event, instead of his equitable portion, would be saddled against his land. Clearly enough, then, he would be prejudicially affected by a reversal of the decree as sought; and, in the absence of service of the notice of appeal on him and Foster, the decree cannot be reviewed. Counsel suggest that, even if this is so, it is of no concern of appellee. But it is of concern to this court; for it is without jurisdiction to pass on issues the decision of which will prejudicially affect the interest of coparties not served with notice of appeal. *Clayton v. Sievertsen*, 115 Iowa, 687, 87 N. W. 412.

[4] What has been said disposes of Smith's

appeal, also, in so far as it involves the decree of foreclosure. But he also challenges the correctness of that portion of the decree allowing Peterson to recover of him whatever he may be required to pay, in order to effect redemption of the parcel of land acquired through mesne conveyances. As no one else is interested in this, it is subject to review; but the only doubtful question argued was settled in *Foshay v. Shafer*, 116 Iowa, 302, 89 N. W. 1106, and *McClure v. Dee*, 115 Iowa, 546, 88 N. W. 1093, 91 Am. St. Rep. 181. See, also, *Bolce v. Coffeen*, 138 N. W. 857, decided at the present session.

It follows that the appeals must be and are dismissed, save in so far as that of Smith involves the issues on the cross-petition of Peterson, and with respect to these the decree is affirmed.

STATE v. THOMAS.

(Supreme Court of Iowa. Dec. 11, 1912.)

1. CRIMINAL LAW (§ 1153*)—APPEAL—REVIEW—DISCRETION—LEADING QUESTIONS.

In the absence of a manifest showing of abuse of discretion, reversal will not be granted because of the allowing of a leading question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. § 1153.*]

2. CRIMINAL LAW (§ 396*)—EVIDENCE—TESTIMONY ON FORMER TRIAL.

Part of the testimony given on a former trial by a witness, who could not be produced on the second trial, having been introduced by defendant, the state could introduce the remainder; it not being foreign to the matter called out by defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 861, 862; Dec. Dig. § 396.*]

3. SEDUCTION (§ 46*)—CORROBORATION—SUFFICIENCY.

It is sufficient corroboration of prosecutrix in seduction that at or about the time of the alleged offense defendant waited on her, was frequently in her company, attended her and was on the streets and at other places with her at night, and that when she was found to be pregnant, and her friends called on him with reference to her claim of his responsibility, he said he was not trying to get away, and that he would make it right, or aimed to make it right.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. § 46.*]

4. CRIMINAL LAW (§ 687*)—TRIAL—REOPENING CASE FOR FURTHER EVIDENCE.

Under Code, § 3719, providing that, at any time before the cause is finally submitted to the jury, either party may be permitted to give further testimony to correct an evident oversight or mistake, a witness may be permitted, after the state has commenced its closing argument, to testify that her testimony as to a date was a mistake.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1621, 1622, 1625; Dec. Dig. § 687.*]

5. CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

An instruction in seduction that "if there is evidence," outside of the testimony of prosecutrix, tending to show defendant was on intimate terms with her, and demeaned himself

as her lover or suitor, or "caressed" her, or manifested apparent affection for her, such facts are proper for consideration on the matter of corroboration will not be considered prejudicial because there was no evidence of caresses, even if it be not an allowable presumption that the jury followed the warning not to go beyond the facts established by the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3123, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.*]

Appeal from District Court, Page County; O. D. Wheeler, Judge.

The defendant was convicted upon a charge of seduction, and appeals. Affirmed.

T. S. Stevens, of Hamburg, and Parslow & Peters, of Clarinda, for appellant. Geo. Cosson, Atty. Gen., and John Fletcher, Asst. Atty. Gen., for the State.

WEAVER, J. The defendant was indicted upon the charge of seducing one Lizzie Baetge, and in support of his appeal for a reversal of the judgment entered against him makes the following points:

[1] 1. In the examination of the complaining witness, she had said, in substance that she would have yielded to plaintiff's solicitation for intercourse even if he had not promised to marry her, but in further testifying, and in response to a direct question by the county attorney, she was permitted, over defendant's objection, to say that she did not yield until there was a promise of marriage. Error is assigned on the ground that such testimony was elicited by leading interrogatories by the prosecutor. The inquiry, as shown by the record, was undoubtedly leading, but we do not think there was reversible error in allowing it. Very few cases will be found where judgment has been reversed upon the single ground that the trial court improperly permitted counsel to put leading questions to a witness. It is safe to say that this is never done except in a very clear case of abuse of discretion by the trial court. It often happens because of the embarrassment or reticence or dullness of a witness, and especially in this class of cases, that direct and leading questions are necessary in order to elicit the information which such witness is able or believed to be able to give. The trial court is in a position to observe and know the circumstances as we cannot, and the presumption of judicial fairness and proper discretion will prevail unless there is a manifest showing to the contrary. The record before us is not of that character, and the objection must be overruled. The rule here applied is too familiar to require a citation of authorities.

[2] 2. One Spring, who had testified in the case on a former hearing, could not be produced on the last trial below, and, on the call of the defendant, the shorthand reporter took the stand and read to the jury from his notes of a former trial a part of Spring's testimony. On the demand of the state, and

over defendant's objection, the reporter was allowed to read the remainder of this witness' examination to the jury, and to this exception is taken. We think the ruling was correct. The law applicable in such case is akin to that which permits a party against whom part of a conversation is given in evidence to have the remainder thereof admitted. No authority holding otherwise is called to our attention. We have examined the evidence of this witness as it is found in the record, and no material part of it seems to be so foreign to the matter called out by the defendant himself as to give him any just ground of complaint because of its introduction.

[3] 3. It is argued that there is no sufficient corroboration of the testimony of the complaining witness to justify submitting the question to the jury. While the corroboration is not overwhelming, we think it is sufficient. Corroboration in nearly all cases of this character is of necessity circumstantial only. In this case the witness is supported in her claim that, at or about the time of the alleged offense, defendant waited upon her, was frequently in her company, attended her, and was upon the streets and other places together with her at night. When the complaining witness was found to be pregnant, and her friends called upon the defendant with reference to her claim that he was the author of her shame, he said he was not trying to get away and would make it right, or that he "aimed to make it right." Corroboration of the character we have above described was held by this court sufficient to take the case to the jury in *State v. Smith*, 84 Iowa, 522, 51 N. W. 24; *State v. McClintic*, 73 Iowa, 663, 35 N. W. 696; *State v. Wells*, 48 Iowa, 672. It may also here be said that for reasons already stated, defendant's claim that upon the whole case the testimony is insufficient to sustain the verdict cannot be upheld.

[4] 4. The next point and the one on which counsel most vigorously contend for a reversal has reference to a somewhat singular episode attending the submission of the case. It appeared in evidence that the complaining witness gave birth to a child on August 29, 1910. According to her story, her pregnancy resulted from intercourse with defendant which occurred first on November 14, 1909, and was repeated at various times after that date. On the part of the defendant, it was claimed that on the evening of November 26, 1909, a date substantially nine months before the birth of her child, the complaining witness attended a "box social" at a local schoolhouse in company with another young man, one Brokaw, and that they went away from the schoolhouse together and alone. Their presence at the box social was testified to by several witnesses, as was the fact that about the same time Brokaw had accompanied the girl to one or more other entertainments. To fix the date of this so-

cial, the school-teacher, Mrs. Hobson, having charge of the affair, was called as a witness and testified that it occurred on November 26, 1909, and that she was able to fix the date with exactness because she deposited the proceeds of the social in a bank on the following day, and the entry of the deposit in her passbook was dated November 27, 1909. No other witness seemed to be able to speak of the true date with the same degree of certainty; and, as the candor of Mrs. Hobson was not open to question, counsel for the defense naturally made this item of evidence a leading topic of discussion in their address to the jury, and argued therefrom that the pregnancy of the complaining witness and birth of her child should be attributed to her association with Brokaw rather than the defendant. During the closing argument for the state, it was announced to the court that Mrs. Hobson desired leave to correct her testimony, and over the objection of the defendant she was permitted to do so. She then testified that the true date of the social was October 29th and not November 26th. She explained the confusion and mistake by saying that, while it was true that she took the money to the bank on the day following the social, she then took a certificate of deposit for it, and did not have it transferred to her open account and entered upon her passbook until the later date. In giving her first testimony she did not recall the incident of taking the certificate of deposit, and had been misled by the book entry. After receiving this testimony, the court reopened the case for argument on behalf of the defendant, and permitted his counsel to again address the jury. It is insisted that there was error in allowing such correction to be made. Counsel concede that the witness acted in perfect good faith, and that she was doubtless mistaken in her first statement of the date; but it is said that, the defense having been misled into laying great stress upon the supposed fact and arguing it to the jury as making it extremely probable that another person than defendant was the father of the child, the subsequent correction of the evidence must have had great, if not decisive, effect in influencing a verdict of guilty. There is no doubt counsel offered the original testimony in entire good faith, and they were justified in regarding the point so made as one having direct tendency to discredit the case of the state. It may well be believed, also, that its subsequent correction was a serious blow to the defense, and had more or less weight in the deliberations of the jury. But it must not be forgotten that the primary purpose of the trial was neither the acquittal nor the conviction of the defendant, but to ascertain with the requisite degree of certainty the truth of the matter charged in the indictment. To that end, as a general rule, all competent and material evidence was admissible. If the case had not reached a

stage in the procedure where the court was without authority to permit it to be made, the correction of a mistake upon a material matter of evidence is so manifestly in accord with the very purpose for which courts of justice have been created that its propriety ought not to be considered open to question. No man ought to be convicted upon false or mistaken testimony. It is equally true that no man on trial for crime should secure an acquittal upon testimony of that character where the mistake is discovered before the case is closed and submitted. That the court had jurisdiction and authority to allow the witness to be heard at any time before the issues were submitted to the jury there can be no doubt. It is expressly provided for by statute (Code, § 3719), and even in the absence of any statute we see no tenable ground for denying the existence of inherent power in the court to make such order in the furtherance of justice. *State v. Shean*, 32 Iowa, 88; *Darland v. Rosencrans*, 56 Iowa, 122, 8 N. W. 776; *Miller v. Insurance Co.*, 70 Iowa, 704, 29 N. W. 411.

[§] 5. The court, instructing the jury upon the subject of corroboration, said that evidence of mere opportunity to commit the offense was not sufficient to satisfy the statute, but added that, if there was evidence before the jury outside of the testimony of the prosecuting witness tending to show that defendant was on intimate terms with the girl and demeaned himself as her lover or suitor, or caressed her or manifested apparent affection for her, such facts were proper for consideration upon the matter of alleged corroboration. This is said to be erroneous because there is no evidence of any circumstances of the kind thus enumerated. Except, perhaps, as relates to the matter of caresses, there is sufficient to justify the instruction. It does appear from statements of other witnesses that defendant was waiting upon the complainant, kept company with her, and attended her to places of public amusement. He was seeking her society and favor. His attentions were, evidently sufficiently assiduous to attract the notice of their mutual acquaintances, and we are of the opinion that the jury would have been justified in finding that his conduct was such as ordinarily marks the lover or suitor. The use by the court of the word "caresses" was perhaps not well advised, but we think it involves no reversible error. The clause is introduced by the expression, "if there is evidence," and the jury is thereby warned that it is not at liberty to go beyond the facts established by the testimony. We may reasonably assume that the jury obeyed the court's instruction. Moreover, if it be denied that this is an allowable presumption, we are inclined to say that a single verbal error of that kind worked no conceivable prejudice to the defendant, and will not justify the ordering of a new trial. The case seems to have

been fairly tried, and we find no cause for reversal.

The judgment below is therefore affirmed.

BOERNER FRY CO. v. MUCCI.

(Supreme Court of Iowa. Dec. 12, 1912.)

1. SALES (§ 364*)—ACTION FOR PRICE—INSTRUCTIONS—ISSUES.

Where, in an action for goods sold and delivered, the buyer alleged a sale by sample, and that the goods were not according to sample, instructions submitting the case on the theory of a sale by sample and noncompliance therewith were sufficient as against the buyer's objection that they ignored the charge of false representation and of worthlessness of the goods, since, if the goods were not up to the sample, it was immaterial whether the buyer charged false representations or breach of warranty for noncompliance.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1065-1076; Dec. Dig. § 364.*]

2. TRIAL (§ 251*)—INVITED ERROR—INSTRUCTIONS.

Instructions which adopt the theory of a party in his testimony on the trial are proper, though such testimony is inconsistent with his pleadings; and such party, when defeated, may not complain thereof.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

3. TRIAL (§ 260*)—REQUESTS—INSTRUCTIONS COVERED BY THE CHARGE GIVEN.

It is not error to refuse requested instructions fairly included in the instructions given.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

4. TRIAL (§ 233*)—INSTRUCTIONS—ISSUES—PLEADINGS.

Where, in an action for goods sold and delivered, the buyer pleaded a sale by sample and of noncompliance therewith, and set up a counterclaim for consequential damages resting on the same breach, he could not complain of the court's failure in its instructions to separate the affirmative defense and the counterclaim.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 527-530; Dec. Dig. § 233.*]

5. SALES (§ 442*)—ACTIONS FOR PRICE—DEFENSES.

A buyer who, when sued for goods sold and delivered, relied on a sale by sample and noncompliance therewith, and who established that fact and his rescission therefor, defeated any recovery by the seller; and, in the absence of consequential damages from the seller's breach, the defeat of the seller's action measures the buyer's injury.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442.*]

6. TRIAL (§ 27*)—DISCRETION OF TRIAL COURT—EXPERIMENTS IN PRESENCE OF JURY.

The question of allowing experiments in the presence of the jury is within the discretion of the trial court.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 76; Dec. Dig. § 27.*]

7. TRIAL (§ 27*)—EXPERIMENTS IN PRESENCE OF JURY—DISCRETION OF COURT.

Where, in an action for the price of vanilla extract for use in the manufacture of ice cream, the buyer sought to show that the extract gave to the ice cream a soapy taste, and produced in court a jar of ice cream, the refusal of the court to permit the jury to taste it

was not erroneous, since the extract itself could have been used for such purpose.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 76; Dec. Dig. § 27.*]

8. SALES (§ 358*)—ACTIONS FOR PRICE—DEFENSES—EVIDENCE.

Where, in an action for the price of vanilla extract for use in the manufacture of ice cream, the buyer pleaded the worthlessness of the extract, the court could, within its discretion, permit the seller to show, in a general way, the extent of his sales of such extract to customers.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1049-1055; Dec. Dig. § 358.*]

Appeal from District Court, Pottawattamie County; O. D. Wheeler, Judge.

The plaintiff is a manufacturer of vanilla extract, residing at Iowa City. The defendant is a manufacturer and wholesale dealer in ice cream, residing at Council Bluffs. In October, 1909, the defendant gave a written order to plaintiff for the purchase of 52 gallons of special vanilla extract at \$3.50 per gallon, payable June 1, 1910. The order purported to be signed by the defendant and by W. C. Burge, a traveling salesman of the plaintiff. The goods having been delivered, the plaintiff brought this action upon the order. The defendant admitted the execution of the order, but averred affirmatively that the sale was made by sample, and that the goods were not according to sample, and that the defendant had therefore rejected the same and rescinded the contract, and so notified the plaintiff. Defendant also pleaded a counterclaim. Upon a trial to a jury, the plaintiff obtained a verdict for the full amount of its claim. Defendant appeals. **Affirmed.**

Flickinger Bros., of Council Bluffs, for appellant. W. H. Killpack, of Council Bluffs, for appellee.

EVANS, J. The alleged errors complained of by appellant are such that it becomes necessary that we set out his answer and counterclaim, upon which the case was tried. We quote the same, as follows, from his additional abstract filed here:

"April 14, 1911, defendant filed:

"Amended and Substituted Answer.

"Denying that plaintiff is a corporation; admits that on or about ——— he gave an order, in writing, to one W. C. Burge, plaintiff's agent and traveling salesman, for barrel of special vanilla extract, in words and figures and at the price set out in plaintiff's petition, and that the same was delivered to him. Further answering, defendant says that said barrel of extract was sold by sample, plaintiff furnishing a sample gallon can of the extract, and covenanting through their salesman, W. C. Burge, orally that the barrel of extract to be furnished under said order to be of the same kind and

quality as the sample furnished, when in truth and in fact the sample by which the sale of the barrel was made to him was entirely and radically different from the extract sold him in the barrel, that in the sample being the kind defendant purchased, and that in the barrel was a cheaper and different grade of goods entirely, and unfit for the use defendant purchased the same, namely, flavoring of his ice cream product. That plaintiff's agent, Burge, represented to your defendant orally that the goods sold by him were the same kind of goods as the sample furnished, when in truth and in fact the said barrel of extract was radically different, unlike the sample furnished, and was wholly unfit for the purpose for which it was purchased. That said representations were false and known by said salesman to be false, and defendant relied on said representations in making his order.

"Counterclaim.

"That defendant made use of a small part of this extract furnished in the barrel in the flavoring of his ice cream product, and the same resulted in his customers refusing the same and in shipping the same back. The extract gave the ice cream a flavoring of fancy soap. [Here follows a list of customers who returned the ice cream flavored with the extract from the barrel.] Which parties were old-time customers, and that defendant is damaged in his reputation in the manufacture of ice cream and his business, by reason of the use of said extract, in the sum of \$500. Defendant further states that he advised plaintiff of the fact that the barrel of extract could not be used, and that the same was subject to plaintiff's order, and that the same is now still held subject to his order, which notice was given as soon as he discovered the condition of said extract."

[1] The trial court submitted the case to the jury upon the theory that the defendant pleaded a sale by sample, and that the goods furnished were not equal to the sample. Appellant complains of the instructions as a whole in this respect and urges that they "misstate the pleadings and misstate the evidence," and that they lose sight of the charge of false misrepresentation and of worthlessness of the goods shipped. A perusal of the defendant's pleadings, which we have above set forth, is sufficient answer to this complaint. The only false representation charged in such pleading is that the goods were not according to sample. If they were not equal to sample, it was quite immaterial whether the defendant should have charged "false representation" or breach of warranty for a failure to comply with the sample. He did plead that because of such failure he rescinded the contract and tendered back the goods. The trial court submitted the case upon this theory. There was no

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

other theory presented by defendant's pleading.

[2] 2. The trial court instructed the jury that the burden was upon the defendants to prove the following propositions: "First. That it was agreed between Burge, the plaintiff's agent, at the time of the sale, and the defendant, Mucci, that the barrel of extract in question would be of the same kind and quality as that contained in a sample to be furnished by the plaintiff company. Second. That a sample, in accordance with such agreement, was furnished to defendant by the plaintiff company. Third. That the barrel of extract in question did not correspond with such sample so furnished in kind and quality, but was inferior thereto. Fourth. That the defendant, within a reasonable time, after said barrel was delivered to him, elected to rescind said contract and to return said goods, and notified the plaintiff company of his election so to do."

The appellant complains because this instruction assumes that the sample referred to was "to be furnished" subsequent to the date of the contract. The same assumption appears in other instructions of the court. The order sued on in this case was dated October 25, 1909. It provided for delivery April 1, 1910, and payment 60 days thereafter. Turning to defendant's answer, its natural construction would be that a sample was presented at the time of the sale. Appellant's counsel contends strenuously for this construction. Plaintiff's witness Burge testified that he had a sample vial of the extract at the time the order was taken. But this statement was vigorously denied by the defendant, Mucci, in his testimony, notwithstanding the form of his answer. Defendant also testified that a sample gallon was "to be sent" to him forthwith before the filling of the principal order, and that such sample gallon was sent to him later in November, and that he thereafter directed the shipment of the principal order.

We quote from his testimony, as it appears in his own abstract, as follows: "I ordered a barrel of vanilla extract along about December, 1909, through a Mr. Burge, who is here in the courtroom. He came to my place in Council Bluffs along in the fall and wanted to sell me a barrel. I told him to send a sample of the barrel, which he did later in the fall, about a month or six weeks before I made the order. I examined this sample. It was vanilla extract, made of beans, good vanilla, and we used it. Later, afterwards he came along, and I ordered from him a barrel, which was to be the same thing as the sample he had already sent. Burge told me that the vanilla would be a vanilla bean extract, either 'Vergonis' or 'Mexican,' and it would be just as good as the sample he had sold me. The barrel was to be the same as the sample. I was paying less money for it than what I had

bought before; but it was to be like the sample—good vanilla flavoring, which he charged me \$5 for. I got the sample some time in November—some time before I gave the order, maybe a month or four weeks—by express. Then Burge came back again and took my order for the barrel."

He also wrote the following letter to the plaintiff, which he introduced in evidence at the trial:

"Council Bluffs, Iowa, July 8, 1910.

"Boerner Fry Co., Iowa City, Iowa—Gentlemen: The vanilla we ordered from your agent was to be a straight vanilla extract. It is not like the sample sent me. Your agent gave us a guarantee, a pure vanilla, as good as the sample sent us."

The foregoing quotations rendered it very clear that the instructions of the trial court at the point complained of simply adopted the theory of the defendant in his testimony upon the trial. Even if such testimony was inconsistent with his pleadings, he is in no position to complain that the trial court submitted the case to the jury upon his own theory of the facts. It will be noted, also, that the allegations of the answer are not necessarily inconsistent with this theory.

[3] 3. The defendant presented to the trial court three request instructions, which were marked "Refused," and these are presented for our consideration. Although the particular instructions requested were marked "Refused," they were in fact incorporated, in their essential features, in the instructions given by the court upon its own motion. Appellant's argument contends for the propriety of the instruction; but he does not point out to us any essential part of any one of the same which is not fairly included in the instructions as given.

[4, 5] 4. Complaint is made that the trial court did not properly separate the allegations of the affirmative defense and those of the counterclaim, and that they were also mingled in the instructions, so that the jury could not distinguish between them. The instructions quite conformed to the defendant's pleading as he chose to make it. The affirmative defense went to plaintiff's whole case. If sustained, it would necessarily defeat any recovery on the part of plaintiff. In the absence of consequential damages, the defeat of the plaintiff's cause of action would measure the full amount of plaintiff's injury. But the counterclaim pleaded consequential damages, in that the attempted use of the defective material had destroyed other material of large value. But the counterclaim, nevertheless, necessarily rested upon the same breach of contract as the affirmative defense. The defendant prefers to call it "false representation," but this adds nothing to the case. It was sufficient for him to show that the goods did not correspond to sample, and that he rescinded because thereof. If it were essential to his defense that

he show false representations in a legal sense, then the case would fail for want of proof of scienter.

It is urged in argument that the counterclaim rested upon different allegations of falsity from those of the affirmative defense. We are unable to find any allegations in the counterclaim to warrant this contention; nor are we ready to concede that it could rest upon any different allegations, except as to the extent of damages claimed. The damages set forth in the counterclaim are claimed to be consequential to the breach pleaded in the affirmative defense.

[§, 7] 5. Complaint is made of rulings in the admission of evidence. The witness Day, one of the employés of the defendant, testified on behalf of defendant as follows: "We mixed up a batch of cream, 10 gallons, with 4 ounces of vanilla." Bucket of ice cream produced, marked 'Exhibit 13.' "The vanilla extract was taken out of this barrel, marked "Boerner Fry Co.," and is in that ice cream. It has the taste of vanilline or vanilla extract. Vanaline is used in imitation flavoring." At this time defendant asks that the jury be permitted to taste the ice cream in the jar, 'Exhibit 13.' Objected to as incompetent and immaterial and irrelevant. Court: 'I do not believe, gentlemen, I will permit the jury to indulge in this luxury at the present time.' Defendant excepts."

We have frequently held that the question of making experiments in the presence of the jury is one peculiarly within the discretion of the trial court. *Chicago Supply Co. v. Marne Telephone Co.*, 134 Iowa, 252, 111 N. W. 935. Several good reasons occur to us why the trial court might properly refuse the proffered testimony. The preliminary showing was deficient. The professed purpose of the experiment was to show that the extract in question would produce a "soapy taste" in the ice cream. It is quite manifest that, though the extract had been perfect, the ice cream might nevertheless disclose the "soapy taste." The court would then have to try the question as to what other ingredients were contained in the ice cream, and as to whether any of them, other than vanilla extract, was calculated to produce a "soapy taste." If the "soapy taste" was to be traced to the extract, the extract itself would have been a sufficient offer. The trial court was clearly within its discretion in the ruling complained of.

[8] The trial court also permitted the plaintiff to show, in a general way, the extent of its sales to customers of the kind of vanilla extract involved in the controversy. Complaint is made of this line of testimony. It was quite beside the real issues. Its only justification was that the defendant had redundantly pleaded the worthlessness of the article, and had introduced some evidence along the same line. The trial court

was within the proper exercise of its discretion in permitting the plaintiff to meet such evidence within reasonable limits. We think appellant has no ground for complaint here.

The foregoing covers the principal points argued. The record is badly chopped up with five abstracts and four arguments, and this has materially increased our labors in disposing of the case.

We find no reversible errors in the record, and the judgment below is accordingly affirmed.

LAKE v. DREDGE et al.

(Supreme Court of Iowa. Dec. 11, 1912.)

1. COMPROMISE AND SETTLEMENT (§ 18*) — FRAUD—RESCISSION—CONDITION PRECEDENT.

A contract of settlement of pending litigation, induced by the fraud of one of the parties thereto, is voidable only at the election of the other party, who can only avoid it by returning, or offering to return, the consideration received thereunder.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 75-82; Dec. Dig. § 18.*]

2. APPEAL AND ERROR (§ 781*)—SETTLEMENT PENDING APPEAL—EFFECT.

One appealing from a judgment setting aside a conveyance may not maintain the appeal where, pending the appeal, he settled the litigation, though he was induced by the fraud of the other party so to do, where he did not return, or offer to return, the money received, though he was unable to make a refund.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3122; Dec. Dig. § 781.*]

3. BANKRUPTCY (§ 252*)—POWER OF TRUSTEE IN BANKRUPTCY—APPROVAL BY REFEREE IN BANKRUPTCY.

Where the referee in bankruptcy, after due notice to creditors, approved a settlement of a litigation entered into by the trustee in bankruptcy, the settlement was binding.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 348, 465; Dec. Dig. § 252.*]

Appeal from District Court, Page County; A. B. Thornell, Judge.

The facts are stated in the opinion. Appeal dismissed.

Earl R. Ferguson and C. R. Barnes, both of Shenandoah, for appellants. Denver L. Wilson and Thos. W. Keenan, both of Shenandoah, for appellee.

SHERWIN, J. This is an action in equity, brought by the plaintiff as trustee of the estate of Louis E. Dredge, bankrupt, for the purpose of setting aside the conveyance of a lot to Clara J. Dredge, the wife of the bankrupt, as in fraud of creditors. The original case was tried before the district court of Page county, Judge Thornell presiding, at the regular May, 1911, term of said court, and was taken under advisement, with the agreement among counsel and the court that written arguments might be filed at counsels' convenience. A short time thereafter,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

but during the same term of court, the plaintiff filed a motion to reopen the case for the purpose of submitting additional evidence. No objection thereto was made by the defendants, and their counsel stipulated for the introduction of the desired exhibits, under certain objections made thereto in the stipulation, and that said evidence might be taken in the absence of the defendants or their counsel. The additional evidence, in the form of exhibits, was not offered during the term of court; but after Judge Thornell had returned to his home in Sidney, Fremont county, said evidence was sent to him with the stipulation to which we have referred, and was considered by him in his final determination of the case. Defendants' counsel were not present before the judge in Sidney; nor is there any showing that they were in any way advised that this additional evidence was first offered after the adjournment of the Page district court, and in vacation. A decree was finally entered, setting aside the transfer, because in fraud of creditors, and the title to the lot was found to be in the plaintiff trustee, subject, however, to a mortgage of \$400, which was on the property at the time Louis E. Dredge purchased it. The defendants appealed in the latter part of August, 1911. In April, 1912, after the abstract had been filed herein, as we understand the record, it was discovered that the exhibits, constituting the additional evidence that was received by Judge Thornell at Sidney, and the stipulation relating thereto, were not in the clerk's office in Page county, nor could they be found, and there was no record showing that they had ever been filed in said office. Thereupon plaintiff moved for leave to substitute copies of the lost papers, and by agreement of parties a hearing on the motion was had before Judge Thornell at Glenwood, Iowa, and after a hearing, in which defendants resisted the application, substitution was ordered, and from that order the defendants have also appealed.

On the 12th day of August, 1912, the plaintiff and the defendants agreed upon a settlement of this case, and the defendants executed a writing, under oath, in which they acknowledged the receipt of \$200 from the plaintiff, and stated that it was received in full settlement and satisfaction of their demands and contentions in the appeal of this case, and stipulated that the decree of the trial court should stand and be binding on all parties concerned, and that their appeal should be dismissed. Based upon this written acknowledgment and stipulation, the plaintiff thereafter filed a motion to dismiss the appeal in this case. This motion is resisted by the defendants on the principal ground that it was obtained by fraud and false representations. The motion was ordered submitted with the case, and we give it our first consideration, because, if sustained, it is an end of both appeals.

Defendants base their contention that the appeal should not be dismissed on the following grounds: First, because it was obtained by fraud and misrepresentations; and, second, because the motion is not a proper remedy—the same being resisted by the defendants. On the last of these two propositions, it is contended, in effect, that this court is without jurisdiction to determine whether the stipulation of settlement was obtained by fraud. It is said that our jurisdiction is appellate only, and because the resistance to the action puts in issue the bona fides of that transaction we have no power to pass upon the question.

[1] We do not deem it necessary to determine this question, because of another matter that is without dispute in the record. As we have heretofore said, the appellants received \$200 when they signed the stipulation of settlement. This sum they still retain and make no offer to return the same, although they say that they are willing to have it charged to them, if it be determined by this court that the judgment of the district court should be reversed and the property ordered returned to them. The defendants further say they are financially unable to tender its return in any other way, because they have used the money and have no means of replacing it. If it be conceded, for the purposes of this case, that the settlement in question was brought about by the fraud of the appellee, it is still true that the contract of settlement is voidable only, and that it can only be disaffirmed and avoided by returning, or offering to return, the consideration received thereunder. *Fitzgerald v. Paisley*, 119 N. W. 166; *Ross v. Eggers*, 148 Iowa, 306, 127 N. W. 196, and authorities cited therein.

[2] Appellants' claim at this point, that they should not be held to an offer to return the money received by them, because, if the judgment against them is reversed, the sum received may be credited on the sum that would have to be returned to them, is not sound. They have no right to rescind and at the same time keep the consideration for the settlement, unless it be found that they are entitled to a return of the property taken from them under the judgment of the district court. There are cases holding that an offer to return is not necessary where it appears that as much, at least, as the amount received would be due the party in any event; but this is not a case of that nature. Here, if the judgment should be affirmed, the plaintiff would be entitled to the property awarded him by the decree of the district court, and would lose the money paid as consideration for the settlement, and this because of defendants' admission that they are unable to refund. Neither law nor equity will give the defendants such an advantage.

[3] Appellants further contend that the plaintiff, as trustee, had no authority to

compromise and settle with the defendants. It is doubtful whether appellants would have any right to make this objection, were the fact as stated by them. The record, however, shows with sufficient certainty for the purposes of this motion that plaintiff's act has been fully approved by the referee in bankruptcy after due notice to creditors.

We reach the conclusion that the motion to dismiss the appeal should be sustained; and such is the order.

STATE v. YOUNG.

(Supreme Court of Iowa. Dec. 10, 1912.)

1. HOMICIDE (§ 340*)—TRIAL—INSTRUCTIONS.

An instruction that if accused alone, or with a codefendant, or either of them, the other being present, aiding, abetting, "or consenting thereto," killed deceased, accused was guilty, was not erroneous, because it authorized a conviction if accused merely stood by and took no part, where he admitted that he was the one who struck deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.*]

2. CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR.

An instruction that if accused went to the home of deceased with view to provoke a quarrel, and did provoke and bring on an affray by assaulting deceased, but subsequently, in good faith, withdrew from the difficulty and clearly signified to deceased that he had so withdrawn, his right of self-defense was restored to him, was not prejudicial to accused, although if deceased had reasonable ground for believing that accused had so withdrawn, it was not necessary that such withdrawal be clearly evinced, where the evidence showed that accused was the aggressor at all times.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3123, 3154-3157, 3159-3163, 3166; Dec. Dig. § 1172.*]

3. CRIMINAL LAW (§ 761*)—INSTRUCTIONS—SELF-DEFENSE—ASSUMPTION OF FACTS.

An instruction that if accused went to the home of deceased with a view to provoke a quarrel, and did provoke a quarrel by assaulting deceased, but subsequently withdrew from the combat, his right of self-defense was restored, was not erroneous as assuming as a fact that he was not originally acting in self-defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1853, 1754-1764, 1771; Dec. Dig. § 761.*]

4. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

The refusal of an instruction fully covered by those given was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

5. CRIMINAL LAW (§ 1160*)—APPEAL—REVIEW—QUESTIONS OF FACT.

Where the jury and trial court who saw and heard all of the witnesses believed those for the state, a verdict cannot be held wrong on appeal because of the character of the state's witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.*]

Appeal from District Court, Decatur County; T. L. Maxwell, Judge.

Defendant was convicted of manslaughter, and appeals. Affirmed.

O. W. Hoffman and Marion Woodard, both of Leon, for appellant. Geo. Cosson, Atty. Gen., and John Fletcher, Asst. Atty. Gen., for the State.

SHERWIN, J. The defendant, Thomas Young, was jointly indicted with Clarence Teale and others for the murder of Mrs. Bertha Zornes on the 7th day of December, 1910. A separate trial was had at his request, and he was convicted of manslaughter. Clarence Teale had already been tried on the same indictment and found guilty, and on his appeal the judgment against him was affirmed. The case is reported in 135 N. W. 408, and from the opinion in that case we quote the general statement as to the facts immediately preceding the death of Mrs. Zornes:

"Mrs. Zornes, with her husband, Levi Zornes, and their children lived on a farm adjoining the farm upon which this defendant lived, and Levi Zornes rented of this defendant two or three acres of his land. In the evening of the 7th day of December, the deceased, with her husband and three sons, Henry, 18 years of age, Willie, 13 years old, and Elzie, 12 years old, were at the family home on the farm. A daughter, 11 years of age, was at the time away from home. The Zornes had for supper that evening Thomas and Henry Phillips, their nephews, and both grown men, and Roy Young, a man 29 years old, who is a brother of Thomas and Ed Young, who, with one Hugh Teale, were jointly indicted with this defendant, Clarence Teale, for this murder. The Zornes family and their supper guests remained at the house during the evening, and about 9 o'clock, or a little thereafter, this defendant, Clarence Teale, his brother, Hugh Teale, a man 22 years old, and Thomas and Ed Young, adults, called at the Zornes home and were admitted to the house, and they, with the other guests and the family, except Mrs. Zornes, were in the same room; it being a southeast room of the house, with an outside door opening therefrom on the east, and a door in the southwest corner thereof opening into the southwest room of the house, which room had an outside door opening to the south. A room directly north of the living room, where these people were, was occupied as a bedroom, and when this defendant and his friends arrived at the house Mrs. Zornes was lying on one of the beds therein; but the door between the two rooms was open. The door between the two south rooms was in the southwest corner of the east room, and it was hung so that it swung to the east and south. At the time in question a shotgun belonging to one of the Zornes boys stood behind this door, which was then open.

Shortly after the Teales and Thomas and Ed Young entered the house, a controversy arose between this defendant and Mrs. Zornes as to who was the author of a report current in the neighborhood that a young woman had been cooking for the defendant; he accusing Mrs. Zornes of being its author, and she denying it. Intemperate language was applied to each other, which finally resulted in a request from both Mr. and Mrs. Zornes that the defendant and his party leave the house. Up to this point there is no substantial difference between the witnesses as to what took place in the house, but beyond this there is a marked conflict in the testimony. The witnesses for the state say that when Mr. Zornes requested them to leave Thomas Young (the defendant in this case) said that Zornes could not put him out, and immediately struck Zornes on the head with a heavy bicycle pump and knocked him down; that Young knocked Zornes down in the same way a second time, and then threw the pump at Mrs. Zornes, striking her in the face and knocking her down. On the other hand, defendant's witnesses claim that Mrs. Zornes told her husband to get the shotgun and shoot the offending persons, and that while he was attempting to do so Thomas Young knocked Zornes down with the bicycle pump; that Mrs. Zornes then assumed a threatening attitude toward Thomas Young; and that he then knocked her down with the pump. But the question as to who was the physical aggressor in the house is not of controlling importance in this. For present purposes it is enough to say that after being knocked down twice Mr. Zornes, together with Henry Zornes and the Phillips men, were driven from the house through the southwest room, and that the conflict was renewed on the outside with Zornes and his son Henry. Mrs. Zornes and the two younger boys remained in the house until the others had gone outside; whereupon she, with these two boys, left the house by the east door, and started in a northwesterly direction therefrom."

The record on this present appeal further shows that the defendant, Thomas Young, followed the Zornes men out of the house, and was actually engaged in a conflict with them on the outside. According to his own testimony, while he was defending himself against the attacks of some of the men, he struck Mrs. Zornes on the head with a club. He claims, however, that Mrs. Zornes assaulted him in the dark outside of the house, and that when he struck her he did not know who it was that he struck. The evidence on the part of the state tends to show that Mrs. Zornes was, in fact, struck and killed by Clarence Teale, and that this defendant, Thomas Young, aided and abetted said Teale.

[1] In the thirteenth and eighteenth instructions the court said: "If you find

* * * that * * * the defendant, Tom Young, alone, or that the defendant, Tom Young, and his codefendant, Clarence Teale, or either of them, the other present aiding, abetting, or consenting thereto, did unlawfully kill Bertha Zornes"—defendant would be guilty. Complaint is made of the use in these instructions of the words "consenting thereto," on the ground that the jury was told, in effect, that defendant might be convicted, if he was standing idly by and took no part in the trouble. Merely consenting to the commission of a crime would not, under all circumstances, be punishable as a crime, no matter how great the moral turpitude involved. But there was no error in the instruction here, because the defendant admitted that he was the one who struck the deceased at the time and place in question.

[2, 3] The twenty-third instruction was as follows: "If, however, you find from the evidence that the defendant, Tom Young, went to the home of Bertha Zornes on the night of December 7, 1910, with a view to provoke a quarrel or bring on an affray or difficulty with her, or that after going to the home of the said Bertha Zornes at said time the defendant, Tom Young, without provocation or legal excuse, provoked or brought on an affray by assaulting the said Bertha Zornes or members of her family, and you further find that thereafter the defendant, Tom Young, in good faith withdrew from such affray or difficulty, and clearly signified to the said Bertha Zornes that he had so withdrawn and abandoned further combat, then thereafter his legal right of self-defense would be restored to him, and he might exercise the same under the rules given elsewhere in these instructions." Appellant says that he was not required to "clearly signify" to Bertha Zornes that he had, in good faith, withdrawn from the conflict, and that the instruction was therefore erroneous. In *State v. Dillon*, 74 Iowa, 653, 38 N. W. 525, this court disapproved a similar instruction and held that, where a defendant actually and in good faith withdrew from the combat, he ceases to be a wrongdoer, if his adversary has reasonable ground for believing that he has so withdrawn, even though such withdrawal is not clearly evinced. But this defendant was not prejudiced by the instruction complained of, because a careful examination of the record before us shows that this defendant, at all times during this difficulty, was an aggressor, and, so far as the record shows, never at any time indicated even to Bertha Zornes that he had withdrawn, or that he intended to withdraw, from the combat. There is clearly no merit in appellant's contention that the instruction under consideration assumed that defendant, Thomas Young, made the assault in the house, and was not acting in self-defense.

[4, 5] Complaint is made because the court

refused to give an offered instruction touching the weight to be given the evidence of certain witnesses whom the defendant had attempted to impeach. There was no error in the refusal to give this instruction, for the reason that the court with sufficient fullness covered the question in the instructions given. Appellant's contention that the evidence is insufficient to warrant this conviction cannot be sustained. There is much evidence supporting the state's case, and, unless we wholly disregard the testimony of many witnesses, the conviction must be upheld. The jury and the trial court saw and heard all of the witnesses, and we cannot, and should not, say in this case that the verdict is wrong because of the character of the state's witnesses. The judgment is therefore affirmed.

Affirmed.

CURTIS v. ARMAGAST et al.

(Supreme Court of Iowa. Dec. 13, 1912.)

1. LIMITATION OF ACTIONS (§ 169*)—BAR—EFFECT—REMEDIES IN OTHER STATES.

A suit by an heir to cancel a conveyance of land in Iowa, executed by the deceased ancestor while residing in a sister state, to a grantee also residing there, is not barred merely because the remedy available in the sister state is barred by the statutes thereof, notwithstanding Code, § 3452, providing that, where a cause of action has been barred by the laws of any country where defendant has previously resided, such bar is effective in Iowa.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 656; Dec. Dig. § 169.*]

2. LIMITATION OF ACTIONS (§ 169*)—BAR—EFFECT—REMEDIES IN OTHER STATES.

Where a deed of land in Iowa was executed in a sister state while the grantor and grantee resided therein, and the grantee procured the deed by fraud, a cause of action for the cancellation of the deed on the ground of the fraud arose in Iowa, within Code, § 3452, providing that, where a cause of action has been barred by the laws of any country where defendant has resided, the bar is effective in Iowa, except as to causes of action arising in Iowa, and an action not barred under the statutes of Iowa was not barred merely because an action was barred in the sister state.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 655; Dec. Dig. § 169.*]

3. CANCELLATION OF INSTRUMENTS (§ 34*)—PROCEEDINGS—LACHES.

A suit to cancel a deed on the ground of fraud in procuring its execution is not barred by laches, where defendant has in no manner been misled to his injury by the delay in instituting the suit and no equities have intervened.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 49-54; Dec. Dig. § 34.*]

4. EVIDENCE (§ 121*)—DECLARATIONS OF GRANTOR—ADMISSIBILITY—RES GESTÆ.

Where an heir sues to set aside a deed of his ancestor on the ground of the fraud of the grantee, the declarations of the ancestor at the time and immediately before the execution of the deed are competent as a part of the res

gestæ, and as bearing on the grantor's mental condition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303, 307-338, 1117, 1119; Dec. Dig. § 121.*]

5. DEEDS (§ 203*)—CANCELLATION—FRAUD—EVIDENCE—ADMISSIBILITY.

The court, in a suit by an heir to set aside his ancestor's voluntary deed on the ground of the fraud of the grantee, may inquire into the circumstances attending the transaction, including all matters of fact having any legitimate tendency to show the capacity of the ancestor and the influence leading him to make the gift.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 602, 604-611; Dec. Dig. § 203.*]

6. DEEDS (§ 196*)—CANCELLATION—ACTUAL FRAUD—BURDEN OF PROOF.

One suing to cancel a deed on the ground of the actual fraud of the grantee has the burden of proving the fraud.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-593; Dec. Dig. § 196.*]

7. FRAUD (§ 6*)—"CONSTRUCTIVE FRAUD"—NATURE.

"Constructive fraud" does not necessarily negative integrity of purpose, and may be an act which the law declares fraudulent without inquiry into its motives, and is such fraud as the law infers from the relationship of the parties or the circumstances surrounding them, regardless of any actual dishonesty of purpose.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 7; Dec. Dig. § 6.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1470-1471.]

8. CONTRACTS (§ 99*)—CONSTRUCTIVE FRAUD—FIDUCIARY RELATIONS—CONFIDENTIAL RELATIONS.

A contract between persons, one of whom occupies a fiduciary or confidential relation to the other, is presumptively fraudulent, and the former, obtaining a benefit by the contract, has the burden to rebut the presumption by affirmative proof that the contract was fairly procured without undue influence or other circumstances impeaching its fairness, and this rule is particularly applicable where one of the parties to the relation has obtained a dominating influence over the other.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 448-453, 1197-1199; Dec. Dig. § 99.*]

9. CONTRACTS (§ 99*)—CONSTRUCTIVE FRAUD—FIDUCIARY RELATIONS—CONFIDENTIAL RELATIONS.

The conferring of benefits by a parent on a child is presumptively valid, and the presumption of constructive fraud arises only where the child is the dominant person in the relationship, and the parent has become dependent on him and trusting his interests to his advice.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 448-453, 1197-1199; Dec. Dig. § 99.*]

10. DEEDS (§ 196*)—CONVEYANCES—FRAUD—CONFIDENTIAL RELATIONS.

Though no presumption of fraud or undue influence arises from the mere fact that a parent prefers one child and leaves another unprovided for, yet where it appears that the parent was at the time wholly dependent on the preferred child for advice, residing in his home and placing in his hands the management of all his business, the taking by such child of a conveyance of substantially all the parent's estate without consideration and without any writing binding him to support the parent for life is presumptively fraudulent, and the child

to uphold the conveyance must rebut the presumption.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-593; Dec. Dig. § 196.*]

11. DEEDS (§ 196*)—CONVEYANCES—FRAUD—CONFIDENTIAL RELATIONS.

A son had for nearly 20 years been intrusted by his mother with the management of her real estate, comprising practically all her property. She had also placed in his hands a part of her small savings for investment. She lived with him and implicitly trusted him. She executed without consideration a deed of her real estate without any agreement on his part to maintain her. *Held*, that the conveyance was presumptively fraudulent, and the son and those claiming under him must show absolute freedom of intelligent action on the part of the mother.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-593; Dec. Dig. § 196.*]

12. TRUSTS (§ 44*)—RESULTING TRUSTS—EVIDENCE—SUFFICIENCY.

Evidence *held* to show that a mother obtaining the legal title to land acquired the title free from any trust in favor of a son.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. § 44.*]

13. DEEDS (§ 210*)—VALIDITY—CONSIDERATION.

Evidence *held* to show that a deed executed by a mother to her son was not made in payment of services rendered by the son and contributions made for her support.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 635-636; Dec. Dig. § 210.*]

14. DEEDS (§ 196*)—VALIDITY—CONFIDENTIAL RELATIONS—EVIDENCE.

In a suit to set aside a deed executed by a mother to a son, evidence *held* not to overcome the presumption that the conveyance was fraudulent arising from the confidential relation of the parties.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-593; Dec. Dig. § 196.*]

Evans and Sherwin, JJ., dissenting.

Appeal from District Court, Mills County; A. B. Thornell, Judge.

Action in equity to set aside and cancel certain conveyances and to quiet title to land. There was a decree in the district court in favor of plaintiff, and the defendants Armagast appeal. Affirmed.

D. E. Whitfield, of Malvern, and Smyth, Smith & Schall, of Omaha, Neb., for appellants. John Y. Stone, of Glenwood, and Sullivan & Rait, of Omaha, Neb., for appellee.

WEAVER, J. The facts leading up to the controversy involve a family history covering a period of more than half a century, with a multitude of details concerning some of which there is no material dispute and very many others about which there is a radical divergence in the testimony. It is manifestly impracticable to embody in this opinion all the facts having more or less bearing upon the merits of such a controversy, and the best we can hope to do is to select so much of the material contained in the record as will fairly illustrate the nature of the claims we have to consider.

James D. Andrews, now deceased, over

whose dealings with his mother, Margaret Andrews, this litigation has arisen, was born in the year 1837. The family, consisting of the father, mother, son (James D.), and two daughters (Jessie and Margaret), settled in Iowa City in the year 1850. Another son, Peter, appears to have left home and gone to California early in life. He died intestate and without lineal heirs before the transactions now in dispute. The father was intemperate and thriftless, and except for a small amount of money belonging to the mother they were without substantial means. A family relative was engaged in mercantile business at the little town of Solon near Iowa City, and in 1855 took the son, then about 18 years old, into his service as a clerk or assistant. Shortly thereafter, at the request of James D., his mother arranged to purchase the business. The amount paid appears to have been between \$1,000 and \$2,000. A large part of the purchase price was represented by money which the seller was owing Mrs. Andrews, and the remainder was obtained by her from friends in Scotland. The entire purchase price was less than \$2,000. It is the theory of the appellant that this purchase was made for James D., and that he became the owner of the business; but, according to the claim of the appellee, it was a joint adventure of the mother and son, she furnishing all the capital and giving her personal assistance in carrying on the enterprise. However this may be, it does appear that the family then removed to Solon, and there they conducted the store until 1857, when it was exchanged with one Pratt for about 1,340 acres of land in Mills county of this state. For some reason the title was taken temporarily in the name of James D. Andrews, but within a few days thereafter he conveyed 1,140 acres of the land to his mother. The other 200 acres he conveyed to her at a later date; the deed reciting that it was intended to supply the place of one which had been made years before and lost without being recorded. After the store was disposed of, James D. attended school for a time, then entered the employment of an express company, continuing therein until about the year 1871. Later he entered the customs service of the United States, in which he remained during the remainder of his life. His employment in these occupations removed him from Iowa, and he became a resident of New York. While still a young man at home, he insured his life for the benefit of his mother and kept the policy in force until his death. During his career he is shown to have been liberal with his mother and his sisters, who continued their home in Iowa, and from time to time contributed to their support and comfort. The sister Jessie never married. Margaret married, became widowed, and both lived in the same home with their mother.

Margaret died in 1906 leaving the plaintiff herein her only surviving heir. James D. married in New York about the year 1871, after which his contributions to the support of the family in Iowa were for a time lessened or suspended; but it is due to him to say that he was at all times disposed to be helpful. About this time also the brother, Peter Andrews, to whom reference has been made, rendered some assistance to the family. In 1889 James D., being then a widower with two children, invited his mother and two sisters to make their home with him in New York. They did so and remained in his family until his death on May 19, 1900. Their place in the family was not that of entire financial dependence. Before leaving Iowa City they had enjoyed some income from the rental of rooms and had earned money to some extent in sewing and other employments. From such sources, from savings made from the contributions received from her sons, and doubtless to some extent from the tenants of the Mills county lands, the mother had accumulated a fund of \$4,000. In the New York home they performed most of the domestic service and assisted in various ways in bearing the burden of family cares. It is true, however, that the son and brother was regarded by them as their principal stay and support, and his success in life and his business capacity, as well as the kindness he had exhibited toward them all from his boyhood, justified this confidence and reliance on their part.

Returning now for a time to a consideration of the land in controversy, the record indicates that until about 1874 it remained uncultivated and unproductive of any substantial income. It does not appear who, if any one, looked after the property, or who paid the taxes thereon during this period. About the year mentioned Mrs. Andrews began to lease the premises to tenants. A few years later James D., visiting his mother, learning that some difference had arisen between her and a tenant, went to Mills county, and, having made some sort of a settlement of the matter, he thenceforth, with her consent, kept the business in charge and himself, through agents of his selection, attended to the leasing and the collecting of rents. According to the testimony of the sister Jessie, he thereafter began and continued sending his mother \$50 per month. Whether this was intended as in the nature of a payment or accounting by him for the rents and profits of the land does not appear except as a matter of inference, which may or may not be justified from the circumstances we have mentioned. Some seven years after taking up her home with James D. in New York, Mrs. Andrews, then being about 83 years of age, made to him a warranty deed of the Iowa land for the expressed "consideration of one dollar and other valuable considerations." The circumstances under which this

conveyance was made are involved in considerable obscurity. According to the story told by Jessie Andrews, her mother showed her the instrument before it was signed, saying it was something which James D. wished her to execute to give him the power to act for her about the land, but that she expressed a reluctance to do so, saying she wanted to keep it in her own power as long as she lived, expressing at the same time her willingness that James should do business for her and her confidence that he would do what was right. The witness says that she herself saw that the paper was a deed of some kind, but did not understand that the effect of it would be to convey the property away. Some three days later Mrs. Andrews, accompanied by James and Jessie, went to the office of a notary, where the deed was executed and acknowledged. Testimony was admitted on the trial of statements by and conversations with Mrs. Andrews after this date to the effect that she had been led to sign the conveyance supposing it to be a power of attorney, and that she did not understand the true nature of the business until after the death of James. This statement is also rebutted by proof of other alleged statements by her of a very different import, indicating her full understanding of the conveyance she had made and expressing the utmost confidence in her son.

In the year 1898 James D. Andrews became a helpless paralytic, in which condition he lived about two years. While physically prostrate and speechless, it is shown that he retained his mental faculties, and by the use of various devices those who ministered to his wants learned to communicate with him. A few months before he died he executed a conveyance of the land to his son and daughter, his only children. This deed was not delivered, and on March 26, 1900, before his death in May of that year, he made and delivered to his daughter, Mary S. Armagast, as sole grantee, a warranty deed of the land for the expressed consideration of one dollar. His mother survived him until the year 1903, when she died intestate at the age of 90 years. The only heirs of said deceased are her daughter, Jessie L. Andrews, her granddaughter, Belle A. Curtis, only child of Margaret Andrews Gray, deceased, and her grandchildren James D. Andrews, Jr., and Mary S. Armagast, only children of James D. Andrews, deceased. On April 5, 1909, Belle A. Curtis, as heir to one-third of the estate left by her said grandmother, began this action, alleging that the conveyance from Margaret Andrews to her son was obtained by fraud, and the title so procured was held by the grantee in trust for the grantor, and asking that a decree be entered accordingly, that said conveyance be canceled, and plaintiff adjudged the owner of a one-third part of the land, and that an accounting be ordered of rents

and profits received by the defendants. To this action Mary S. Armagast appears and defends. She denies all allegations of fraud in the procurement of the deed. She alleges that Margaret Andrews not only understood the nature and effect of the conveyance, but that with her full knowledge and consent James D. Andrews, relying upon said deed, took full charge and control of the property claiming both in public and private the full beneficial ownership thereof and taking and using as his own all the rents and income derived therefrom. She further alleges that Margaret Gray, through whom plaintiff claims, knew of the conveyance to James D. Andrews and acquiesced therein without protest, and also knew and acquiesced in the conveyance by James D. Andrews to his daughter, who, as she knew, relying upon said conveyance, assumed full control of said premises as their rightful owner. Defendant further pleads that plaintiff's right of action, if any she ever had, has been barred by the statute of limitations of the state of New York and the statutes of Iowa. For a further answer she alleges that plaintiff has been guilty of laches in bringing her action, and is therefore estopped to demand or receive equitable relief. The issues were tried and submitted to the court, which entered a decree for plaintiff substantially as prayed.

[1] I. We have first to inquire whether the plea of the statute of limitations is available to the defendant. The deed sought to be avoided or held to create a trust in favor of Margaret Andrews and her heirs was made in New York. The grantee was then a resident of that state and continued to reside there until his death in 1900. The grantor also resided there from a date prior to the deed until her death in 1903. The appellants have at all times been residents there. The plaintiff has never been a resident of New York, but her mother, through whom she traces her claim of title, did reside there from 1889 until her death in 1903. The property in controversy is real estate wholly within the jurisdiction of the state of Iowa. It is alleged in answer that under the statutes of New York "an action brought to procure a judgment other than for a sum of money on the ground of fraud, in a case formerly cognizable by the court of chancery," must be brought within six years after the cause of action accrued, but such cause shall not be deemed to have accrued until discovery by the plaintiff or by the person under whom he claims of the facts constituting the fraud. Proof of the New York statute does not appear to have been made upon the trial, but for the purposes of this appeal we may assume it to be as stated. The point urged by appellant is that, while it would not be competent for the courts of New York to entertain an action in rem for the recovery of the land in Iowa, it could take cognizance of an equita-

ble action against one of its own citizens and compel him to do equity, although the subject-matter of the controversy be lands within the jurisdiction of another state. Relying on this principle, counsel argue that as plaintiff or those through whom she claims might have brought an action in New York against James D. Andrews in his lifetime or against Mary S. Armagast after she took the title, and upon proof of the alleged fraud could have had a decree compelling a reconveyance or restitution of the title, but failed to do so for more than six years, the bar of that statute may be pleaded to an action thereafter begun in this state.

Turning to our own statute we find a provision somewhat similar to the one alleged to prevail in New York but making the period five years. It is also provided that actions for the recovery of real property may be brought within ten years. Code, § 3447. But the time during which a defendant is a nonresident of this state shall not be included in computing any of these limitations. Code, § 3451. It is evident therefore that the statute of New York furnishes no defense to an action brought in this state, unless the case comes within the scope of that other provision which reads as follows: "When a cause of action has been fully barred by the laws of any country where defendant has previously resided such bar is effective in this state except as to causes of action arising here." Code, § 3452. That this statute is not applicable to the case before us will become clear upon a little reflection. It is conceded that the courts of New York are without jurisdiction to grant any relief in the premises except such as involves the personal liability or personal conduct of one found in that jurisdiction. For instance, they would entertain an action for the recovery of a personal judgment for damages although the controversy more or less involves the title to lands in another state. Having the parties within their jurisdiction, they could also to a certain extent compel them to do equity by executing proper conveyances or releases affecting titles to such lands and enforce their decrees so far as practicable by injunction or other appropriate writ; but such remedy is neither full nor complete. No court can properly assume to deal directly with land situate in a foreign jurisdiction. It cannot quiet title thereto, or establish or extinguish liens thereon, or restore possession, or cancel records, or afford many other forms of relief which affect primarily the rem. The prayer for relief in this case is that the deeds from Margaret Andrews to James D. Andrews and from James D. Andrews to Mary S. Armagast be canceled and expunged from the records of Mills county, that plaintiff be adjudged the owner of an undivided one-third of the property free from the lien of a mortgage placed upon

the land by Mary S. Armagast, and for an accounting of rents and profits. She also asks a writ of possession in her favor and for general equitable relief.

That the New York courts would not and could not enforce a remedy of this nature would seem to need neither argument nor citation of authorities, but see *Gillett v. Hill*, 32 Iowa, 220; *Blackman v. Wright*, 96 Iowa, 541, 65 N. W. 843; *Carpenter v. Strange*, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 640; *Davis v. Headley*, 22 N. J. Eq. 115; *Short v. Galway*, 83 Ky. 501, 4 Am. St. Rep. 168; *Clarke v. Clarke*, 178 U. S. 186, 20 Sup. Ct. 873, 44 L. Ed. 1028; *Clarke's Appeal*, 70 Conn. 195, 39 Atl. 155; *Insurance Co. v. Bank*, 68 Ill. 348; *Fryer v. Myers* (Tex.) 13 S. W. 1025; *Wilson v. Braden*, 48 W. Va. 196, 36 S. E. 367; *Pritchard v. Henderson*, 2 Pennewill (Del.) 553, 47 Atl. 376; *Courtney v. Henry*, 114 Ill. App. 635. That plaintiff could have gone into the courts of New York, and, having personal service upon the defendant, there procured a decree or judgment requiring a reconveyance of the land—a remedy operating solely in personam—is no answer to the suggestion. Having a right of action in this state, the only jurisdiction in which full and final relief could be procured, she was not bound to pursue the less effective remedy. And permitting such remedy to become barred by the statute of a foreign state could not bar her right to resort to another and more efficient remedy in this jurisdiction and against which our own statute has interposed no bar. The precedents cited by counsel for the most part go no farther than to recognize the authority of a foreign court having jurisdiction of the persons to enter judgment operating in personam; but none appear to hold that failure to seek such relief affects in any manner the right of the injured party to seek that relief which can be fully administered only by the tribunals of the state where the property is situated.

[2] There is yet another reason why Code, § 3452, is inapplicable. The terms of that section expressly exclude from its operation causes arising in this state. Now, while the alleged wrong for which the prayer for relief is predicated was committed in New York, the cause of action for the relief here demanded did not arise there. A cause of action cannot be said to "arise" in any jurisdiction whose courts cannot take cognizance of the complaint and administer appropriate relief. No matter where the alleged wrongful act was done, if its harmful effects operate solely upon property and rights and titles subject to the exclusive jurisdiction and control of the courts of Iowa, then here, and not elsewhere, is the place where such cause of action arises. The defense of the statute of limitations cannot therefore be sustained.

[3] Nor do we find any merit in the plea

of laches. The appellants, so far as appears, have in no manner been misled to their injury by the delay in bringing suit, and no equities have intervened which require the court to hold the plaintiff estopped from pursuing the remedy she has chosen. *Hemp-hill v. Holford*, 88 Mich. 293, 50 N. W. 300.

[4] II. Counsel argue with much force against the admissibility of statements alleged to have been made by Margaret Andrews and immediately before the execution of the conveyance by her to her son. We are of the opinion, however, that in the case presented by the record before us the testimony, or at least some of it, is competent. Ordinarily, of course, a deed or other writing cannot be impeached by proof of declarations of the grantor, but it is here the theory of the plaintiff's case that the instrument was obtained by fraud, actual or constructive; that by reason of the grantor's advanced age, her weakened powers, her want of business knowledge and experience, and her peculiar trust and confidence in her son, she was deceived as to the real nature of the transaction and did not comprehend or understand that she was parting with the beneficial ownership of the land. Upon an issue of that nature we incline to the view that evidence of her language and conduct with respect to that transaction at the time and immediately before it was consummated is competent both as *res gestæ* and as bearing upon her mental condition. This has often been held where the validity of a will or of an alleged gift is under consideration. *Vannest v. Murphy*, 135 Iowa, 123, 112 N. W. 236; *Johnson v. Johnson*, 134 Iowa, 33, 111 N. W. 430; *Kah's Estate*, 136 Iowa, 119, 113 N. W. 563; *Manatt v. Scott*, 106 Iowa, 203, 76 N. W. 717, 68 Am. St. Rep. 293; *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Mulock v. Mulock*, 31 N. J. Eq. 594; *Sanderlin v. Sanderlin*, 24 Ga. 583; *Garnsey v. Mundy*, 24 N. J. Eq. 243.

[5] The record in this case tends to support the conclusion that the deed to James D. Andrews was made without any present valuable consideration and, if valid, was in the nature of a gift or ante mortem disposition of the principal part of the grantor's estate, and we see no reason why the court may not inquire into all the circumstances attending the transaction, including all matters of fact having any legitimate tendency to show the capacity of the giver and the influences, if any, leading her to make the gift. Upon the trial both parties availed themselves of the benefit of this rule to a very liberal extent, with the result that more or less of incompetent hearsay may be found in the record; but, when all this has been eliminated, considerable remains which may properly be considered.

[6] III. Decision of the merits of this controversy involves the consideration of two questions: First, was the deed to James D.

Andrews obtained by actual fraud? And, second, if not obtained by express or actual fraud, was it obtained by constructive fraud? Or, stated otherwise, was it obtained under circumstances which cast upon the grantee and those claiming under him the burden of an affirmative showing of entire good faith on his part and free, voluntary, and intelligent action on the part of the grantor?

Were the appeal to be disposed of upon answer to the first inquiry, we should have no serious hesitation in reversing the decision of the trial court. The burden of showing actual fraud is upon the party pleading it, and in our judgment plaintiff fails to make such a case. It is unnecessary for us to recite the evidence upon this issue. It is enough to say that no witness speaking of his or her own knowledge testifies to any misrepresentation, falsehood, or deceit on the part of the son to persuade or mislead his mother into a conveyance of her land, and the court should not and cannot enter into the realm of conjectures to fasten that stigma upon him.

[7] The other question is more difficult of solution. What is called "constructive fraud" does not necessarily negative integrity of purpose. *Lampman v. Lampman*, 118 Iowa, 140, 91 N. W. 1042. It has been defined as "an act which the law declares fraudulent without inquiry into its motive." *McBroom v. Rives*, 1 Stew. (Ala.) 72. Or "such contracts or acts as, though not originating in any actual evil design or contrivance to perpetrate a fraud, yet by their tendency to deceive or mislead, or to violate confidence, are prohibited by law." *Bouvier*, Law Dict. It has also been said to be such fraud as "the law infers from the relationship of the parties or the circumstances by which they are surrounded, regardless of any actual dishonesty of purpose." 14 Am. & Eng. Ency. of Law (2d Ed.) 21.

[8] The use of the phrase "constructive fraud" has frequently been severely criticised by the courts and lawwriters as being misleading and unscientific, but it has become so fixed in the literature and terminology of the law that any attempt to substitute a more fitting name to the thing to which it is applied would result in confusion. The necessity of considering this phase of the law arises most frequently in controversies which grow out of dealings between persons when one occupies fiduciary or confidential relations to the other. As between such persons, a contract by which the one having the advantage of position profits at the expense of the other will be held presumptively fraudulent and voidable, and the burden is placed upon him who claims the benefits thereof to rebut that presumption by an affirmative showing that such contract was fairly procured without undue influence or other circumstance tending to impeach its fairness. Though strictly of differing sig-

nification, the phrases "fiduciary relations" and "confidential relations" are ordinarily used as convertible terms and have reference to any relationship of blood, business, friendship, or association in which the parties repose special trust and confidence in each other and are in a position to have and exercise, or do have and exercise, influence over each other. The rule or presumption to which we have referred is more particularly applicable where one of the parties to such relation has by reason of his stronger character, greater ability, and wider experience, or by his hold upon the affection, trust, and confidence of the other, obtained a dominating influence over him. The relationship of principal and agent, attorney and client, parent and child, guardian and ward, is frequently mentioned as illustrative examples, but fiduciary or confidential relations may exist under a great variety of circumstances. Mr. Pomeroy states the general proposition as follows: "The doctrine arises from the very conception and existence of a fiduciary relation. While equity does not deny the possibility of valid transactions between the parties, yet because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity and casts upon that party the burden of proving affirmatively its compliance with equitable requisites and of thereby overcoming the presumption." 2 Pomeroy, Eq. (3d Ed.) § 956. In *Rodes v. Bate*, L. R. 1 Ch. 252, *Turner*, L. J., says: "I take it to be a well-established principle of this court that persons standing in confidential relation toward others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. * * * The jurisdiction is founded on the principle of correcting abuses of confidence, and I shall have no hesitation in saying that it ought to be applied whatever the nature of the confidence reposed or the relationship of the parties between whom it has subsisted. I take the principle to be one of universal application." After quoting this precedent, Mr. Pomeroy speaks of all those instances in which the two parties in confidential relation "consciously and intentionally deal and negotiate with each other, each knowingly taking a part in the transaction, and there results from their dealing some conveyance, contract, or gift. To such cases the principle literally and directly applies. The transaction is not necessarily voidable, it may be valid; but a presumption of its invalidity arises which can only be overcome, if at all, by clear evidence of good faith, of full knowledge,

and of independent consent and action." 3, Pom. Eq. (3d Ed.) § 957.

[9] While the relation of parent and child is nearly always given as an illustration of confidential relations, it does not follow that all transactions between persons occupying that relation are presumptively invalid. Indeed, it may be said that as a general rule the conferring of benefits by a parent upon a child is presumptively valid. The unfavorable presumption arises only where the child, by reason of its youth and inexperience or other special circumstances, is to some degree under the dominion, control or paramount influence of the parent, or where the child is the dominant personage in that relationship and the parent has become the dependent one, trusting herself and her interests to his advice and guidance. *Mulock v. Mulock*, 31 N. J. Eq. 594; *Parker v. Parker* (N. J.) 5 Atl. 586; *White v. Daly* (N. J. Ch.) 58 Atl. 929; *Fitch v. Reiser*, 79 Iowa, 34, 44 N. W. 214; *Nobles v. Hutton*, 7 Cal. App. 14, 93 Pac. 289; *Gibson v. Ham-mang*, 63 Neb. 349, 88 N. W. 500; *Doyle v. Welch*, 100 Wis. 24, 75 N. W. 400; *Cole v. Getzinger*, 96 Wis. 559, 71 N. W. 75; *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997.

[10] This is in no manner inconsistent with the undoubted right of parents to dispose of their estate as they may think best. They may by deed or will dispose of it to persons outside of the family, or may give it all to one or more of their children and ignore the equal and perhaps superior rights of others. No presumption of fraud or undue influence arises from the mere fact that a mother exercises such right, or that she has preferred one child and left another unprovided for; but when, in addition to such a conveyance, under such circumstances it appears that she was at the time wholly dependent upon the grantee for advice, residing in his home and placing in his hands the management and control of all her business interests, and in all things manifesting her implicit confidence and trust in him, the taking of a conveyance of substantially all her estate without consideration and without any writing binding him to support her through life, there is a presumption of undue influence which equity will require the beneficiary of the transaction to rebut before his claim of title thus secured can be sustained against an attack by the grantor or by these who succeed to her rights. The rule is well stated in *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997, as follows: "With reference to transactions between parent and child, the law presumes that the influence of the parent over the child during the tender years of infancy is so controlling that it regards transfers from child to the parent on arriving at majority or immediately thereafter as having been made under the influence of overweening confidence. As the child matures and acquires experience and independence, the presumption

weakens and at last ceases. As the parent, however, advances in years, the condition of dependence may be reversed by the hand of time. If life draws to a close with a failing intelligence and enfeebled frame, the parent naturally looks to a son or daughter for advice and protection. The parent becomes the child with the same dependence, overweening confidence, and implicit acquiescence which had made the other in infancy the willing instrument of the other's desires. *Highberger v. Stiffler*, 21 Md. 338, 83 Am. Dec. 593; *Martin v. Martin*, 1 Heisk. 653; *Comstock v. Comstock*, 57 Barb. (N. Y.) 453; *Whelan v. Whelan*, 3 Cow. (N. Y.) 557. If, under such circumstances, a son obtains a conveyance from a parent, the court will not permit it to stand unless he establishes by abundant proof that the contract was free and fair and made with the utmost good faith."

In *Fitch v. Reiser*, 79 Iowa, 34, this court had to consider a conveyance by an old man to his daughter, upon whom he largely depended for advice and in whom he placed great reliance. After considering the evidence, we said: "We are not prepared to say that the evidence shows an absolute want of mental capacity to make a testamentary disposition of property. But in consideration of the extreme mental weakness of the deceased at the time the deed was executed, and as the property in controversy embraced substantially all of his estate, and as the deed was without consideration, and in view of the relation of trust and confidence between the parties to the conveyance, we think the learned district judge was right in entering a decree annulling the deed. The control of the defendant over the deceased appears to have been absolute. Under such circumstances, it was incumbent upon the defendant to show that the conveyance was made voluntarily and without the exercise of any influence on her part to procure the same."

In *Reese v. Shutte*, 133 Iowa, 682, 108 N. W. 526, the court, speaking by Sherwin, J., said: "It is well settled that transactions of this kind between an aged and infirm parent who has reposed confidence and trust in the child will be closely scanned by the court, and that the burden is on the grantee to show the bona fides thereof." The same rule is approved in *Spargur v. Hall*, 62 Iowa, 500, 17 N. W. 743. In *Davis v. Dean*, 66 Wis. 109, 26 N. W. 740, where a deed from mother to son was in question, the court, after discussing the evidence of mental competency, uses this language: "The transaction, if upheld, practically disinherits her daughter and her other heirs. Assuming her mental competency, this strange and unnatural disposition of her property of itself strongly suggests the existence of improper influence upon her mind." Of the burden of proof the court further says: "The grantee has failed to satisfy the requirements of the rule, and the

presumption of injustice, fraud, and wrong stand against the conveyances, which he must remove before the court is authorized to say that they are valid." The same rule is applied in *Barnard v. Gantz*, 140 N. Y. 249, 35 N. E. 430. Dealing with a conveyance from an aged mother to a son to whose hands she had intrusted all her business and upon whom she largely relied in all her affairs, the Illinois court has said: "A gift made by a parent to a child on account of the affection of the former for the latter, even where it is made at the solicitation of the child, is not the object of suspicion, and there is no presumption against its validity unless the relation between them is something more than the ordinary relation between parent and child. Where, however, the natural positions of the parties become reversed—where the parent defers to, trusts in, and yields to the child, when there exists between them what in law is termed a fiduciary relation in which the parent is dominated by the child, and where the child prepares or causes to be prepared and executed an instrument conveying to him property of the parent as a gift or upon a grossly inadequate consideration—the presumption arises that the transfer was obtained through undue influence, and the burden rests upon him to show that the conveyance was the result of full and free deliberation on the part of the parent. This is not peculiar to transactions where the parties are parent and child, but is the law in any case where a fiduciary relationship exists, where the conveyance is from the dependent to the dominant party, and where the donee or grantee prepares or procures the preparation and execution of the deed or other instrument; and the rule is applied under such circumstances wherever that relation exists, no matter whether the parties are related by blood or not." *Rickman v. Meier*, 213 Ill. 507, 72 N. E. 1121.

The rule of the cited cases has been very frequently affirmed and prevails in practically all the states. For example, in addition to the cases hereinbefore cited, see *Coffey v. Sullivan*, 63 N. J. Eq. 296, 49 Atl. 520; *Hensan v. Cooksey*, 237 Ill. 620, 86 N. E. 1107, 127 Am. St. Rep. 345; *Soberanes v. Soberanes*, 97 Cal. 145, 31 Pac. 910; *Brummond v. Krause*, 8 N. D. 573, 80 N. W. 686; *Kerr on Fraud & Mistake*, 150-152; *Thorn v. Thorn*, 51 Mich. 167, 16 N. W. 324; *Parker v. Parker* (N. J.) 5 Atl. 586; *Bowe v. Bowe*, 42 Mich. 195, 3 N. W. 843; *Slack v. Rees*, 66 N. J. Eq. 447, 59 Atl. 466, 69 L. R. A. 393; *Hall v. Otterson*, 52 N. J. Eq. 528, 28 Atl. 907; *White v. Daly* (N. J. Ch.) 58 Atl. 929; *Post v. Hagan*, 71 N. J. Eq. 234, 65 Atl. 1026, 124 Am. St. Rep. 997; *Hattie v. Potter*, 54 Wash. 170, 102 Pac. 1023; *Swanstrom v. Day*, 46 Misc. Rep. 311, 93 N. Y. Supp. 192; *Couch v. Couch*, 148 Ala. 332, 42 South. 624; *Highberger v. Stiffler*, 21 Md. 338, 83 Am. Dec. 593.

[11] Under the rule upheld by these precedents,

we think there is no room for doubt that the burden in the case before us is upon the defendants to affirmatively show that the deed under which they claim was obtained without undue influence and was the free, voluntary, intelligent, and unrestrained act of the grantor. James D. Andrews, the grantee, was not merely the son of the grantor. He was her agent, and for nearly 20 years had been intrusted by her with the management of these lands comprising practically all her worldly estate. She had also placed in his hands a part of her small savings for investment. She was a member of his family living under the same roof with him. She unquestionably regarded him with great affection and put implicit trust and confidence in his ability and his purpose to do whatever was right with respect to her property and property interests. The deed which she made to him was absolute in form and vested him with title to all the land—her entire estate—without reservation or power of recall. So far as appears, there was no agreement or promise on his part to provide her maintenance or home for the remainder of her life. Doubtless he expected to do so; but, legally speaking, there was no reason why he might not on the next day decline to render her further support. What is still more to the point, no thought appears to have been taken of the possibility that his mother might outlive him, as in fact she did, and that in such case the land which had been her safe security against want would pass wholly to his heirs without the slightest obligation on their part to keep or care for her except by way of charity. And all this was given without valuable consideration to the son occupying the closest confidential and fiduciary relation to her and to the exclusion of her two surviving daughters.

Among all the very many cases in which a child has been held to the burden of negating presumptive fraud or inference of undue influence in the procurement of an advantageous contract from a parent, it will be difficult to select any in which the showing is stronger than the one here presented. As we have already shown, it is not necessary to the application of this rule that the court should find or presume an actual intent upon the part of the son to wrong his mother. Indeed, if there were any such actual intent, the fraud would be express and not constructive. He had so long had a free hand in managing the land that he doubtless felt something akin to a sense of proprietorship. The evidence tends to show that in conversation with strangers and third persons he was in the habit of speaking of the property as his own. His mother and sisters were evidently women of simple tastes and habits, living in his family, and we may presume that he expected to continue to provide for them. Under such circumstances, it would perhaps be natural and evince no moral turpitude on

his part if he secured from her the title to the land so long as he was willing to give to her and his sisters the one substantial benefit they could derive from its ownership—a home and the supply of their reasonable personal wants. But the end which the principle which we have been discussing is intended to promote may not be defeated by a showing of good intentions. The rule has not been formulated to punish active or premeditated wrong, but to close the door against resulting wrong. In the very nature of the situation, where the parties occupy such intimate relations, it is rarely, if ever, possible to prove the extent to which the weaker or dependent party's action has been influenced by that relationship; hence the burden is properly placed upon him who has profited thereby to make an affirmative showing, not merely of good faith on his part, but of absolute freedom of intelligent action on the part of the grantor. The New Jersey court goes to the extent of holding that every conveyance from an aged and dependent parent to a child occupying a relation of trust and confidence will be invalidated unless in making it the parent has had the benefit of competent independent advice on the subject. *Slack v. Rees*, 66 N. J. Eq. 447, 59 Atl. 466, 69 L. R. A. 393; *Post v. Hagan*, 71 N. J. Eq. 234, 65 Atl. 1026, 124 Am. St. Rep. 997; *Baur v. Cron*, 71 N. J. Eq. 743, 66 Atl. 585; *Hall v. Otterson*, 52 N. J. Eq. 528, 28 Atl. 907. See, to the same effect, *Rodes v. Bate*, L. R. 1. Ch. 252, and 3 Pom. Eq. (3d Ed.) § 957. In *Post v. Hagan*, *supra*, the court defines "proper independent advice" to mean that "the donor had the benefit of conferring fully and privately upon the subject of his intended gift with a person who was not only competent to inform him correctly as to its legal effect, but who was furthermore so disassociated from the interests of the donee as to be in a position to advise with the donor impartially and confidentially as to the consequences to himself of his proposed benefaction." It is probably not necessary for us in this case to go to the full extent of the precedents here cited, but it may be said they discuss and defend the principle so announced with logical force and clearness.

[12] With evident appreciation of the rule we have here affirmed as to the burden of proof in support of a conveyance in the nature of a gift to one who holds a confidential or fiduciary relation to the grantor, counsel for appellants argue that in the case at bar James D. Andrews was at all times the beneficial owner of the land, that the mother held the legal title as a trustee for his benefit, and that in conveying it to him she was only vesting him with that which was already equitably his own. But this claim is without basis in the record. Indeed, even if the burden upon this question were upon the appellee—and of course it is not—we

should have to say that the evidence shows beyond all reasonable question that at the date of the deed to her son Margaret Andrews was both in law and in equity the absolute owner of this property. So far as appears, James D. Andrews never invested a dollar in its purchase. The stock of goods exchanged for it was paid for with the mother's money, and, while for some reason not shown the title to the land was at first conveyed to the son, he almost immediately conveyed it to his mother, in whom it rested for nearly 40 years. It also affirmatively appears that some 15 years or more after the title had been vested in Margaret Andrews a judgment creditor of James D. Andrews, claiming that the latter was in fact the owner of the land, or of some of it, undertook to subject it to the payment of his claim. Thereupon the mother brought an action in equity to enjoin the sale. Upon trial of the cause both mother and son testified by deposition in support of her title, and she was found to be the true owner and the sale permanently enjoined. So far as the record shows, James D. Andrews never exercised or claimed any right in or authority over the land until about the year 1873, when, as we have before mentioned, in visiting the family in Iowa he went to Mills county and settled some dispute which had arisen between his mother and her tenant or agent, after which, apparently at her request, he continued in the management of the property. Except statements alleged to have been made by him to persons outside of the family, there is no evidence that he ever denied the absolute character of his mother's title or claimed ownership in himself. In short, all the competent testimony having any bearing on that question tends to support the presumption of ownership attaching to the legal title which for more than a generation confessedly stood in Mrs. Andrews.

[13] Again, it is strenuously argued that this conveyance was but the natural and proper recognition by Mrs. Andrews of the indebtedness of herself and family to James for his services and contributions in the matter of their support. It is no disparagement of the filial loyalty and kindness of James D. Andrews, which all admit, to say that this argument is somewhat overwrought. He was undoubtedly a helpful son. He was active, industrious, and within the range of his earning capacity, was from boyhood liberal in assisting the family. But they were not wholly dependent upon him or upon his ability to make such contributions from his salary, which was necessarily restricted. The only witness in position to speak from personal knowledge estimates the help furnished by him up to the time of his marriage in 1871 at from \$150 to \$200 per year. After his marriage his own increased cost of living appears to have interrupted his contributions to his mother until about 1878, when

he took over the management of the land, from which date to 1889, when she went to live with him, his remittances were about \$50 per month. Thereafter his assistance to her and his sisters was limited to the supply of their needs as members of his family, for which service on his part there was at least partial return of value in their services to him and his family. Computing his contributions at the highest estimate from 1857, when he was a boy of 20 years until 1889, when the family was reunited in his New York home, their aggregate will not exceed \$10,000. On the other hand, the rental value of the land from 1878 to 1896 is shown to have been \$2,000 to \$2,500 per year, or an aggregate for 18 years of \$36,000 to \$47,000, and, if we add thereto the estimate for the four years between the date of the deed and the death of James D. Andrews, the aggregate will be increased to \$44,000 to \$49,000. How much of this was actually realized above expense and taxes we do not know, for no account has been exhibited; but it is shown that the entire tract is fair average Iowa land, all under cultivation, and that for a period of seven years Mrs. Armagast has secured therefrom an aggregate net income of \$22,555.82. It is therefore reasonably clear that, conceding to James D. Andrews full and deserved credit for the care manifested and the expense incurred by him on account of his mother and sisters, he had received in return financial benefits far in excess of the benefits conferred by him.

[14] We have left therefore only to consider whether the evidence offered in support of the defense sufficiently sustains the burden of proof as to the validity of the deed. This in our judgment must be answered in the negative. We may further add that such must be our conclusion even if we eliminate from the record all the testimony offered by the plaintiff concerning the alleged declarations of Mrs. Andrews. It does sufficiently appear that the deed was prepared and executed at the request or by the procurement of James D. Andrews, that it was wholly without valuable consideration, that it conveyed to him with no power of revocation on her part the mother's entire estate without any provision or binding legal obligation of the son for her support or for the support of her daughters, and that at the date of such transfer the son receiving such valuable gift was her agent and the sole manager of her property interests. It further appears, as we have already shown, that at this time she was 83 years of age, with at most no more than an average mental strength, which is normal in persons of her years, that she was an inmate of the son's family and depended upon him with entire faith and confidence in his judgment and fidelity. The defendants made no affirmative showing whatever of the conversations or negotiations be-

tween mother and son or of the promises or undertakings, if any, on his part. They do offer evidence of witnesses to the execution of the deed that the grantor appeared to be of sound mind and to have an intelligent conception of what she was doing, but this falls far short of negating the presumption or inference of undue influence. In a large majority of the cases hereinbefore cited the mental capacity of the grantor to make a valid conveyance is conceded, but it is universally held that this showing does not of itself fill the requirements of the rule. It is at this point that there is a marked failure of proof which requires an affirmance of the decree of the district court.

The importance of the interests involved in the controversy and of the rules of law upon which the decision depends is our only apology for the unusual length to which we have pursued its discussion.

The appeal cannot be sustained, and the decree below is affirmed.

EVANS, J. (dissenting). I am unable to concur in the majority opinion. After a careful study of the record herein, I cannot avoid the conclusion that the merits of the case are with the defendant. The majority opinion is made to rest upon the theory of constructive fraud, in that fiduciary relations existed between the parties to the deed at the time of its execution, and that the burden is upon the defendant to support the deed with extrinsic evidence and to rebut thereby a legal presumption of fraud. As to the general proposition of law thus set forth in the majority opinion, I make no controversy. As applied to this record, however, such proposition is perhaps overemphasized in the majority opinion, and I am inclined to make that criticism upon it. The deed under consideration is an old one. Both parties to it were dead many years before this action was brought. Direct evidence from the parties themselves is therefore impossible. The extrinsic evidence upon which the defendant must necessarily rely is largely circumstantial and is to be found in the history of the family, extending over a period of 40 years. This history is succinctly stated, in the main, in the majority opinion. I will avoid repetition as much as possible, but I cannot wholly avoid it without rendering my own statement unduly disconnected.

In 1857 the Andrews family consisted of the parents and the son, James D., and the daughters, Jessie and Margaret. The father was a drunkard and of no assistance to his family. He died in the early sixties. The son James D. was born in 1837. Margaret was older and Jessie was younger. Margaret was married in 1850 to one Gray, but was later separated from her husband. She had one child born in 1856, named Belle, and she is the plaintiff herein. She also was a member of the Andrews family. Her mother

is known in this record as Margaret Gray, her aunt as Jessie Andrews, and her grandmother as Margaret Andrews. Prior to 1857, Margaret Andrews and her son James D. had engaged in an enterprise of storekeeping at Solon, which lasted for a couple of years or more. The store was traded for the land in controversy, and other land. The land was cheap and unproductive; the family was poor. In 1857, James D. left home and obtained employment. The financial relations between him and his mother and his sisters began at this point. The only living witness who has personal knowledge of these matters is the sister Jessie. She was a witness on behalf of the plaintiff. She is interested adversely to the defendant in precisely the same manner that the plaintiff is. The greater part of her testimony is incompetent under the provisions of section 4604, but I shall spend no time upon that question in this dissent. Notwithstanding her adverse interest, her testimony discloses a state of facts which tends strongly to support the transaction now under attack.

Beginning in 1857, James D. sent of his wages to his mother and sisters from \$150 to \$200 every year until he was married in 1871. It is said by Jessie that his contributions ceased during his married life. But his married life was very brief; his wife dying in 1874, leaving him with two children, a son and a daughter. At this time, James D. was in the government service in New York City. He continued his benefactions and visited his mother and sisters often. In 1879 the farm began to pay a revenue, and he looked after it through a resident agent. It is assumed in the majority opinion that James D. got the benefit of the use of this farm for himself. This assumption is based wholly upon an estimate of the witness Jessie that he sent his mother about \$50 a month. The record shows quite satisfactorily that the mother and sisters had complete knowledge concerning all revenues from the farm, and that whatever was done was recognized by all of them as just and proper. This appears from some letters in the record written by Jessie herself in the eighties. In the early sixties, James took out a life insurance policy for \$10,000 in favor of his mother and kept it in force throughout his life.

In 1889 he invited his mother and sisters to come to New York and make their home with him. Such arrangement was entered into. The family at Iowa City at that time consisted of the mother and two daughters and Mabel Stuart, a daughter of the plaintiff herein by her first marriage. James D. rented a residence near Sheepshead Bay, which was occupied by the family until it was broken up by death. It is urged in appellee's argument and somewhat assumed in the majority opinion that this invitation was extended by James D. for his own advantage

and in order to obtain the help of his mother and sisters in taking care of his own children. The record warrants no such assumption. His children were already quite grown up and were away at school. The oldest, the daughter (now Armagast, the defendant herein), had attained her majority. The son became engaged in business and never made his home there after such date. Prior to 1889 James D. had already become a mere boarder. It is too plain for argument that the home thus provided operated greatly to the advantage of the mother and sisters and the niece Mabel. The service rendered by the mother and daughters which is much paraded in argument was a service principally to themselves. Jessie testified on this subject as follows: "The circumstances under which the family moved to Brooklyn were these: My brother had his two children in school. He was boarding. He asked me to come on and stay with his daughter Mary. She wished to attend some concerts down at Brighton Beach. I spent the summer of 1888 with him. The next summer she came out and stayed with us. Her father came after her. He asked Mother if she would not come to New York and keep house for him. He was tired living in a boarding house. He was going to build a house. The family moved to Brooklyn on his solicitation. He was boarding, and he wanted a home for his children. He thought it would be nice for us all to be together. He only hesitated on account of Mother's age, for fear she might not like the change; but she was willing to go. We were to live with him as one family. He expected to build a house for us. One inducement was that my sister was very fond of flowers, and he was planning a greenhouse for her. We removed to Brooklyn in November, 1889. He advanced the money to go there. Mabel Stuart went with us. She was Mrs. Gray's granddaughter, and the daughter of Mrs. Curtis, the plaintiff. She was a member of our family at the time we removed to Brooklyn. Her mother was living in Omaha part of the time and part of the time in St. Paul. Mrs. Curtis was unfortunate in her first marriage and left her husband. She had to go to work. She was a stenographer and held a very good position, but left Mabel with us. I wrote to my brother before going to New York and asked him how it would be about Mabel coming. Mrs. Gray thought perhaps there would be objection to it. He wrote back that she was perfectly welcome to come with the rest of us. I do not think Mother would have gone to New York without Mabel. Mabel was then eight years old and had lived in the family four years. My sister and I did most of the work of the family. My brother's two children were in school. Mabel was in school and Mother was not able to do very much work. We never had any servant except a woman in to wash two or three times during

that time. His daughter did some sewing for herself after she was out of school. Aside from my board, I do not think I ever got more than \$50 in money; that is, \$50 a year. It did not cover the expense of my clothes. Some of those were given to me. The cost to my brother for our clothes I could hardly say. We did not have such a lot of clothes. We made them ourselves. I think, to take it on an average, it would not be more than \$100 a year for me. Mrs. Gray got a little more than I did. I do not know whether she got more than \$100 a year or not. Mother required very little. He looked after us all as my father would look after his children. He always seemed like a father to me. He always seemed to regard us with love."

James D. was not a man of wealth. At the time of his death he had been in the government service for a great many years, beginning with a salary of \$1,500, which had been increased to \$2,400 in the last ten years of his life. This was the highest salary he had ever received. It is the testimony of Jessie that he bore every expense of every kind for the family. It goes without saying that he could not bear such expense out of a salary of \$2,400, and it may be fairly assumed that the proceeds of the farm were devoted to that end. The farm was in the mother's name. I shall assume for the purpose of this dissent that it belonged to her both legally and equitably, although it was once in the name of James D. and was conveyed to his mother while he was yet a minor. But I can entertain no reasonable doubt upon this record but what it was the understanding of the family that James D. was to have this land. But for his contributions for more than 20 years this land could not have been kept in the family. On October 8, 1896, the mother conveyed this land to her son James D. According to Jessie's testimony, the mother talked with her about it and showed her the deed before she signed it. She signed the deed in the absence of James D. and in the presence of Jessie alone. She not only signed it, but she wrote her name in its appropriate blank space in the body of the deed. It was two or three days after she signed it before she went to the city to acknowledge it. It was acknowledged and witnessed in a formal manner. The witnesses to the deed have both testified as witnesses herein. Jessie was present with her mother. There was nothing in the conduct of the parties to attract the particular attention of the witnesses. It is shown practically without dispute that the mother, although 83 years of age, was remarkably bright and intelligent and well preserved. She lived for 7 years thereafter. She was not lacking in practical business experience. She had not only engaged in a store business in an early day, but she was also the postmistress of Solon. When she came to New York in 1889, she brought with her a little over \$4,000 which she had saved out of her son's remittances.

During her entire stay with her son she kept that as a fund for herself, spending none of it. Her habits of consultation on business matters are described by Jessie as follows: "Q. To whom did she go for advice and consultation in regard to any matters in which she was interested during the time she was in New York. A. My brother, and she talked things over with me always. Q. What were the relations between her and your brother? A. The very best, always."

There was no secrecy about the execution of the deed. It was known to each member of the family. Considering the age of the mother, the sisters, Jessie and Margaret, might well have deemed their interests affected by such a transaction. The fact that these never questioned it in any way, but acquiesced in it, as a matter of course, is a strong circumstance indicating that the conveyance was in full accord with the family understanding. That this continued to be the state of mind of Jessie for many years after her mother's death is indicated by a letter written by her in August, 1907, from which I quote as follows: "When mother deeded the land to my brother, she was not obliged to do so by law, but from a sense of justice for what he had done for her. He promised many things. My sister and I were to have a home and enough to keep us. We had nothing in writing, and I do not think he dreamed but what we would be all right. As far as I am concerned I want nothing, but my sister left a daughter who has to be kept." Going back for the moment to their early experience, the record contains a letter written in 1865 by Margaret Gray, the mother of the plaintiff, under whom plaintiff claims. I quote the following reference therein to her brother James: "My brother did not get home until after the funeral. There are very few young men like him. He has supported the family for several years. He is surely one of earth's noblemen. My husband died four years ago the first of last January. I have a little girl eight years old. She has always been very sickly, but is getting better now. My sister Jessie is quite a large girl and is on the fair way to be a good scholar. My brother is going to give her a good education." The plaintiff herself testifies on that subject as follows: "Up to the time of my marriage as far back as my recollection goes, I always lived in the family of my grandmother. It was a matter of common knowledge that James D. Andrews was assisting in the support of the family. That is so as far back as I can recollect." Since the writing of that letter, the granddaughter Mabel, the daughter of the present plaintiff, came into the family. The history of Mabel is recited by Jessie in her testimony as follows: "She had a daughter, Mabel, who was born in 1881. Mabel came into our home when Mrs. Curtis left her husband. She was then about three or four years old, and she continued to make her home with us. She went to New York with

us, was educated, and her support and education was contributed to by James D., the same as he contributed to the support of myself, my mother, and Mrs. Gray. Mabel had no property of her own. After she went to New York, her mother sent her some boxes of clothing. Aside from this, she was raised, educated, and clothed by James D." Her mother, the plaintiff herein, gives it as follows: "My mother had an income until she went to New York. She derived it from dressmaking. I visited the family in New York. They were supported by my Uncle Jim. My daughter went to the public schools and then to a boarding school at Ft. Edwards, called the Ft. Edwards Seminary. I did not send her. I could not afford it. Well, I had something to do with the education of my daughter. I paid for some of her painting lessons. I always sent Mabel money when I could, but the fact is I was not able to pay for her education. It devolved largely on James D. Andrews. Don't know whether my daughter graduated from the public schools. The expense of sending my daughter one year to the institute was not paid by Uncle Jim. It was defrayed by the family. Uncle Jim was dead then. The last time I saw Uncle Jim was in the year 1889, ten years before his death. I did not see my grandmother during that ten years."

The conduct of the parties subsequent to the making of the deed is very significant, not only in its acquiescence, but in disclosing their understanding of the transaction. The deed purported in terms to have been made "for several valuable considerations." Jessie discloses her mother's understanding subsequent to the execution of the deed as follows: "Q. Did you have any talk with your mother about the deed from the time it was acknowledged in New York until her death? A. Yes, sir. Q. What was it? A. Well, during my brother's life she always spoke with reference that he would do what was right. I know the time when my brother deeded the land in question to Mary, now Mary Armagast. I knew of the conveyance. Q. After your brother's death, did you have any talk with your mother about the land? A. Yes, sir; she talked about it. Q. What did she say? A. She thought things were always going the same as they had when my brother was alive, the house would be kept, and everything would go on the same. She thought that was understood."

About two years after the execution of the deed, James D. executed a conveyance of the land to his two children. This was known to the mother and the sisters and was acquiesced in. This conveyance was not in fact delivered. But in the early part of the year 1900 and about three months before his death, while he was helpless in his sickness, he executed a conveyance to his daughter Mary, the defendant herein, and this was known to the mother and to the sisters and acquiesced in. In 1899 James D. executed a

bill of sale of all the farm products on the place to his daughter Mary. He was at that time physically helpless and unable to sign his own name except by a mark. That instrument is in evidence. It is conceded to be in the handwriting of Jessie Andrews. She prepared it and guided the hand of her brother in the making of his mark thereto. There was full acquiescence thereto. This also was known to the mother. James D. died in May 1900. The life insurance already referred to was still in force payable to his mother and was collected by her. It is surely a fair inference that this was at least one of the considerations referred to in the deed of conveyance. That this insurance figured in the material considerations of the family is disclosed somewhat unwittingly in the testimony of Jessie. After collecting this insurance, the mother turned it over to Jessie. This is explained by Jessie in her testimony as follows: "It was a part of my brother's wish that the insurance should be turned over to me." Jessie also received from her mother the fund of \$4,000. The dealing of the family with the daughter Mary after the death of James D. is entitled to consideration. It appears that in 1898, about the beginning of the sickness of James D., and just before he went away upon a trip for his health, a settlement was had between him and his mother whereby he executed to her his note for \$1,200. The mother held this note unpaid at the time of the death of James D. The daughter Mary paid this note. She also paid the rent on the home for several years and until after the family was broken up by the death of the mother and Margaret Gray. These performances on her part were in pursuance of the mutual understanding of the family and were in accord with the understanding of the mother as testified to by Jessie. She was under no obligation to do these things, except as she had stepped into the shoes of her father in the ownership of the land and was for that reason performing his obligations. These undertakings, therefore, ought to be considered as a part of the consideration contemplated by the parties in the recitals of the deed. After the death of James D., the witness Christy, of Iowa, visited the family with a view of becoming agent for the land. He did afterward become such agent. It appears from his testimony that Mrs. Andrews spoke of the land as "Mary's land."

There is another circumstance in this record that tends to explain why no provision was made by Mrs. Andrews for Mrs. Margaret Gray in the distribution of her estate. There was an older son, Peter, who went to California in an early day and spent his life there. He never married. At the time the deed in question was made, the plaintiff herein was in California with her Uncle Peter. He died intestate shortly thereafter leaving a substantial estate. The plaintiff received it all.

Margaret Gray had been the most dependent of the family and had received the most assistance. In a sense, she brought into the family the burden of three generations. Her brother had supported not only her, but her daughter and her granddaughter. She was the least capable one of the family. According to Jessie's testimony, she received all her mother's money with the understanding that she would take care of Margaret. This was what James had done for 40 years before the conveyance was made to him, and it is a fair inference from this record that he was undertaking to do so to the end. It is undisputed in this record that Mary bore every expense needed by Margaret from the time of her father's death to the time of Margaret's death.

Mrs. Andrews died in 1903. Margaret Gray died in 1906. Before the death of Mrs. Gray every statute of limitations under the laws of New York had run against an action to assail the conveyance. During all that time it had never been questioned and never was questioned until the plaintiff brought this action in 1909. The conduct of all parties interested directly or indirectly was at all times consistent with the good faith of the conveyance and was at all times inconsistent with any other theory. It seems to me that this kind of evidence ought to be more satisfactory as extrinsic proof than any mere words. The fault that I find with the majority opinion at this point is that it has looked for words and has ignored the long years of mutual and consistent conduct of the parties. If such a transaction as this is to be called in question long years after the death of the parties thereto, I know of no more satisfactory form of evidence than the long-continued conduct of the interested parties. I feel constrained to say, therefore, that the deed in question represented the intelligent act and wish of the grantor; that it was fully understood both by the parties thereto and by the other members of the family; and that there never was a moment of misunderstanding on the subject.

The original cost of this land was about \$1,000. The conceded contributions of the young man to his mother from 1857 to 1871 alone would have paid for it more than twice over. Without these contributions, the mother must have sold it and absorbed the proceeds in living expenses. Instead of investing his money in property for himself, he gave it generously to his mother.

The law could give him no cause of action for his generosity, but the mother could. She recognized her moral obligation and distributed her property accordingly. From the parental point of view it was just.

According to Jessie's understanding, as heretofore quoted from her letter of 1907, the conveyance was made "from a sense of justice for what he had done" and upon

promises of continued provision for support of the family. These promises of support were faithfully performed by James while he lived, and, after his death, by his daughter as his successor in title.

By the same arrangement the life insurance went first to the mother, and then to Jessie. If James D. had known that his daughter took nothing by his conveyance of the land to her, surely he would have made other provision for her. The only other provision he could have made for her was to make her payee of his life insurance. The mother and sisters not only availed themselves of the immediate fruits of the conveyance during the life of James D. and of his life insurance at his death, but they accepted thereafter years of performance by his daughter Mary. And now after the full performance, and after the death of the parties to the transaction, and after the expiration of 13 years, it has remained for a descendant to come into the Iowa courts to ask relief against the conveyance. It seems clear to me that she is entitled to none.

2. I am not fully satisfied with the majority opinion on the question of the statute of limitations, nor am I ready to say that it is erroneous. If it is not erroneous, it is because of legislative oversight. The parties were all residents of New York. Every statute of limitations in their own state had run against them. If they were not barred in this state, it is because there is no statute of limitations applicable to them. An action could be brought 20 years hence as well as now. It is a deplorable state of the law, to say the least.

3. I am fully convinced that the action ought to be deemed barred by laches. If an action had been brought in New York to declare the conveyance fraudulent, it is clear that a plea of laches would lie as being kindred to the plea of the statute of limitations. To allow the statute of limitations to run before bringing an action is *prima facie* laches. If the failure to bring this action before 1909 would be deemed laches by the courts of the state of the parties to the transactions, it ought to be deemed such here. The long delay has resulted in manifest disadvantage to the defendant. Especially is this so, if she is required to support her title by positive and detailed and direct extrinsic proof. I do not care to discuss this point further than to cite two of our previous cases and adopt here what we said there. *Mathews v. Culbertson*, 83 Iowa, 434, 50 N. W. 201; *McBride v. Caldwell*, 142 Iowa, 228, 119 N. W. 741.

I would award decree to the defendant on the merits.

SHERWIN, J. I join in the above dissent of Judge EVANS.

MURRAY v. SWANWOOD COAL CO.

(Supreme Court of Iowa. Dec. 12, 1912.)

1. MASTER AND SERVANT (§§ 101, 102*)—INJURY TO SERVANT—OBLIGATION OF MASTER.

An employer must furnish his employé a reasonably safe place in which to work, and maintain the same in reasonable repair for the protection of the employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178, 179, 180-184, 192; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 205*)—OBLIGATION OF MASTER—ASSUMPTION OF RISK.

An employé may assume that the employer has furnished him a reasonably safe place in which to work, and that he may safely perform his duties in the exercise of reasonable care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. § 205.*]

3. MASTER AND SERVANT (§ 286*)—INJURY TO SERVANT — NEGLIGENCE — QUESTION FOR JURY.

Whether an owner of a coal mine was guilty of negligence in the construction of an entry resulting from the fact that cross timbers supporting the roof thereof were too low *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

4. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

Whether a mule driver in a coal mine, injured by being caught between the top of the load on his car and cross timbers supporting the roof of the entry, was guilty of contributory negligence *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

5. MASTER AND SERVANT (§ 206*)—ASSUMPTION OF RISK.

An employé assumes the risks which are incident to the employment after the employer has discharged the duty of furnishing him a reasonably safe place in which to work, and he does not undertake, in entering the employment, the risk arising from the employer's failure to provide a reasonably safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 550; Dec. Dig. § 206.*]

6. MASTER AND SERVANT (§ 288*)—INJURY TO SERVANT—ASSUMPTION OF RISK—QUESTION FOR JURY.

Whether a mule driver in a coal mine, injured by being caught between the top of the load on his car and cross timbers supporting the roof of the entry, assumed the risk of injury arising from the fact that the cross timbers were too low *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1005, 1068-1088; Dec. Dig. § 288.*]

7. MASTER AND SERVANT (§ 288*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Acts 33d Gen. Assem. c. 219, providing that an employé continuing in the employment does not assume any risk from the employer's failure to furnish reasonably safe machinery or place to work, unless the danger is imminent, and that the statute shall not include risks incident to the employment, relates to the property, works, machinery, or appliances of the employer which are defective, and an owner of a coal mine, negligently maintaining cross tim-

bers supporting the roof of an entry too low for the safety of his employés, is liable for injury sustained by a driver caught between the top of the load on his car and the cross timbers, in the absence of anything to show that such condition was necessarily incident to the reasonable operation of the mine, and the risk of the injury did not attach, as a matter of law, to the service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1005, 1068-1088; Dec. Dig. § 288.*]

Appeal from District Court, Polk County; Wm. McHenry, Judge.

Action at law to recover damages for personal injury. There was a directed verdict and judgment for the defendant, and plaintiff appeals. Reversed.

S. B. Allen, of Des Moines, for appellant. Guernsey, Parker & Miller, of Des Moines, for appellee.

WEAVER, J. The plaintiff was employed as a mule driver in the defendant's coal mine. He was a driver of experience, and had been at work in this mine for several weeks. On the day in question he was caught and crushed between the top of the load on his car and the cross timbers supporting the roof of the entry at that point. He charges such injuries to the negligence of the company in that, first, reasonable care on the part of the company required it to so construct and maintain the entry as to afford a passage of at least five feet in height to enable the driver to safely pass thereunder with his mule and car, but that said roof, at the point where this injury occurred, was constructed or maintained at a height of but four feet; and, second, that due and reasonable care as aforesaid required that the company make such entry of sufficient width to afford room between a moving car and the rib of the entry for the escape of the driver in case it became necessary for him to jump from the car, but said entry, at the point in question, was so narrow that the driver could not escape from the car without being crushed against the rib. He avers that at the time of his injury he was driving his mule with a loaded car through the entry which was without light of any kind, except such as was afforded by the miner's lamp or candle attached to his cap; that, in accordance with the custom and his duty as driver, he was standing with one foot on the bumper of the car, and the other on the tail chain, one hand resting on the top of the car, the other on the rump of the mule, and his body bending low between the mule and the car to avoid collision with the roof timbers, when the mule began to kick, and, as plaintiff lifted himself up to avoid injury from the vicious animal, his head came into contact with the low place in the roof, forcing him back on top of the loaded car, thus wedging him between the load and the roof,

whereby he was severely injured. Upon this pleaded state of facts, and alleging that he did not contribute to his injury by his own negligence, he demands a recovery of damages. The defendant admits that plaintiff was injured in its mine, but denies all allegations of negligence on its part. It alleges further that plaintiff was guilty of contributory negligence, and that he was fully aware of the conditions of which he complains, and assumed the risk of remaining in such employment.

The plaintiff's testimony fairly tends to show truth of his allegations as to the condition of the roof of the entry and the truth of his version of the circumstances immediately attending the accident. As to a material part of his testimony, he is corroborated by the testimony of others. No testimony was offered on the part of the defendant. The motion to direct a verdict was based on grounds as follows: First. The evidence shows no negligence on the part of the defendant. Second. Plaintiff does not show himself free from contributory negligence. Third. It conclusively appears that plaintiff assumed the risk of such injury. The trial court in sustaining the motion expressed the view: First, that, if it was negligence on the part of the defendant to maintain the entry in the alleged defective condition, "it was negligence for the plaintiff to work in that condition"; and, second, that as plaintiff had worked on that entry for a matter of five weeks, passing daily and frequently under the alleged defective roof, he is bound, as a matter of law, to know its condition. "If he knew it, he is just as guilty of negligence as the defendant company. If he knew it, he assumed it as part of the risk that he undertook when he went into the employment of the defendant in passing through the entry." The foregoing statement of the record is sufficient for the consideration of the points brought to our attention by the briefs of counsel.

[1-3] 1. Was there evidence to go to the jury upon the question of defendant's negligence? Of this we think there can be no reasonable doubt. When defendant employed plaintiff to work as a mule driver in the entry of its mine, it assumed the duty of furnishing him a reasonably safe place to do that work. In entering such employment, plaintiff could rightfully assume and rely upon the performance of that duty by the employer. He had the right to assume that the entry in which he was directed to work was so constructed that, in driving through it in the exercise of reasonable care on his own part, he would not be brought into collision with the timbering of either the roof or rib of such entry. If the witnesses in the case are to be believed, and their credibility was for the jury, while as a rule the distance from the car rail to the roof of the entry was five feet, and that such was the usual and

customary height of entries in coal mines, there were, at the place of the accident, two low hanging timbers suspended at not to exceed four feet from the rail. Some of the witnesses make it less. Whether such a construction was negligent appears to us a fair question for the jury. When we stop to consider that under the roof of the entry, even when built to the full height of 5 feet, there must pass and repass mules drawing cars standing 34 inches in height above the rail, carrying loads rising 6 inches or more above the car, and bearing drivers crouched between car and mule, the whole structure with car, load, mule, and driver enveloped in thick darkness, save such illumination as may be given by the light in the driver's cap, and the roof above is, to say the least, never small. But when in such an entry, either by reason of a defect in construction or by reason of lack of repair, one or more of the cross timbers are permitted to drop a foot or more below the prevailing height of such passageway, it is difficult to imagine a more deadly peril for the driver who must use it. Counsel's answer to this is that the height of a mine entry cannot be controlled by custom or arbitrary rule, but the dimensions thereof must be governed by the natural conditions of rock and soil which are penetrated. Such answer is true only in part. In the first place, there is here no evidence whatever of any necessity for the condition of which plaintiff complains and his testimony tends to show did exist. In the next place, it is not easy to conceive of any conditions to justify the hanging of one or two individual timbers below the general height of the roof on either side thereof, and if such conditions do exist, thereby creating unusual or special danger for the driver, the employer cannot avoid the charge of negligence except by showing that the injured employé had been warned of the danger or knew, or ought to have known, of its existence. We are satisfied, therefore, that, upon the question of defendant's negligence, plaintiff made a case for the jury. Quite in point in this branch of the case, see *Elk v. Fuel Co.*, 138 N. W. 547, decided by this court at the November period of the present term.

[4] 2. But it is said plaintiff was himself negligent, and such it appears was the view of the court below. The statement in the ruling that, if it was negligent for the plaintiff to construct or maintain the entry as complained of, it was equally negligent for the plaintiff to work therein was probably not intended as the enunciation of a general rule, for, if it were such, then in no case could an employer ever be held liable for negligence in furnishing a proper place to work. We take it for granted that the court intended to hold that, if the defect complained of by the plaintiff existed, it must have been so patent to him, and was of such imminent character, that it must be conclusively held

that no prudent man would take or remain in such employment, and he was therefore guilty of contributory negligence. We are not able to satisfy ourselves with that view of the record. It was no part of plaintiff's duty to care for the roof of the entry. That was the duty of the master. The defect complained of was not so manifest that plaintiff must have seen it, or that he must be guilty of negligence, as a matter of law, in not seeing it. It was not open and obvious. It was enveloped in impenetrable darkness save when a miner or driver passed with his lamp. Plaintiff, bending between his car and mule, could hardly be expected, certainly not as a matter of law, to be twisting his neck and head to search the roof above his bended back for evidence that his employer was neglecting its duty in making the place reasonably safe. Even if he had seen these timbers prior to his injury and knew the existence of the danger, we are not prepared to say, as a matter of law, that reasonable prudence required that he should refuse to work or quit his job. He may in such case have reasonably believed that he could avoid the danger, and the fact that he had worked for several weeks without injury shows that it was possible to do so. Of course if, having such knowledge, he had voluntarily or carelessly lifted his head at that point and thus brought about the accident, he might well be charged with contributory negligence; but, if while bending over the heels of the mule to avoid such collision the animal became vicious and began to kick, it is not within the province of the court to say that he was negligent in suddenly lifting his head, even though in the excitement of the moment he lifted it high enough to be struck by the low hanging cross timbers. The law makes some allowance for the fallibility of human judgment when a person is placed in circumstances of imminent danger, and it would be establishing an extraordinary precedent to hold that one is conclusively chargeable with negligence because, when confronted with the necessity of instant choice between the danger of collision with the heels of a mule and collision with a crossbeam over his head, he chooses the latter as the lesser peril. We think the trial court erred in holding, as a matter of law, that plaintiff did not exercise ordinary care in entering or remaining in the employment in which he was injured. We do not overlook the point made by the appellee that, if the mule became vicious, it was because of misuse by the plaintiff. There was indirect evidence that plaintiff hit the mule with the sprag which he was carrying in his hand. But this fact was denied by the plaintiff. Moreover, such fact was at best a matter for the consideration of the jury upon the question of plaintiff's due care.

[5-7] 3. The third and last proposition, and the one apparently upon which defendant most strongly relies, is that of plaintiff's alleged assumption of the risk. Assuming, as

we think we must for the purposes of this appeal, that the evidence would warrant a finding of negligence on the part of the defendant in failing to provide plaintiff a reasonably safe place to work, then the risk arising therefrom was not one which plaintiff undertook in entering the defendant's employment. *Martin v. Electric Light Co.*, 131 Iowa, 734, 106 N. W. 359. If he is to be held as assuming the risk of defendant's negligence as at common law, it must be because he knew and appreciated the danger, or as a reasonable person in possession of his faculties ought to have known and appreciated it, yet chose to remain in the dangerous service. The reasons stated in the last paragraph why we cannot hold the plaintiff guilty of negligence, as a matter of law, are equally applicable to the claim that he assumed the risk of the danger arising from the defendant's negligence. The risks which a servant assumes as incident to his employment are such as remain or attach to the service after the master has discharged the magisterial duties which the law imposes upon him, and among these duties, as we have noted, is the furnishing of a reasonably safe place to work.

But there is a still more insurmountable obstacle to the assertion of this defense. A recent statute which had gone into effect prior to the date of plaintiff's injury provides as follows: "That in all cases where the property, works, machinery or appliances of an employer are defective, or out of repair, and where it is the duty of the employer, from the character of the place, work, machinery or appliances to furnish reasonably safe machinery, appliances or place to work, the employé shall not be deemed to have assumed the risk by continuing in the prosecution of the work, growing out of any defect as aforesaid, of which the employé may have had knowledge when the employer had knowledge of such defect, except when in the usual and ordinary course of his employment it is the duty of such employé to make the repairs, or remedy the defects. Nor shall the employé under such conditions be deemed to have waived the negligence, if any, unless the danger be imminent and to such extent that a reasonably prudent person would not have continued in the prosecution of the work; but this statute shall not be construed so as to include such risks as are incident to the employment. And no contract which restricts liability hereunder shall be legal or binding." Acts of 33d Gen. Assembly, c. 219. Appellee avoids the effect of this statute by saying that it evidently has no application to this case because the risk of the danger from which plaintiff suffered was one incident to his employment, and is therefore expressly excepted in the language of the statute itself. In support of this claim, counsel say: "The entry was neither defective nor out of repair. It was in identically the same condition in which

it had been placed when built. The low timbers, if any there were, and the alleged narrowness of the entry, had existed from the moment the entry was first driven. These conditions were not inherently dangerous; they did not constitute a want of repair; they were not in themselves defective; they had not relapsed or deteriorated from a previous better condition into the condition of which complaint is made. The entry was therefore neither defective nor out of repair. On the other hand, any man five feet or over in height, riding the chain, as the plaintiff was, was bound to get his head bumped if he straightened up. The vein of coal was not thick enough to admit of the entry being made higher. There are many veins in this state which are being worked which are less than three feet in thickness. Entries in the same mine vary in height. Obviously no entry could be put through them high enough to satisfy the plaintiff's demands." Here then, was a condition necessarily incident to the conduct of the business. Any one who entered the employment of the defendant company was necessarily exposed to injury from accident in case his head or body by any means came forcibly in contact with the roof of the entry and the roof timbers. Surely, then, this is the sort of a situation which is meant by the latter clause of the statute, which says: "But this statute should not be construed so as to include such risks as are incident to the employment." We apprehend that what the statute means, taken as a whole, is that when the "property, works, machinery, or appliances" of an employer are inherently sound and not out of repair, and not inherently dangerous, and the dangers, if any, which are incident to their use, or being in contact with them, are open and obvious, or, if not open and obvious, are properly explained to the servant, then such risks are "incident to the employment," and hence are not assumed. The only conceivable exception to the foregoing interpretation of the statute would arise in the case where "property, works, machinery, or appliances" were of such an inherently dangerous character as that no ordinarily prudent person would maintain or operate them.

We have quoted the foregoing from the brief for the appellee in order that we may do no injustice to the views of counsel by any attempt to abbreviate them. To uphold the points so made would be to rewrite the law of master and servant and establish doctrines which in our view have never yet found judicial approval anywhere. Moreover, it assumes as fact many matters of which there is no evidence in the record. The fact, if it be such, that the entry when the plaintiff went to work was in the precise condition in which it was originally constructed is no answer to plaintiff's claim. There may be negligence or want of reasonable care in constructing the place where the servant is required to work, and, if so, it

is universally held, both upon precedent and upon principle, that liability is created where such faulty construction occasions injury to the servant without fault upon his part. Where such fact exists, we find no authority holding that the risk so created is one of the incidental hazards which the servant accepts in entering the master's employment. In entering such service, the servant may rightfully assume that the master has done his duty, and that he will be exposed to no dangers which are not ordinarily and naturally incident to work of that nature. *Bryce v. Railroad Co.*, 108 Iowa, 685, 72 N. W. 780; *Spevack v. Coal Co.*, 152 Iowa, 80, 131 N. W. 653; *Taylor v. Railroad Co.*, 112 Iowa, 157, 83 N. W. 892; *Crown Coal Co. v. Hiles*, 43 Ill. App. 310; *Poll v. Coal Co.*, 149 Iowa, 104, 127 N. W. 1105, 33 L. R. A. (N. S.) 646; *Kink v. Ice Co.*, 84 Iowa, 321, 51 N. W. 155; *Mosgrove v. Coal Co.*, 110 Iowa, 169, 81 N. W. 227.

There is nothing in the record to indicate that the existence of the two low hanging cross timbers arose from any engineering necessity. The fact that the coal vein was of no great thickness does not of itself indicate any such need. It is a fact of such frequent exposition and mention in coal mining cases we may treat it as a matter of common knowledge that the height of entries through which cars are operated is not limited by the thickness of the coal vein, and that the required height for the purposes of practical operation is often obtained either by taking down rock from the roof above or by taking up the floor or bottom from beneath sufficiently for the desired purpose. If conditions are sometimes found in which this cannot be done, they are not shown to have existed at the time and place under inquiry. It was not then a condition necessarily incident to the proper or reasonable operation of the mine, and the risk of it did not attach, as a matter of law, to the plaintiff's service. We are not sure that we fully comprehend the point of counsel's proposition that the conditions complained of in this entry were not "inherently" dangerous or unsound. It is true nothing appears to indicate any decay or weakness in the timbering rendering it liable to fall upon the driver, but these pieces did so encroach upon the open way, which was small at best, as to make them a continual threat of injury to one driving under them. Such a structure, we think, may very properly be called inherently dangerous; and, not being a risk which was necessarily incident to the plaintiff's employment, it does not fall within the exception to the statute upon which defendant relies. Nor can we assume to enlarge that exception by so construing the statute as to confine its application to cases where, to use the language of counsel, "the property, works, machinery, or appliances have by use or neglect become defective and out of repair." It is sufficient in this re-

spect to say that such is not the language of the act, nor is there to be found therein any word, phrase, or sentence indicating a legislative purpose to thus narrow or restrict its meaning. In express words it relates to the property, works, machinery, or appliances of the employer which are defective or out of repair in cases where it is the duty of the employer to furnish a reasonably safe place to work. The employer's duty, as we have seen, is first to provide a safe place to work, and then to maintain it in reasonable repair for the protection of the employé. A defect in such place may arise from neglect of either duty, and the statute in clear terms is made applicable to both. The case as presented in the record comes within the operation of the statute, and should have been submitted to the jury.

For the reasons stated, a new trial must be ordered. The judgment appealed from will be reversed, and cause remanded for further proceedings in harmony with the views expressed in this opinion.

Reversed.

CITY OF COUNCIL BLUFFS v. ILLINOIS CENT. R. CO. et al.

(Supreme Court of Iowa. Dec. 10, 1912.)

1. RAILROADS (§ 243*)—GATES AT CROSSING—ORDINANCE—VALIDITY.

Where an ordinance requiring a railroad company to erect and operate suitable gates at a certain crossing at all hours did not impose an unreasonable burden as a whole, it was not invalid, though no street cars were ordinarily operated over such street from 2 a. m. till 4:27 a. m., and there were ordinarily no foot travelers thereon at such time.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 754, 757; Dec. Dig. § 243.*]

2. RAILROADS (§ 243*)—REGULATION—GATES AT STREET CROSSING.

A city ordinance requiring gates at a street crossing of a railroad and an interurban railway was authorized by Code, § 769, authorizing cities to compel railroad companies to erect and maintain gates upon public streets at railroad crossings, and Code Supp. 1907, § 2033c, providing that any interurban railways within a city are street railways and subject to the same laws, and was not inconsistent with Code Supp. 1907, §§ 2033a, 2033b, regulating the method of crossing at intersections of steam and interurban electric railways; the latter statute not applying to crossings within city limits.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 754, 757; Dec. Dig. § 243.*]

3. CONSTITUTIONAL LAW (§ 241*)—RAILROAD REGULATION — DISCRIMINATION — ORDINANCES.

An ordinance requiring railroad companies owning or operating tracks at a street crossing at the intersection of a railroad with an electric railway to maintain gates at such place applied to either a corporation or an individual operating a railroad over such crossings, and was not objectionable as discriminating in favor of natural persons against corporations.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 700, 701; Dec. Dig. § 241.*]

4. MANDAMUS (§ 15*)—DEFENSES—COMPLIANCE WITH ORDINANCE—RAILROADS.

In mandamus to compel a railroad company to comply with an ordinance requiring the installation of gates parallel with its track at a street crossing at the intersection of the railroad and an interurban railway, it is no defense that the ordinance also requires the interurban road to maintain other gates at such crossing, and it has not complied therewith.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 47, 49; Dec. Dig. § 15.*]

5. RAILROADS (§ 243*)—ORDINANCE—CONSTRUCTION.

An ordinance requiring gates at a street crossing at the intersection of a railroad with an electric line to protect and warn the traveling public by closing same as the circumstances should require did not require a watchman, as distinguished from an operator of the gates.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 754, 757; Dec. Dig. § 243.*]

6. MUNICIPAL CORPORATIONS (§ 112*)—ORDINANCE—VALIDITY—SUBJECT ENTITLED.

An ordinance entitled, "An ordinance amending Ordinance No. 376, to compel the erection and operation of suitable gates, etc., and repealing ordinances in conflict therewith," and in its text requiring railroad companies owning or operating tracks at a certain street crossing to erect and operate gates and providing when it should go into effect and repealing ordinance No. 376, and complying with Code, § 681, providing that no ordinance shall be amended unless the new ordinance contain the entire ordinance amended and the former ordinance be repealed, was not objectionable as embracing more than one subject and distinct matters not covered by the title.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 258-262; Dec. Dig. § 112.*]

7. MANDAMUS (§ 132*)—GROUNDS.

Mandamus will lie to compel a railroad company to comply with a valid city ordinance requiring it to install and operate gates at a street intersection.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 266, 267; Dec. Dig. § 132.*]

Appeal from District Court, Pottawattamie County; A. B. Thornell, Judge.

Action in mandamus to compel defendants to install and operate gates at a street intersection. Judgment for plaintiff. Defendants appeal. Affirmed.

Kelleher & O'Connor, of Ft. Dodge, Tinley & Mitchell, of Council Bluffs, and Helsell & Helsell, of Ft. Dodge, for appellants. O. F. Kimball and D. E. Stuart, both of Council Bluffs, for appellee.

SHERWIN, J. Avenue A, in the city of Council Bluffs, runs east and west, and Eighteenth street is a north and south street crossing Avenue A. The railway tracks of the appellants run north and south on Eighteenth street crossing Avenue A. The main line of the Omaha & Council Bluffs Street Railway between Council Bluffs and Omaha is a double-tracked road running on Avenue A, and crosses appellants' track at Eighteenth street. The appellants maintain switch tracks both north and south of Avenue A and near thereto. The street railway

has a large passenger business between Council Bluffs and Omaha, and runs its cars over the crossing in question, in its ordinary operation, from 4:27 a. m. until 2 a. m., and at the time of the trial it was operating a nine minute schedule with double service during rush hours in the morning and evening. In the regular service, aside from extras, there were about 252 cars crossing this intersection daily, and, in addition thereto, there were 34 extras morning and evening. There are no sidewalks on Avenue A at this point, nor is the avenue used to any extent by vehicles other than the street cars. Some distance west of this intersection there are many residences, and the record shows that there is considerable travel by foot along the street car tracks over and west of this intersection. But it may fairly be said that the purpose of the city in requiring the appellants to establish and operate gates at this point was to protect the great number of people who use the street cars crossing appellants' track. In December, 1907, the plaintiff city passed an ordinance, known as No. 376, which was entitled as follows: "An ordinance to compel railroad companies to erect, construct, maintain and operate suitable gates upon certain public streets at railroad crossings and providing regulations therefor."

[1] On the 10th day of February, 1908, the city passed an ordinance that was entitled as follows: "An ordinance amending an Ordinance No. 376, to compel railroad companies to erect, construct, maintain and operate suitable gates upon certain public streets at railroad crossings and providing regulations therefor, and repealing ordinances in conflict therewith." This last ordinance required railroad companies owning or operating tracks "at the intersection of Avenue A on 18th street * * * to at once erect, construct and maintain, without expense to the city, on both sides of such tracks and right of way where the same cross and intersect said streets, suitable gates operated by hand, or other power, to protect and warn the traveling public by closing same during the passage of trains or when the cars, engines or trains are about to pass upon and over said streets and crossings." This ordinance provided that it should be in force and effect from and after its passage, approval, and publication, and it also required a copy of the same to be served upon each of the companies owning or operating the said railways crossing said streets. This ordinance repealed Ordinance No. 376. It was approved February 14, 1908, and was duly published, and a copy thereof served on both of the defendants herein on the 2d day of March, 1908. The defendants have consistently refused to comply with this ordinance. The first of the appellants' contentions meriting our attention is their claim that the ordinance is unreasonable and void,

because appellants are required to operate the gates at all hours of the day and every day in the year. The only basis for this claim is the fact appearing in the record that ordinarily street cars are not operated over this crossing between the hours of 2 a. m. and 4:27 a. m., a matter of about 2½ hours in the early morning. It may also be presumed that ordinarily the public will not use this street for a footway between the hours mentioned, but the fact remains that exigencies may require the use of the street cars during the time in question, and that the street may be used at all hours of the night by foot travelers. An ordinance will not be held void because unreasonable, unless it clearly appears that it imposes an unreasonable burden as a whole. While it may be that public interests would be fairly well subserved without the service during the 2½ hours in controversy, we cannot say that the city has so abused its discretionary power in the matter as to require us to interfere by declaring the ordinances void for unreasonableness. The authorities relied on by appellants are not controlling, because the facts upon which they are based are not similar to the facts here.

[2] 2. Appellants further contend that the ordinance is void because inconsistent with the state statute regulating the method of crossing at intersections of steam and interurban electric railways. It is very doubtful whether this line of street railway, extending only from Council Bluffs to Omaha, Neb., and exclusively within the corporate limits of both cities, is an interurban railway within the meaning of Code Supplement, §§ 2033a, 2033b. But, however that may be, we are confident that there is no conflict between the ordinance and the state statute, because of the express power given to cities of this class by section 769 of the Code, and because of section 2033c, Code Supplement. Section 769 expressly authorizes cities of this class to compel railroad companies to erect and maintain gates upon public streets at railroad crossings, and section 2033c provides as follows: "Any interurban railway shall within the corporate limits of any city or town, or of any city acting under a special charter, upon such streets as it shall use for transporting passengers, mail, baggage, and such parcels, packages, and freight as it may carry in its passenger or combination baggage cars only be deemed a street railway, and be subject to the laws governing street railways." The state statute was evidently intended to regulate crossings outside of cities, and not to interfere with the authority of cities within their limits, and such construction gives force and effect to all of the statutes on the subject, while no other construction would do so. Furthermore, it is not solely a question of the crossing of two railroads. The matter of a public street is involved, and, to some extent at least, the

protection of the public not using the street railway.

[3] 3. The appellants' claim that the ordinance is void because it discriminates in favor of natural persons and against corporations is hypercritical in the extreme. There is not a shadow of merit in the position so far as this case is concerned, because the ordinance requires the establishment of a gate at this particular point, and this would compel either a corporation or an individual operating a railroad over the crossing to maintain such gates.

[4] 4. It is said that the language of the ordinance requires gates to be maintained by the interurban railway equally with the steam railroad at the same intersection. If it be conceded for the purpose of argument that the street railway is properly an interurban road, the appellants need not be concerned with the requirements of the ordinance beyond its own affairs. If it was the intention of the city to have both streets guarded by gates, it can attend to the matter itself.

[5] 5. The ordinance does not require a watchman, as distinguished from an operator of the gates, and is clearly within the power of the city.

[6] 6. It is further contended that the ordinance is void because "it embraces more than one subject and distinct matters not covered by the title." There is nothing in the point. An examination of the title thereto, in connection with the title to Ordinance No. 376, leaves no room for doubt on this subject, and everything enacted in the ordinance is distinctly referred to in the title. The ordinance in question was in form in accordance with section 681 of the Code, which provides that "no ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section revised or amended, and the former ordinance or section shall be repealed."

[7] 7. Mandamus is the proper remedy here. *Swinney v. C. R. & P. Ry. Co.*, 123 Iowa, 219, 98 N. W. 635.

One or two other complaints are made by appellants, but they are not of sufficient moment to require specific mention.

The judgment is affirmed.

Affirmed.

LEE v. HEDERMAN et al.

(Supreme Court of Iowa. Dec. 11, 1912.)

1. TRIAL (§ 96*)—RECEPTION OF EVIDENCE—OBJECTIONS—EVIDENCE PARTLY ADMISSIBLE.

Where, in a civil damage action for selling or giving intoxicating liquor to plaintiff's deceased father, the mother as a witness was asked whether the father was a strong and robust or a delicate man, and, over objection for immateriality, answered that he was a strong and healthy man, and added, over a similar objec-

tion, "he was very pleasant around the house," defendant's motion to strike out the entire answer was properly overruled, since the portion that he was a strong and healthy man was competent on the extent of plaintiff's loss of support by the father's death.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 248; Dec. Dig. § 96.*]

2. INTOXICATING LIQUORS (§ 309*)—CIVIL DAMAGES—ADMISSIBILITY—MATERIALITY.

In a civil damage action, the court did not err in sustaining an objection for immateriality to a question asked of a witness as to what he knew concerning plaintiff's father being a bootlegger, in the absence of any preliminary showing that what the witness knew would have any bearing on the father's occupation, or to show what kind of a man he was.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 444-448; Dec. Dig. § 309.*]

3. INTOXICATING LIQUORS (§ 308*)—WRONGFUL SALE—CIVIL DAMAGES—STATUTES—EXTENT OF PROOF.

Under a statute giving every child injured in his means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, a right of action against any person who by selling or giving intoxicating liquor contrary to law shall cause such intoxication for all damages actually sustained as well as exemplary damages, it need only be proved that the injury was caused by an intoxicated person, without proof that the injury was in consequence of the intoxication.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 443; Dec. Dig. § 308.*]

4. APPEAL AND ERROR (§ 1064*)—INSTRUCTIONS—PREJUDICE.

In a civil damage action by a minor alleged to have been injured in his means of support by the death of his father while intoxicated from liquor given or sold to him by defendant, instructions requiring that plaintiff prove that he was injured in his means of support "in consequence of such intoxication," either of himself or of another, in whose company he was when killed, were not prejudicial to defendant, but only to plaintiff.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

5. INTOXICATING LIQUORS (§ 309*)—CIVIL DAMAGE LAW—LOSS OF SUPPORT—EVIDENCE—HABITS OF DECEASED.

Where a minor sued defendant for loss of support because of the death of his father while intoxicated from liquor sold or given to him by defendant, evidence of the habits of plaintiff's father as to indulgence in intoxicating liquors, and that he was a drunkard, while not a defense, was admissible in determining the amount of plaintiff's loss.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 444-448; Dec. Dig. § 309.*]

Appeal from District Court, Crawford County; Z. A. Church, Judge.

Action for damages resulted in a judgment against defendant, from which he appeals. Reversed.

Connor & Lally, of Denison, for appellant. Shaw, Sims & Kuehnle, of Denison, for appellee.

LADD, J. The plaintiff is a minor son of Arnold Lee, deceased, and sued by his moth-

er, as next friend, for loss in his means of support. The defendant operated a saloon at Arlon, and was alleged in the first count of the petition to have sold or given intoxicating liquors to said Arnold Lee on August 3, 1909, who drank the same, and that said liquors so sold or given caused or contributed to his intoxication, and that while on the way from Arlon to Dow City, when so intoxicated, he fell or was thrown from the wagon in which he was riding by reason of the team becoming frightened by the shouting and hallooing of said Lee and one Shaffer, and was thereby killed. In the second count of the petition it is alleged that defendant sold or gave to one Shaffer a pony keg of beer and put a spigot in it; that this was put in Shaffer's wagon; that Lee accompanied Shaffer from Arlon to Dow City; and that Shaffer became intoxicated on the way from drinking beer from said keg, and when near Arlon, and while so intoxicated, by shouting and hallooing, frightened his team, caused it to lunge forward and start to run away, and thereby Lee was thrown from the wagon and killed. The defense interposed was a general denial. Appellant has assigned only 68 errors, 37 of which are argued. Such as seem of sufficient gravity to require it will be considered.

[1] 1. The mother of deceased, after testifying that he was 29 years old past, and that she had seen him in the afternoon prior to his death, was asked: "Was he a strong, robust, or very delicate man?" And, over objection as immaterial, answered: "Yes, sir; he was a strong, healthy man, and [over same objection] he was very pleasant around the house." The defendant moved to strike out the answer because immaterial. The motion was overruled. Defendants argue that the last clause of the answer should have been excluded, but, as the motion was to strike the entire answer, that point was not saved. Defendant's condition was material as bearing on the extent of plaintiff's loss of support, and, as part was material, the motion to strike out the entire answer was rightly overruled.

[2] 2. Another witness, George Bell, after testifying that he had resided in Union township, Crawford county, for 40 years, and had seen Lee about an hour before he left Arlon, and also when he was about half way between Arlon and Dow City, and did not regard him as intoxicated, was asked: "What do you know about Mr. Lee being a bootlegger?" An objection as immaterial and incompetent was sustained. Whether what the witness knew would have had any bearing in ascertaining the kind of a man deceased was or his occupation the court had no means of knowing, and, in the absence of any preliminary showing, there was no error in the ruling.

3. Exception is taken to several of the instructions given and refusal of those request-

ed. All of the latter in so far as correctly stating the law were embodied in or negatively by those given. Most of the latter were very short, and, of course, could not for this reason be very comprehensive, but we think the law fairly stated in the charge as a whole except in the instructions hereafter criticized.

[3] In the thirteenth instruction the jury was told that it was only necessary "to show that the accident occurred while the father was in fact intoxicated by the use of intoxicating liquors sold or given to him by defendant or another for him," and that plaintiff was not required to show as a condition to his right of recovery on the first count that "the father would not have met with the accident resulting in his death had the defendant not sold or given him the liquor in question." The exception thereto is based on an erroneous interpretation of the statute which provides, in substance, that every child who is injured in his means of support "by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person," has a right of action against any person, who by selling or giving contrary to law shall cause intoxication of such person for all damages actually sustained as well as exemplary damages. It is enough that the injury was by an intoxicated person, regardless of whether it would have been committed by him if sober. In other words, if by an intoxicated person, it is not necessary to prove that the injury was in consequence of intoxication. *Bistline v. Ney Bros.*, 134 Iowa, 172, 111 N. W. 422, 13 L. R. A. (N. S.) 1153, 13 Ann. Cas. 196.

[4] The nineteenth instruction was inconsistent with the thirteenth, in that it was there laid down that plaintiff must have been "injured in his means of support in consequence of such intoxication." This error, however, was not prejudicial to defendant, for it cast on the plaintiff the additional burden of proving that the injury by an intoxicated person was in consequence of his intoxication. What has been said disposes of the criticisms of the sixteenth instruction, where the jury was told that if the deceased was riding with Shaffer, and Shaffer was intoxicated from drinking intoxicating liquors purchased or procured by him from defendant, and while so intoxicated "did, by shouting and hallooing, frighten, or contribute to frightening of, the team the said Shaffer was driving at the time, and caused the said team to start or jump, and by reason thereof" Lee to be thrown or fall from the wagon and killed, then plaintiff would be entitled to recover, regardless of whether Lee was intoxicated. The criticism is that the court omitted to say that the shouting and hallooing must have been in consequence of Shaffer's intoxication, but this, as seen, was not necessary. If while intoxicated he frightened the team, and thereby caused Lee to fall from the wagon, the de-

fendant became liable, for the statute in express words declares the right of recovery if the injury is by an intoxicated person.

The twenty-first instruction submitted the issue on the theory contended for, however, and in the twenty-second the jury was told, in substance, that, unless injury to means of support was in consequence of intoxication, there could be no recovery. Appellant has no room for complaint of a greater burden being cast on plaintiff than the law exacts. We have called attention to these discrepancies that they may be avoided on another trial.

[5] 4. The court excluded evidence bearing on defendant's habits of economy, and instructed the jury in the fifteenth paragraph of the charge as follows: "The habits of the said Arnold Lee as to indulgence in the use of intoxicating liquors, or the fact that he may have become an habitual drunkard, if it had been shown in evidence, would not have been material in determining the plaintiff's right to a verdict or the amount thereof, and you are not permitted to take such matters into consideration, for the reason that it does not follow that he would have continued as such, or that he would have met his death at the time notwithstanding the sale or gift by the defendant to him. In other words, it is no defense in an action of this kind whether the father was in the habit of drinking little or much of intoxicating liquors, or what his earnings were, or how he used them in the support of his wife and child." An instruction "to take into consideration the habits of deceased as to spending money or saving the same, amount of property he had accumulated and owned at the time of his death, his habits as to spending his money in saloons, and any other fact and circumstance and evidence which will aid in determining just what the plaintiff suffered in his means of support by the death of his father," was refused. It would seem that no argument is required to demonstrate that the value of an infant's means of support lost by the death of his father necessarily depends largely on the habits of that father, whether economical, industrious, and sober or the reverse. The means of support to be expected from one in the habit of becoming intoxicated would likely be much less than were he a man of sobriety, and the same may be said of a lazy person as compared with one who is industrious, a thrifty person as against a spendthrift, one who earns good wages as compared with a loafer.

But, according to the instruction given, these matters have no bearing, and the fact of deceased's excessive use of intoxicants or that he may have become a drunkard might not have been considered in determining the amount of the verdict. Of course, as said in the last clause of the instruction, what deceased's habits may have been did not constitute a defense, but these were material in

determining the loss in means of support plaintiff suffered through his father's death. *Dunlavy v. Watson*, 38 Iowa, 398; *Uldrich v. Gilmore*, 35 Neb. 288, 53 N. W. 135; *Black, Intox. Liq.* § 324. In *Woolheather v. Risley*, 38 Iowa, 486, followed in *Huff v. Aultman*, 69 Iowa, 71, 28 N. W. 440, 58 Am. Rep. 213, the rule was laid down that, if a husband had been addicted to drink and failed to support his wife prior to the time defendant had furnished him intoxicating liquors, this could not be considered as bearing on the measure of damages in the loss in means of support claimed by the wife during the period defendant was furnishing him liquors. This was tantamount to saying that because the husband had formerly obtained liquors elsewhere it afforded defendant no justification for selling or giving him liquors during the period alleged, and thereby causing his intoxication, and depriving his wife of the support to which she was entitled. Here the injury was in causing death and all the probabilities of the future were open to inquiry, and, of course, might be estimated only from the life deceased had lived in the past. But for his death, what was the character and value of the means of support this three year old child would likely have enjoyed? This necessarily depended on the kind of a man he was, and this the jury had the right to take into account in fixing the amount of damages recoverable. There was error in the instruction given in the refusal to give that requested and in the exclusion of the proffered evidence.

Reversed.

STATE v. O'BRIEN et al.

(Supreme Court of Iowa. Dec. 10, 1912.)

1. BURGLARY (§ 41*) — EVIDENCE — SUFFICIENCY.

Direct proof of "breaking" is not essential to a conviction of burglary, where the only reasonable inference from the circumstances in evidence is that there was an actual "breaking."

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 94-103, 109; Dec. Dig. § 41.*]

2. CRIMINAL LAW (§ 629*)—NOTICE OF ADDITIONAL WITNESS—RETURN.

Return of service upon the defendants of written notice of an additional witness, certifying that the sheriff served same upon the defendants "by reading said notice to each of said defendants and delivering them a true copy thereof," showed complete service upon each defendant, though it would have been more exact had it stated that a copy was delivered to "each" defendant.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1420-1429, 1432-1436; Dec. Dig. § 629.*]

3. CRIMINAL LAW (§ 1043*)—APPEAL—OBJECTION—SUFFICIENCY.

Where defendants' objection to the return of service of notice of an additional witness was so made as to divert the court's attention from the real defect, though the court tacitly invited counsel to point out the specific error, complaint

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of such defect could not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.*]

4. CRIMINAL LAW (§ 628*)—INDORSEMENT ON INDICTMENT—WITNESSES—VARIANCE IN NAME.

That a witness' surname is improperly spelled on the back of an indictment to which his testimony before the grand jury is attached does not constitute variance sufficient to justify the rejection of the witness, where his identity is readily ascertainable from such testimony and from the name actually written upon the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1409-1411, 1413-1419; Dec. Dig. § 628.*]

Appeal from District Court, Page County; O. D. Wheeler, Judge.

Defendants were indicted for burglary, under the provisions of section 4791 of the Code. Upon a plea of "not guilty," there was a trial to a jury. A verdict of "guilty" was rendered, and judgment entered thereon. The defendants appeal. Affirmed.

Earl R. Ferguson and C. R. Barnes, both of Shenandoah, for appellants. Geo. Cosson, Atty. Gen., John Fletcher, Asst. Atty. Gen., and L. H. Mattox, Co. Atty., of Shenandoah, for the State.

EVANS, J. [1] It is contended that the evidence was not sufficient to sustain the verdict. There was no testimony offered on the part of the defendants. On behalf of the state it was shown that the defendants were discovered in the store of the Essex Mercantile Company at about 2 o'clock on Sunday morning, September 10, 1911. A few minutes later they left the store, and were arrested. At the time of their arrest they were carrying away a sackful of merchandise, which had been taken from such store. They were strangers in the town. The specific manner in which, and the place at which, they entered the store was not disclosed at the trial. The proprietor and employes closed the store shortly after 10 o'clock the night before. At that time they fastened all doors and windows and other openings. When the defendants were discovered in the building by the night watchman, he found no evidences of the place or manner of their entrance. It is urged here that there was therefore no evidence of a "breaking," within the meaning of the law. It would be more correct to say that the evidence was circumstantial on that question. The jury drew the inference that they must have entered the building in some manner, and that they could not have entered it without "breaking," within the meaning of the law, if all openings were closed the night before. This was the only possible inference, under the evidence, consistent with common sense. We readily reach the conclusion, therefore, that the evidence was not only sufficient to sustain the verdict at this

point, but that it was very persuasive in its details. State v. Sorenson, 138 N. W. 411.

[2] 2. Three days before the trial the state served upon the defendant written notice of an additional witness. The sheriff made the following return of service thereon: "State of Iowa, Page County—ss.: I, George H. Whitmore, hereby certify that I am the sheriff of Page county, Iowa; that I served the above notice upon the defendants John J. O'Brien and Harry Summers on the 23d day of October, 1911, by reading said notice to each of said defendants and delivering them a true copy thereof. All of which was done in Page county, Iowa. George H. Whitmore, Sheriff." When such additional witness was called to the witness stand, the following occurred: "Mr. Barnes: Before this witness testifies, I want to object to him as incompetent, for the reason that no proper notice was ever given of his testimony before the court, and no proper service was ever made of the notice upon the defendants. The notice is not properly served upon the defendants at all. (The notice is here produced and examined by the court.) The Court: The return is here, Mr. Barnes, that it was served by reading it to each of the said defendants and delivering them a true copy thereof. If there is anything defective, I do not see it, Mr. Barnes. Mr. Barnes: We make the objection for the sake of the record. I do not feel very sure. I make this objection, but I thought there was a possibility of a defect in there which I thought I saw. I am stating my record for that purpose. That is the only reason I am making the objection at this time. The Court: The record already shows here that the defendants, for the purpose of going to trial on this date, waived the fact that notice was served less than three days prior to the date of this trial. Mr. Barnes: No; there is no objection to that fact, your honor. The Court: Then the objection will be overruled."

The particular point which is now urged for reversal is that, although the return of the sheriff disclosed a reading of the notice to each of the defendants, it did not show delivery of a copy to each. The contention is that the return showed a delivery of only one copy for both defendants. The most that can be said is that the return was possibly ambiguous. It would have been more exact, in a grammatical sense, if it had stated, not only that the notice was read to each defendant, but that a copy was delivered "to each of them." But grammatical exactness is not always available in the sheriff's office; nor is it legally necessary, though always desirable. We think the return, above quoted, could fairly be construed as showing a complete service upon each defendant.

[3] There is a further reason why the point is not available to the defendants. It was not frankly made before the trial court.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

A perusal of the record, above quoted, shows that there was no attempt to bring to the attention of the court the point now urged. A formal objection was made "for the sake of the record." The trial court stated: "If there is anything defective, I do not see it." Counsel for defendants appear to have been too deferential to the court to point out the defect which they now urge vigorously upon us. If the attention of the trial court had been directed to the defect claimed, it might have been cured, either by an amended return, or by evidence of the facts relating to the service. No claim is made that the service was in fact defective as distinguished from the return. The art of concealing a grievance from the trial court, in order to save it on the record for this court, will, perhaps, never be wholly lost to the profession. But the assistance which it can command in this court when it gets here will not be conspicuous for zeal. In the case before us the attention of the trial court appears to have been diverted to some extent from the real defect now complained of by the fact that the notice had not been served four days before the trial commenced. This fact is apparent from the remarks of the court appearing of record. We think the defendants are in no position to complain of the ruling involved at this point.

[4] 3. One of the witnesses for the state was L. Wiedman. He had been examined before the grand jury, and the minutes of his testimony were attached to the indictment. Signatures of the witnesses had been waived. But the name of the witness appeared on the back of the indictment as L. Weldman. Proper objection was made to his competency as a witness, because his name did not appear upon the back of the indictment. We think the variance was not sufficient to justify the rejection of the witness.

John Zachison also was a witness. The minutes of his testimony before the grand jury were attached to the indictment. His name appeared upon the back of the indictment as John Zacherson. The same objection was made to this witness. No question is raised as to the identity of either of these witnesses as being the persons who testified before the grand jury, and the minutes of whose evidence were attached to the indictment. The question presented is solely one of innocent mistake in spelling. We think the identity of the witnesses was readily ascertainable from the minutes of their evidence and from the names as actually written upon the back of the indictment. We have never held such a variance as here shown to be fatal. We do not think that such a holding is required by a fair construction of the statute, nor in the interest of a fair trial to the defendants. If perfect spelling were essential to legal procedure and pleading, the prospect for the maintenance of law and order by criminal prosecutions

would become quite gloomy. In the record before us the name of the first witness appears as "Wiedeman," "Wiedman," "Weideman," and "Weidman." That of the second witness appears as "Zachison," "Zacherson," "Zachrisson," and "Zachesson."

No other points are argued. We reach the conclusion that the defendants had a fair trial, and that there is no reasonable doubt of their guilt.

The judgment of the trial court is therefore affirmed.

FIRST NAT. BANK OF TITONKA v. CASEY et al.

(Supreme Court of Iowa. Dec. 14, 1912.)

1. INFANTS (§ 115*)—APPEAL—CONFIRMATION.

An appeal by a minor acting for himself, instead of through his guardian, is irregular, but the court acquires jurisdiction in spite of Code, §§ 8480, 8482, requiring an infant to sue and defend by guardian, and he affirms his action after attaining majority by resisting a motion to dismiss.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 326-332; Dec. Dig. § 115.*]

2. APPEAL AND ERROR (§ 415*)—NOTICE TO COPARTIES—PARTNERSHIP.

One partner need not serve notice of appeal on his partner against whom judgment has been entered by default, since he cannot be prejudiced thereby under Code, § 4111, providing that a coparty must be served with notice, unless a reversal of the judgment will not prejudicially affect him, since it will not adjudicate anything between the partners.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2139; Dec. Dig. § 415.*]

3. INFANTS (§ 56*)—CONTRACTS—GUARDIANSHIP.

A minor is bound by his contracts, regardless of whether he is under guardianship, unless he disaffirms within a reasonable time after majority, and restores the property received thereunder and remaining in his control, but by the provisions of Code, § 3190, an infant, whether under guardianship or not, cannot disaffirm, where by misrepresentations as to his age the other party had good reason to believe him capable of contracting.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 100; Dec. Dig. § 56.*]

4. INFANTS (§ 102*)—TRIAL—EVIDENCE—QUESTIONS FOR JURY.

In an action on contract against an infant, evidence held sufficient to go to the jury on the question whether plaintiff had good reason to believe defendant capable of contracting under Code, § 3190, forbidding disaffirmance of contracts by infants under such circumstances.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 296-300; Dec. Dig. § 102.*]

5. EVIDENCE (§ 191*)—INFANTS—CONTRACTS—QUESTIONS FOR JURY.

In an action on contract against an infant, the appearance of the infant on the witness stand was proper for consideration in determining whether plaintiff had good reason for supposing defendant of age.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 676; Dec. Dig. § 191.*]

6. INFANTS (§ 58*)—DISAFFIRMANCE OF CONTRACT—CONDITIONS PRECEDENT.

It is no objection to an infant's disaffirmance of a contract by defending an action based thereon that he has not returned the money received under the contract, where it is undisputed that it was no longer in his possession.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 149-160; Dec. Dig. § 58.*]

Appeal from District Court, Kossuth County; A. D. Ballie, Judge.

Action on promissory notes resulted in a verdict being directed against defendant Halvorson and judgment entered thereon. He appeals. Reversed.

Oliver Gordon, of Forest City, and Quar-ton & Hastings, of Algona, for appellant. E. A. & W. H. Morling, of Emmetsburg, and E. V. Swetting, of Algona, for appellee.

LADD, J. One John Casey and Carl Halvorson formed a partnership, which operated a meat market in Titonka in September, 1909. After a short time Halvorson sold his interest in the business to his brother, L. Halvorson, who became a partner of Casey in the business. About August 1, 1910, the latter sold out to the defendant, who conducted the business in his own name until October 3d following, when the building containing the market was burned down. The partnership composed of Casey and defendant was indebted to the plaintiff on notes executed to cover moneys used in carrying on the business, and this action was brought to recover the amount due thereon. Judgment by default was entered against Casey. Halvorson suggested his minority, and that his mother, Emma Halvorson, had been appointed his guardian August 28, 1900, and prayed that she be permitted to defend. Thereupon the guardian filed an answer putting in issue the allegations of the petition with respect to the indebtedness, and alleging that the defendant would not attain his majority, until December 19, 1911, and praying that he go hence with his cause. The plaintiff in its reply alleged that the moneys were actually advanced to defendant for which the notes were executed while he was engaged as an adult in operating a meat market at Titonka in partnership with Casey.

[1] 1. Notice of appeal served October 25, 1911, recited that the defendant L. Halvorson appealed, and was signed by counsel for appellant as "attorneys for defendant." One of the grounds of the motion to dismiss is that the appeal should have been prosecuted by the guardian, instead of defendant. Section 3480 of the Code requires an action by a minor to be brought by his guardian, or, if he has none, then by his next friend, and section 3482 that the defense of a minor must be by his regular guardian or one appointed to defend. But the court is not without jurisdiction in an action brought by

a minor in his own name, even though the judgment may have been erroneous. *Par-kins v. Alexander*, 105 Iowa, 75, 74 N. W. 769. Nor is the defense by guardian essential to the jurisdiction of the court, though a judgment against an infant in the absence of guardian, regular or ad litem, is erroneous. In re Estate of Strange, 131 Iowa, 583, 106 N. W. 631; *Wise v. Schloesser*, 111 Iowa, 16, 82 N. W. 439; *Rice v. Bolton*, 126 Iowa, 854, 100 N. W. 634, 102 N. W. 509; *Harris v. Bigley*, 136 Iowa, 307, 111 N. W. 432. The infant is the real party in interest, and, though suit should be brought or defended as prescribed in the statutes cited, the omission so to do is an irregularity rendering the judgment erroneous but not void and subject to correction by procedure defined in the Code. At the common law an infant was required to sue and defend by guardian. Later, by act of Parliament, he was permitted to act through his next friend also. *Williams v. Cleaveland*, 76 Conn. 426, 56 Atl. 851. And, though he might prosecute a writ of error by his next friend, yet if he did so in his own name, and there was a joinder in error, his disability was waived. *McClay v. Norris*, 9 Ill. 370. In *Ramsey v. Keith* (Ky.) 77 S. W. 693, an appeal was prosecuted by an infant, and the court denied a petition to dismiss on the ground that appellee by previously submitting a motion to affirm as a delay case had waived the objection that appellant was without capacity to sue. That the appeal was taken by the minor, acting for himself, instead of through the guardian, undoubtedly was irregular, but the court acquired jurisdiction thereby. Of course, he subsequently might have disaffirmed what he had done, but, instead, upon the filing of the motion to dismiss, which was long after he had attained his majority, he resisted the same, and thereby confirmed his action in taking the appeal. For these reasons, this ground for dismissal of the appeal should be denied.

[2] The other ground of the motion to dismiss is that notice of appeal was not served on Casey. He was a coparty, and must have been served with such notice, unless it can be said that a reversal of the judgment will not prejudicially affect him. Section 4111, Code; *Clayton v. Sievertson*, 115 Iowa, 687, 87 N. W. 412. Regardless of the issue as to Halvorson, Casey was liable as partner, and judgment was entered against him by default. This would not be affected by any ruling in the case against Halvorson, and the only contingency in which prejudice might result from passing on the errors assigned in this case would be in the settlement of the affairs between Casey and Halvorson. But the judgment finally entered in this suit of plaintiff against Halvorson would not constitute an adjudication in any action between Casey and Halvorson for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

adjustment of their partnership affairs. Possibly such judgment might be valuable as evidence in an action between Casey and Halvorson as tending to establish Halvorson's obligation as a member of the partnership; but, should the judgment in this suit finally be in Halvorson's favor, this would not be conclusive as between Casey and Halvorson. In the settlement of their relative obligations growing out of the partnership, the most that can be said, then, is that the ruling in this case might incidentally affect evidence to be used in possible litigation between Casey and Halvorson, but, as it would not be conclusive therein, it cannot be said to prejudicially affect the rights of Casey. In other words, if as a result of the ruling on this appeal judgment should be finally entered in favor of Halvorson, such judgment would not constitute an adjudication as to the relative obligations of Casey and Halvorson in the adjustment of their partnership affairs. This case is readily distinguishable from *Fisher v. Chaffee*, 96 Iowa, 15, 64 N. W. 662, where a judgment had been obtained against a principal and two sureties, and it was held that in an appeal by one surety notice thereof must be served on the other in order to confer jurisdiction. It follows that neither of the grounds of the motion to dismiss the appeal is sufficient, and it is therefore overruled.

[3] 2. Appellant contends that there was error in directing a verdict for plaintiff for that during the transactions in controversy defendant was under guardianship, and whether plaintiff had good cause to believe defendant an adult did not conclusively appear. In this state a minor is bound by his contracts, regardless of whether he is under guardianship, unless he disaffirms within a reasonable time after having attained his majority, and restores the property received thereunder and remaining in his control (section 3189, Code), but "no contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe him capable of contracting." Section 3190, Code.

The defendant was engaged in operating a meat market. The business in behalf of plaintiff was transacted with him through its cashier, Armstrong. Neither he nor any other officer of the bank knew of the appointment of a guardian of defendant in a neighboring county, and, under the language of the statute, constructive notice of his status is not to be imputed. No exception is contained therein. That minors may disaffirm is the rule to which there are two exceptions: (1) Where he has misrepresented his age; and (2) where he has engaged in business as an adult. But in either event, from such misrepresentation as to age, or being so engaged in business, the other contracting

party must have good reason to believe him capable of contracting. These exceptions are not limited by statute to minors not under guardianship but apply to all, and whether there was "good reason to believe" the minor dealt with capable of contracting necessarily must depend on the circumstances of each particular case.

[4] Armstrong testified that defendant was engaged in the buying and selling incident to the operation of a meat shop, that an account was kept with plaintiff, numerous deposits made and checks issued thereon by him for Casey & Halvorsen or for himself after buying Casey out, and that he entertained no suspicion that he was a minor, but believed him to be an adult. Wolfe thought his appearance that of an adult, while his mother testified that "he did not look as though he was 21 years old."

[5] The defendant was a witness before the jury, and, of course, was subject to their inspection. He was still a minor, and certainly his appearance was a proper matter for the jury to consider in determining whether Armstrong, in acting for the bank, had good reason for supposing him of age. *Hermann v. State*, 73 Wis. 248, 41 N. W. 171, 9 Am. St. Rep. 789; *Commonwealth v. Hollis*, 170 Mass. 433, 49 N. E. 632; *Jones v. State*, 32 Tex. Cr. R. 108, 22 S. W. 149; 1 Wig. Ev. § 222, and note. See contra *Bird v. State*, 104 Ind. 384, 3 N. E. 827. But, saying that were the question not foreclosed by prior decisions, some members of the court would be of the view here expressed. In *State v. Robinson*, 32 Or. 43, 48 Pac. 857, the court held that not allowing a witness to testify from the appearance of a person to her age was not error, where such person was present at the trial, as this would furnish no substantial aid to the jury. Though an ordinary witness, after fully describing a person, may express his opinion as to his age (*State v. Bernstein*, 99 Iowa, 5, 68 N. W. 442), this would be of little or no value where the witness is before the jury, and but one ground seems to have been suggested for denying consideration of appearance by the jury in determining age; i. e., that such appearance may not be preserved for the purposes of review. This court, however, is committed to the doctrine that this is not a valid objection, for experiments, not exemplified by the record, are now allowed in presence of the jury, and injured members of the body are exposed to their view in damage cases, although there is no way of accurately reproducing them in the abstracts. Moreover, in *State v. Smith*, 54 Iowa, 104, 6 N. W. 153, 37 Am. Rep. 192, a baby two years old was shown to the jury as tending to establish resemblance. The appearance of a minor in a case like this is especially pertinent to the inquiry as it would be an important circumstance in determining whether from his having engaged in

business as an adult the other party to the contract had good cause to believe him such. See *Beller v. Merchant*, 30 Iowa, 350; *Jaques v. Sax*, 39 Iowa, 367. We are of opinion that the record was such that this issue should have been submitted to the jury.

[¶] 3. There is nothing in the suggestions that defendant had not disaffirmed nor returned the moneys or property received in virtue of the notes. By interposing the defense he undertook to disaffirm, and his testimony that he had none of such moneys or property within his control was undisputed.

Because of the error in directing a verdict, the judgment is reversed.

JOHNSON v. CONVERSE.

(Supreme Court of Iowa. Dec. 10, 1912.)

CONTRACTS (§ 277*)—PERFORMANCE—DEMAND.

Where the grantor agreed to take up and hold a mortgage on the premises for the grantee for a certain period, if the mortgagee refused to extend the same, the grantee owed no duty to ascertain before the mortgage matured whether an extension would be granted, and was not required to make demand upon the grantor on the day of the maturity of the mortgage, but it was sufficient that he gave notice and made demand within a reasonable time.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1217-1232; Dec. Dig. § 277.*]

Appeal from District Court, Pottawattamie County; O. D. Wheeler, Judge.

Action to recover damages for breach of written contract. By answer the defendant put in issue the allegations as to breach. There was a verdict and judgment for plaintiff, and the defendant appeals. Affirmed.

I. D. Shuttleworth and C. H. Converse, both of Avoca, for appellant. A. L. Preston, of Avoca, for appellee.

McCLAIN, C. J. Prior to December 11, 1904, plaintiff had purchased from defendant a farm, with provision in the contract that the plaintiff assume the payment of a mortgage for \$5,000 which had been recently executed by defendant, and which would fall due on that date. The contract contained this further provision: "And Converse agrees that in case the party holding the said mortgage refuses to extend the time of payment when due, for another period of five years, that he will take up the same, pay it off and hold it, to be paid by Johnson to Converse at the same rate of interest." It appears without controversy in the evidence that on the day after the date of maturity of this mortgage plaintiff spoke to defendant with reference to its renewal, whereupon defendant objected that he had not been notified of refusal of the mortgage to extend, and that he was not prepared to take care of it. Thereupon plaintiff communicated with the party representing the mortgagee (then

deceased), and ascertained that the mortgage would not be extended. He caused his attorney on January 27th following to write a letter to defendant, who was then in another state, advising defendant that plaintiff was unable to get the mortgage renewed without expense, and giving to defendant the option to take it up and carry it or pay the expense of the renewal. Upon failure of defendant to comply with either of these conditions, and after further conference between the parties on the subject, defendant at no time indicating a willingness to either take up the mortgage or secure another mortgage to cover the indebtedness, plaintiff brought this action for damages in the amount of the expense necessarily incurred by him in procuring another loan, including an increase of interest which it became necessary for him to pay in order to secure the money by mortgage on the land.

Defendant's theory throughout seems to have been that it was plaintiff's duty to ascertain before the mortgage matured whether an extension would be granted, and notify defendant of that fact, demanding at the same time a performance of the condition of the contract; and an instruction to that effect was asked for the defendant. This theory is evidently untenable. There is nothing in the stipulation requiring notice or demand on the day of the maturity of the mortgage. The court left it to the jury to say whether notice and demand were within a reasonable time, and we think this was the proper construction of the effect of the contract.

A further contention for appellant seems to be that, after ascertaining that the mortgage would not be extended, plaintiff without notice to the defendant incurred expense in procuring a new mortgage. But it appears without conflict in the evidence that at no time was the defendant willing to perform the obligation of his contract to take up the mortgage by paying it off and to hold it as an obligation of plaintiff; and it further appears that plaintiff had not concluded his negotiation of a new mortgage until some time after defendant was formally notified of plaintiff's requirement that the mortgage be taken up or renewed at defendant's expense. The question whether plaintiff incurred unnecessary expense in securing a new mortgage was left to the jury under proper instructions. Although the instructions given by the court are subjected to some verbal criticism on behalf of appellant, we have been unable to discover, after carefully noticing the points made in the argument, that there was any error in such instructions. The criticisms are predicated on the erroneous view of defendant as to his obligations under the agreement.

Finding no error in the record, the judgment is affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

1. EASEMENTS (§ 17*)—EASEMENTS BY IMPLICATION—WAYS.

Where, at the time of a devise of the halves of a building to different devisees, there existed in one of the halves adjoining the dividing wall, stairways and a hallway originally designed and obviously in use for the mutual convenience of the occupants of the entire building, the devisee of the other half and those claiming under him acquired by implication an easement in the use of the stairways and hall.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 45-49; Dec. Dig. § 17.*]

2. EASEMENTS (§ 15*)—EASEMENTS BY IMPLICATION—NATURE.

Easements by implication are strictly limited to rights which must be presumed to have been in the minds of the parties concerned, appurtenant on the one hand and servient on the other, and the necessity of the use for the convenient enjoyment of the premises to which the easement is claimed as appurtenant is a material consideration in determining whether such easement is implied.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 42-58; Dec. Dig. § 15.*]

3. EASEMENTS (§ 24*)—EASEMENTS APPURTENANT—CONVEYANCES.

Easements appurtenant pass with the description of the property to which they are appurtenant without specific designation, and the purchaser of the servient property takes subject to the easement without express reservation.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 64-69; Dec. Dig. § 24.*]

4. JUDGMENT (§ 590*)—CONCLUSIVENESS—QUESTIONS CONCLUDED.

A decree, reforming a will devising the halves of a building to different devisees so as to correctly describe one of the halves, does not involve the right of the devisee of the other half to an easement appurtenant, and does not bar a subsequent suit for the protection of such easement.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1065, 1068, 1064, 1102-1106; Dec. Dig. § 590.*]

5. EASEMENTS (§ 36*)—ABANDONMENT—EVIDENCE.

Evidence held not to justify a finding of an abandonment of an easement.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88-93; Dec. Dig. § 36.*]

6. EASEMENTS (§ 30*)—ABANDONMENT—EVIDENCE.

Mere nonuser of an easement, consisting of the right to use stairways and a hallway located in a half of the building by the occupants of the other half during a period of time within which there is no occasion to use it, does not show a permanent abandonment.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77-79; Dec. Dig. § 30.*]

Appeal from District Court, Johnson County; R. P. Howell, Judge.

Action in equity to enjoin the defendants from obstructing certain stairways and access to a hall on their premises in the use of which, it is claimed by plaintiff, he has an easement. There was a decree for plaintiff, and the defendants appeal. Affirmed.

McCLAIN, C. J. About the year 1860, one J. D. Templin was the owner of a parcel of land in the business portion of Iowa City with a frontage of 40 feet on the south side of Washington street and extending southward 150 feet to an alley, and erected thereon a two-story brick building of the entire width of the parcel of land and of a depth of about 80 feet. Through the center of this building, extending north and south, was a brick wall from the foundation to the roof, dividing the lower story into two storerooms, each about 20 feet in width, save that out of the east half space was taken for a front and a rear stairway, inclosed, and adjoining the center wall, which stairways gave access to a hallway on the second floor extending the entire length of the building north and south and also adjoining the center wall. There was no access to the front stairway from the west storeroom, but the back stairway was reached from that room through a door near the south end of the center wall. On the second floor, the rooms on the west side of the center wall were reached from the hallway through doors cut in the wall, and on the east side of the hallway were doors into corresponding rooms over the eastern storeroom. Without any substantial change of plan, the front and rear stairways and the hall on the second floor continued to be used for the purposes above indicated until the death of the owner in 1882, when the two portions of the premises passed by devise to different owners; the eastern part of the building being described as the west half of the east half of lot 2 in Blk. 81, and the western part being described as the east half of the west half of the same lot. The title of the plaintiff and the defendants, respectively, to the west half and the east half of the building, rests upon these devises. For the purpose of determining the question presented, no further details as to the title to the respective portions of the property need be set out. The claim of plaintiff as owner of the west half of the building is that, under the devise to his remote grantors of the west half of the east half of lot 2, he acquired the right to the use of the stairways and hall as an easement appurtenant to his portion of the building; while the contention for defendants is that there was no easement granted in the stairways and hall which are wholly within the limits of the east half of the building, and that the devise of that portion excluded any easement by implication or necessity. There is a further claim for defendants that, if any easement existed at the time the devise took effect, it has been

abandoned by the conduct of plaintiff and those under whom he claims.

[1] I. The devisees of the two halves of the building took title as purchasers, and their rights, so far as we can see, were the same as they would have been had J. D. Templin conveyed the west half of the building, that is, the last half of the west half of lot 2, to plaintiff's remote grantors, and at the same time conveyed to others the east half of the building, that is, the west half of the east half of the same lot. If, at the time such conveyances were made, there had existed, in the east half of the building adjoining the dividing wall, stairways and a hallway originally designed and still used as was obvious to all the grantees, for the mutual convenience of the occupants of the entire building, then, as we think, the grantees of the west half would have acquired by implication an easement in the use of such stairways and hall, and the grantees of the east half would have taken title subject to such easement. *Thompson v. Miner*, 30 Iowa, 386; *Marshall Ice Co., v. La Plant*, 136 Iowa, 621, 111 N. W. 1016, 12 L. R. A. (N. S.) 1073; *Howell v. Estes*, 71 Tex. 690, 12 S. W. 62; *Doyle v. Lord*, 64 N. Y. 432, 21 Am. Rep. 629.

[2] It must be conceded that easements by implication are to be strictly limited to rights which in the very nature of the case must be presumed to have been in the minds of the parties concerned, appurtenant on the one hand and servient on the other; and the necessity of the use for the convenient enjoyment of the premises to which the easement is claimed as appurtenant is a material consideration in determining whether such easement is to be implied. Nevertheless, an easement by implication is a different thing from an easement by necessity, as the latter term is properly used. *Scott v. Palms*, 48 Mich. 505, 12 N. W. 677. It must be conceded, also, that in some courts easements by implication have been limited to those existing strictly by necessity. See, for example, *Buss v. Dyer*, 125 Mass. 287; *Hildreth v. Gogins*, 91 Me. 227, 39 Atl. 550; *Stillwell v. Foster*, 80 Me. 333, 14 Atl. 731. Much may be said in behalf of this rule; but we think the other rule which recognizes an implied easement as arising out of the method of construction and use of the building, portions of which subsequently pass to different purchasers, has been adopted by this court in the cases already cited.

[3] Easements appurtenant pass with the description of the property to which they are appurtenant without specific designation, and, on the other hand, the purchaser of the servient property takes subject to the easement without express reservation. *Teachout v. Capital Lodge*, 128 Iowa, 380, 104 N. W. 440; *Reed v. Gasser*, 130 Iowa, 87, 106 N. W. 383; *Hatton v. Cale*, 152 Iowa, 485, 132 N. W. 1101; *Stephens v. Boyd*, 138 N. W. 389.

We do not undertake to say that, if the building should be entirely destroyed, the plaintiff would have an easement in that portion of defendants' lot over which the stairways and hall are now maintained. No such question is before us. Plaintiff asks only that defendants be enjoined from obstructing his use of the stairways and hallway as they now exist, such use being that to which they were subject at the time title passed under separate ownership by virtue of the provisions of J. D. Templin's will. We think this claim of plaintiff was properly recognized by the lower court.

[4] II. Appellants rely upon a decree in an action to which all the devisees of J. D. Templin were parties as an adjudication in favor of defendants J. W. Templin and others against plaintiff's remote grantor cutting off any right in the east half of the building. But it appears that the action in which such decree was rendered was one in which John W. Templin and his minor children, who are defendants in the present action, asked that as against the other heirs or devisees of J. D. Templin the will of the latter be so reformed as to correctly describe a certain parcel of land devised to said John W. Templin and his issue as the west half of the east half of lot 2 in block 81, instead of the east half of the west half of said lot, which was in said will devised to a daughter, remote grantor of the plaintiff, and that the right of said plaintiffs to the west half of the east half of said lot under the will as thus corrected be confirmed, and that to remove any cloud from said plaintiff's title the record of the will be made to conform to the correction asked. The decree in that action recites service of notice on defendants therein and default by them, and a finding that said plaintiffs were, under the provisions and conditions of the will, the owners of the west half of the east half of said lot, correcting the will accordingly in that respect, and confirming their title and quieting it as against the defendants in that action. It is clear therefore that plaintiffs' remote grantor, as heir of J. D. Templin and devisee under his will, was not called upon to defend her right to an easement by implication in the west half of the east half of the lot which she had by virtue of the devise to her of the east half of the west half of the lot, and that the only effect of the decree was to reform the will and make it effectual to carry out the intent of the testator. In the first division of this opinion the rights of the parties have been determined on the theory of devisees of the two halves of the building to different devisees, and that conclusion is not affected, therefore, by the consideration of the decree herein described.

In view of this conclusion, the motion of appellee, submitted with the case, to strike from the record the decree offered in evidence on certain grounds set up in said mo-

ment by plaintiff's grantors or himself seems to us to be quite inadequate. The obstructions of which plaintiff complains, and which he asks to have abated, have not existed for any great length of time and have but recently come to his attention. It is true that for some years the second floor of plaintiff's premises has been occupied by a tenant in connection with the second floor room to the west; communication having been established by an arched opening in the wall with plaintiff's consent, and the entrances from the hall to the east have not been used. But if plaintiff's present tenant for his second floor allows his lease to expire, it will be necessary for plaintiff in all probability to lease the second floor or portions of it to tenants who will desire access by means of the hallway; for there is no other avenue of access in the building to plaintiff's second floor save by the stairways and hallway to which this action relates.

It further appears that at one time plaintiff's immediate grantor, in leasing the storeroom on the first floor to George W. Spedel, who now, as tenant of the east half of the building, is a defendant in this suit, agreed to construct and did construct for him an inside stairway for reaching the back portion of the second floor. But after occupancy of two or three years, Spedel removed to the east side of the building, and his succeeding tenant of the storeroom on the west side, having no use for the inside stairway, cut it out. Spedel's testimony that, when plaintiff's grantor agreed to construct the inside stairway, he declared that his tenant had no right to the use of the stairways in the east half of the building, is contradicted by the other party to the alleged conversation, and, as the burden of proving abandonment is upon the defendants, we reach the conclusion that no actual or intentional abandonment is made out.

[6] Mere nonuser of an easement of this kind during a period of time within which there is no occasion to use it does not tend to show a permanent abandonment. *Teachout v. Capital Lodge*, 128 Iowa, 380, 104 N. W. 440; *Reed v. Gasser*, 130 Iowa, 87, 106 N. W. 383.

The decree of the trial court is therefore affirmed.

JULIUS A. BAUER & CO. v. CHAMBERLAIN et al.

(Supreme Court of Iowa. Dec. 12, 1912.)

1. LANDLORD AND TENANT (§ 124*)—LEASE—CONSTRUCTION.

An owner, contemplating the erection of a building, leased a room on the first floor for a drug store on the completion of the building.

extension of the time to complete the room. Thereafter the tenant saw a blueprint which showed a door connecting the room with the lobby of the part of the building to be occupied as a hotel. When the hotel lobby was finished the doorway was closed on the hotel side. *Held*, that the tenant did not acquire by the original lease, or the extension, or subsequent plans, any right to have constructed and kept open for use a door between the store and the hotel lobby.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 437-440; Dec. Dig. § 124.*]

2. EASEMENTS (§ 17*)—WAYS.

The tenant did not acquire an easement by implication of a right of access to and from the lobby, though such right would be advantageous to him.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 45-49; Dec. Dig. § 17.*]

Appeal from District Court, Polk County; Lawrence De Graff, Judge.

Action to enjoin the defendant Chamberlain, the owner of a hotel building, and W. L. Brown, the lessee of such building, from interfering with the use by plaintiffs, the lessees of a storeroom in such building, of a certain door opening from the storeroom into the portion of the building occupied as a hotel. Damage is also demanded for the past interference by defendants with the use of such door by the plaintiffs in connection with their business. There was a decree denying to plaintiffs any relief, and they appeal. Affirmed.

Sullivan & Sullivan, of Des Moines, for appellants. Read & Read, of Des Moines, for appellees.

McCLAIN, C. J. In December, 1902, the defendant Chamberlain was proposing to construct, and, indeed, had in process of construction, a building on the northeast corner of Locust and West Seventh streets in Des Moines, and entered into a written contract of lease with the plaintiffs by which he granted to them for the term of eight years from the completion of the building, on an agreed monthly rental, the use, for the purpose of a drug store, of a room on the first floor of such building of the dimensions of about 18 feet on Locust street and about 66 feet on Seventh street. The contemplated building, as described, was to be of not less than two stories in height, and it was to be completed within about 90 days from the date of the lease, barring accidents, etc., according to the plans and specifications of Messrs. Proudfoot & Bird, architects. In February following, defendant Chamberlain, desiring to erect a larger building than had at first been contemplated, which might be used for hotel purposes, and the construction of which would require a longer time than that referred to in the lease to plain-

tiffs, procured from the plaintiffs a written indorsement on said lease as follows: "In consideration that this building be changed to a hotel we agree to the necessary extension of time to complete the drug room and to the changes to be made by the architects Proudfoot & Bird, drug room to be ready for occupancy by June 1st, 1903, if possible. Rental to begin 30 days after drug room is completed. No other drug store to be in this building."

Soon after this indorsement was made, plaintiffs saw a blueprint of the architect's plans for the first floor which showed not only a front entrance to the room on Locust street and a rear side entrance on Seventh street, but also a door connecting the room which was to be occupied by plaintiffs with the lobby of the portion of the building to be occupied as a hotel. During the construction of the building in accordance with these plans, defendant Brown, who had already an arrangement for a lease of the building for hotel purposes, and who was to some extent looking after the proper construction of the building, noticed that a door was being put in between the storeroom and the lobby in accordance with the revised plans, and raised the question with the plaintiffs whether they should be allowed to have access to the hotel lobby through such door without the payment of additional consideration in the way of rental. The testimony of the witnesses is in conflict as to what was said at various times on this subject-matter by Brown and by the plaintiffs, but it is not contended for plaintiffs that Brown at any time conceded to plaintiffs the right to have such door kept open and used under the terms of their lease with Chamberlain. The building was so far completed that plaintiffs took possession of their storeroom in February, 1904, before the other portions of the building were yet completed, and put in use for hotel purposes in October following. In the meantime the door had been to some extent kept open and used by workmen, but plaintiffs had no occasion to make use of it in connection with their business and had not done so. When the hotel lobby was finished, this doorway was closed up by a blind door on the hotel side, and it has remained closed ever since. Plaintiffs' lease was, by Chamberlain, assigned to Brown in November, 1904, and the final lease between Brown and Chamberlain for the use of the remaining portion of the building for hotel purposes was made in December. Plaintiffs' rights are predicated upon the writings above referred to and upon a claim of an easement by implication or necessity.

[1] I. It is plain that the original lease made by Chamberlain to plaintiffs did not confer upon plaintiffs any right to have constructed and kept open for use an interior door between their storeroom and other portions of the building, for no use of the other portions of the building for hotel pur-

poses was then contemplated, and there is nothing in the leases as to any doors whatever save by reference to plans and specifications which it is conceded did not indicate any other doors than the front entrance from Locust street and the side entrance from Seventh street. It is also plain that the extension of lease above set out did not confer upon the plaintiffs any right to have an interior door constructed and maintained from plaintiffs' storeroom to the lobby of the hotel, for the revised plans and specifications therein referred to had not yet been prepared. It appears that, in the conversation between Chamberlain and plaintiffs relating to the extension of time for the completion of the building, it was urged by plaintiffs that they would be seriously damaged by the proposed delay, and that Chamberlain urged upon their attention the fact that the proposed use of the remainder of the building for hotel purposes would be to their decided advantage. But it is not claimed that Chamberlain made any reference to a proposed door leading from the storeroom to the lobby.

Under these circumstances, it seems to us clear that if, in the preparation of the revised plans and in the construction of the building, no doorway between plaintiffs' storeroom and the lobby of the proposed hotel had been provided for, there would have been no breach of contract, nor interference on the part of Chamberlain with any easement right of plaintiffs, and we think it clear also that the subsequent preparation of plans which plaintiffs may have seen, showing a doorway between the storeroom and the hotel lobby and the construction of an opening for such doorway, did not confer any right upon plaintiffs to the use of a door connecting their storeroom with the hotel lobby. No contract right of plaintiffs has therefore been interfered with by defendant Brown in keeping closed, as against plaintiffs, the opening constructed between their storeroom and the lobby of the hotel, unless out of the contract relations between the plaintiffs and Chamberlain some easement by implication or necessity has arisen entitling plaintiffs to the use of such means of communication.

[2] II. With reference to the claim of an easement, it must be observed that the right of access to and from the lobby would necessarily imply a burden upon the use of the hotel lobby itself. It is not contended that any advantage would have inured to plaintiffs from the opening unless persons were entitled to pass from plaintiffs' storeroom into the hotel lobby and from the hotel lobby into the storeroom. The question then is whether the defendant Brown, in leasing the remaining portion of the building for hotel purposes, took subject to a servitude in favor of plaintiffs as tenants of the storeroom. We are unable to see any basis on which such a servitude could rest. There

was plainly no such servitude by reason of any strict necessity. Plaintiffs have enjoyed, and are still enjoying, ample means of access to their storeroom by the general public.

An easement by implication does not arise from considerations of mere convenience or advantage. If, at the time plaintiffs took a lease of their storeroom, it was apparent, from the construction of the building and the method of its use, that a communication with the hotel lobby was one of the advantages which would accrue to them from such lease, it may be that an implied agreement that such communication would continue would have arisen. But it cannot be said that at any time there has been any implied agreement arising out of the circumstances under which the written contract was entered into or the premises have been occupied, nor have the plaintiffs been justified in assuming that they were acquiring a right to an interior communication with the hotel lobby. Easements by implication are not to be recognized merely on considerations of advantage or convenience. *Ward v. Robertson*, 77 Iowa, 159, 41 N. W. 603; *Walker v. Clifford*, 128 Ala. 67, 29 South. 588, 86 Am. St. Rep. 74; *Belser v. Moore*, 73 Ark. 297, 84 S. W. 219; *Kane v. Templin*, 138 N. W. 901, decided at the present term.

Finding that plaintiffs have not and never have had any right to use a doorway between their storeroom and the hotel lobby, we reach the conclusion that they are entitled to no relief whatever, either by way of injunction, mandamus, or damages. In view of this conclusion, it is unnecessary to discuss the question whether mandamus would be a proper remedy in such a case.

The decree of the trial court is therefore affirmed.

KERR et al. v. YAGER et al.

(Supreme Court of Iowa. Dec. 13, 1912.)

1. ADVERSE POSSESSION (§ 57*)—BURDEN OF PROOF.

In partition, a defendant claiming the land through an oral transfer followed by possession for the period prescribed by the statute of limitations has the burden of proof.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 277, 278, 687; Dec. Dig. § 57.*]

2. VENDOR AND PURCHASER (§ 44*)—SALE—EVIDENCE.

In partition, evidence held sufficient to warrant a finding that a parol conveyance was made to defendant's grantor in consideration for past services and an agreement to pay the taxes on the land.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 69-76; Dec. Dig. § 44.*]

3. WITNESSES (§ 144*)—TRANSACTIONS WITH DECEASED PERSONS.

The grantor of a party in an action involving land cannot testify to personal transactions or communications between himself and

his deceased father, from whom he claimed an oral conveyance of the land, under Code, § 4604, relating to communications with deceased persons.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 625-643; Dec. Dig. § 144.*]

4. WITNESSES (§ 143*)—HUSBAND AND WIFE—TRANSACTIONS WITH DECEASED PERSONS.

A wife can testify as to transactions between her husband and his deceased grantor in which she took no part in an action to which neither she nor her husband was a party.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 644-649; Dec. Dig. § 146.*]

5. WITNESSES (§ 139*)—PARENT AND CHILD—TRANSACTIONS WITH DECEASED PERSONS.

A son who was not a party to a suit could testify as to conversations with his deceased father relative to transactions with another son.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 532-597; Dec. Dig. § 139.*]

6. APPEAL AND ERROR (§ 232*)—EVIDENCE—OBJECTIONS—WAIVER.

One objecting to evidence only on certain grounds waives all other grounds of objection.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1351, 1368, 1430, 1431; Dec. Dig. § 232.*]

7. FRAUDS, STATUTE OF (§ 129*)—CONVEYANCES—CONSIDERATION.

The satisfaction and release of a pre-existing debt is a sufficient consideration for a conveyance, and amounts to such payment as to take the transaction out of the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292, 303, 306-308, 311, 314, 318-320, 322, 325, 326; Dec. Dig. § 129.*]

8. APPEAL AND ERROR (§ 643*)—ABSTRACTS—MOTIONS TO STRIKE—TIME.

A motion to strike appellee's amendment to the abstract, which, though not filed in time, was filed as soon as it was known what points appellant was relying on for a reversal will be overruled.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2791-2794; Dec. Dig. § 643.*]

Appeal from District Court, Harrison County; A. B. Thornell, Judge.

Action for the partition of certain real estate. Defendants Yager and Yager claimed to be the owners of the land through mesne conveyances from James H. House, now deceased, from whom all parties trace their title. Various other issues were tendered, and upon trial to the court a decree was rendered dismissing plaintiff's petition, and quieting the title to the land in defendants Yager and Yager. Plaintiffs appeal. Affirmed.

J. S. Dewell, of Missouri Valley, for appellants. C. W. Kellogg, of Missouri Valley, for appellees Yager. Clem F. Kimball, of Council Bluffs, for other appellees.

DEEMER, J. James H. House died some time in the year 1888, seised of the record title to the land in controversy. He had five children, to wit: William, Chas., and Allen, sons, and Jannet, who afterwards married William Eddie, and Eliza, who afterwards married Abraham Sapp, daughters. Prior to the death of James, Jannet Eddie died, leav-

ing three children, Chas., Winnie, who married plaintiff John D. Kerr, and Lillie, who afterwards married John Brownrigg. Winnie Kerr died prior to the demise of James House, leaving one daughter, Sadie Kerr, a minor, who is also one of the plaintiffs, and the two plaintiffs claim to own an undivided one-fifteenth of the real estate. Eliza Sapp died before the death of her father, leaving six children surviving, and these, with their respective husbands and wives, are defendants, and they each claim a one-thirtieth interest in the real estate. William, Chas., and James House, sons, quitclaimed their interest in their father's property to the other son, Allen, and thereby Allen became vested of an undivided three-fifths of said real estate. And on July 27, 1904, Allen House, his wife joining, conveyed their interest to defendants Yager and Yager. In October of the year 1906 Chas. Eddie and wife and Lillie Brownrigg and husband conveyed their interest in the land to plaintiff Kerr, and it is claimed that he thereby became the owner of two-fifteenths of said estate. In November of the same year George Sapp conveyed his interest to one W. A. Smith, who, in turn, conveyed the same to plaintiff Kerr, by reason of which Kerr became the owner of an undivided one-sixth of estate. Defendant Annie Yager is the daughter of Allen House, and Chris Yager is her husband. Defendants Yager and Yager claim title to all the property in controversy in virtue of a warranty deed for the same to them executed by Allen House and wife on July 27, 1904. They also pleaded that James H. House during his lifetime and some time prior to the year 1876 sold and transferred the property to his son Allen by oral contract, and that, pursuant to such sale, Allen took possession of the land, made improvements thereon, and ever thereafter paid the taxes on the premises. They also procured an assignment from Allen House in the following terms:

"Having sold to my daughter, Anna Yager, and her husband, Chris Yager, lot 6 and all of lot 5, except the west eleven acres thereof in section No. 18, township No. 78, range 45, Harrison county, Iowa, and given the said Anna Yager and Chris Yager a warranty deed to the said land, I hereby sell and assign to said Anna Yager and Chris Yager, my claim against the several plaintiffs and defendants in the suit of John D. Kerr et al. vs. Anna Yager et al., commenced in the district court of Harrison county, Iowa, for the January term, 1907, the said taxes having been paid on said land by me under claim of ownership, believing that I was the owner of the land under oral sale and gift from my father, James H. House. And I hereby authorize my said daughter and her husband, Anna Yager and Chris Yager, to collect said taxes and the interest thereon from the several claimants of said property in said suit, if it shall be found by the court that the plaintiffs and defendants are enti-

tled to any part of said land, and authorize them to claim the same as an offset against any claim of the plaintiffs or defendants in said suit.

"Dated Missouri Valley, Iowa, this 29th day of December, 1906.

his
"Allen X House."
mark

And, after averring that Allen paid taxes on the land to the amount of \$275.81, they asked to be protected in any event to the amount of these taxes which should be charged proportionally against any adverse interest in the land. They also pleaded that they went into the possession of the land some time in the year 1890 or 1891 under an arrangement with Allen House, believing that they were the owners thereof, and that they have ever since been in the continuous, open and adverse possession of the property. They further pleaded the adverse possession of their grantor, Allen House, for the full statutory period, both before and after the death of his father. Repleading the same facts, they asked that their title to all the premises be established and quieted in them. As to defendant Eliza Sapp, they pleaded that deceased, James H. House, made a conveyance to her which was to be in full of her share in his estate, and that she accepted the same as such, and that plaintiff Kerr took nothing under his deed from George Sapp. They also pleaded that, since they took possession under their deed from Allen House, they cleared off the property at an expense of \$50, and made improvements thereon of the value of \$2,250, and they asked that these matters be also taken into account in the event their title was not confirmed. In a reply to the pleadings setting up these various matters plaintiffs denied most of the affirmative statements, and pleaded the statute of frauds. They also pleaded that the rents and profits of the land should be offset against the claims for taxes. They also asked that, if it be found that the Sapp heirs had nothing in the land because of the conveyance to their mother, their interest in the lands be proportionally increased. Plaintiff Sadie Kerr also pleaded that she was a minor 15 years of age, and that the statute of limitations could not and would not run against her until after she became of age. The other defendants filed pleadings which are not now material because they seem to be content with the decree as rendered. That decree was to the effect that Yager and Yager were and are the owners of the property in fee simple. It also established and confirmed their title and dismissed plaintiffs' petition. The facts so far recited being undisputed, and the appeal having been taken by plaintiffs alone, it is manifest that the only issues to be considered are those arising between plaintiffs and defendants Yager and Yager. The record title was in James H. House at the time of his death, and the burden was and is on the

defendants Yager and Yager to show that the said James sold the land to his son Allen House in his lifetime as claimed, and that thereafter Allen conveyed the same to them, or that they took possession of the land under the warranty deed from Allen and his wife to them of date July 27, 1904, and that they have since held possession thereof, claiming to own the same, and that their grantor, Allen, held adversely since the year 1896. If the latter be the finding, it would not in itself be sufficient to bar the title of Sadie Kerr, for she is a minor, and the statute of limitations would not run against her. We may for the purposes of this opinion dismiss all other claims save those made by appellees Yager and Yager in the briefs filed by them: (1) That they hold title to all the land by adverse possession; (2) that there is sufficient evidence to show an oral sale of the land by James H. House during his lifetime to his son Allen in consideration of services performed followed by the sole possession and occupancy thereof under said contract for more than 10 years, and the making of improvements thereon; and (3) that, in any event, they are entitled to an allowance for all taxes paid, for improvements placed upon the land, and for the value of labor performed in putting into condition for cultivation.

It should be stated in this connection, in order to avoid confusion, that Allen House may have acquired title to the land by adverse possession before the death of his father, and, if that be true, plaintiff Sadie Kerr (minor) would have no interest therein.

[1, 2] The primary and pivotal question in the case is this: Did James H. House during his lifetime sell the land by oral agreement to his son Allen? And incidental thereto: Did the son Allen go into possession thereof and thereafter sell the land by warranty deed to defendants Yager and Yager, and did they or either of them go into possession, claiming to own the entire title, and use and occupy the land for any full 10-year period? Upon these questions the burden is upon the defendants Yager and Yager. Originally the land was covered with a heavy growth of timber, and was unoccupied, and the evidence tends to show that some time during the years 1873 and 1874 Allen House, by agreement with his father, undertook to, and did, clear the land of all saw lumber, and caused the same to be sawed, and the lumber was sold and the money turned over to the deceased James H. House, and defendants produced evidence to show that after this was done, and some time in the year 1876, the father said to his son Allen, "I will give you this land if you will take it and pay the taxes on it for what you have done for me in clearing it off." Testimony was also offered to show that the son Allen accepted the proposition, took possession of the land, and paid the taxes thereon. The testimony as to the possession taken by Allen is

not very strong. It seems that thereafter he took timber therefrom for fuel and for posts. The land was unimproved and unfenced, save that some small garden spots were inclosed, and for a portion of the time part of it was in the possession of squatters. Cattle and stock ran over the land almost at will, and until the time the Yagers took possession squatters lived upon portions of it, and they never paid any rent, although they built some shanties thereon, and cultivated some small garden spots. Yager moved upon the land under an arrangement with Allen House about the year 1890, and immediately began its improvement. He fenced it off, cleared it off, and made valuable improvements thereon.

[3] Most of the testimony offered to show the sale of the land was objected to as incompetent and as coming from incompetent witnesses, and we may here say that we regard the witness Allen House incompetent to testify to any personal transactions or communications between himself and his deceased father because of the provisions of section 4604 of the Code. As to other relevant issues he was competent.

[4] But the witness Mary House, wife of Allen House, was competent to testify to transactions and communications between Allen and his father in which she took no part. Neither Allen nor his wife was a party to the suit, and the wife was not an incompetent witness to the matters of which she gave testimony.

[5] William House, who was not made a party to the suit, was also a competent witness as to conversations he heard from his father. This competent testimony is sufficient as we think to show a parol conveyance of the land by James H. House to his son Allen in consideration of his services in clearing it up, and the further agreement to pay the taxes upon it. This is corroborated to some extent at least, in that he paid the taxes thereafter both before and after his father's death, and down to the time the land was deeded to the Yagers, by the fact that he assumed to control it both before and after the father's death, and to exercise exclusive acts of ownership over it, that he listed it for taxation as his own after the death of his father, and that plaintiff John D. Kerr, who now claims to own a part of it, knew as early as 1892 that he, Allen, was claiming to own it all, and by the further fact that he assumed to own it all and conveyed the entire title by warranty deed to the Yagers. Although plaintiff Kerr knew of this claim as early as the year 1892, he made no objections thereto.

[6] Such being the testimony, we do not think it is open to the objection that it is within the statute of frauds. See *Hotchkiss v. Cox*, 47 Iowa, 655. Aside from this, it was not objected to on that ground, and for that reason the objection was waived. *Holt v. Brown*, 63 Iowa, 319, 19 N. W. 235; *Crossen v. White*, 19 Iowa, 109, 87 Am. Dec. 420;

Graves v. Clark, 101 Iowa, 738, 69 N. W. 1046.

[7] The satisfaction and release of a pre-existing debt is a sufficient consideration for a conveyance and amounts to such payment as to take the case out of the statute of frauds. See the Hotchkiss Case, *supra*. If Yager's case depended upon a parol gift, which must, to be sufficient, be followed by actual possession, if not by the making of improvements thereon, we should have more difficulty with it. But, as the conveyance was made in consideration of the son's past services, we think the agreement was something more than a gift. It was a transfer upon a consideration paid, and such acts of possession and ownership as followed are confirmation of the claims made by the Yagers. It would not be difficult to establish the claim of adverse possession against plaintiff John D. Kerr. But this would not dispose of the claim of Sadie Kerr, for as we think the statute did not run against James H. House during his lifetime.

Our conclusion is also supported by competent and uncontradicted testimony that James H. House said to James and Charles House in the presence of Mary, Allen's wife, about the time of the alleged transfer, that he had given the land to Allen.

[8] Appellant's motion to strike appellees' amendment to abstract is overruled. It was not filed in time, it is true, but it was filed as soon as appellees knew what points appellants were relying upon for a reversal.

We are satisfied after a careful reading of the entire record that the decree of the trial court is right, and it is therefore affirmed.

DEPUGH v. BROWN.

(Supreme Court of Iowa. Dec. 14, 1912.)

1. APPEAL AND ERROR (§ 1002*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. MORTGAGES (§ 87*)—EXECUTION—NEGLECT—QUESTION FOR JURY.

Where a real estate broker selling land to a purchaser and agreeing to procure for him a loan at 5 per cent., and to pay any difference if obliged to pay a higher rate, directed the purchaser to a third person, who, making a loan secured by notes and two mortgages, read to the purchaser the mortgage bearing 5 per cent. interest, but did not read the other mortgage bearing 8 per cent. and the purchaser signed both mortgages without reading them, the question whether he was negligent so as to prevent enforcement of the promise of the broker was for the jury.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 87.*]

3. TRIAL (§ 144*)—INSTRUCTIONS—DIRECTION OF VERDICT.

Where plaintiff, if entitled to recover at all, is entitled to recover a specified per cent.

on a specified amount, the court properly fixed the amount of the recovery at the specified per cent. on the specified amount in the event the jury found for plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 344; Dec. Dig. § 144.*]

4. LIMITATION OF ACTIONS (§ 46*)—RUNNING OF LIMITATIONS.

Where a real estate broker selling land to a purchaser agreed to procure for him a loan at 5 per cent., and to pay any difference if obliged to pay a higher rate, limitations did not begin to run on the promise until the purchaser suffered loss which was when he was compelled to pay additional interest.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 240-253; Dec. Dig. § 46.*]

Appeal from District Court, Harrison County; O. D. Wheeler, Judge.

Action to recover excess interest upon a loan which plaintiff was compelled to pay; defendant agreeing to pay all over 5 per cent. that plaintiff was compelled to pay. Defendant denied the allegations of the petition, pleaded the statute of limitations, and also, in substance, that plaintiff was not compelled to pay the amount of interest which he did, and that if he, plaintiff, had notified defendant, he, defendant, could have procured a loan for a much lower rate. On these issues the case was tried to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals. Affirmed.

C. W. Kellogg, of Missouri Valley, for appellant. S. H. Cochran, of Logan, for appellee.

DEEMER, J. Defendant and one Ellis were real estate agents, and as agents for a landowner named Nelson they sold his, Nelson's, farm to plaintiff on or about March 1, 1906. It is agreed that plaintiff said he could not pay all cash for the farm, and would have to borrow some money thereon, and it is claimed by plaintiff that defendants then agreed that they would procure a loan for him at 5 per cent., and that, if he was obliged to pay more, they would pay him the difference.

[1] Defendant denied that this was the nature of the contract, but the jury found against defendant on this proposition, and the verdict must in view of the conflict in the testimony be treated as a verity. Defendants deny that they agreed to furnish the money at 5 per cent., but stated that they could get a first mortgage at 5 per cent., and had made arrangements with one Burke at Missouri Valley for a second mortgage at 6 per cent. After the contract of sale had been signed, plaintiff went to Missouri Valley, and saw Burke, and on March 12, 1906, signed two mortgages securing two separate notes, one made payable to H. W. Binder and the other to Burke. The note to Binder bore 5 per cent., and the one to Burke 8 per cent. interest. Plaintiff signed

the notes without reading, and did not know that the second bore 8 per cent. interest until some time afterwards, nor did he inform defendant of that fact until about a year afterward.

[2] Plaintiff explains the circumstances attending the signing of the notes as follows: "At the time the two mortgages were made, the first one was read over to me by Mr. Burke. The second mortgage was not read over to me. * * * I discovered for the first time that the second mortgage provided for 8 per cent. interest the year after it was made, when I went to pay the interest. At that time I went to see Mr. Brown, and I said to him that Mr. Burke said that the mortgage called for 8 per cent. Brown says: 'It is no such damn thing.' I told him that was what he charged against me, and I would not pay it. Mr. Brown said he would see about it. I spoke to Mr. Brown again when I went to pay the interest again next year. I wanted him to straighten it out, but he didn't seem to think he would. I had to go off and leave it that way. * * * When I went to Missouri Valley, Billy Burke drew up the papers in his office. I went to Mr. Brown, and told him I was ready to close the deal. He says: 'Well, the papers are over to Mr. Burke's bank. We will have to go over there.' I do not recollect he said anything to Mr. Burke in my presence, but he told me, he says: 'I have got Mr. Burke to do this writing. He is a better hand than I am. I have got him to do this.' He said Mr. Burke would fix out the papers. Mr. Burke read the first mortgage from Mr. Binder. I knew I was giving the first mortgage to Mr. Binder. I did not say anything about the second mortgage, and he did not read it over, and he did not read over the note to me. I knew how much the second mortgage was, how much it called for, but I did not know what rate of interest. He told me how much the first mortgage was and read that over. I signed the second mortgage and the note with it without knowing what it was, except that it was a second mortgage for that amount. * * * At the time this mortgage (Exhibit 2) was signed, I went to Mr. Brown, and he said he got Mr. Burke to write it up, he was a better hand at the business. Mr. Brown went with me to the bank, and went through the bank to Mr. Withrow's office, and went out. He was not there when the papers were being signed. I did not see him about this again for a year. * * * I did not read the contract over. I can read a little. I can read newspapers sometimes. (Witness shown Exhibit 1.) Yes; I can see that signature on that contract. It is my signature. I can see the signature upon deed Exhibit 2. That is my signature. At the time this mortgage (Exhibit 2) was signed I did not get Mr. Burke to read it to me."

Burke testified as follows: "Mr. Brown

called on me before this farm was sold in regard to securing this money for Mr. Depugh."

Defendant testified on the same subject as follows: "We told him (plaintiff) we could make the first loan at 5 per cent. straight and the second at 6 per cent. Said that Mr. Burke would make the second loan at 6 per cent. He said he would take the farm if he could get it at \$67.50 an acre and pay 5 per cent. on the first and 6 per cent. on the second loan. There was nothing said about how much of a first mortgage had to be made. He was to get all he could at 5 per cent. and the balance at 6 per cent."

And Ellis testified: "I told him we could get a first loan for all the farm would stand for 5 per cent. * * * We told him we could get all the farm could stand in the first mortgage at 5 per cent. It would be a higher rate for the balance. We did not know how much at that time. We saw him again that afternoon after we had been to town. We told Mr. Depugh at that time that Mr. Burke was to furnish the first loan at 5 per cent. and the balance at 6 per cent., but we did not know yet whether we could close the deal until we had seen Mr. Nelson as his price was still \$70." Burke was recalled, and testified as follows: "I have an independent recollection that I made out the mortgage, the body of it. It was signed in my presence as a witness. I do not now recollect how many days before the mortgage was drawn that Mr. Brown came to see me about it. Mr. Brown did see me about making the loan. He did not say anything about the per cent. at any time. At that time first mortgages could be had at 5 per cent."

On this record the case was submitted with the results hitherto stated. Defendants contend (1) that there is no testimony to support the verdict; (2) that the court erred in giving and refusing certain instructions; and (3) that on the whole record there should be no recovery. The basis of all of these contentions is that plaintiff was guilty of such negligence in signing the mortgage without reading and in not attempting to get his money at a lower rate, or at least in not advising with defendant before signing the mortgage that he cannot recover. The trial court submitted the case to the jury for its determination of this question of negligence, instructing as follows:

"(11) The defendant Brown claims that, in executing said mortgage to W. J. Burke the plaintiff did not have the same read over to him, and did not read the same himself, and that the plaintiff was negligent in thus executing this mortgage without having the same read over to him or reading the same himself, and in not learning the rate of interest provided for therein.

"(12) 'Negligence,' as that term is here used, means the 'want of ordinary care'; that is, the want of that degree of care and

caution which an ordinarily prudent person would exercise when placed under like circumstances, in conducting a similar business or in doing like acts. It appears from the evidence without conflict that, when the plaintiff executed the mortgage to W. J. Burke, he did not read the same, or request that it should be read to him.

"(13) Ordinarily, where one is executing papers, like the mortgage in question, business prudence requires of him that he should either read the same or require the same to be read to him, so as to inform himself of its contents. And, where he fails to do this, he cannot be heard to complain that the instrument contains provisions to which he did not agree. He is presumed to have agreed to what is contained therein, and, unless some fraud or circumvention is practiced upon him to mislead and deceive him and prevent him from reading the instrument, he cannot be heard to complain that the instrument is different from what he believed it to be. And under the facts disclosed in the evidence in this case, unless the circumstances surrounding this transaction were such as to indicate to him and induce him to believe in the exercise of reasonable care and prudence upon his part, that the defendant Brown had looked after the matter and knew what the mortgage contained, then the plaintiff, in signing said mortgage, without reading the same, or requiring it to be read to him, was negligent, and such negligence, upon his part, would prevent his recovery in this case. Unless, therefore, it appears from the evidence before you that the representations made by the defendant Brown, if any were made by him, that the said Burke would furnish said money at 5 per cent., and the fact, if it be a fact, that the defendant Brown was at the office where the mortgage was executed, and directed that said Burke should draw the papers, were such circumstances as would have led a reasonably prudent person to withhold from reading said mortgage or causing the same to be read to him, under like circumstances as those disclosed in the evidence before you, before signing the same then the plaintiff was guilty of negligence in signing such mortgage, without knowing the contents thereof and such negligence would defeat his recovery in this action. Whether the defendant Brown had represented to plaintiff that said Burke had agreed to furnish the money at 5 per cent., and whether or not defendant Brown was present at the time said papers were drawn, and whether or not the defendant Brown stated to plaintiff that the said Burke would draw the papers, are questions of fact to be decided by you from the evidence before you; and, even if such facts be shown, it is also for you to say whether or not such circumstances, if shown, were such as would have led a person of ordinary care and prudence, under such circumstances, to sign said

mortgage, without reading the same or causing the same to be read to him."

These instructions are complained of, and it is also contended that the trial court erred in not giving the following requests:

"(3) You are instructed that, if the plaintiff signed the note and mortgage in question without reading them or trying to inform himself as to the rate of interest the same bore, his negligence in so signing same would preclude his recovery herein.

"(4) Where a party signs a contract without reading it, and the contract contains provisions different from the agreement between the parties, the party signing without reading is bound by such contract on account of his negligence."

These present the opposing views of the parties, and defendant contends that the trial court was in error in submitting the question of negligence at all, and that, if this be not true, it erred in its manner of submission because it referred to matters not supported by the testimony. We are of opinion that the question of negligence on the part of plaintiff was involved, and that there was testimony in support of all the matters referred to in the instructions. The case is peculiar, in that plaintiff went to the very man for his money to whom he was directed by defendant, and was led to understand that the rate of interest was agreed upon by defendant and Burke. Burke read him one of the mortgages, the one bearing 5 per cent. interest, and, as the other was not read, plaintiff might well have assumed that the second bore the same rate. The conduct of all of the parties was such as to put plaintiff off his guard, and a jury was justified in finding that he was not negligent. He was not under the circumstances required to notify defendant, for he went to the very man with whom he thought defendant had arranged for the money, and did not know that the second mortgage bore eight per cent. interest until some time after it was made. He had the right to assume that defendant's arrangements with Burke were being carried out. There was no error as we have said in submitting the question of plaintiff's negligence.

[3] The trial court fixed the amount of plaintiff's recovery in the event the jury found for him at 3 per cent. on the amount borrowed. In this there was no error. Plaintiff was entitled to that or nothing, and there was nothing for the jury to do in any event but to make the computation. There was no error then in the action of the trial court in doing it for them.

[4] The statute of limitations did not begin to run until plaintiff suffered some loss, and this was when he was compelled to pay the extra 3 per cent. This being true, the action is not barred.

No prejudicial error appears, and the judgment must be, and it is, affirmed.

1. WILLS (§§ 603, 608*)—ESTATES DEVISED—"CONDITIONAL FEE."

A devise to one and to the heirs of his own body is not within the rule in Shelley's Case, but creates in the devisee a conditional fee as it existed at common law before the statute de donis, which is a part of the common law of the state, and on the birth of issue the estate becomes absolute, while on his death without issue the estate reverts to testator's heirs. A "conditional fee" is one which restricts the fee to some particular heirs, exclusive of others, and at common law is a fee simple on condition that the devisee has the heirs prescribed, and if he dies without issue the property reverts to testator's heirs.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1351-1359, 1372-1378; Dec. Dig. §§ 603, 608.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1406-1407.]

2. WILLS (§ 608*)—CONSTRUCTION—"RULE IN SHELLEY'S CASE."

To bring a will within the "rule in Shelley's Case," the limitations to heirs must be by way of remainder; and it does not apply to a devise to one and his heirs, or the heirs of his body.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6272-6273.]

Weaver, J., dissenting.

Appeal from District Court, Polk County; W. H. McHenry, Judge.

Action to quiet title. There was a judgment for the plaintiffs, and the defendant appeals. Affirmed.

Henderson & Henderson, of Indianola, and Samson & Noble, of Des Moines, for appellant. Mills & Perry, of Des Moines, for appellees.

SHERWIN, C. J. The plaintiffs alleged that their father, Jacob Sagers, died testate in 1903, seised of the land in controversy, and that by a codicil to his will he devised said land to his son, W. L. Sagers, and to the heirs of his own body; that said W. L. Sagers died testate in 1908, and in his will attempted to devise this real estate to his wife, Pauline Sagers, defendant herein, and that, because of such pretended devise, Pauline Sagers claims to be the owner of the real estate; that W. L. Sagers never begot a child, and consequently neither had nor left "heirs of his own body"; that by reason of his death without issue the land upon his death reverted to the living heirs of the original testator, Jacob Sagers, who are the plaintiffs. The defendant demurred to the petition, on the ground that the facts stated therein did not entitle the plaintiffs to the relief demanded. The demurrer was overruled, and judgment was rendered for the plaintiffs; the defendant electing to stand on her demurrer.

[1] The only question presented for our determination is whether W. L. Sagers took,

ley's Case applies, and that the will of Jacob Sagers created an estate in fee simple in W. L. Sagers, and that his devise to his wife, Pauline Sagers, the defendant herein, created an estate in fee simple in her. On the other hand, the appellees contend that the devise to W. L. Sagers created in him an estate in fee simple conditional, and, as he never had "heirs of his own body," that the estate, upon his death, reverted to the heirs of the testator, Jacob Sagers. We are of opinion that the will in question does not fall within the rule in Shelley's Case. The devise was to W. L. Sagers and "to the heirs of his own body," and the rule in Shelley's Case can only be applied where there is an express or implied life estate with a limitation by way of remainder to the heirs.

[2] In other words, to bring a conveyance or will within that rule, the limitations to heirs must be by way of remainder. The distinction between instruments of that kind and the one before us is well and accurately stated as follows: "A limitation to A. and his heirs created in A. a fee simple, and a limitation to A. and the heirs of his body creates a fee tail. So, under the rule in Shelley's Case, a limitation to A. for life, remainder to his heirs, creates a fee simple, and a limitation to A. for life, remainder to the heirs of his body, creates a fee tail. The difference between these two sets of limitations is that in the first there is not express limitation of an estate for life, and in the second there is. Where there is an express limitation for life, A. takes the fee by virtue of the rule in Shelley's Case; where there is no express limitation of life estate, A. takes the fee also, but not by virtue of the rule in Shelley's Case. That rule does not apply, unless there is an express or implied life estate with a limitation by way of remainder to the heirs. * * * It is a plain misapprehension of the scope of the rule in Shelley's Case to assert that it applies to a conveyance to a person and his heirs, or the heirs of his body." Note in 29 L. R. A. (N. S.) 1008; De Wolf v. Middleton, 18 R. I. 810, 26 Atl. 44, 31 Atl. 271, 31 L. R. A. 146; Doyle v. Andis, 127 Iowa, 36, 102 N. W. 177, 69 L. R. A. 953, 4 Ann. Cas. 18; Pierson v. Lane, 60 Iowa, 60, 14 N. W. 90; Klene v. Gmehle, 85 Iowa, 312, 52 N. W. 232; Zavitz v. Preston, 96 Iowa, 52, 64 N. W. 668; Westcott v. Binford, 104 Iowa, 645, 74 N. W. 18, 65 Am. St. Rep. 530. See note in 7 Am. St. Rep. 428; Miller v. Mowers, 227 Ill. 392, 81 N. E. 420; Johnson v. Buck, 220 Ill. 227, 77 N. E. 163; Berry v. Williamson, 11 B. Mon. (Ky.) 245; 25 Am. & Eng. Enc. Law, 644.

In Wild's Case, 6 Reports, 17, 10 English Ruling Cases, 773, it was held that where lands are devised to a person and his chil-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

dren, and he has no children at the time of the devise, the parent takes an estate tail. The reason assigned for the holding is that the intent of the deviser is manifest and certain that the children (or issue) should take, and as immediate devisees they cannot take, because they are not in *rerum natura*, and by way of remainder they cannot take, for that was not the deviser's intent, for the gift is immediate; therefore such words shall be taken as words of limitation.

In *Pierson v. Lane*, 60 Iowa, 60, 14 N. W. 90, cited above, the conveyance was to Minerva Pierson and "the heirs of her body begotten by her present husband. * * * To have and to hold the above granted and bargained premises * * * unto the said Minerva Pierson and the heirs of her body begotten by said husband." And it was there held that the rule in *Shelley's Case* did not apply, and that the grant created a conditional fee under the common law. Under the common law, before the enactment of the statute *de donis* (13 Edw. I, c. 1), it was held that such a conveyance created a conditional fee, because, if the grantee died without having the specified heirs, the land reverted to the grantor. As soon, however, as the specified heirs were born, the estate became absolute, and the grantee could alienate it. This rule was adopted by the court in *Pierson v. Lane*, and it was held that, as Minerva Pierson had the requisite heirs, she took an absolute fee, and could alienate the land. In *Kepler v. Larson*, 131 Iowa, 438, 108 N. W. 1033, 7 L. R. A. (N. S.) 1109, we distinctly said that conditional fees, as they existed before the enactment of the statute *de donis*, prevailed in this state.

In 4 Kent's Commentaries a conditional fee is thus defined: "A conditional fee is one which restrains the fee to some particular heirs, exclusive of others, as to the heirs of a man's body, or to the heirs male of his body. This was at the common law construed to be a fee simple, on condition that the grantee had the heirs prescribed. If the grantee died without such issue, the lands reverted to the grantor. But if he had the specified issue the condition was supposed to be performed, and the estate became absolute, so far as to enable the grantee to alien the land and bar not only his own issue, but the possibility of a reverter. By having issue, the condition was performed for three purposes: To alien, to forfeit, and to charge. Even before issue had, the tenant of the fee simple conditional might by feoffment have bound the issue of his body. But still there existed the possibility of a reverter in the donor. After issue born, the tenant could also bar the donor and his heirs of that possibility of a reversion; but the course of descent was not altered by having issue. The common law provided the *formedon in reverter*, as the remedial writ for the grantor and his heirs, after the determination of the gift of the conditional fee by

the failure of heirs. Before the statute *de donis*, a fee on condition that the donee had issue of his body was in fact a fee tail, and the limitation was not effaced by the birth of issue. If the donee died without having aliened in fee, and without leaving issue, general or special, according to the extent of the gift, the land reverted again to the donor. But the tenant, after the birth of issue, could and did alien in fee; and this alleged breach of the condition of the grant was the occasion of the Statute of Westminster II, 13 Edw. I, c. 1, commonly called the statute *de donis*, which recited the evasion of the condition of the gift by this subtle construction, and consequent alienation, going to defeat the intention of the donor."

Blackstone defines a conditional fee as follows: "A conditional fee, at the common law, was a fee restrained to some particular heirs, exclusive of others, * * * as to the heirs of a man's body, by which only his lineal descendants were admitted, in exclusion of collateral heirs, or of heirs male of his body, in exclusion both of collaterals and lineal females also. It was called a conditional fee by reason of the condition expressed or implied in the donation of it, that if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever, that, on failure of the heirs specified in the grant, the grant should be at an end and the land revert to its ancient proprietor."

In *Croxall v. Sherrerd*, 5 Wall. 268, 18 L. Ed. 572, it was said: "Estates tail, under the statute *de donis*, were, before the passage of the statute, known in the common law as conditional fees. Like estates tail, they were limited to particular heirs to the exclusion of others. The condition was that if the donee died without leaving such heirs as were specified the estate should revert to the grantor. According to the common law, upon the birth of such issue the estate became absolute for three purposes: (1) The donee could alien, and thus bar his own issue and the reversioner. (2) He could forfeit the estate in fee simple for treason. Before he could only forfeit his life estate. (3) He could charge it with incumbrances. He might also alien before issue born; but in that case the effect of the alienation was only to exclude the lord, during the life of the tenant, and that of his issue, if such issue were subsequently born; while if the alienation were after the birth its effect was complete and vested in the grantee a fee-simple estate. *Willon v. Berkley*, 1 Plowd. 241. In this state of the law it became usual for the donee, as soon as the condition was fulfilled by the birth of issue, to alien and afterwards to repurchase the land. This gave him a fee simple absolute for all purposes. The heir was thus completely in the power of the ancestor, and the bounty of the donor was liable to be defeated by the birth of the

issue, for whom it was his object to provide. To prevent such results, and to enable the great families to transmit in perpetuity the possession of their estates to their posterity, the statute de donis of 13 Edw. I, known as the Statute of Westminster II, was passed."

As we have said, the conditional fee of the common law, as it existed before the enactment of the statute de donis, is a part of the law of this state; and this being true, on the death of W. L. Sagers without the particular heirs specified in the will, the estate reverted to the testator's heirs, the plaintiffs herein. The judgment of the district court must therefore be affirmed.

Affirmed.

WEAVER, J., dissenting.

STATE v. DUNCAN.

(Supreme Court of Iowa. Dec. 10, 1912.)

1. CRIMINAL LAW (§ 511*)—TESTIMONY OF ACCOMPLICE—CORROBORATION.

Under Code, § 5489, requiring corroboration of the testimony of an accomplice to sustain a conviction, the corroboration must be by testimony other than that which comes from the accomplice and must tend to connect accused with the commission of the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511.*]

2. CRIMINAL LAW (§ 511*)—EVIDENCE—ACCOMPLICE'S TESTIMONY—CORROBORATION.

Where an accomplice testified that accused had told him he had placed a revolver, alleged to have been stolen during the commission of the crime charged, in a certain vault, the finding of the revolver in the vault did not tend to corroborate the accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511.*]

3. CRIMINAL LAW (§ 511*)—BREAKING AND ENTERING—EVIDENCE—CORROBORATION OF ACCOMPLICE.

In a prosecution for breaking and entering, evidence held insufficient to corroborate an accomplice so as to sustain a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511.*]

4. CRIMINAL LAW (§ 780*)—INSTRUCTIONS—CORROBORATION OF ACCOMPLICE.

In a prosecution for breaking and entering a passenger station, in which a confessed accomplice had testified against accused, the court charged that it was a question for the jury to determine from all the evidence whether the accomplice had been corroborated, and that in determining such question they should consider the situation of accused and the witness, whether they were together or where they were at the time the accomplice broke and entered the building, what interest, if any, accused had in watching for the so-called detectives of the railroad company, whether he received any portion of the stolen property at the time or soon after, what, if anything, he did with any part of it, whether he received a revolver which he claimed was stolen at the time of the breaking and entering, and, if so, what he did with it, and from those and other facts find whether

the accomplice had been corroborated as the law required. Held that, since none of the facts referred to in such instruction, nor all together, constituted sufficient corroboration of the accomplice's testimony, the instruction was erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1863; Dec. Dig. § 780.*]

Appeal from District Court, Fremont County; E. B. Woodruff, Judge.

Defendant was indicted, tried, and convicted of the crime of breaking and entering in the daytime the passenger depot of the Chicago, Burlington & Quincy Railroad Company at the town of Hamburg, and appeals. Reversed.

Wm. Bammer, of Hamburg, and Wm. Eaton, of Sidney, for appellant. George Cosson, Atty. Gen., and John Fletcher, Asst. Atty. Gen., for the State.

DEEMER, J. On the 5th of March, 1911, the ticket office located in the depot of the Chicago, Burlington & Quincy Railroad Company was broken into while the ticket agent was at dinner, and the money drawer was broken open and \$98.23 in money taken therefrom. One R. E. Fowler, who was in the employ of the railway company as a section hand, was arrested for the offense and confesses to have had a part therein and at the trial of defendant was a witness for the state. At that trial he testified that he and defendant conspired to commit the offense, and selected Sunday as the day for the reason that there would then be more money in the office because the ticket agent did not make any bank deposits from Friday until the following Monday. Defendant lived about 100 feet just south of the depot, and his wife conducted a restaurant in the property. Fowler testified that on the day of the breaking he went to defendant's restaurant just before noon, and that defendant then said, "This is Sunday"; that the two men then watched until the ticket agent went to dinner, whereupon he (Fowler) went to the depot, taking with him a piece of wire for the purpose of opening the door of the ticket office, which he then did; that defendant stood guard upon the porch of his dwelling; and that when Fowler returned, after getting the money and also a revolver, the money was temporarily deposited in a cob-house at Fowler's home, but that later the parties met on the Fowler premises and divided the money. Fowler said that defendant took the revolver and afterward hid it in the vault of an outhouse near the depot. The revolver was afterward found in this outhouse.

[1] Fowler is a confessed accomplice, and the statute provides that: "A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence which shall tend to connect the defendant

with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Oode, § 5489. This corroboration must be by testimony other than that which comes from the accomplice, and it must tend to connect defendant with the commission of the offense.

[2] It is manifest that the finding of the revolver at the place where the accomplice, Fowler, said defendant put it, does not tend to corroborate the witness, for he may have put the revolver there himself and concocted the story about defendant's telling him that he (defendant) placed it there.

[3] Fowler testified that defendant promised to watch for railway detectives who might appear, and, when a detective appeared the following Monday morning to investigate the matter, it is claimed that defendant watched him constantly, and that the two (Fowler and defendant) met during the afternoon at defendant's residence or near a coalhouse, and that defendant inquired of Fowler as to whether he had seen the detectives, what they had said to him, or what he said to them. In fact, the only corroboration here comes from witness Seaman, a detective, and witness Arnold, the ticket agent. We here quote Arnold's testimony with reference to the matter: "Defendant has been around the depot there for years, 35 or 40, I should judge. He knows just how we handle the office there. Q. Were you at the depot when the train came from the South that afternoon at 4 o'clock? A. Yes, sir. Q. Do you know whether the defendant was there. A. Yes, sir. Q. Where was he about the premises? A. I think he was standing just about the corner of the baggageroom door. Q. Could the people who got off that train be seen from his place of residence? A. No, sir. Q. When was the next daylight train, the first daylight train after that that came into the station? A. Eight thirty next morning, Monday morning. Q. From where did it come? A. From Red Oak. Q. What, if anything, did you observe Mr. Duncan do about coming to that train? A. He came over to that train in his shirt sleeves, went around the depot around by the baggageroom, and stood there when the train stopped. Q. What did you observe Mr. Duncan do after the train stopped? A. Well, he seen who got off and went back home. Q. Who did get off? A. Mr. Seaman. Q. Did you see him after he went back home? A. I noticed him—I seen him several times, standing in the door over there, looking at the depot. Q. Where was Mr. Seaman at that time? A. He was in the office talking to me about the case, about this robbery. Q. What did you observe Mr. Duncan do while Seaman was at the depot about standing near the door and looking across at the depot? A. Well, I noticed him standing at the door of the restaurant there looking toward the depot sev-

eral times, and he looked over that way. Q. Did Mr. Seaman leave the depot and go uptown or away from the place? A. He went away from the depot. Q. What did you observe Mr. Duncan do about taking his place at the window or door looking across that way after Mr. Seaman returned to the depot? A. He did. He watched the depot very close. Q. Now, what did you observe? Had you seen Mr. Duncan about the trains before this Sunday afternoon? A. Not around the passenger trains after that time. Q. Did you see him around the passenger trains after the 8 o'clock train in the morning, after Mr. Seaman got off? A. No, sir. Q. Do you remember seeing him some time right after noon on the porch of his restaurant there? A. Yes, sir. Q. Do you remember seeing Ed Fowler in that vicinity? A. Yes, sir. Q. What, if anything did you observe the defendant do as to motioning or calling Mr. Fowler and Mr. Fowler going over there? A. Fowler started down the track and was walking along and I saw Bob motion for him to come back, and he went in the restaurant with Bob. Q. How long did he remain there? A. Well, I should say about 15 or 20 minutes. Q. Now, did you see Mr. Fowler and the defendant after you came back to the depot—I mean after you got back to the depot after dinner on Sunday? A. I saw them together. I seen Fowler go back over to Duncan's about 1:15, just shortly after 1. I didn't see the two together that day."

The witness Seaman testified: "I am special agent for the Burlington road. My duties are to investigate claims and look after parties who commit thefts against the company. I have known the defendant about a year and a half. I learned of this robbery on Sunday and came from Red Oak to Hamburg about 8 o'clock on Monday morning. When I got off the train, Duncan was standing by baggageroom. He went from there over to Mrs. Duncan's boarding house. I went into the ticket office. I observed Duncan. I went into the depot at the east door. I don't know whether he saw me or not. I saw him standing on the porch over there and watching every move I was making. I went to St. Joe that evening on the 6 o'clock train."

This is all the corroborating testimony, and we think it insufficient to connect defendant with the crime. The witnesses all admit that defendant had met the trains at the depot frequently for many years, and there is nothing in the fact that he met the Monday morning trains, which under this record should be considered a circumstance against him. The only other testimony against him is that he watched the detective while he was investigating the matter in the ticket office, and that during the afternoon of the day the detective was there defendant motioned to Fowler to come over to his (de-

of the breaking of the depot just after it was committed, and, if he did, it was quite natural for him to watch the movements of the detective. That he did watch him then is not at all inconsistent with innocence. That he should have called Fowler to his residence in plain daylight, while the detective was in town, is not in any manner indicative of guilt. Arnold also testified that when he got back to his office on Sunday he saw Fowler go over to Duncan's place at the hour of about 1:15 p. m. Remembering that it was Sunday, and that a restaurant or lunch house was being conducted at that residence, there is nothing indicative of guilt in that transaction. There is nothing in this independent testimony which in our opinion tends to connect defendant with the commission of the offense. Defendant or his wife or both were conducting a restaurant or lunchroom at their residence which is close to the depot, and defendant frequently met incoming trains. Fowler was a section hand, and his business frequently calling him near the restaurant, and he was acquainted with Duncan. Their meeting then, either on the day of or after the commission of the crime, is not suggestive of crime. If Duncan knew the railway detectives as the state claims he did, there was nothing unusual in his watching their movements if he was advised, as the record shows he was, that the ticket office had been broken into. He frequently met trains as they came before the day when the detective appeared upon the scene. This being the entire record, we think there should have been a verdict for the defendant, and that the trial court was in error in not granting a new trial. See, as sustaining our contentions, *State v. Willis*, 9 Iowa, 582; *State v. Mikesell*, 70 Iowa, 176, 30 N. W. 474; *State v. Cowell*, 149 Iowa, 460, 128 N. W. 836; *State v. Jones*, 115 Iowa, 113, 88 N. W. 196.

[4] II. In any event, some of the instructions given by the trial court were erroneous. Instruction 15 reads as follows: "It is a question of fact for you to determine from all the evidence before you whether the witness Fowler has been corroborated as above explained, and in determining this question you have a right to consider the situation of the defendant and the witness Fowler. That is, whether they were together, or where they were, at the time the witness Fowler broke and entered said building; what interest if any, the defendant took in watching for the so-called detectives of the railroad company; whether he received any portion of the stolen property at the time or very soon thereafter; and what, if anything, he did with any part of it; whether he received the revolver which he claimed was

instances in evidence you must say whether or not witness Fowler has been corroborated as the law requires."

Assuming for the purpose of this discussion that there was some corroborating testimony, it is very clear to our minds that the circumstance of the finding of the revolver in the outhouse in no manner tends to connect defendant with the commission of the offense. Aside from the testimony of Fowler, there is nothing whatever to show that defendant ever saw, had possession of, or had anything to do with putting it in the vault of the outhouse. This finding of the revolver did nothing more than show that some one had broken into the ticket office, and this the statute expressly says shall not be sufficient. See *State v. Cowell*, 149 Iowa, 460, 128 N. W. 836; *State v. Jones*, 115 Iowa, 113, 88 N. W. 196.

For the errors pointed out, the judgment must be, and it is, reversed.

PORTABLE ELEVATOR MFG. CO. v. BRADLEY, MERRIAM & SMITH.

(Supreme Court of Iowa. Dec. 13. 1912.)

1. CONTRACTS (§ 812*)—PERFORMANCE OR BREACH—ACTS CONSTITUTING BREACH.

A contract granted to a jobber the sole and exclusive sale of a manufacturer's machinery in said territory for one year, machines to be furnished complete as listed in catalogue, and provided that the jobber should use all good business methods to promote the sale of the machinery in that territory. *Held*, in view of evidence that both parties knew of the customary method of taking orders for such machinery for future delivery, and that canvassing for such orders was the proper or only way of working for the trade in that line of business, that the manufacturer's refusal to deliver to the jobber certain machines and attachments for which orders were obtained within the term of the contract to be delivered thereafter was a breach of the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1279½; Dec. Dig. § 312.*]

2. DAMAGES (§ 120*)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

A jobber upon breach of a manufacturer's contract to furnish him with machinery and attachments sold during a year by refusing to deliver machinery sold within the year, but for delivery thereafter, who could not obtain such machinery on the general market, and whose expense of substituting other machinery in place of that sold was as great as procuring the original order, was entitled to recover as damages the profits which would have been obtained from filling such orders.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 291-305; Dec. Dig. § 120.*]

3. APPEAL AND ERROR (§ 1073*)—HARMLESS ERROR—AMOUNT OF RECOVERY.

Where the damages allowed by the court on breach of a manufacturer's contract to furnish and deliver machinery was less than the proper measure of damages, there was no prej-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

udice to the manufacturer in awarding the expense of obtaining the orders.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4233½; Dec. Dig. § 1073.*]

Appeal from District Court, Pottawattamie County; E. B. Woodruff, Judge.

The parties agreed upon the amount owing on the account sued on, but from judgment awarding recovery on the counterclaim the plaintiff appeals. Affirmed.

Saunders & Stuart, of Council Bluffs, and Francis A. Brogan, of Omaha, Neb., for appellant. Tinley & Mitchell, of Council Bluffs, for appellee.

LADD, J. The parties agreed that \$1,735.34 was due plaintiff for goods furnished the defendant in pursuance of a contract. The controversy arises on the counterclaim in which defendant claims damages suffered in consequence of an alleged breach of said contract, in that plaintiff failed and refused to deliver to defendant certain machines and attachments for which orders were obtained prior to its expiration to be delivered thereafter. This agreement was entered into November 21, 1907, and therein the plaintiff, as party of the first part, granted "unto the party of the second part (defendant) the sole and exclusive sale of their entire line of portable wagon dumps and elevators, conveyors, drages and horse powers" in certain defined territory "for a period of one year." Plaintiff undertook not to ship or sell such machines in said territory "during the existence of the contract, unless upon the written consent of the party of the second part," and that it would "make prompt and satisfactory shipments or delivery of all goods ordered by party of second part." The defendant agreed "to buy 150 standard machines for the season of 1908, specifications to be furnished in sufficient time before Nov. 1, 1908, for their manufacture and shipment." The fifth clause contains a guaranty, and the sixth stipulates that "all of the 'little Giant grain dumps,' elevators, conveyors, and drages are to be furnished complete as called for in 1908 catalog and price list of said manufacturers as attached to this contract and marked 'Exhibit A.' Seventh. Party of the first part agrees to sell party of the second part all machinery at a discount of 35 per cent. from their price list of 1908." Following was a price list of attachments, after which the contract proceeds: "All shipments made prior to October 1st, 1908, payable four months from October 1st, subject to a cash discount of one (1) per cent. per month for all anticipated payments, but not to exceed a total of three (3) per cent. cash discount. Shipments after October 1st to be four months from shipment, subject to a cash discount of one (1) per cent. per month for anticipated time, but not to exceed three (3) per cent. cash discount. The said party of the second part for and in

consideration of the promises and undertakings of party of the first part, hereby covenants and agrees as follows: First. To fully canvass and work for the trade in the territory assigned by using all good business methods to promote the sale of the goods herein mentioned, and not to handle or offer for sale, other portable dumps and elevators, conveyors or drages; nor to sell outside of said territory except by consent of said party of the first part. Second. To make settlements promptly and in accordance with the terms hereinbefore mentioned." The remainder of the agreement relates to repairs and extras which were to be settled for December 1st of each year.

As the contract was not renewed or extended, the defendant prayed for allowance on the counterclaim for damages suffered in consequence of plaintiff's refusal to furnish articles to fill the orders taken prior to November 21, 1908, the time to which the right of exclusive sale was granted, but to be delivered thereafter. The evidence disclosed that plaintiff manufactured various articles to be furnished under the contract, and that defendant was a jobber supplying local dealers or retailers, and that prior to the expiration of the year during which the exclusive right of sale was granted defendant had taken 44 orders for machines from local dealers within the stipulated territory. At their settlement in December following, plaintiff's attention was directed to these orders, but, having entered into a similar contract with another concern, it declined to furnish machines and attachments to defendant with which to perform its obligations assumed in accepting the orders.

But two matters are argued: (1) The construction of the contract; and (2) the measure of damages.

[1] The language of the contract indicates that the implements were of a particular make or type, and are manufactured and supplied to jobbers as demanded. Such demand is measured by the call from jobbers, who, in turn, necessarily rely upon orders from retailers. It will be noted that the right to the "sole and exclusive sale" was limited to one year, or ended November 21, 1908. This had reference to the negotiation of sales by defendant with the local dealers. Were completed sales only contemplated or such executory sales as ordinarily are made by jobbers in the usual course of business in that particular line? This may be ascertained from the relations of the parties, the manner of transacting business between the jobber and retailer and especially by comparison with another portion of the contract. Plaintiff manufactured the implements enumerated, and defendant was engaged in soliciting trade from and supplying retailers with these and other implements. This was done by taking orders

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

articles manufactured by plaintiff, as the demand for their use was in the fall of the year. This method of doing business was understood by both parties. The other clause of the contract alluded to obligated defendant to "fully canvass and work for the trade in the territory assigned by using all good business methods to promote the sale of the goods herein mentioned." How was this to be done? By soliciting the trade from retailers and procuring from them orders of goods, and this must have been so understood, for it appears to have been the only method of canvassing and working for trade in this line of business. Indeed, an officer of plaintiff in charge of its business with defendant testified that he "understood that the proper handling of business of that kind required canvassing for future business." When was the canvassing and work for trade in the territory to cease? At the end of the year. Until that time, November 21, 1908, the defendant was not only bound to canvass and work for trade by the use of all good business methods, but prohibited from handling or offering for sale other articles of the kind. This, as said, involved soliciting business from the retailers and taking orders for future delivery according to the usage of the business being carried on up to the end of the year. Can it be that, though bound to solicit and enter into contracts with retailers for the sale of the implements in question up to the end of the year, this was to be done notwithstanding the impossibility of performing them within that time, and without assurance that they might be performed thereafter? And yet defendant must necessarily have been in this predicament were the construction contended for by plaintiff to be adopted. The time within which goods must have been ordered from or delivered by plaintiff is not restricted in the agreement, unless by the period defined for the "sole and exclusive sale" by defendant to the retailers, and this, as we think, in view of the duty of defendant to canvass for and take orders throughout the period, must be construed to have reference to the procurement of those executory contracts evidenced by accepted orders from retailers. Refusal then to furnish machinery and attachments to fill such orders was a breach of the contract on which damages were recoverable.

[2] 2. The implements were of a designated manufacture. The defendant must have delivered these in order to perform its contracts with retailers. Though there may have been others of similar device, they were not such as had been contracted, and, though defendant was able to substitute some of another make in place of those ordered, the evidence that this involved as much expense and trou-

of the authorities relied on by appellant. The defendant was handling these implements in order to acquire the profits to be obtained from supplying the local dealers, and, as by the breach of the agreement the defendant was deprived thereof, these constituted the damages which the latter was entitled to recover. *Hichhorn v. Bradley*, 117 Iowa, 130, 90 N. W. 592; *Rule v. McGregor*, 117 Iowa, 419, 90 N. W. 811; *Black v. Ry.*, 122 Iowa, 36, 96 N. W. 984. See *Iowa-Minnesota Land Co. v. Conner*, 136 Iowa, 674, 112 N. W. 820.

[3] As the amount allowed by the court was less than this measure authorized, there was no prejudice to appellant in awarding the expense of obtaining the orders only.

Affirmed.

DOWNING v. FARMERS' MUT. FIRE INS. CO.

(Supreme Court of Iowa. Dec. 12, 1912.)

1. INSURANCE (§ 56*)—STIPULATIONS—ADJUSTMENT BY BOARD OF DIRECTORS—CONCLUSIVENESS.

A by-law of a co-operative insurance association, stipulating that, on failure of the adjuster and insured to agree as to the amount of the loss or as to whether there is any liability, the matter shall be referred for final adjustment to the directors, does not make a decision of the directors final, but insured may resort to the courts to determine the liability of the association.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 70; Dec. Dig. § 56.*]

2. TRIAL (§ 254*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

Where, in an action on a policy insuring against loss of live stock by lightning, insurer defended on the ground that the animal claimed by plaintiff to have been killed by lightning had not been so killed and introduced expert testimony that the animal had none of the characteristic marks indicative of death by lightning, an instruction that in determining whether the animal was killed by lightning the jury could consider their own observation and experience, if any, as to loss of that nature, was erroneous as allowing jurors, having special knowledge, either to state such knowledge to their fellow jurors or to act on it in arriving at a verdict, though jurors in weighing testimony may use the knowledge and experience which they possess in common with mankind in general.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 624-626; Dec. Dig. § 254.*]

3. TRIAL (§ 254*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

The court on request must instruct the jury that the case should be tried on the evidence given, and not on information that one or more of the jurors may have outside of the record, and it is error to authorize the jury to consider their own experience and observation regarding the matters under trial in addition to the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 624-626; Dec. Dig. § 254.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. APPEAL AND ERROR (§ 930*)—QUESTIONS REVIEWABLE — INSTRUCTIONS — PRESUMPTIONS.

It must always be presumed that the jury followed the instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. § 930.*]

Weaver, J., dissenting.

Appeal from District Court, Guthrie County; J. H. Applegate, Judge.

Action to recover upon policy of insurance against loss or damage by lightning to certain live stock. There was a judgment for plaintiff, and defendant appeals. Reversed.

F. O. Hinkson, of Stuart, and Sayles & Taylor, of Guthrie Center, for appellant. Milligan & Moore, of Guthrie Center, for appellee.

DEEMER, J. Among the live stock covered by the insurance against lightning was a certain black mare which met its death on or about September 13, 1910. It is the claim of the plaintiff that the animal was killed by lightning, and that under the terms of the defendant's contract he is entitled to demand and recover thereon the sum of \$100. The defendant admits the issuance of the policy, that it was in force at the time of the loss of the mare, that the mare was of the reasonable value of \$100, and that proofs of said loss have been waived by the company. It further admits that it has rejected plaintiff's claim and refused to pay the value of the property alleged to have been lost. It denies, however, that the mare was killed by lightning, and pleads that said company is a co-operative insurance association, which is made up of the owners of the property insured by its policies, and that losses incurred are paid by assessment upon said members in proportion to the amount of insurance carried by them, and all persons so becoming members are bound to observe and abide by the rules and regulations adopted for the government of its business. It is further alleged that by the regulations adopted by said company it is provided that, where a loss occurs, and the adjuster of the company and the insured fail to agree as to the amount of loss or damage suffered or concerning the question whether the company is liable at all, then the dispute must be referred to the company's board of directors for final adjustment, and that under this rule or regulation, the matter of plaintiff's alleged loss having become subject of controversy between him and the adjuster, he was duly notified to meet with the board of directors on September 21, 1910, for the purpose of considering his claim. It is further alleged that plaintiff did attend said appointed meeting and presented his claim and his evidence and proofs of loss, upon consideration of which the board of directors

voted to reject the same and refused to make payment demanded. Upon this showing defendant says that, plaintiff having elected to submit his claim to the board of directors, and said board having acted thereon and found no liability on part of the company, he is now estopped to maintain this action.

I. Concerning the merits of the question whether plaintiff's animal was in fact killed by lightning, we think sufficient to say that the testimony was such as to require its submission to the jury.

[1] II. The by-law or regulation upon which the defendant relies reads as follows: "This association will not pay for stock killed by lightning, unless the loss has been brought to the notice of the nearest adjuster in five days, who shall immediately notify the secretary, and as soon as practicable, proceed to adjust the loss. If this cannot be done in a reasonable time, the owner shall have two disinterested parties examine the animal and if there are no positive marks of lightning on the outside, then examine under the skin, until marks are found, or it is proven there are none, and report the facts to the adjuster. The president, secretary, and directors are the adjusters for the association. In case the loss exceeds \$200.00 there shall be two adjusters called, one of whom shall be the president or secretary. Should the adjuster and the assured fail to agree as to the amount of the loss or damage or as to whether there is any liability at all, the matter shall be referred for final adjustment to a meeting of the board of directors, said meeting to be called by the president within ten days after notice of such disagreement."

It appears from the evidence that plaintiff, upon discovering the death of his mare, at once notified the company of his loss, and on the same day the president and secretary visited plaintiff's farm. After making some investigation, they announced their conclusion that the loss had not been occasioned by lightning, and that the defendant was not liable therefor upon its policy. In this conclusion plaintiff refused to acquiesce and was told that a meeting of the board of directors would be held on Wednesday of the next week at which claims would be considered. On the day named the directors met, and plaintiff appeared before them asserting his claim, some of his neighbors upon whose corroboration he relied were also present and made their statements; but the board, reaffirming the action taken by the president and secretary, denied the liability of the company and refused payment of the loss. It is now insisted for the defendant that, plaintiff having elected to appear before the board of directors to obtain adjustment of his alleged loss, the decision there made must be given the effectiveness and finality of an adjudication by a court of competent jurisdiction, and no further action for recovery

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

upon the policy can be maintained. The trial court overruled this objection and did not err in so doing. Whether it be possible for a corporation or association to devise a scheme or plan by which it shall itself be judge and jury to adjudicate the question of its own liability upon its own contracts to the exclusion of the judicial tribunals provided by law we need not now stop to consider, for, even if we assume that such a thing is legally conceivable, we are very certain it is not to be found in the law above quoted. The evident purpose of this provision is to promote adjustment and settlement of losses without litigation, and to that end, if the claimant and adjuster sent out to make investigation shall fail to reach an agreement, a further hearing and consideration by the board of directors are provided for. Though the by-law speaks of this hearing as a "final adjustment," this cannot fairly be construed as a final and conclusive determination of the right to recover on the policy, but rather as the final effort to adjust or settle the claim amicably. Neither the adjuster nor the board of directors in such case acts judicially. Their attitude is that of representative of the association making inquiry to satisfy themselves whether the loss is within the terms of the policy, and their final determination to reject the claim is not an adjudication of plaintiff's right to recover, but is rather their final conclusion that the proofs offered are insufficient to justify them in making payment without suit.

Nor do we find anything in our cases or the policy of our own statutes or system of procedure to sustain the proposition that the effort of plaintiff to obtain payment of his loss by amicable adjustment operates as an election of remedies to bar him from seeking relief in the courts. To thus penalize negotiations for the private adjustment of disputed claims is not to lessen litigation, but to multiply it. There is nothing in this provision for settlement by adjusters or by the board of directors which brings the case within the rules or precedents applicable to the arbitration of disputes, or to contracts by which matters merely incidental or collateral to the performance may be referred to the decision of a designated third party. The by-law in question does not attempt to prohibit resort to the courts, and such effect is sought to be deduced only by way of argument or inference from the use of the phrase "final adjustment." For the reasons suggested, we are not disposed to adopt that construction, and therefore hold that the court correctly overruled appellant's motion for a directed verdict.

[2] III. In one paragraph of the court's charge the jury was told that, in determining whether the animal was killed by lightning, they were not at liberty to indulge in mere speculation or conjecture, but that they could

properly consider their own observation and experience, if any, with reference to losses of that nature. This was excepted to, and the giving thereof is now assigned an error. In our opinion the instruction cannot be sustained, and in giving it the court committed an error which was prejudicial to the defendant. A jury is to try a case on the evidence adduced, and not upon personal knowledge. *Clarke v. Robinson*, 44 Ky. (5 B. Mon.) 55. Of course, weighing testimony, the jurors may use the knowledge and experience which they possess in common with mankind in general; but it is not proper for some of them having special knowledge of a subject, either to state this knowledge to their fellow jurors, or to act upon it in arriving at a verdict. If such a course were permitted, no record could be made of the testimony on which the case was decided, and the information upon which the jury acted would come from unsworn witnesses. If this were not the rule, there would be no necessity in many cases for introducing any testimony at all upon a given proposition, for some of the jurors might have special knowledge or experience with reference to the subject which he could detail to his fellows, and this would be the foundation of the verdict. Moreover, all cases are to be tried upon the testimony adduced, and jurors are permitted to use the knowledge and experience possessed by mankind in general in weighing that testimony. If this were not the rule, a case could be tried upon common knowledge and experience without the introduction of any testimony. The rule that in weighing the testimony of experts a jury is not bound to receive it as final has no application here. If no testimony is given by experts at all, surely a jury cannot render a verdict based upon their own knowledge alone. This has so many times been held that there is no need for citing authorities upon the proposition. And for a much stronger reason it is highly improper for any of the jurors to consider and found a verdict upon the special knowledge or observation of some of its members. The authorities are but one way upon this proposition. In *Douglass v. Trask*, 77 Me. 35, an instruction to a jury to infer the facts from the evidence, "or from such personal knowledge as you may have in relation to matters of this kind," was held erroneous. An instruction that "the jury may call into requisition their practical experience and knowledge relating to cattle of this kind" is erroneous. *Page v. Alexander*, 84 Me. 83, 24 Atl. 584. See, also, to the same point, *Karrer v. City*, 142 Mich. 331, 106 N. W. 64.

[3] Upon request a jury should be instructed that the case should be tried upon evidence given, and not upon information that one or more of the jurors may have outside of the record. *Citizens' St. Ry. Co. v. Burke*, 98 Tenn. 650, 40 S. W. 1085. An instruction

not limiting jurors in their finding of facts to the testimony in the case was held erroneous in *Goulding v. Phillips*, 124 Iowa, 496, 100 N. W. 516. An instruction that the jury should use their own judgement as to the value of services was held erroneous in *Wood v. Barker*, 49 Mich. 295, 13 N. W. 597. It is error to tell a jury to use their own judgment, experience, and knowledge in determining what would have prevented a fire. *Burrows v. Delta Co.*, 106 Mich. 582, 64 N. W. 501, 29 L. R. A. 468. It is error for a juror to state in the jury room his own knowledge of facts bearing upon material issues. *Hathaway v. R. R. Co.*, 97 Iowa, 747, 66 N. W. 892. A jury cannot, of their own knowledge, determine in how short a distance a train can be stopped. *U. P. R. R. v. Shannon*, 33 Kan. 446, 6 Pac. 564. An instruction authorizing a jury to take into consideration their own experience and observation regarding the matters under trial in addition to the evidence is erroneous. *O., R. I. & P. R. R. v. Cemetery Ass'n*, 57 Pac. 253.¹

In *Waite v. Teeters*, 36 Kan. 604, 14 Pac. 146, the court said: "The next objection made by the plaintiff in error is the following instruction: 'That the measure of damages, if you find that the corn was converted, was the value of the corn as it stood in the field at the place and time of conversion, and, in arriving at such value, you may take into consideration the kind and character of the corn, the number of acres, where it was situated, and all the circumstances of the case; and you have also a right, in arriving at the value of the corn, to call to your aid what knowledge you possess in common with mankind generally.' As the evidence is presented here, we think that part of the instruction which directed the jury that they might use their own knowledge in determining the value of that particular corn was misleading and erroneous. The value of the corn was to be determined as it stood in the field, and at the time the alleged conversion occurred, which was September 10, 1884. It was then unripe and unharvested, and no witness undertook to state what it was then worth. Not a syllable of testimony was offered in regard to its value per bushel, by the acre, or other measure, in that neighborhood, or in fact anywhere. The case cited, of *Railroad Co. v. Richards*, 8 Kan. 101, correctly decides that in making up their verdict the jury are to use the knowledge and experience which they possess in common with mankind generally; but the court there distinctly says that the jury cannot use and apply the knowledge they may have of the particular case on trial; and that, if any juror has such knowledge, he should be sworn. Here the court directed the jury that they might

use their knowledge in finding the value of this particular corn, standing unripe and unharvested in a place somewhat remote from a general market. There was testimony offered of the quality and location of the corn, and the jury could take notice that corn such as that described was of some value, and this would have justified a finding of nominal value; but from the verdict we see that far more than nominal damages were allowed. The jury could apply their general knowledge and experience to the facts in arriving at a conclusion upon many other matters; but the value of unripe corn standing in a particular field, somewhat distant from a railroad and a market, was not common knowledge, and was a fact to be proven in the case. The jury, collected, as it probably was, from all occupations, may have been constituted, in part, from farmers resident in the locality, who were conversant with the demand and supply of corn like that in controversy, and also of other facts sufficient to enable them to form a correct opinion upon its value; but such information is special, and not common to even other members of the jury following different occupations, and who resided in other parts of the county, and can be used only when given in testimony. *Union Pac. Ry. Co. v. Shannon*, 33 Kan. 446, 6 Pac. 564; *Railroad Co. v. Richards*, 8 Kan. 101."

In *Gibson v. Carreker*, 91 Ga. 617, 17 S. E. 965, the court, by Lumpkin, J., said: "It was certainly error to charge the jury that, in ascertaining the value of the lands at the time of the breach of the bonds, they might consider not only the evidence, but their own knowledge as to the value of land in the country. Juries should decide questions of fact according to the evidence introduced before them, and their personal knowledge certainly cannot constitute a part of the evidence. This is so obvious that we deem a further discussion of this subject unnecessary." See, also, *Bowman v. Foundry Co.*, 226 Mo. 53, 125 S. W. 1120; *Hale v. State*, 122 Ala. 85, 26 South. 236; *Northern Supply Co. v. Wangard*, 123 Wis. 1, 100 N. W. 1066, 107 Am. St. Rep. 984; *Burrow v. Transfer Co.*, 106 Mich. 582, 64 N. W. 501, 29 L. R. A. 468.

[4] In view of such an array of cases, which are sound in their reasoning, it is impossible to sustain the instruction complained of without making a bad precedent. It must always be assumed, no matter what the fact may be, that a jury follows the instructions of the court, and if that be true the verdict here may have been founded upon the special observation or experience of some of the jurors with reference to animals killed by lightning, and not upon the testimony adduced with reference thereto. That such would not be the general knowledge and experience of mankind is clear. The defendant introduced expert testimony

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 9 Kan. App. 383.

of things was all that it could be. This testimony could, under the instruction complained of, have been easily overthrown by statements of some juror that he had observed the marks on animals killed by lightning, and that no such marks were an accompaniment of death by lightning. If that were the case, then it is manifest the verdict would not have been based upon the testimony adduced. Had the instruction limited the jurors in weighing testimony to their own personal observation and experience, it might not have been so bad, but it did not do so, and in this respect there was manifest error.

For the error pointed out, the judgment must be, and it is, reversed.

WEAVER, J. (dissenting). I am unable to agree that the trial court erred in giving the instruction discussed in the third paragraph of the foregoing opinion. On the contrary, when construed as it should be in connection with the entire charge of the court, it announces a rule of law which is both sound and wholesome. The record shows that the defense relied for the most part on evidence of an expert or opinion character that the marks said to have been found upon the body of the dead animal did not indicate it had been struck by lightning. In different paragraphs of the charge the court expressly warned the jury that the burden was upon the plaintiff to establish his claim by a preponderance of the evidence, and in the same paragraph, and in connection with the very language criticised by the majority, the court told the jury that its verdict must be found *from the evidence offered and submitted to the jury*. This was repeated so often and so clearly that to say confusion or misunderstanding could have arisen in the minds of the jurors concerning this elementary rule is an impeachment of their sanity. But the testimony was wholly of a circumstantial character. No one saw the animal killed. It was the claim of the plaintiff that the marks upon the body indicated death by lightning. This the defendant denied, and offered in evidence the opinion of the witnesses based upon their experience and observation to the effect that such marks did not indicate injury by lightning. It was then proper for the court to instruct upon the subject of expert evidence, and in connection therewith I think the statement in such instruction was not erroneous. Jurors are not required to accept the mere opinion of any witness, even though undisputed. This is especially true where the subject-matter of the opinion has reference to a fact or condition which is as likely to have fallen within the observation of the average juror as of the witness who assumes to speak from expert knowledge. In such cases it has fre-

testimony is uncontradicted. Familiarity with the effect of lightning strokes upon the bodies of animals is not a thing known only to students of science or insurance agents and adjusters. It is a matter open to the observation and experience of the average man, and especially of the average farmer, everywhere. Jurors to whom such a question is submitted may and must exercise their own judgments in determining whether to accept an expert opinion is correct. The judgment which they are thus to exercise is the quality of mind which enables them to consider and compare and discriminate with respect to the values and relations of things and to reach just conclusions from given states of facts. The facts upon which they are to thus pass as jurors are to be found in the evidence alone, but the judgments which they are to exercise in rendering their verdict is a judgment enlightened not alone by the evidence or by matters of knowledge common to all men, but also by the matters common to the knowledge and experience of the jurors themselves. Either I misread the authorities, or the majority is wrong in saying the "authorities are all one way" in holding the rule of the instruction erroneous. For example:

Chief Justice Shaw has said: "Juries would be very little fit for the duties of the high and responsible office to which they are called, especially to make an appraisal which depends upon knowledge and experience, if they might not avail themselves of these powers of their minds, when they are most necessary to the performance of their duties." *Patterson v. Boston*, 20 Pick. (Mass.) 166.

On another occasion the same distinguished jurist used these words: "The jury may properly exercise their own judgment and apply their own knowledge and experience in regard to the general subject of inquiry. In the present case the jury was not bound by the *opinion* of the witness." *Murdock v. Sumner*, 22 Pick. (Mass.) 156.

Citing these precedents approvingly, the Supreme Court of the United States has said: "It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services." *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028.

In *Lafayette v. Olsen*, 108 Fed. 340, 47 C. C. A. 367, 54 L. R. A. 33, it was held that, in considering the opinion of an expert concerning a defective plank which was alleged cause of injury, it was competent for the jurors to make use of *their own knowledge*

and experience. A similar instruction was upheld in *Beveridge v. Lewis*, 137 Cal. 628, 67 Pac. 1040, 70 Pac. 1088, 59 L. R. A. 581, 92 Am. St. Rep. 188.

Mr. Elliott, in his work on Evidence (1046), states the rule thus: "The effect of expert evidence or opinion rests entirely with the jury, and the jurors may apply *their own experience and knowledge* and exercise their own independent judgment upon the facts in evidence in reaching their conclusion." Bearing upon the same proposition, see *Manning v. Railroad Co.*, 166 Mass. 230, 44 N. E. 135; *Green v. Chicago*, 97 Ill. 370; *Stevens v. State*, 3 Ark. 66; *Houston v. State*, 13 Ark. 66; *McGarrahan v. Railroad Co.*, 171 Mass. 211, 50 N. E. 610; *Hayes v. Wagner*, 220 Ill. 256, 77 N. E. 211; *Wills v. Lance*, 28 Or. 371, 43 Pac. 384, 487; *Haught v. Vallet*, 89 Cal. 245, 26 Pac. 897, 23 Am. St. Rep. 465; *Nybach v. Lumber Co.*, 48 C. C. A. 632, 109 Fed. 732.

The United States court, after recognizing the general proposition that jurors must find their verdict from the evidence alone and may not arbitrarily discredit an unimpeached witness, adds that "no such obligation attaches to witnesses who testify merely to their own opinion, and the jury may deal with it as they please, giving credence or not as *their own experience* or general knowledge may dictate." *The Conqueror*, 166 U. S. 131, 17 Sup. Ct. 518, 41 L. Ed. 937. To the same effect, see *Buckalew v. Railroad Co.*, 107 Mo. App. 575, 81 S. W. 1176; *Railroad Co. v. Baltimore*, 98 Md. 535, 56 Atl. 790; *Parks v. Boston*, 15 Pick. (Mass.) 209; *Stevens v. State*, 3 Ark. 66; *McGarrahan v. Railroad Co.*, 171 Mass. 211, 50 N. E. 610.

In the last-cited case the court says that the jury take with them to the jury room "*their own knowledge and experience* of affairs, and are not only at liberty to use the same in drawing conclusions from the evidence, but ought to make use thereof. This rule certainly has the saving grace of common sense." Honest jurors ought not to be asked or instructed under any condition of the record to treat or give effect to the opinion of any witness as the truth when they know from their own experience and knowledge it is *not* true. If, for instance, a witness testifies without contradiction that a locomotive of given pattern and weight running at a stated speed on a level track cannot be brought to a stop within less than 1,000 feet, and there is upon the jury one or more practical locomotive engineers who know from actual experiment that the stop may be made in 600 feet, it would be a gross parody on the forms of justice to hold that such jurors, in reaching their conclusions upon the merits of the case, may not consult their own judgment, as enlightened by their own experience, and in reliance thereon reject the testimony which they know to be false or mistaken,

even though not contradicted on the trial. The instruction which is condemned by the majority, when fairly read in connection with the record and in charge as a whole, is well supported by the authorities to which I have referred. The rule for which I contend does not operate as the majority seems to think to make the jurors witnesses in the case or to make evidence of particular facts coming within their knowledge and experience. It does no more than to say that, if the intelligence and judgment of the jurors have been enlightened by their own experience and observation, they are not required to lay aside these qualifications in performing the duty for which they are impaneled. The rule is not only reasonable in itself, but it would seem unavoidable unless we are to reduce jury trials and the matter of jury instructions to an absurdity. What the jurors have seen, known, and experienced in their own lives and observations concerning the cause and effect of given or stated conditions is an inseparable part of their being. It is that which qualifies them to exercise judgment, and affords the only just basis for confidence in the correctness and integrity of the opinion or conclusion registered by their verdict. The verdict is none the less based upon the evidence and the evidence alone, because in reaching it jurors have brought that evidence to the test thus indicated.

While I regret the conclusion announced in the majority opinion, I am glad to believe that it cannot result in widespread mischief. For however solemnly we may declare the rule so approved, and however faithfully the trial courts may go through the perfunctory routine of repeating it in their instructions, juries will continue just the same to test the truth and value of expert testimony concerning matters which are not of an abstruse or scientific character by the touchstone of their own experience and observation.

I think the judgment of the trial court should be affirmed.

CHIESA & CO. et al. v. CITY OF DES MOINES.

(Supreme Court of Iowa. Dec. 14, 1912.)

1. MUNICIPAL CORPORATIONS (§ 385*) — CHANGE IN GRADE OF STREET—RIGHT TO DAMAGES.

The right to recover damages to abutting property by change in established grade of a street is wholly statutory.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 925-928; Dec. Dig. § 385.*]

2. STATUTES (§ 239*)—CONSTRUCTION—STRICT CONSTRUCTION.

The rule that a statute in derogation of common law must be given a strict construction has been abrogated by Code, § 3446, providing that statutes in derogation of common law

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and all proceedings thereunder shall be liberally construed with a view to promoting the objects of the statutes and assisting parties in obtaining justice.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 320; Dec. Dig. § 239.*]

3. MUNICIPAL CORPORATIONS (§ 398*) — CHANGE OF ESTABLISHED GRADE OF STREETS — "PROPERTY" — "OWNER" — "REAL PROPERTY."

Under Code, § 785, requiring a city changing an established grade of a street to the injury of abutting property to pay the damages to the owner, and section 48 (8, 10), defining "real property" as including lands, tenements, hereditaments, and all rights thereto and interest therein, and the word "property" as including real property, a tenant for life or for years of a city lot is an "owner" to the extent of his interest, and may sue the city for injuries sustained by a change in the established grade of the street in front of the property.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 953-957; Dec. Dig. § 398.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5134-5151; vol. 8, p. 7744; vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770; vol. 7, pp. 5939-5951; vol. 8, pp. 7778-7779.]

Appeal from District Court, Polk County; Hugh Brennan, Judge.

Action at law to recover damages alleged to have been sustained by the plaintiffs because of a change made by the city in the street grade fronting a certain lot and building occupied by the plaintiffs as tenants for years of the fee owner. There was a verdict and judgment for plaintiffs, and defendant appeals. Affirmed.

R. O. Brennan, H. W. Byers, and E. C. Carlson, all of Des Moines, for appellant. Miller & Wallingford and Oliver H. Miller, all of Des Moines, for appellees.

WEAVER, J. The property in question abuts upon East Locust street, one of the principal streets of Des Moines, and near the east of the bridge which carries said street over the Des Moines river. As originally established, the grade sloped downward somewhat rapidly from the bridge eastward to a point near the property in question, whence it followed an ascending slope for a distance of several blocks. Adjacent to this grade the lot in question had been improved by the erection of a building. The plaintiff acquired the possession and use of the lot, as thus improved, in April, 1907, under lease from the owner for a term of five years. In the year 1909 a change in the grade of East Locust street was ordered by the city, raising the same about six feet in front of this lot. The work of conforming the street to the new grade had been done, and plaintiff sues to recover damages for the consequential injuries to his leasehold interest. There was trial to a jury and verdict found for plaintiff for \$500.

The argument in support of the appeal presents the single question whether a tenant

under a lease for a term of years is entitled to maintain an action of this nature. The argument by which the appellant negatives the proposition may be briefly stated as follows: The right to recover damages for injuries resulting to abutting property by reason of a change of grade was unknown to the common law, and now exists only where it is expressly provided for by statute. Our statute creates such right but limits it to the "owner" of the property so affected. A tenant under lease from the holder of the legal title is not an "owner" of the property, and, although his leasehold interest may suffer injury, the law gives him no remedy. To the soundness of this reasoning we now give consideration.

[1] That the right to recover damages occasioned by the act of the public authorities in altering the grade of a city street exists only by reason of some statute providing therefor may be admitted for the purposes of this case. In a very early case (*Creal v. Keokuk*, 4 G. Greene [Iowa] 47) the court, feeling bound by what it believed was the weight of authority, expressed its reluctant assent to that view. That precedent has since been cited with approval. *Cotes v. Davenport*, 9 Iowa, 227; *Russell v. Burlington*, 30 Iowa, 267; *Farmer v. Cedar Rapids*, 116 Iowa, 324, 89 N. W. 1105.

[2, 3] The statute under which plaintiff asserts his alleged right of recovery reads as follows: "When any city or town shall have established the grade of any street or alley, and any person shall have made improvements on the same, or lots abutting thereon, according to the established grade thereof, and such grade shall thereafter be altered in such a manner as to damage, injure or diminish the value of such property so improved, said city or town shall pay to the owner of such property the amount of such damage or injury." Code, § 785. It is manifest from the foregoing that the decision of the question thus presented turns entirely upon the word "owner," as used in the statute, and whether it may properly be construed to include tenant as well as holder of the title.

The appellant starts out with the proposition that the statute, being in derogation of common law, must be given a strict construction. That this rule prevails in many jurisdictions is quite true. It has, however, a much less restrictive effect in our procedure because of our statutory rule of construction providing that "the rule of the common law that statutes in derogation thereof are to be strictly construed had no application to this Code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice." Code § 3446. The old rule has at times been quoted by our courts with apparent forgetfulness of this wholesome provision, and a statute so clearly in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

accord with essential justice and fairness ought not to be ignored or allowed to fail in to disuse.

The word "owner" is of frequent use in our statutes pertaining to property and property rights, and, like most words, its significance is subject to some degree of variance, dependent upon its context and the subject-matter to which it is applied. In common speech it is doubtless most often used to designate the person in whom the legal or equitable title rests, as distinguished from a mere occupant or tenant. As used in law, it is very often given a wider and more comprehensive meaning. In its strictest sense, the owner of land is he who had the sole right of dominion, use, enjoyment, and disposition. It may happen, however, and does happen every day, that with respect to a given item of real property the various elements or estates which together make up what we may call absolute ownership are vested in different persons. One may hold the legal title, another the equitable title, another a tenancy for life, and another a term of years. Each owns a property right in the land, and each is, for many purposes, the actual owner thereof. The statutes of the state expressly note the existence of different estates in the same land, and inferentially recognize the several holders of such distinct estates as owners. It is provided that the words "land," "real estate," and "real property" shall be held to include lands, tenements, hereditaments, and *all rights thereto and interests therein*, equitable as well as legal. Code, § 48 (8). And the word "property" includes "real property." Code, § 48 (10). A tenant for life or for a term of years of a city lot or other land certainly has a right and interest therein. He is therefore an owner of the property to the extent of that interest; and it would seem to follow of necessity that the statute which gives the right to recover for damages to the property includes damages to each and every estate or interest therein, legal or equitable. In pursuance of that conception or definition of property, this court has held the word "owner" to include the wife of a husband who holds title to a family homestead. *Adams v. Beale*, 19 Iowa, 68. The court there says that any right which, in law or equity, amounts to an ownership in land, any right of entry upon it, to its possession or enjoyment, or any part of it which may be deemed an estate, makes the person an owner, as far as it is necessary to entitle him to redeem the land from tax sale. See, also, *Cummings v. Wilson*, 59 Iowa, 14, 12 N. W. 747; *Swan v. Harvey*, 117 Iowa, 58, 90 N. W. 489. A mortgagee is an owner, within the statute providing for the condemnation of land for public purposes. *Severin v. Cole*, 38 Iowa, 463. The word "owner," as used in the mechanic's lien statute, has been held to include "any person who has an estate or interest in the land." *Monroe v.*

West, 12 Iowa, 119, 79 Am. Dec. 524. As supporting this view, see *Gitchee v. Kreidler*, 84 Mo. 476; *Benjamin v. Wilson*, 34 Minn. 517, 26 N. W. 725; *Gerrard v. Railroad Co.*, 14 Neb. 270, 15 N. W. 231; *Losco v. Sutherland*, 38 Mich. 171; *Mixon v. Stanley*, 100 Ga. 377, 28 S. E. 440; *Higgins v. San Diego*, 131 Cal. 308, 63 Pac. 470; *Telephone Co. v. Marsh*, 96 App. Div. 122, 89 N. Y. Supp. 79; *Parker v. Railroad Co.*, 79 Minn. 373, 82 N. W. 673; *Smith Co. v. Labore*, 37 Kan. 480, 15 Pac. 577. In *Schott v. Harvey*, 105 Pa. 228, 51 Am. Rep. 201, this language is used: "A tenant for years, a tenant for life, and a remainderman in fee is each an owner." Indeed, it seems to be thoroughly established that the term "owner" will be held to include the owners of any distinct interest or estate in the land less than a fee, whenever the connection in which it is used, or the apparent purpose of the statute, is such as to call for the broader construction. If we look to the reasonableness and justice of the case, there is no good ground upon which the owner of the fee ought to be given the right to recover which does not apply with at least equal force to the tenant, who suffers injury by the same wrong. As we have already noted, this court, in the pioneer case of *Creal v. Keokuk*, supra, expressed its regret at the absence of a statute holding the city to liability for injury in such cases. Thereafter, and apparently to remedy this defect in the law, the statute under consideration was passed. If it is to be given the construction for which the city contends, and its benefits restricted to owners of the fee only, it furnishes but a very partial and imperfect remedy for hardships which the individual citizen ought not to be compelled to bear alone. The tenant, even more than his landlord, is often exposed to irremediable injury from improvements of this nature. The improvement may be such as to destroy in a large measure the value of the use for which the tenant leased the premises, while the actual market value of the fee had been enhanced rather than decreased. While the city is not here prosecuting a condemnation proceeding, the effect of it upon the plaintiff's rights partakes very much of the same nature. True there is not physical invasion or taking of the property, but there is an interference with its use and a taking away of its value to promote the interest of the public at large, and the statute which provides for compensation for injuries so inflicted ought not to be given a construction which denies relief to persons whose rights have thus been invaded, unless the language of the act clearly requires it. No injustice is done by requiring the municipality, as a whole, to pay for the injury it inflicts in carrying on improvements for the general public good. The statute as it stands is capable of a construction which prevents injustice, and we think it the duty of the courts to so interpret it. The trial court

and not left in, making plaintiff entitled to maintain the action.

Question has been raised by the appellee whether, under the record as presented, the city has any standing in this court to raise the principal question argued by counsel, because of failure to make such point in the court below, except by amendment to motion for new trial. As we are disposed to hold against appellant upon the merits of the appeal, we do not undertake to pass upon this question of practice.

The judgment below is therefore affirmed.

GASTON v. HORN (GASTON, Intervener).

(Supreme Court of Iowa. Dec. 10, 1912.)

1. HOMESTEAD (§ 33*)—ESTABLISHMENT—OCCUPANCY.

Mere sleeping in a roofless house was not sufficient occupancy of the premises to constitute them a homestead, where such act was consistent with the purpose of having a temporary sleeping place and the party continued to pay rent for a place where he had resided, and to get his meals, though he then intended to render the house habitable and subsequently occupied it as a home.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 44-49; Dec. Dig. § 33.*]

2. VENDOR AND PURCHASER (§ 101*)—NOTICE OF FORFEITURE—CONSTRUCTION.

Where the contract between vendee and vendor provided that the vendee should pay \$185 to the vendor, and \$275 on a mortgage given to a third party, a notice of forfeiture, served on the vendee, providing that, if he should fail within a certain time to fulfill the terms of the contract to the amount of \$500, due the vendor, and costs of serving the notice, the vendor would declare a forfeiture of the contract as provided by law, merely called upon the vendee to fulfill the terms of the contract, and did not exact payment of the \$500 to the vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 170-174; Dec. Dig. § 101.*]

3. VENDOR AND PURCHASER (§ 101*)—NOTICE OF FORFEITURE—SUFFICIENCY.

A vendor's notice of forfeiture, which declared an intention to forfeit a contract and the reason therefor, was sufficient, though no forfeiture was expressly declared.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 170-174; Dec. Dig. § 101.*]

4. VENDOR AND PURCHASER (§ 101*)—NOTICE OF FORFEITURE—SUFFICIENCY.

In a vendee's suit to quiet title against the vendor, defendant's cross-petition for cancellation of the contract of sale was a sufficient declaration of forfeiture.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 170-174; Dec. Dig. § 101.*]

Appeal from District Court, Pottawattamie County; A. B. Thornell, Judge.

In June, 1908, plaintiff entered into a contract with F. T. True for the purchase of lots 17 and 18 in block 9 of Benson's addition to Council Bluffs for the sum of \$300, of

which \$25 was to be paid January 1, 1908, and the remainder later. On December 14, 1908, the defendant, Horn, furnished plaintiff \$185, of which \$25 was paid to True on the contract, and \$150 to plaintiff, with which to complete the house on the lots, the \$10 to be retained for expense of recording and the like, and by agreement defendant took a deed of the lots from True, and executed to True a mortgage thereon securing the unpaid purchase price of \$275. At the same time defendant entered into a written contract with plaintiff, reciting "that defendant, Charles Horn, has sold the plaintiff for the sum of four hundred sixty dollars (\$460.00), to be paid as follows: One dollar (\$1.00) cash, pay one hundred eighty-five dollars (\$185.00) in eighteen months from the date, and assumes and agrees to pay a mortgage given to F. T. True as security for a note of two hundred seventy-five dollars (\$275.00), with 6% interest, and also containing the clause that time of payment was the essence of the contract, and the usual covenant of conveying the title to said premises, by defendant Charles Horn, to C. G. Gaston, upon the performance of said written contract."

The plaintiff paid the taxes and also the interest on the mortgage to True, but omitted to pay the \$185 owing plaintiff, and on August 10, 1910, defendant caused to be served on plaintiff a notice reciting the amount owing on the contract, his readiness to execute it, and adding: "You are further notified that after thirty days from receipt of this notice by you that the said Charles Horn will declare a forfeiture of all your right, interest, and title to said property named above and the contract hereinbefore referred to, as shown by Exhibit A hereto attached. Should you fail within said time to fulfill your terms of said contract to the amount of five hundred dollars (\$500.00), due the said Charles Horn, and costs of serving of this notice, the said Charles Horn will then declare a forfeiture of said contract as provided by law." The plaintiff failed to perform, and on this state of facts plaintiff prayed that the deed from True to defendant be declared a mortgage, for an accounting, and that title be quieted in him. The defendant demanded that the petition be dismissed, the contract between him and plaintiff be canceled, that title be quieted in him, and that he be awarded a writ of possession.

Effie Gaston intervened, alleging that at and prior to the transactions on December 14, 1908, she was the wife of and living with plaintiff, that with her family she was occupying the premises as a homestead, and that she had joined in the execution of none of the papers mentioned. She prayed that the homestead be protected, and the claim of plaintiff be decreed not to be a lien thereon.

Another action was brought by defendant at about the same time, but was consolidated with this. On hearing, the petition and petition of intervention were dismissed, and title quieted in defendant as prayed. Both defendant and intervener appeal. Affirmed.

Thomas Q. Harrison, of Council Bluffs, for appellants. John Fletcher, of Des Moines, for appellee.

LADD, J. The plaintiff had purchased two lots of True, and afterwards arranged with Horn to pay True \$25 on the price, and procure a deed thereof from True, and execute to him a mortgage thereon to secure the remainder of the purchase price. This was done, and, having loaned plaintiff \$185 in addition thereto, defendant executed a contract to convey the lots to plaintiff upon the payment of the \$185, with interest, in 18 months, the grantee to assume the mortgage to True. The plaintiff's wife did not join in these transactions, and in her petition of intervention alleged that the premises were the homestead of herself and family, and prayed that it be protected against the claim of defendant. Whether it was such, and whether the contract described was forfeited, are the only issues submitted for review.

[1] The testimony bearing on the occupancy of the premises as a homestead is not such as to warrant interference with the decision of the trial court that it was not so occupied. Plaintiff and his sons may have slept there previously, and a trunk, some bedding, and possibly other articles, may have been taken there from the house near by where they lived; but the house was not then habitable. Only a part of the roof was on, and the windows were uncased. According to one witness, who is undisputed, the doors and windows were nailed in during the winter, and plaintiff admitted he did not sleep there when "too awful cold." He continued to pay rent for the place where he had resided and get his meals there, though he explained that the payment of rent was

for his daughter and son-in-law. Merely sleeping in a roofless house is not alone sufficient occupancy of the premises to constitute them a homestead, any more than sleeping in a tent, or with only the skies above. It is entirely consistent with another purpose, as that of having a temporary place to sleep, and that it was so used is confirmed by the testimony. The design in borrowing the money was to complete the house therewith, so as to render it habitable, and the district court rightly held that he did not enter into its occupancy as a home until the spring of 1909. The case is readily distinguishable from *Neal v. Coe*, 35 Iowa, 407, which involved the change of homesteads, and, of course, some time was required to effect such change, and according to subsequent decisions this is a reasonable time. *Robinson v. Charleton*, 104 Iowa, 293, 73 N. W. 616; section 2981, Code. Here the inquiry is: When did the homestead character first attach? And, as said, this was long after the transactions under consideration, and when actually occupied as such.

[2-4] II. The notice of forfeiture described the contract, and indicated that, if plaintiff should "fail to fulfill the terms of said contract, the amount of \$500, due Charles Horn, and costs of serving of this notice, the said Charles Horn will declare a forfeiture of said contract as provided by law." Counsel for appellant argue that this exacted payment of the \$500 to Horn. Not so, for it merely called upon the vendee to fulfill the terms of the contract, which were that he pay the \$185, with interest, and assume the payment of the \$275 to True. It is said that the notice of forfeiture merely threatens to declare a forfeiture, but none is shown to have been declared. All the statute requires is that the notice "shall contain a declaration of an intention to forfeit said contract, and the reason therefor." Defendant's cross-petition for cancellation was sufficient declaration of forfeiture.

The decree quieting title in defendant is affirmed.

SCHOOL TP. OF EDEN IN CARROLL COUNTY v. STEVENS.

(Supreme Court of Iowa. Dec. 14, 1912.)

1. TOWNS (§ 33*)—TREASURER—LIABILITY ON BOND—MONEY LOST BY BANK FAILURE.

Where township funds were lost through failure of a private bank in which they were deposited by the township treasurer, and the treasurer's bond provided that he would "exercise all reasonable diligence and care in the preservation and lawful disposal of all money," there was no liability on such bond, in the absence of negligence on the treasurer's part in selecting the depository, though the bond also provided that he should "faithfully account for all balances" and "promptly pay over" the same to his successor; the treasurer's authority to deposit funds in a bank being implied from Code, § 2768, amending the statute which required the treasurer to "hold" the money, by substituting the word "receive" for "hold."

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. §§ 60, 61; Dec. Dig. § 33.*]

2. APPEAL AND ERROR (§ 1062*)—HARMLESS ERROR—SUBMISSION OF ISSUES—EVIDENCE.

Where, in an action against a township treasurer for public money lost through the failure of the bank in which it was deposited, the evidence was wholly insufficient to warrant any finding that the treasurer was negligent in selecting such depository, failure to submit the question of his diligence in making such selection, if error, was harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.*]

3. TOWNS (§ 29*) — TREASURER — FUNDS — RIGHT TO REIMBURSEMENT.

Where a township treasurer, while the public funds were tied up through the closing of a bank, paid warrants from his individual funds expecting to be reimbursed when the public funds should become available, he was entitled to reimbursement from the township when, through insolvency of the bank, such funds never became available.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. § 52; Dec. Dig. § 29.*]

4. TOWNS (§ 29*) — TREASURER — FUNDS — RIGHT TO REIMBURSEMENT—ESTOPPEL.

A township treasurer was not estopped to claim a reimbursement for his individual money paid on township warrants while the public funds were tied up in an insolvent bank, by the fact that he had rendered annual statements in which the funds tied up were treated as moneys on hand, where the facts were fully understood by all parties and it was then expected that some part of the funds would be received from the bank.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. § 52; Dec. Dig. § 29.*]

5. PLEADING (§ 204*)—COUNTERCLAIM—CONTRACTS.

Where a counterclaim contains two counts presenting a single claim upon two different legal theories, and one count presents a good cause of action, the insufficiency of the other count is immaterial.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 486-490; Dec. Dig. § 204.*]

Appeal from District Court, Carroll County; F. M. Powers, Judge.

The plaintiff is a school district. The defendant was its treasurer. This action was brought on his official bond. The defense was that the funds of the plaintiff were lost

without fault of the defendant, through the failure of a bank in which they were properly deposited by the defendant in a separate and distinct account. The defendant also filed a counterclaim to recover moneys advanced by him while such treasurer in payment of valid orders and warrants drawn upon him while in such office, and paid by him in advance and in anticipation of the receipt of the public revenues for that purpose. At the close of the evidence the trial court sustained defendant's motion for a directed verdict on the main case and sustained the motion of the plaintiff for a directed verdict on the counterclaim. Both parties appealed. Plaintiff having first appealed, it is denominated the appellant. Reversed and remanded.

Reynolds & Meyers, of Carroll, for appellant. Chas. C. Helmer and E. A. Whissler, both of Carroll, for appellee.

EVANS, J. The defendant became the plaintiff's treasurer in 1903, and so continued by annual elections until July, 1909. The funds of the plaintiff came into his hands from his predecessor in the form of a check on the Bank of Templeton, a going concern of repute. He deposited the check in the same bank to his account as treasurer of the plaintiff district. Such account continued as a distinct and separate account down to the date of the failure, January 27, 1908, and defendant deposited to such account all the moneys of the plaintiff which came to his hands during such period, and paid all warrants and orders by appropriate checks thereon. There is no claim of any commingling of the funds or of misappropriation of any kind. The amount deposited in such account at the time of the failure was \$2,011.93. The bank was a private bank owned by one Wilson. Wilson died on January 27, 1908, and an administrator was appointed for his estate, who, as such, took possession of the bank but did not operate the same as a bank. Wilson proved to be insolvent, but this fact was discovered only after his death. The immediate cause of the closing of the bank was the death of Wilson, and not his supposed insolvency. The official bond of the defendant which was in force at the time of the failure was conditioned that he should perform all the duties of his office and that he should "faithfully account for all balances" of money in his hands at the termination of his term of office, and "promptly pay over" the same to his successor, and "that he will hereafter exercise all reasonable diligence and care in the preservation and lawful disposal of all the money," etc. The plaintiff brought this action in three counts, upon this bond, and two succeeding bonds executed, respectively, July, 1908, and July, 1909. The defendant is clearly liable, if at all, on the bond in force at the time of the loss, and we need give no separate attention

to the other bonds. After the death of Wilson, and while the public funds were apparently "tied up," the officers of the plaintiff issued warrants in the ordinary way, and the defendant paid the same as presented out of his own funds in anticipation of receiving later the necessary public revenues to meet the same. The amount so paid by him over and above the revenues received by him amounted at the close of his service to \$811.12, which sum he asked to recover by counterclaim. The plaintiff conceded the amount so paid out by the defendant, and tendered him full credit therefor on the original amount of the claim, and only asked to recover from the defendant the balance of \$1,200 remaining. By way of reply to the counterclaim, the plaintiff pleaded that the payment of warrants by the defendant out of his own funds was voluntary and without authority, and that the plaintiff therefore was not liable therefor. The plaintiff pleaded further, by way of estoppel, that at the annual settlements had between the defendant and the plaintiff's board of directors in July, 1908, and July, 1909, respectively, the defendant reported the full amount of money due the plaintiff as being on hand, and that his report was approved upon such representation.

[1] 1. We will give our first attention to the controversy as presented in the main case. The contention of plaintiff is that the liability of the defendant for the money coming into his hands as treasurer is absolute, and that no defense of diligence is available to him. In support of this contention, reliance is had upon the following cases: *District Township v. Morton*, 37 Iowa, 550; *District Township v. Smith*, 39 Iowa, 9, 18 Am. Rep. 89; *District Township v. Hardinbrook*, 40 Iowa, 130.

The contention of the defendant is that, in the course pursued by him for the care of the public funds, he performed his full duty as indicated by the conditions of his bond, in that he used every diligence which could have been within the contemplation of himself or of the public corporation which he served. In support of this contention, reliance is had upon *Ross v. Hatch*, 5 Iowa, 149, and the recent case of *Hanson v. Independent District*, 135 N. W. 1090. The plaintiff contends that the holding of the court in the last two cases cited is not consistent with the holding in the *Morton*, *Smith*, and *Hardinbrook* Cases. We think there is force in this contention, although the court in the *Smith* Case assumed to distinguish such case from the case of *Ross v. Hatch*, supra. It was there said that the liability of the treasurer was determined by the conditions of his bond. In the *Ross* Case, the conditions of the bond bound the treasurer to "reasonable diligence and care." This provision was not contained in the bonds involved in the later cases of *Smith*, *Morton*, and *Hardinbrook*,

above cited. Such provision was contained in the bond involved in the *Hanson* Case, supra, and is contained in the bond involved herein. The present case therefore comes within the letter of the *Ross* and *Hanson* Cases, supra, and within the distinction made in the *Smith* Case, supra. We are not quite willing, however, to lean upon so fine a distinction, and are inclined to the view that one line of decisions ought to be followed and the other frankly overruled. The *Morton*, *Smith*, and *Hardinbrook* Cases were all decided at about the same time. They were put largely upon the ground of public policy. The defense presented in one of the first two cases was that the money had been burned by accident, and the defense presented in the other was that the money had been stolen. Such defenses were in their nature comparatively easy to fabricate. The public corporation would naturally encounter great difficulty in meeting evidence produced in support of such a defense, even though fabricated. The same rule, however, was applied in the *Hardinbrook* Case, wherein the defense of loss by bank failure was presented. In these cited cases, emphasis was laid upon the provision of the statute requiring the treasurer to "hold" the money. It was the current judicial opinion at that time that a public treasurer could not lawfully deposit public funds in a bank, and that to do so, however innocently in a moral sense, would amount to a technical conversion. *Lowry v. Polk County*, 51 Iowa, 50, 49 N. W. 1049, 33 Am. Rep. 1146 (later overruled). Since that time the ordinary methods of business and of the care and disbursement of funds have been quite revolutionized. The statute which required the treasurer to "hold" the money has been slightly amended by the elimination of the word "hold" and the substitution therefor of the word "receive." Code, § 2768. The substitution is not very important in its effect upon the statute as a whole, but the word "receive" does not lend itself readily to the degree of emphasis which was formerly placed upon the word "hold." The doctrine that a general deposit of public funds in a bank to the separate account of the officer as such is of legal necessity a technical conversion has been repudiated. *Officer v. Officer*, 120 Iowa, 389, 94 N. W. 947, 98 Am. St. Rep. 365; *Hunt v. Hopley*, 120 Iowa, 695, 95 N. W. 205; *Hanson v. Roush*, 139 Iowa, 58, 116 N. W. 1061; *Brown v. Sheldon Bank*, 139 Iowa, 83, 117 N. W. 239.

It is held, in effect, in the foregoing cases, that the adoption of this method of caring for public funds, their identity being carefully preserved by separate and distinct accounts, as such, is not only permissible but commendable. In the light of modern methods of business, it would be difficult to specify a safer method of care and custody than is thus provided. Indeed, it might be a fair ques-

tion whether, in the absence of excusing circumstances, a treasurer could properly ignore such facilities and subject public funds to the risk of loss naturally incident to a personal custody of currency. Where such course is followed, we can see no reason of public policy to be subserved by declaring for a rule of absolute liability of the treasurer, notwithstanding the exercise of all diligence and the observance of every legal duty. We adhere, therefore, to the rule followed in *Hanson v. Independent District*, supra, and foreshadowed in the cases of *Officer v. Officer*, *Hunt v. Hopley*, *Hanson v. Roush*, and *Brown v. Sheldon Bank*, cited above, and *Ross v. Hatch*, supra. In so far as the other cases cited by appellant should appear to be inconsistent herewith, they must be deemed to be overruled to that extent. The trial court therefore rightly held against the claim of absolute liability on the part of the defendant.

[2] As a last word, the plaintiff contends that, even though the defendant was not absolutely liable as contended for, yet the question of his diligence was one for the jury under the evidence. This point is not entirely free from difficulty. Cases might arise wherein the diligence and care of the treasurer in the selection of the depository bank might be open to question under the evidence. The evidence in this record is practically undisputed at all points. We think the most that could be claimed for the plaintiff is that there is a scintilla of evidence upon which an inference of negligence might be based. We do not think, however, that the evidence would warrant any other verdict than that the defendant was free from fault. Upon that view, therefore, we would not be warranted in remanding the case for trial upon that question.

[3] 2. We come now to the defendant's counterclaim. This was dismissed by the trial court. The first contention of the plaintiff is that the defendant made the payments voluntarily and without authority. That he acted voluntarily is, of course, not questioned. He was not, however, a volunteer in an intermeddling sense. He was the treasurer. Through him alone could warrants be paid. The present funds of the district were "tied up." At first this inconvenience was expected to be quite temporary. Indeed, the fact and extent of the loss came to the officers of the plaintiff and to the defendant quite gradually. When the fact of insolvency became known, there was still the hope of partial recovery in the form of dividends. If dividends were paid, they would be paid into the hands of the defendant. Other taxes were in course of collection and on the way into the same custody.

The defendant doubtless could have refused all warrants and compelled all holders to wait. What he did was to pay the warrants as presented out of his own funds, expecting

to reimburse himself out of the public funds as soon as they should be available. He served no interest of his own thereby. The situation was anomalous. It was not covered by any statutory provision. He found himself in the breach, not of his own volition, but because of his official position. His response to it was so reasonable and so in accord with the public interest and without detriment to any right or interest of the plaintiff that he ought not to be deemed an intermeddler or a volunteer in such sense. The plaintiff got the full official benefit of the money so paid out. It would be a reproach to the law if there were no remedy available to the defendant under such circumstances. We can think of no fair reason, either legal, equitable, or moral, why he should not be reimbursed.

[4] 3. As against the counterclaim, the plaintiff pleads also an estoppel in that annual settlements were had with the defendant, in July, 1908 and 1909, respectively. In these settlements the funds "tied up" in the bank were treated as "moneys on hand," and they appeared in the defendant's account accordingly. There was neither fraud nor misunderstanding nor mistake of any kind. The facts were fully understood by all parties, and the expectation of realizing something was not abandoned. True, the settlement was binding upon the defendant. He does not claim otherwise. He disputes no item of his account as presented then. "The money on hand" was shown by the presentation of his bank book. If, as we have above held, he deposited such funds in said bank in the exercise of proper diligence, then it was "money on hand" in a legal sense as between him and the plaintiff. The issues in this case do not involve in any manner the correctness of the settlements with the directors. They involve only the question as to whether the loss sustained shall fall upon the plaintiff or upon the defendant. That question was not involved in the settlements; nor did either party waive its contention in relation thereto by making the annual settlements required by the statute. We see nothing therefore in such settlements upon which to base a claim of estoppel.

Reliance is had by plaintiff at this point upon the cases of *Webster County v. Hutchinson*, 60 Iowa, 721, 9 N. W. 901, 12 N. W. 534, and *Boone v. Jones*, 54 Iowa, 689, 2 N. W. 987, 7 N. W. 155, 37 Am. Rep. 229. These cases do not reach the point. The first case cited involved fraud and misrepresentation. The second involved the correctness of the settlement and the presumption obtaining in the absence of evidence as to whether statutory requirements were followed in the settlement.

[5] 4. The defendant pleaded his counterclaim in two counts. These counts presented the claim upon two different legal theories. The trial court sustained a demurrer to the

first count and at the close of the evidence directed a verdict against the defendant upon the second count. It is not important that we should discuss these counts or determine which presented the better theory.

We are of the opinion that the first count, to which a demurrer was sustained, presented a good cause of action. Whether the second count did likewise is quite immaterial. The difference between the two counts is not very substantial. It is our conclusion therefore that the order and judgment of the trial court should be affirmed on plaintiff's appeal and reversed on defendant's appeal. The case will therefore be remanded to the district court, with directions to enter judgment for the defendant upon his counterclaim.

Reversed and remanded.

STATE v. HECTOR.

(Supreme Court of Iowa. Dec. 10, 1912.)

1. WITNESSES (§ 268*)—CROSS-EXAMINATION—SCOPE.

Where, in a prosecution for seduction, prosecutrix testified on direct examination that defendant was her beau, that she had also been with W., but could think of no others, questions as to her having gone with other young men named before the month in which the seduction was alleged to have been committed were proper cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948; Dec. Dig. § 263.*]

2. WITNESSES (§ 203*)—CONTRADICTION—COUNTY ATTORNEY—PRIVILEGE.

Where, in a prosecution for seduction, prosecutrix testified that the reason why she had not testified before the grand jury to defendant's promise to marry her was because she had not been interrogated on that point, defendant was entitled to call the county attorney who conducted the proceedings before the grand jury and acted as clerk, and prove by him that prosecutrix was asked before the grand jury whether defendant had promised to marry her and had answered in the negative; such question not being within the privilege conferred by Code, § 4608, prohibiting the disclosure of confidential communications by a practicing attorney.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 758; Dec. Dig. § 203.*]

3. CRIMINAL LAW (§ 721½*)—TRIAL—ARGUMENT OF COUNSEL—MISCONDUCT.

In a prosecution for seduction alleged to have been committed at W., it was improper for the county attorney in argument to the jury to state that W. was close by, but that defendants could not in that city find a witness who would testify that prosecutrix's character and chastity prior to the date of her alleged seduction by defendant was not what the two important witnesses for the state had testified it was.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1673; Dec. Dig. § 721½.*]

4. CRIMINAL LAW (§ 721*)—TRIAL—REMARKS OF COUNTY ATTORNEY—REFERENCE TO DEFENDANT'S FAILURE TO TESTIFY.

Where, in a prosecution for seduction, defendant did not testify, it was improper for the

county attorney in argument to the jury to refer to certain evidence with reference to the dealings between prosecutrix and defendant as undisputed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. § 721.*]

5. SEDUCTION (§ 50*)—INSTRUCTIONS.

In a prosecution for seduction, an instruction as to the extent of the seductive arts, wiles, and deception necessary to sustain a conviction held proper.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 89-92; Dec. Dig. § 50.*]

Appeal from District Court, Pottawattamie County, at Avoca; E. B. Woodruff, Judge.

Defendant was indicted, tried, and convicted of the crime of seduction and appeals. Reversed.

A. L. Preston, of Avoca, and John P. Organ, of Council Bluffs, for appellant. George Cosson, Atty. Gen., and John Fletcher, Asst. Atty. Gen., for the State.

DEEMER, J. At the time the crime is said to have been committed, Minnie Peterson, the prosecutrix, was about 16½ years of age, and defendant was just past 18. Each lived at the home of his parents in the town of Walnut in Pottawattamie county, Iowa, and within a short distance of each other. Prosecutrix came into town with her parents in the year 1905, and during the fall of that year she first met the defendant. The seduction is said to have occurred in June of the year 1906. At that time defendant was attending the public schools; but prosecutrix had ceased going to school and was living at home. She met the defendant, so she says, about three times in the year 1905 and the same number of times during the year 1906 before the seduction was actually accomplished. She says that this occurred on the 8th or 9th day of June, 1906, and was the result of defendant's making love to her, hugging and kissing her, and stating that it was all right to have sexual intercourse, that other girls did, that no harm would come of it, and that if there did he would marry her. She also testified that as the result of the intercourse a child was born to her on February 26, 1907.

[1] On direct examination prosecutrix gave the following testimony: "Q. He was your beau? (Objected to as incompetent and asking for the conclusion of the witness. Overruled. Defendant excepts.) A. Yes, sir. Q. And you never had any other young man about you or with you, did you, before or up to that time? A. Yes, sir; I had been with Mr. Walters before, I remember. Q. And any others? A. No, sir; not that I can think of. Q. Was there any other young man with you so frequently as this young man, the defendant here? (Objected to. Not answered.) Q. What I want to know is whether or not this young man, the de-

fendant here, was your—was the fellow that was with you, as you folks tell it, whether he was your fellow? (Objected to as incompetent, leading, suggestive, and asking for an opinion and conclusion of the witness. Overruled. Defendant excepts.) A. Yes, sir; I loved him better than anybody else." On cross-examination the witness was asked as to her going with other young men, naming them, before June of the year 1906; but objections to the questions because not cross-examination and immaterial were sustained. In this there was manifest error. The matter was clearly cross-examination and the testimony material.

[2] We extract the following from the record in order that another proposition relied upon by appellant may be understood: "Exhibit 1 is the statement I signed about this matter in the grand jury room, when it was under investigation. At that time, I didn't say that the defendant said to me that he would marry me in the event that I became pregnant, or that he would take care of me in the event that I got into trouble in that way, or anything of that kind, because they didn't ask me. I think it was Mr. Hess who was asking the questions in the grand jury room. He didn't ask me there if Harry Hector had at any time promised to marry me or anything of that kind. And I didn't reply, 'No, it was never mentioned.' I don't think he ever asked me that. Before I went to the grand jury room, I saw Mr. Hess at Walnut and talked with him quite a while. Q. Didn't he also at that time ask you if Harry Hector hadn't promised to marry you during some of these times? Or something of that kind? Didn't he ask that repeatedly, and didn't you say that there was nothing of that kind occurred? (Objected to as not proper cross-examination, incompetent, immaterial, and privileged.) Court: You are referring to the grand jury? Defendant's Counsel: I am referring to a time prior to the session of the grand jury; not in the grand jury room, but at her home in Walnut. It is admitted by defendant's counsel that Mr. Hess at the time was county attorney of Pottawattamie county. (The objection was sustained upon the grounds that it was privileged communication, to which ruling the defendant excepted.) Q. At the time Mr. Hess was talking with you (referring to the conversation at Walnut), is it not a fact that it was not with reference to any prosecution of a criminal case against the defendant, but with reference to another feature of the case? (Objected to as not cross-examination, immaterial, incompetent, and a privileged communication. Sustained. Defendant excepts.) Q. Is it not a fact that, subsequent to the indictment in this case, Mr. Hess, the county attorney, talked with you about this particular case, and about this particular feature of the case, as to

what deception or art was practiced upon you at the time of the alleged seduction, and at that time didn't you say to him, in substance, that the only thing he did or said was to make love to you, and to make other statements to you, but that he said nothing about marriage or about protecting you in that way, and that was not the subject of your talk with Harry Hector at any of the times when you were in his company? (Same objection as to the previous question. Sustained. Defendant excepts.) A. I was in the grand jury room only once while the matter was under investigation. I talked with Mr. Turner and Mr. Cullison this week about my testimony, at Mr. Turner's office. I think my father was there. Q. In the conversation with reference to what your testimony in the case would be, wasn't your attention called to the fact that in your testimony before the grand jury you had made no reference to any promise of marriage or the like? (Objected to as incompetent, immaterial, irrelevant, not cross-examination, and privileged. Sustained. Defendant excepts.) Q. And at that conversation, wasn't it suggested to you that that must have been said to you, or that something of that kind was necessary in the case? (Same objection as to the previous question. Sustained. Defendant excepts.) You said that when you were before the grand jury that the reason that you didn't say anything about the promise of marriage or the like was because it was not asked of you. Now I want to know who first asked you that question? (Same objection as to the previous question. Sustained. Defendant excepts.) A. The only persons I talked with concerning my testimony in this case is Mr. Cullison, Mr. Turner, Mr. Hess, and Mr. Jones of Des Moines; the last named being a lawyer at that place."

The various rulings here shown are assigned as error. That the entire matter may be fully understood, it should also be stated that the then county attorney, Hess, was called as a witness for the defendant, and this extract from the record discloses what happened: "I was in attendance upon the grand jury here in Avoca at the April or May term, 1907, when the matter of the charge against Harry Hector in this case was being presented to the grand jury. I think it was in May, and I was in attendance upon the grand jury at that time. Exhibit A is the indictment in this case, and the writing thereon and the minutes of testimony, excepting the signatures, and the writing on the back of the indictment, are in my handwriting. At that time I acted as clerk of the grand jury in so far as I made the memoranda of the testimony of the witnesses which was afterwards attached to the indictment. I remember the prosecuting witness being before the grand jury at that time. Q. I will ask you to state whether

or not the prosecuting witness was asked at that time and place anything with reference to the question whether or not the defendant, Harry Hector, had made any promise of marriage to her in connection with her other testimony in which she said that he had sexual intercourse with her? (Objected to as incompetent, immaterial, and privileged.) In connection with this same matter and on this objection, the witness further testified the grand jury was at the time receiving evidence in this case and in other cases from different witnesses. A. The grand jury was in session and duly organized, and I was propounding most of the questions, and occasionally a grand juror might ask one, but I was propounding practically all of the questions. In connection with this same matter, and the objection urged thereto, the following question was put: Q. Now at this time, and while the grand jury was so organized, were there any questions asked by you of the prosecuting witness, Minnie Peterson, as to whether or not, at the time she claims she had been seduced by Harry Hector, that prior thereto, whether or not there had been any promise of marriage by him to her in connection with the seduction? To this the same objection was urged by the counsel for the state as to the previous question, and by permission of the court, on his examination, testified that he was before the grand jury at that time as the county attorney. The court thereupon sustained the objections made to the previous questions upon the grounds that the prohibition of the statute, section 4608, applied to the county attorney, and the same was privileged, and thereupon defendant excepted to the ruling of the court. Q. What, if anything, did Miss Peterson say at that hearing before the grand jury with reference to the question or fact as to whether Harry Hector had made her any promise of marriage, or promise to protect her in the event anything should go wrong or anything of that kind? (Objected to as immaterial, incompetent, and privileged. Sustained, and defendant excepts.) Q. At that hearing did you ask her any questions as to whether Harry Hector had promised to marry her or promised to take care of her or protect her in the event anything should happen to her, or any questions of that character? I refer to such time as the grand jury was in session receiving testimony upon this charge against Harry Hector. (Objected to for the same reasons as stated in the previous objection. Sustained on the grounds of privilege, and defendant excepts.) Q. Did you, at that hearing, and while the grand jury was in session, ask the prosecuting witness, Minnie Peterson, any questions as to whether Harry Hector had made her any promise of marriage or promises of any kind in connection with the charge of seduction? (Objected to for the same reason assigned in

the objection to the previous question. Sustained, and defendant excepts.) Q. Did she at that time, when the grand jury was in session investigating the matter, give any testimony before the grand jury that Harry Hector made her any promises of marriage or promises to protect her, or take care of her in the event she should become in the family way, in connection with her testimony that defendant had sexual intercourse with her and seduced her? (Objected to for the same reasons stated in the objections to the previous question. Sustained. Defendant excepts.) Q. I want to ask you whether in this investigation before the grand jury of the charge against Harry Hector, while you were acting as clerk or scribe in taking down the testimony, whether you included in her statement that was signed by her in these minutes, all that she related before the grand jury that Mr. Hector said to her in connection with the charge of seduction as an inducement for her to submit her person to him? (Objected to as incompetent, immaterial, and privileged. Sustained, and defendant excepts.) In connection with the foregoing questions and before ruling thereon, defendant's counsel stated that they expected to show by the witness Hess that the prosecutrix, Minnie Peterson, when examined before the grand jury, and during the giving of her testimony with reference to the offense charged against the defendant, had been asked by Mr. Hess, who was conducting the examination, on several occasions during that examination, whether the defendant had ever promised to marry her, prior to the alleged seduction, and that she replied to such questions that the defendant had never made any promises of marriage to her or any other promises, and that such marriage had never been mentioned or discussed by herself and the defendant."

Defendant also introduced the minutes of the prosecuting witness' testimony attached to the indictment, reading as follows: "Am 17 years old. Was 17 on January 28th, this year. Got acquainted with defendant in the fall of 1905. I went out with him a number of times to different places. He said he loved me, and that I was his sweetheart, and that I was the only girl he loved, and always made love to me. I believed him, and he had intercourse with me a number of times. Minnie Peterson."

In the rulings complained of we think there was error prejudicial to the defendant. The prosecutrix first attempted to explain the minutes of her testimony taken before the grand jury by a statement which was not objected to, that none of the persons examining her had asked about any promise of marriage, and especially to the fact that the county attorney did not ask her any such question. In view of this record it seems to us that it was entirely proper for the defendant to call the county attorney to dis-

prove this statement. In *State v. McPherson*, 114 Iowa, 492, 87 N. W. 421, this matter was discussed, and it was held to be within the discretion of the trial court to permit the clerk of the grand jury to testify as to what a witness had testified to before the grand jury. And in *State v. Swafford*, 98 Iowa, 370, 67 N. W. 284, it is held in effect that matter called for as in this case was not privileged because made in response to questions by the county attorney in the performance of his duty. Again, in *Foreman v. Archer*, 130 Iowa, 49, 106 N. W. 372, it was held that, when a client gives testimony as to what he said to his attorney, the attorney may be permitted to testify as to the same subject-matter. See, also, *Kelly v. Cummins*, 143 Iowa, 148, 121 N. W. 540, 20 Ann. Cas. 1283. It is true that in *Gabriel v. McMullin*, 127 Iowa, 426, 103 N. W. 355, and *State v. Houseworth*, 91 Iowa, 740, 60 N. W. 221, we held that communications made by a prosecutor to the county attorney not in the grand jury room were privileged under section 4608 of the Code, or by reason of public policy; but this holding does not dispose of the question now before us. Here the proceedings were before the grand jury and in the presence of the county attorney, who also acted as the clerk of that grand jury, and prosecutrix had already opened up the subject by attempting to explain why she did not testify before the grand jury as she did upon the trial of the case. Assuming that the matter was within the discretion of the court, we think it was so vital to the case that the county attorney should have been allowed to testify.

[3, 4] II. In arguing the case to the jury counsel for the state indulged in the following remarks: "Walnut is close here, and yet they have not, and I must say it must be inferred that was the case. They could not in that city find one witness that would testify that this prosecutrix's character, chastity, or reputation for chastity was not, prior to the time of her seduction, was what these two important witnesses (Clark and Linebach) testified to. Defendant's Counsel: We object to this line of argument. It would not be at all competent for us to show want of chastity by such method as counsel points out. It is prejudicial and misconduct on the part of counsel. * * * With these falsehoods they made an assault upon the young girl's chastity. They have not disputed her stories. What she said to you about her dealings with the defendant are undisputed. Defendant's Counsel: We take exception to that remark. Mr. Cullison: They have not chosen to dispute it. Defendant's Counsel: We take exception to that remark. Mr. Cullison: It stands unchallenged. Defendant's Counsel: We take exception to that remark."

The first of these remarks should not have

been made. *State v. Williams*, 122 Iowa, 115, 97 N. W. 992; *State v. Hogan*, 115 Iowa, 455, 88 N. W. 1074; also, *People v. Aiken*, 68 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512. While something like the remarks last quoted have been held not in violation of section 5484 of the Code in *State v. Seely*, 92 Iowa, 490, 61 N. W. 184, *State v. Snider*, 119 Iowa, 15, 91 N. W. 762, and *State v. Hasty*, 121 Iowa, 507, 96 N. W. 1115, and other like cases, yet they fall dangerously close to the rules announced in *State v. Trauger*, 77 N. W. 336, *State v. Baldoser*, 88 Iowa, 55, 55 N. W. 97, *State v. Graham*, 62 Iowa, 108, 17 N. W. 192, and *State v. Ryan*, 70 Iowa, 154, 30 N. W. 397. And while we shall not reverse here because of them, we deem it advisable to caution counsel here and all county attorneys and assistant prosecutors against making reference either directly or indirectly to defendant's failure to take the witness stand or to deny the alleged seduction. Here the defendant did not take the stand, and under our practice this was his privilege, and the statute expressly says that no reference shall be made to the fact that he did not testify. Such reference may be made indirectly with as much, if not more, force than if directly charged, and it is quite important that the statute be observed so long as it remains upon the books. Whether or not it should be repealed in the interest of justice is not now before us. During the trial of the case counsel for the state were guilty of many improprieties which should not be repeated if the case is retried.

III. The corroborating testimony is weak, but we think there was enough to take the case to the jury. *State v. Mullholland*, 115 Iowa, 172, 88 N. W. 325; *State v. Smith*, 84 Iowa, 522, 51 N. W. 24; *State v. Coffman*, 112 Iowa, 8, 83 N. W. 721; *State v. Curran*, 51 Iowa, 112, 49 N. W. 1006.

[5] IV. Instruction 10, given by the trial court, reads as follows: "It must be shown by the state beyond a reasonable doubt that, at the time of the first indulgence of sexual intercourse between the defendant and prosecuting witness, the defendant induced her to have such sexual intercourse with him as the result of some seductive arts, deception, or promise of marriage or promise, if anything came of it, he would take care of her, made and used by the defendant for the purpose of overcoming her virtue, and which was calculated to and did overcome her will and induced her to surrender her person to him, and but for such seductive means and influence she would have maintained her virtue. The exact amount of seductive means and influence necessary to make out this element of the offense cannot be definitely defined and explained. They depend upon the circumstances of each case. The seductive means and influence which

would induce one woman to surrender her person might not have that influence upon another woman; but the seductive means and influence, however, must have been of such character and force as that by reason thereof the said prosecuting witness in this case was led to submit to the intercourse with defendant, and but for such seductive means and influences and promises practiced by the defendant, if any there were, she would have maintained her virtue. On this point it will be proper for you to consider, so far as disclosed by the evidence, the age, education, mental qualities, experience, and strength of mind of the prosecuting witness and of the defendant; their acquaintance, its duration, and intimacy prior to the time of the alleged seduction; their conduct and relations towards each other; what, if any, acts or words of love and affection or flattery and attention the defendant had used towards her prior to the time of the alleged seduction; what, if any, sentiments or feeling of love and affection she at that time bore towards the defendant; what, if anything, he had said or done to kindle the same; and what, if any, control or influence he had over her by reason thereof; what, if any, representations, statements, declarations, promises, or appeals the defendant made, used, or employed prior to or at the time of the alleged seduction which were, if at all, calculated to mislead, influence or deceive the prosecuting witness and cause her through interest, trust in, or love for the defendant, to yield to his desires. And from these matters, if shown by the evidence, and from all the evidence before you, it is for you to say whether this prosecuting witness, Minnie Peterson, was led astray and influenced to yield her person to the defendant by means of some representations, declarations, promise of marriage, or artifice hereinbefore explained."

This is complained of. It has ample support in the case and is a correct statement

of the law. See *State v. Price*, 138 N. W. 520, decided at present term.

Other instructions complained of are apparently correct, and there was no error in denying defendant's requests.

For the errors pointed out, the judgment must be and it is reversed.

DODD v. SCHWERTLEY et al.

(Supreme Court of Iowa. Dec. 12, 1912.)

Appeal from District Court, Harrison County; O. D. Wheeler, Judge.

Action for damages resulted in judgment against defendants, from which they appeal. Affirmed.

J. S. Dewell, of Missouri Valley, and Ross McLaughlin, of Logan, for appellants. C. A. Bolter, of Logan, for appellee.

PER CURIAM. The facts of the case sufficiently appear in *Martin v. Schwertley et al.*, 138 N. W. 218, save that plaintiff was tenant in possession of another tract of land different from that of plaintiff in that case. The grounds of liability are sufficiently discussed in that case, and on the issues submitted the evidence was in conflict. As no doubtful questions of law are presented, the judgment is affirmed.

Affirmed.

STATE v. McEWEN.

(Supreme Court of Iowa. Dec. 14, 1912.)

Appeal from District Court, Pocahontas County; D. F. Coyle, Judge.

"Not to be officially reported."

Plaintiff was indicted for fraudulent banking, and found guilty. From the sentence, the defendant appeals. Affirmed.

T. F. Lynch and Parson & Mills, for appellant. Geo. Cosson, Atty. Gen., and John Fletcher, Asst. Atty. Gen., for the State.

PER CURIAM. This case is presented only by short transcript showing the indictment, instructions, the verdict, and the sentence.

Finding no error in the record, the judgment is affirmed.

STATE v. HAGER.

(Supreme Court of Minnesota. Dec. 6, 1912.)

(Syllabus by the Court.)

1. HIGHWAYS (§ 53*)—ESTABLISHMENT—STATUTORY PROCEEDINGS—DESCRIPTION OF HIGHWAY.

The description of a public highway as contained in the petition and final order of the public authorities in proceedings to lay out and establish the same, set out in the opinion, is held so indefinite and uncertain as to render the highway proceedings a nullity.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 155-164; Dec. Dig. § 53.*]

2. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR.

In a prosecution for the obstruction of a public highway the state offered evidence tending to show that the locus in quo had been lawfully laid out as a public highway, and also evidence tending to show the establishment of a highway by user under the statute. The proceedings for laying out the highway by the public authorities were void for indefiniteness in the description of the road, and were erroneously received in evidence. It is held, since the record does not disclose whether the conviction of defendant was predicated upon the evidence tending to show a lawfully established highway by the public authorities, or upon a highway acquired by user, the latter not conclusively appearing from the evidence, that the judgment of conviction cannot stand, and must be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137-3143; Dec. Dig. § 1169.*]

(Additional Syllabus by Editorial Staff.)

3. HIGHWAYS (§ 2*)—ESTABLISHMENT BY USER—STATUTORY PROVISIONS.

Laws 1899, c. 152, providing that, when any road shall have been used and kept in repair and worked for six years continuously as a public highway, it shall be deemed as dedicated to the public to the width of two rods on each side of the center line of the road, is not retroactive, and a highway established before its enactment is limited to the character and extent of the user.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 8; Dec. Dig. § 2.*]

Appeal from District Court, Goodhue County; Wm. Hodgson, Judge.

Wolfgang Hager was convicted of obstructing a public highway, and appeals. Reversed.

Mohn & Mohn, of Red Wing, for appellant. Wm. M. Ericson and F. M. Wilson, both of Red Wing, for the State.

BROWN, J. In this prosecution, commenced before a justice of the peace, defendant was charged with wrongfully obstructing a public highway. He was convicted before the justice, and appealed to the district court upon questions of law alone, where the judgment was affirmed. From the judgment of affirmance, defendant appealed to this court.

The state claimed on the trial before the justice, and offered evidence to substantiate the claim, that the highway alleged to have been obstructed by defendant had been (1) laid out and established as such by the pub-

lic authorities, and, if the proceedings had for that purpose were defective, and ineffectual, (2) that it had become a public highway by user under the statute, since it had been traveled and used by the public generally for the period of over 30 years prior to the date of defendant's alleged obstruction. The evidence tending to show that the highway had been lawfully laid out by the public authorities was all objected to by defendant, and the objections were sufficient to challenge the validity of the road proceedings. We first turn our attention to those proceedings.

[1] The highway, if ever legally laid out, was in part a county and in part a town road; a part thereof having been attempted to be laid out by the board of county commissioners, and a part by the town board. The objections to the proceedings had for this purpose related in the main to the description of the highway as contained in the petition and the order establishing the road. The description as contained in the township proceedings was as follows: "Commencing near the house of Eric Johnson in section 11, thence easterly through lands belonging to Charles Hahn in section 12, thence through the lands of Gilbert in section 12, thence near the house of Johnson in section 13, thence through the land of Barras in section 13, thence near the house of F. King in section 13, thence near the house of Andrew Fredrich, to intersect with Wells Creek road." This description is taken from the final order of the town board, which in the above language refers to the highway petitioned for. A survey and plat attached to the order does not aid much in definitely locating the highway, even if the record of the survey might be referred to for the purpose of curing the defect in description as contained in the petition and final order.

The proceedings before the county commissioners were had for the purpose of vacating an existing highway, or a part thereof, and to establish a new one, connecting with the town road, and extending thence beyond the town line. The petition, which was recorded in the minutes of the commissioners' proceedings, prayed for the vacation of an existing county road, which was described as follows: "Commencing at the point where said road crosses the section line between sections 12 and 13 in said town of Hay Creek, and terminating where the same crosses the section line between section 13 in said Hay Creek and section 18 in said Florence, the same being a town line." The petition contains nothing further to aid in locating the highway sought to be vacated, and in ordering a vacation the commissioners were guided necessarily solely by this description in the petition. This was followed by a prayer for the location of a new highway, described as follows: "Commencing on section line between sections 12 and 13 in the town of Hay Creek, at the point where the road,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a portion of which is hereinbefore asked to be vacated, crosses said section line; thence east on said section line to the township line between the towns of Hay Creek and Florence; thence in a northeasterly direction until the same strikes the road running from the military road in section 7 in the town of Florence."

It is well settled by our decisions that a petition in proper form, definitely describing the proposed road, is essential to the jurisdiction of proceedings to lay out and establish a public highway, and that an accurate and definite description thereof is also essential to the validity of the final order of the town or county board, as the case may be. The order must in some manner describe the location of the road so definitely as to enable a "person conversant with such matters to trace it out on the ground." *Sonnek v. Town*, 50 Minn. 558, 52 N. W. 961; 3 *Dunnell's Dig.* 8459 and 8461. It requires no particular discussion, within the rule, to demonstrate the insufficiency of either the petition or the order in the proceedings before the town supervisors. It is clear that the description there given was wholly insufficient to vest in the town board authority to act. The final order of the board contains the same description, and is not materially aided by the survey and plat made a part of the order. No person, with the description of the road as given in the petition or the order, could trace the road upon the ground, and its termini—commencing near the house of Johnson, and ending at the Wells Creek road—afford no basis for a survey or plat. The order of the county board, though describing the road with some degree of certainty, entirely fails to describe the road sought to be vacated. It was held in *Sheehan v. Town Board*, 80 Minn. 355, 83 N. W. 352, that a defect of this kind was fatal to the whole proceeding. The order laying the road, the court said, could not be upheld in part and repudiated in part. We discover no reason for departing from that decision.

It follows that the highway proceedings were fatally defective, that a highway at the locus in quo was not thereby legally established, and it was error to admit the proceedings in evidence. *State v. Lindig*, 96 Minn. 419, 105 N. W. 186.

[2, 3] But it is contended by the state that the error should be held without prejudice, since the evidence is practically conclusive of the establishment of a highway by user under the statute on the line of that covered, or attempted to be covered, by the road proceedings. We are unable to concur in this contention. The prosecution against defendant is criminal, not civil, and the rules guiding the trial of criminal actions must apply. *State v. Cotton*, 29 Minn. 187, 12 N. W. 520. The road attempted to be laid out was four rods wide. The alleged obstructions of which complaint is made consisted of a fence claimed to have been constructed by defendant

along and parallel with the road, which at one or more points encroached upon the traveled track of the road. It may be conceded that the evidence would justify a finding that a public road was acquired at the point in question by public use. But it does not follow that it was four rods wide. On the contrary, our decisions, prior to the passage of chapter 152, Laws 1899, limited the highway so acquired to the character and extent of the user. *Arndt v. Thomas*, 93 Minn. 1, 100 N. W. 378, 106 Am. St. Rep. 418, 2 Ann. Cas. 972. The statute referred to can have no retroactive operation, and cannot be held to apply to the highway in question, for it became established long prior to the passage of the statute. *Gilbert v. White Bear*, 107 Minn. 239, 119 N. W. 1063. The highway in question, conceding it to have been established by user, must then be limited to the character and extent of the public use. The evidence presented in the record leaves the question of the precise location of the road as traveled and used in former years in some doubt, at least as to certain points between its termini. It appears to be a "crooked road," and has shifted in recent years. Defendant's fence encroaches very nearly to, if not actually upon, the traveled track at one point, but does not interfere with travel at any other point.

Now, the important inquiry is: Upon what did the justice and the learned district court rely in support of the judgment of conviction? Did they proceed upon the theory that the highway in question was four rods wide, as the town or county board attempted to lay it, or upon the theory that the road as acquired and established by user was encroached upon and obstructed? The question cannot be answered from the record. If the decision below was based upon a legally established highway four rods wide, the court was entirely right, for it conclusively appears that defendant's fence was within the boundaries of the same for its entire length. But the judgment of conviction cannot stand upon that foundation; for, as we have held, no highway was ever legally laid out. If, however, the foundation of the conviction was a highway by user, then it might be sustained, if the evidence made it clear that the alleged obstruction was placed there by defendant, or by his direction, and upon a part of the highway so acquired. The evidence upon this question is not free from doubt, though we deem it sufficient to charge defendant with responsibility for the fence, though it is not conclusive. And since there was error in the reception of the highway proceedings, and it cannot be ascertained from the record whether the court predicated its decision upon the evidence so erroneously received, or upon that properly received, there must be a reversal. We have often applied this rule in civil actions. *Moldenhauer v. Railway Co.*, 80 Minn. 426, 83 N. W. 381:

Peterson v. Railway Co., 36 Minn. 399, 31 N. W. 515. There is a stronger reason for its application in a criminal prosecution, where the guilt of defendant must be shown beyond a reasonable doubt.

A reversal does not necessarily amount to a final determination that defendant may rightfully maintain his fence, so as to obstruct this highway, as established by the public use. If the highway is thus obstructed, the maintenance of the fence constitutes a continuing obstruction, and a new prosecution may be maintained. We may say, also, in conclusion, that the proper proceeding in prosecutions of this kind, where the title to real estate becomes involved, is pointed out in *State v. Sweeny*, 33 Minn. 23, 21 N. W. 847.

Judgment reversed.

STATE v. SCHUELLER.

(Supreme Court of Minnesota. Dec. 13, 1912.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§ 369*)—EVIDENCE.

In a prosecution for rape upon a female child under the age of consent, the evidence is *held* to support the verdict of guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

2. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSE.

Evidence of acts of intercourse between the parties immediately prior to the time relied upon by the state for conviction, and other than the act so relied upon, *held* competent and proper, as tending to corroborate the charge made by complainant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

3. CRIMINAL LAW (§ 1169*)—APPEAL—EVIDENCE—PREJUDICE.

Whether evidence of subsequent acts is admissible for the same purpose, *quære*. But the admission thereof, under the circumstances stated in the opinion, *held* not prejudicial to defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8088, 3137-3143; Dec. Dig. § 1169.*]

4. CRIMINAL LAW (§ 678*)—ACT OF INTERCOURSE—ELECTION.

In a prosecution for rape on a child under 16, it was not an abuse of discretion for the court to refuse to require the county attorney, at the close of his opening statement, to elect one of several acts of intercourse on which he would rely for a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580-1583; Dec. Dig. § 678.*]

5. CRIMINAL LAW (§ 830*)—TRIAL—REFUSAL OF REQUESTS.

It was not error to refuse a request to charge, which did not correctly state the rule on which it was based; the court not being required to correct a request, so as to make the language conform to the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. § 830.*]

Appeal from District Court, Stearns County; M. D. Taylor, Judge.

Louis Schueller was convicted of rape, and he appeals. Affirmed.

John R. Donohue, of St. Paul, and Wm. F. Donohue, of Melrose, for appellant. Lyndon A. Smith, of St. Paul, and J. B. Himsel, of St. Cloud, for the State.

BROWN, J. Defendant was convicted of the crime of rape upon a female child under the age of 16 years, and appealed from an order denying a new trial.

There is no controversy in the evidence that the child alleged to have been violated was about 14 years of age and under the age of consent, and no question that she became pregnant as the result of intercourse with some one at about the time charged in the indictment. Defendant was charged with being that person; and, though he denied having any improper relations with the girl, our examination of the record leads to the conclusion that the evidence made the question one of fact, and justified the jury in finding defendant guilty. We do not refer to the evidence in detail. It is unnecessary. The fact of intercourse with complainant by defendant, probably with complainant's innocent consent, was shown by competent evidence, and the conviction must be sustained, unless the record presents some reversible error in the rulings of the court on the trial.

[1] 1. The county attorney in his opening statement to the jury said that the state expected to show that defendant had sexual intercourse with complainant on several occasions during the months of August and September, 1911. The date charged in the indictment was September 10, 1911. Whereupon counsel for defendant moved for an order requiring the state to elect, if there was more than one act of intercourse, upon which act reliance would be had for conviction. The motion was denied, and defendant excepted. The evidence offered was in harmony with the opening statement of the county attorney, and disclosed several acts of intercourse between the parties; all having taken place in the latter part of August and the early part of September, one of which occurred after the date mentioned in the indictment. When the state rested, defendant again moved for an order requiring the state to elect upon which of the several acts of intercourse testified to the state would rely. The motion was granted, and the county attorney stated that reliance would be had upon the first act in September, the date of which was named in the indictment as September 10th. Defendant at the same time moved to strike from the record all evidence of other acts of intercourse, which motion the court denied.

[4] 2. We discover no error in the refusal of the court to require the state at the opening of the trial to select a particular act of

intercourse as the basis of the prosecution, and upon which reliance would be had for conviction. The indictment named September 10, 1911, as the date of the offense, and the only basis for the motion to require an election was the opening statement of the county attorney that he expected to prove several acts of intercourse at about that date. We think the motion was addressed to the sound discretion of the trial court, in the exercise of which we discover no abuse. It is not a case of several distinct offenses charged in separate counts in the indictment, but a case of one offense, and a single charge. There was no suggestion below that defendant intended to interpose the defense of an alibi, and the refusal of the court to require the state to fix upon some definite and specific act, in advance of the evidence coming in, in no way prejudiced defendant in the preparation or presentation of his defense, which consisted solely in a denial of improper relations with complainant. There was, therefore, no error in this ruling. *State v. Willett*, 78 Vt. 157, 62 Atl. 48; *State v. Parish*, 104 N. C. 679, 10 S. E. 457; *Com. v. Barnes*, 138 Mass. 511; *State v. Acheson*, 91 Me. 240, 39 Atl. 570. The case of *State v. Masteller*, 45 Minn. 128, 47 N. W. 541, cited and relied upon by defendant, is not in point. All that was before the court in that case was the question whether, after the state has offered its evidence relative to the commission of the crime charged and rested its case, and after a motion for a directed verdict by defendant on the ground that the evidence failed to show a public offense, the prosecution may then be permitted to reopen its case and present evidence of another and distinct offense, and sustain a conviction thereon. What was said in the opinion in that case had reference to that state of facts. It is not, properly considered, an authority for the contention of defendant that in a case of this character an election must be ordered by the court at the opening of the trial when requested so to do by the prisoner on trial. There are authorities supporting defendant's contention. *People v. Flaherty*, 162 N. Y. 532, 57 N. E. 73; *State v. Palmberg*, 199 Mo. 233, 97 S. W. 566, 116 Am. St. Rep. 476. But we prefer the rule of discretion, particularly in a case where there is no claim of an alibi, or other suggestion that knowledge of the precise date of the act is essential to the preparation or presentation of the defense.

[2] 3. Defendant further contends that the trial court erred in overruling objections to testimony tending to prove several acts of intercourse between the parties, and also erred in denying the motion to strike from the record all evidence of such acts, save the one the state, at the close of the case, elected to rely upon for conviction. This contention is founded upon the general prop-

osition that evidence of an offense, or offenses, separate and distinct from that upon which the defendant is on trial, is inadmissible against him. The rule is elementary, and is applied by all courts, except where the evidence tending to show the separate and distinct offense tends also to corroborate in some substantial degree the specific charge made the basis of the indictment on trial. The rule has not, however, been applied strictly in prosecutions for the so-called "sexual crimes," such as rape, adultery, incest, and seduction. In that class of prosecutions the rule has been most liberally extended. Nearly all the courts admit evidence of other acts of intercourse in such cases, occurring before the date mentioned in the indictment, on the theory of disclosing the relationship between the parties, opportunity and inclination to commit the act complained of, and as corroborative of the specific charge. See note to *People v. Molineaux*, 62 L. R. A. 329; *Grabowski v. State*, 126 Wis. 447, 105 N. W. 805; *Blair v. State*, 72 Neb. 501, 101 N. W. 17; *People v. Abbott*, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360; *State v. Trusty*, 122 Iowa, 82, 97 N. W. 989. We follow and apply this rule, and hold that there was no error in the refusal of the court to strike out the evidence of prior acts of intercourse between complainant and defendant. We may say, however, that evidence of this character should be confined to reasonable limits as to time, and be not of acts or conduct so remote as to render its corroborative force doubtful and uncertain. To what extent the state may go in this direction must rest in the sound discretion of the trial court. It should in no case be extended to matters having no relation in character to the charge made in the indictment. Whether the rule applies to a rape by force we need not determine.

[3] 4. The authorities are not in harmony upon the further question whether acts committed subsequent to the date relied upon for conviction are admissible. The evidence is held admissible by several courts of high standing. *State v. Sebastian*, 81 Conn. 1, 69 Atl. 1054; *Woodruff v. State*, 72 Neb. 815, 101 N. W. 1114; *People v. Castro*, 133 Cal. 11, 65 Pac. 13; *State v. King*, 117 Iowa, 484, 91 N. W. 768. The majority of the courts, however, though admitting evidence of prior acts, exclude evidence of those occurring subsequent to the date charged in the indictment. It may well be doubted whether there is any real or substantial basis for the distinction. Yet we do not deem it necessary to determine the question in the case at bar. It appears from the evidence in the record before us that four acts of intercourse occurred between these parties, the precise date of any one of which complainant was unable to give. She was at that time under the age of 14 years, and could not be expected to give accurate dates

of occurrences happening some time prior to the trial. She testified that two of the acts took place the latter part of August, and two early in September; but she did not know the day of the week or the day of the month. That one act was subsequent to the date charged in the indictment appears only from the fact that the county attorney elected, at the close of the state's case, to rely for conviction upon the first act testified to by complainant as having occurred in September. Whether the second September act was as a matter of fact subsequent to the 10th, the date named, the evidence is not clear. In any event, we are clear that no prejudice resulted from the refusal of the court to eliminate the evidence of that occurrence. All acts of intercourse took place within a period of four, or perhaps five, weeks; those happening before the date charged were admissible, and that happening thereafter, made so by the election of the county attorney, doubtful on the authorities, but its retention in the case was without prejudice.

[5] 5. The other assignments do not require special discussion. There was no error in the refusal of the request to instruct the jury in reference to the rule of "falsus in uno falsus in omnibus." The request incorrectly stated the rule, omitting the essential of willfulness, and it would have been an erroneous statement of the law had it been given. *State v. Henderson*, 72 Minn. 74, 74 N. W. 1014. The court was not required to correct the request and make its language conform to the rule, and the evidence was not of a character to require the court of its own motion to draw the attention of the jury to the rule. The alleged error in the date of the offense, as charged in the indictment, is without merit.

This covers all that it is necessary to say. We have fully considered all assignments of error, and discover no reason for granting a new trial, and the order appealed from must be affirmed.

Order affirmed.

A. A. WHITE TOWNSITE CO. v. CITY OF MOORHEAD et al.

(Supreme Court of Minnesota. Dec. 18, 1912.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 513*)—PUBLIC IMPROVEMENTS—ASSESSMENT—REMEDIES OF PROPERTY OWNER.

Where, under the charter of a city, the assessment of benefits for public improvements is given to a board of commissioners, with a right of appeal from the assessment to the district court, the owner of property assessed cannot maintain an action to set aside the contract for the improvement and the assessment against his property on any grounds not going to the want of power or jurisdiction on the part of the city to make the improvement

or the assessment. His remedy by a hearing before the commissioners and by appeal is exclusive.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1188-1208; Dec. Dig. § 513.*]

2. EVIDENCE (§ 31*)—JUDICIAL NOTICE—CITY CHARTER—AMENDMENTS.

The court will take judicial notice of the contents of a home rule charter, and of amendments regularly adopted thereto, certified and deposited as required by law.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 40, 41; Dec. Dig. § 31.*]

3. MUNICIPAL CORPORATIONS (§ 864*)—CITY CHARTER—PUBLIC IMPROVEMENTS—COST—DEBT LIMIT.

An amendment to the charter of Moorhead construed, and held to empower and authorize the city to construct a pavement on and retaining wall along a certain street, notwithstanding that the cost of such improvement would make the indebtedness of the city exceed the limit prescribed by the original charter.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1828-1835; Dec. Dig. § 864.*]

Appeal from District Court, Clay County; M. D. Taylor, Judge.

Action by the A. A. White Townsite Company against the City of Moorhead and others. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Christian G. Dosland, of Moorhead, for appellant. Garfield H. Rustad and F. H. Peterson, both of Moorhead, for respondents.

BUNN, J. This action was brought by plaintiffs to have declared void a contract entered into by defendant city of Moorhead for the construction of a retaining wall and pavement on one of its streets, and to have set aside the special assessments levied against property of plaintiff for such construction. Plaintiff appealed to this court from an order sustaining a demurrer to the complaint.

Does the complaint state a cause of action? Its allegations are in substance as follows: Plaintiff, a corporation, is the owner of certain lots and tracts of land within the corporate limits of the city of Moorhead, which city in May, 1900, adopted a home rule charter pursuant to article 4, § 36, of the state Constitution, and chapter 35, G. L. 1899. This charter provides that "the debt of the city shall not be increased by bonds or otherwise beyond five per cent. of the total value of the taxable property of the city, according to the last preceding assessment for the purposes of taxation." The city is empowered to levy assessments for local improvements, to the extent of benefits only. The bonded indebtedness of the city is \$92,000; the total value of the taxable property of the city according to the assessment for the year 1909 was \$1,227,650. On May 25, 1910, the city entered into a contract with one Kennedy, by which the contractor agreed

to construct a retaining wall to furnish lateral support to the soil in a street running along the lots owned by plaintiff, and to construct a pavement on such street. For this work the city agreed to pay Kennedy the sum of \$14,562.33, and pledged its good faith and credit for such payment. It is alleged that the plans and specifications for the construction of the retaining wall and pavement were wholly inadequate, defective, and impractical, for reasons specifically pointed out; that the wall and pavement were constructed under the contract and specifications, but not according to the best and approved engineering methods, in that the wall was constructed of rows of piling and planks, whereas a solid concrete wall extending beneath the quicksand was necessary in order to prevent the quicksand constituting the subsoil of the street from flowing under the wall, thus causing the pavement to settle. It is alleged that the pavement has settled, and will continue to settle, and that it will in a few years be absolutely worthless. The president of plaintiff appeared before the city council when the plans and specifications were under consideration, pointed out the defects, and protested against the construction of the wall and pavement in accordance with such plans and specifications; but his protest was unavailing. The wall and pavement were constructed, and, when the commissioners met to assess the damages and benefits, plaintiff appeared and filed written objections against the assessment of any of the cost against its property. Nevertheless the commissioners wrongfully, unjustly, and illegally assessed the entire cost of the wall and a great portion of the cost of the pavement against the property of plaintiff. Its lots assessed are on an average 15 feet below the level of the street paved. The wall was constructed for the sole purpose of furnishing lateral support for the pavement, at an enormous expense, which was wrongfully, unlawfully, and unjustly assessed against plaintiff's property. The assessments against plaintiff's lots for the wall and pavement aggregate \$2,937.04, which sum is greatly in excess of the value of the lots, and the benefits accruing to them by reason of the construction of the wall and pavement. The levy and assessment made by the city has been certified by the city clerk to the county auditor of Clay county, and by him entered upon the assessment roll and taxed against plaintiff's property.

[1] It is clear that as to all matters going to show that plaintiff's property was not specially benefited by the improvement, and to show mistakes in the plans and specifications, or in making the assessment, plaintiff is without a remedy in this action. The charter of Moorhead provides that any person interested in any property assessed for benefits resulting from any improvement may appeal from such assessment to the district court of Clay county, and such appeal is declared to be the exclusive way in which such assess-

ment can be in any wise reviewed, modified, or annulled. It is alleged in the complaint that plaintiff appeared before the commissioners and filed objections to the assessment of its property, but whether it appealed to the district court from the assessment made does not appear. In any event, such appeal is the sole and exclusive remedy, and, whether taken or not, plaintiff cannot attack the assessment in an action for that purpose brought after the improvement is made and the contractor paid. This is true as to all matters that do not go to the power of the city to enter into the contract, and disposes of the entire complaint, except the charge that the city in entering into the contract incurred an indebtedness in excess of the limit provided by its charter.

Plaintiff contends that every contract made with a municipality which creates an indebtedness in excess of the legal limit is absolutely void, and that an assessment levied to pay the cost of work done under such a contract is absolutely void, and so subject to attack in an independent action to set it aside as a cloud on the title to property covered by it. Conceding, but not deciding, this to be correct, and also that failure to raise the objections before the work is actually completed and the contractor paid does not estop plaintiff from now claiming the invalidity of the contract as a ground for setting aside the assessment, we are brought to the question whether the contract did create an indebtedness in excess of the limit fixed by the charter of the city at the time the contract was entered into.

[2] As we have stated, the city of Moorhead adopted a home rule charter in May, 1900, which charter fixed the limit of indebtedness at 5 per cent. of the assessed valuation of the city's property. The court will take judicial notice of the provisions of a home rule charter. This was so provided in the Laws of 1899, pursuant to which the city of Moorhead adopted its charter, and the same provision is in all subsequent legislation on the subject. We hold without hesitation that we will take judicial notice of amendments to the charter regularly adopted, as well as of the original charter. The law requires amendments adopted by the voters to be certified and a copy deposited in the office of the Secretary of State, as in the case of the original charter. An amendment so adopted and certified becomes a part of the charter, and there is no reason for saying that courts will not take judicial notice of such amendments.

[3] It appears that at a special election held May 9, 1910, the voters of Moorhead adopted an amendment to the charter, which was duly certified and deposited as required by law. This amendment expressly authorized the city to construct a permanent pavement on or otherwise improve the street in question, and to enter into the necessary contracts for such work, "all provisions of

the charter to the contrary notwithstanding." This amendment was adopted shortly before the contract in question was entered into, and its purpose was clearly to make legal the undertaking. So far as we can see the work was not prohibited by the original charter, except that the cost thereof would make the indebtedness of the city exceed the 5 per cent. limit, and it is entirely fair to assume that the purpose of the amendment was to authorize the work notwithstanding the indebtedness limit. It was quite clearly within the power of the people of Moorhead to so amend the charter adopted by them as to authorize the expenditure of money for this improvement, though the limit was exceeded. And we think that the intention to do so is apparent, and that the language of the amendment is sufficiently expressive of such intention. It is to be noted that the amendment, as so construed, is not in violation of the Constitution, or of the laws prescribing the provisions of home rule charters, with respect to the limit of indebtedness permitted.

We agree with the learned trial court that the complaint did not state a cause of action.

Order affirmed.

In re BROWN.

BROWN v. HAGADORN et al.

(Supreme Court of Minnesota. Dec. 6, 1912.)

(Syllabus by the Court.)

1. RECORDS (§ 9*)—REGISTRATION OF TITLE—
TIME TO ANSWER—"AT ONCE."

Under Rev. Laws 1905, § 3395, providing that, where a person acquires an interest in land pending proceedings to register the title thereof and prior to the entry of decree, he must appear and answer in such proceedings "at once," persons who delayed more than six months after actual notice of proceedings to register the title to certain land before making application for permission to answer in such proceedings, in order to assert interests alleged to have been acquired pendente lite, were not entitled to answer as a matter of right; Rev. Laws 1905, § 3396, having no application to such a case.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 1, pp. 610, 611.]

2. RECORDS (§ 9*)—REGISTRATION OF TITLE—
DISCRETION OF COURT.

The trial court held, in such case, not to have abused its discretion in denying the application for leave to answer.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

Appeal from District Court, Crow Wing County; W. S. McClenahan, Judge.

Proceeding by T. H. Brown against Fred J. Hagadorn and others to register title to real estate in Crow Wing county. From an order denying the application of William H. McGrath and others for leave to answer, they appeal. Affirmed.

Jay Henry Long, of Brainerd, for appellants. Stringer & Seymour, of St. Paul, for respondent.

PHILIP E. BROWN, J. Appeal by Wm. H. McGrath, James E. McGrath, and Robert W. McGarry from an order of the district court for Crow Wing county, denying their application for leave to answer in the matter of the application of Thomas H. Brown to have registered the title to certain lands therein, under the provisions of Rev. Laws 1905, c. 65.

The motion was presented solely upon affidavits and documentary evidence, from which it appears, without controversy, that the applicant was on March 10, 1911, the record owner of the lands in question, and on that day filed an application for the registration thereof. The matter was duly referred to the examiner, who, on March 28th reported that the land was vacant and unoccupied, and, while the applicant's title was proper for registration, yet certain parties not concerned in the present litigation should be joined as parties to the proceedings. Neither Fred Hagadorn, under whom the appellants claim, nor the appellants were mentioned therein. On April 7th the summons issued in the proceedings, and was served on all of the parties mentioned in the report of the examiner, and on June 8th all parties defendant, except those mentioned as not being material, were in default. On August 4, 1911, the appellants and Fred T. Hagadorn entered into a contract, reciting substantially that he was the owner of the land which is the subject of this action, but that his title was being attacked and litigation thereof was threatened by certain parties claiming pretended title thereto, and he was desirous of obtaining money and legal assistance to defend his title if required so to do, and therefore he sold and agreed to convey to appellants by warranty deed an undivided two-thirds of the premises, agreeing to continue living on and improving and cultivating the premises as formerly, care for appellants' interests, fence the premises, if required to by appellants, see to the survey, and to care for the appellants' interests in all ways; that should his title be now in dispute, or disputed at any time hereafter, he would prosecute his defense in such case to his utmost ability, and by all honorable means defend the same, and that he would remain upon the premises as an ordinary dweller thereon, as formerly, until his title was adjudicated and settled; and, furthermore, that he would co-operate with the appellants in the defense of the title and obtain all necessary witnesses, etc. The contract also provided that the appellants would pay Hagadorn \$200 upon the execution and delivery of a warranty deed well and truly conveying the above-described premises, \$100 on the 1st day of January, 1912, and a like sum on April 1st and July 1st thereafter, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that they should aid, assist, and advise in any litigation, pay legal expenses, expenses of survey, and material for fencing the premises, if fencing was thought necessary. On the following day William H. McGrath, one of the appellants, advised the applicant's attorneys that he represented Hagadorn, who, he alleged, was the owner of the land by adverse possession, and requested a stipulation permitting him to interpose an answer for Hagadorn. No action was taken upon this request.

On October 27, 1911, upon the applicant's petition, Hagadorn was made a party to the proceedings, and on the following day a supplemental summons was issued, which was served on him on October 30th. On November 2, 1911, Hagadorn executed a warranty deed to the appellants for two-thirds of the premises, which deed was not recorded until March 13, 1912. Hagadorn answered in the proceedings, by his attorneys McGrath & Cary—said McGrath being William H. McGrath, one of the appellants—on November 20, 1911, setting up title in himself in fee to all the lands in controversy by adverse possession. On November 23, 1911, the said attorneys, in behalf of Hagadorn, moved to dismiss the application for registration, and also moved to submit issues joined therein to a jury. Attached to the first motion referred to was an affidavit, made by Hagadorn, to the effect that he was the owner of the premises. Both motions were denied January 18, 1912. On February 17, 1912, Hagadorn delivered to the applicant a quitclaim deed to the premises in consideration of \$120, paid by the applicant, who, on the same day, paid the taxes on the land and recorded the deed. The deed contained the following clause: "And the party of the first part [Hagadorn] consents that judgment be entered adjudging that he has no right, title, or interest in said land, and that title be adjudged in the party of the second part [Brown] in those certain proceedings now pending in the district court of Crow Wing county to register title to said land." On March 16, 1912, the application of the appellants to answer in the said proceedings in their own behalf was made, the proposed answer alleging that Hagadorn obtained title to the property by adverse possession and conveyed the same to them by his deed delivered November 2, 1911, and from the order denying such motion this appeal was taken. Appellant James E. McGrath is a brother of William H. McGrath, and appellant Robert W. McGarry was a business associate of both, especially in land transactions.

In addition to the undisputed facts appearing as recited above, affidavits were presented on the part of the moving parties tending to show that Hagadorn acquired title by adverse possession. The showing in this regard, however, was meager, and it appeared from the affidavits offered in opposition, and it was

undenied, that Hagadorn had never paid any taxes on the land, that he never had color of title thereto, and, further, that on August 19, 1910, he wrote applicant, requesting permission to act as his agent in the sale of the land or in the drilling thereon. The affidavits were also conflicting concerning Brown's knowledge of either the contract or the deed between Hagadorn and the appellants.

1. Coming, now, to the merits of the appeal, the appellant contends that his application must be considered on the theory that James E. McGrath and Robert W. McGarry had no notice of the registration proceedings until after Brown obtained the deed from Hagadorn. We cannot sustain this claim, for it is inherently improbable. It is not at all likely that William H. McGrath, who, as stated, was a brother of James E. McGrath, and a business associate of the said James and the said McGarry, and who appeared as attorney for Hagadorn in the latter's answer in these proceedings, would fail to advise his associates of the fact, within his knowledge, that Brown was proceeding to register the title to the land of which they claimed to be part owners. Besides, the recitals of their contract indicate quite clearly that they were cognizant of the pendency of the proceedings.

[1] 2. The appellants contend that they were entitled to answer as a matter of right. This claim is predicated, as we understand it, upon the ground that R. L. 1905, § 3396, provides a six months' limitation for the bringing of an action questioning a decree of registration, and that they had the right to answer within such six months. This contention cannot be sustained. It is in contravention of R. L. 1905, §§ 3394, 3395; the latter section providing that, where any interest in the land sought to be registered is acquired subsequently to the filing of a copy of the application to register with the register of deeds, and prior to the entry of decree, the party so acquiring such interest shall "at once," appear and answer as a party defendant. The moving parties have not brought themselves within the provisions of this section. Even if the expression "at once" be construed as meaning "within a reasonable time, under the circumstances of the case," as contended by the appellants, still the moving parties did not comply with the requirement of the statute; for it must be held that they had notice of the registration proceedings more than six months before making their application to answer, and after acquiring their alleged interest in the land. Section 3395 does not prohibit the acquisition of interest in lands pending proceedings to register and prior to the entry of decree therein; but in such event the person so acquiring the interest must appear and answer as a party defendant "at once," so that the decree shall adjudge the interest of such person. We hold that the moving

parties were not entitled to answer as a matter of right.

[2] 3. The question remains, however, as to whether the court abused its discretion in denying the appellants' application to answer; for we are of the opinion that it was within the discretion of the court, upon the facts, to either allow or disallow such application, under familiar rules of practice governing such applications, it being well settled that proceedings to register title to land are of an equitable nature. *Owsley v. Johnson*, 95 Minn. 168, 103 N. W. 903; *In re Peters* (Minn.) 137 N. W. 390. Besides, R. L. 1905, § 3385, provides that an answer may be made within such further time, in addition to that prescribed for answering, as may be allowed by the court. While the appellants' point, that the claim of the moving parties that their grantor had acquired title to the land in controversy by adverse possession prior to his conveyance to them could not be determined on a hearing of this motion, must be sustained, yet the court had the right to consider the evident weakness of such claim in determining the application. We conclude that while, on application for registration of title, the court should be quite liberal in permitting parties to answer within the limitations prescribed in chapter 65, yet there was clearly no abuse of discretion in this case. *Dunnell*, Minn. Practice, § 1890; *McClymond v. Noble*, 84 Minn. 329, 87 N. W. 838, 87 Am. St. Rep. 354.

Several other and interesting questions have been raised and discussed on this appeal; but the conclusion reached, as above announced, dispenses with the necessity of their consideration.

Order affirmed.

GILBERT v. GILBERT et al.

(Supreme Court of Minnesota. Dec. 13, 1912.)

1. LIMITATION OF ACTIONS (§ 180*)—COMPLAINT—DEMURRER.

The bar of the statute of limitations is not available on demurrer unless it clearly and unequivocally appears from the face of the pleading attacked that the statute has run against the cause of action alleged.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 670-675; Dec. Dig. § 180.*]

2. LIMITATION OF ACTIONS (§ 127*)—AMENDED COMPLAINT—EFFECT.

Assuming, without deciding, that where the original complaint states one cause of action, and an amended complaint, which takes the place of the original, states another and different cause, the action must be treated as begun at the time of the service of the amended complaint, the rule is not applicable to this case, for the original and amended complaints relate to one and the same cause of action in substance. So construed, the action stated in the amended complaint must be treated as instituted at the time of the service of the summons, and a demurrer thereto upon the ground that the statute of limitations had

run before the service of the amended complaint was rightly overruled.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

Appeal from District Court, Polk County; William Watts, Judge.

Action by John Gilbert against Charles J. Gilbert and others. From an order overruling a demurrer to the amended complaint, defendants appeal. Affirmed.

Eric O. Hagen, of Crookston, for appellants. Peterson & Adams, of Moorhead, for respondent.

HOLT, J. Appeal from an order overruling a demurrer to an amended complaint.

The original complaint appears to have been served in October, 1907. In substance the cause of action therein alleged is this: On December 4, 1902, plaintiff owned certain lands in Polk county, which he employed one Rosaaen to sell. It was then thought that this could be done more advantageously by conveying the lands to Rosaaen. Rosaaen was unable or unwilling to sell, and on September 28, 1903, it was mutually agreed between plaintiff and defendants that they should pay to Rosaaen such amounts as the latter had paid out at plaintiff's request for interest on incumbrances, taxes, and abstract fees in connection with the land, and should obtain a conveyance from Rosaaen, and thereafter sell the lands for and on account of plaintiff, and out of the proceeds reimburse themselves for the amounts paid to Rosaaen, and also retain a reasonable commission for selling the lands, and account and pay to plaintiff the balance of the proceeds of the sale. It is stated that defendants under the agreement paid Rosaaen \$426.50 and procured a deed from him to the defendant Charles J. Gilbert for the lands, which defendants thereupon undertook to sell. Shortly thereafter they sold one piece, and received \$525, and on or about October 27, 1905, disposed of the balance, receiving in payment from the purchaser, on or about January 6, 1906, certain hardware and merchandise of the cash value of \$8,400. It is alleged that thereafter, and on or about January 6, 1906, defendants converted said merchandise to their own use. In February, 1912, plaintiff at a general term asked for and obtained leave to serve an amended complaint; but when, on March 13, 1912, such pleading was served, defendant returned it on the ground that a different cause of action from the one set out in the original complaint was stated. However, the court, by order dated May 4, 1912, permitted the proposed amended complaint to be substituted for the original. Thereupon defendants demurred, on the ground that several causes of action were improperly united, and that the facts stated

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the amended complaint do not constitute a cause of action.

The amended complaint, after alleging, substantially as in the original, plaintiff's ownership of the lands and the agreement under which the conveyance was made to Rosaaen, alleges more in detail the agreement between plaintiff and defendants under which defendants were to pay Rosaaen what he had advanced for plaintiff, take a conveyance of the lands, and sell the same for plaintiff, reimburse themselves for the money paid to Rosaaen, retain a reasonable commission for selling, and account and pay over to plaintiff the balance. The amended complaint then avers that plaintiff was the father of defendants, old and unused to business matters; that he was at the time greatly depressed on account of the death of his wife, the mother of defendants; that defendants were active business men, and plaintiff relied upon them, not only as sons, but on their integrity and ability as business men; and that he was hard pressed for money, and believed defendants would be able to handle the business better than he could. It is further alleged that defendants, in order to procure the conveyance to be made to them, represented to plaintiff that if he would cause the title to said lands to be placed in their name they would be able rapidly to dispose of the same, and would do so, and faithfully account to him for the proceeds; that plaintiff relied on these representations, but that the defendants made them in bad faith for the express purpose of cheating and defrauding plaintiff out of the lands, and pursuant to such purpose they paid to Rosaaen on September 26, 1903, \$426.50 and procured from him a warranty deed running to defendant Charles J. Gilbert. A sale, on or about October 27, 1905, of a piece of these lands is then averred to one Hamilton for \$525, out of which defendants reimbursed themselves for the money paid to Rosaaen, and also "that thereafter, and on or about October 27, 1905, said defendants sold the remaining portion to one Larson for \$8,400, which was the value of plaintiff's equity therein, which sum defendants willfully appropriated and converted to their own use, and refuse to account for or pay over any part to plaintiff." Judgment is asked for \$8,400 and interest from January 6, 1906.

No claim is now made that the amended complaint is demurrable because several causes of action are improperly united, so that the sole question is: Does the amended complaint state facts constituting a cause of action?

The appellants claim the original complaint was for conversion, but the amended complaint states an entirely different cause of action, namely, one in fraud and deceit; hence the action cannot be deemed to have been begun until the amended complaint was

served, and since it appears that the defendants obtained the property through the alleged fraud and deceit more than six years before the service of the amended pleading, and no allegation is contained therein that plaintiff did not discover the fraud until within the six years from the service of the amended complaint, the demurrer was well taken. We may assume for the purpose of this decision that by serving an amended complaint the action, as far as affected by the statute of limitations, must be considered as begun at the time of the service of such complaint, and not as of the time of the service of the summons. Nevertheless, we think the demurrer was properly overruled.

[1] A complaint is not demurrable on the ground that the statute of limitations has run against the cause of action alleged therein, unless it clearly and unequivocally appears therefrom that such is the case. *Kennedy v. Williams*, 11 Minn. 314 (Gil. 219); *McArdle v. McArdle*, 12 Minn. 96 (Gil. 53); *Davenport v. Short*, 17 Minn. 24 (Gil. 8); *Trebby v. Simmons*, 38 Minn. 508, 38 N. W. 693; *Humphrey v. Carpenter*, 39 Minn. 113, 39 N. W. 67, down to the case of *Thornton v. City of East Grand Forks*, 106 Minn. 233, 118 N. W. 834. Under this rule it may be doubtful whether an allegation that the act upon which the action is predicated took place on or about a certain date fixes that date as the one from which the statute begins to run. *Lockwood v. Bigelow*, 11 Minn. 113 (Gil. 70).

[2] But we do not need to determine that proposition, for, as we construe the original and amended complaints herein, the latter does not state a new or different cause of action. The relation of the parties, and the element of alleged deception introduced in the amended complaint, may be regarded as surplusage or inducement to the real cause of action, namely, the conversion of the proceeds of plaintiff's lands. Under both complaints it clearly appears that plaintiff intended to place the title to his lands in defendants to facilitate the sale thereof. The defendants were acting exactly in accordance with plaintiff's desires and their employment in making the sales and receiving the proceeds. Although defendants may have been actuated by bad faith from the first, they did nothing contrary to plaintiff's instructions or in opposition to his interests until they failed to account and pay over the proceeds of the sale to plaintiff. In neither pleading does plaintiff ask to have the conveyances set aside, or seek to recover from defendants the value of the land. The only difference is that in the original complaint the allegation was that defendants received a hardware stock worth \$8,400 for plaintiff's equity, and they converted that to their own use, while in the amended complaint the averment is that defendant received \$8,400,

which they converted and failed to pay over or account for.

The court correctly disposed of the demurrer.

Order affirmed.

TEGELS v. GREAT NORTHERN RY. CO.
(Supreme Court of Minnesota. Dec. 13, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 350*)—CROSSING ACCIDENT—NEGLIGENCE — SIGNALS — QUESTION FOR JURY.

Evidence, in an action for the death of a pedestrian at a railway crossing, considered, and held sufficient to take the case to the jury upon the question as to whether the defendant's employees in charge of its train were guilty of negligence in failing to give the necessary and statutory signals.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

2. EVIDENCE (§ 77*)—FAILURE TO CALL WITNESS—EFFECT.

The jury, in such action, had the right to consider the defendant's failure to produce as a witness the fireman of the engine which struck the deceased, in determining the truth of the engineer's testimony that he signaled by whistle and that the fireman rang the bell.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 97; Dec. Dig. § 77.*]

3. DAMAGES (§ 103*)—DEATH (§ 99*)—RAILROADS (§ 350*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE — QUESTIONS FOR JURY—PRESUMPTION—DAMAGES — EXCESSIVENESS.

It appearing, in such action, that the accident occurred at night, and that the view in the direction from which the train approached was somewhat obstructed by buildings, and there being evidence tending to show that the night was hazy, that the headlight of the engine was dim, that the train was running fast and made little noise, and that no signals were given for the crossing, the question of contributory negligence on the part of the deceased was for the jury, especially in view of the presumption of due care on the part of a deceased person killed by the negligence of another.

Verdict for \$3,250 sustained.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 260-264; Dec. Dig. § 103.* Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.* Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

(Additional Syllabus by Editorial Staff.)

4. APPEAL AND ERROR (§ 837*)—SCOPE OF REVIEW — GROUNDS OF NEGLIGENCE WITHDRAWN BY TRIAL COURT.

In an action for death at a railroad crossing, the Supreme Court, on defendant's appeal, could not consider grounds of negligence alleged in the complaint which the trial court refused to submit to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262-3278; Dec. Dig. § 837.*]

Appeal from District Court, Lyon County;
I. M. Olsen, Judge.

Action by John Tegels, as administrator, etc., against the Great Northern Railway Company. From an order denying defendant's motion for judgment or a new trial, it appeals. Affirmed.

Winsor & Keith, of Sioux Falls, S. D. (M. L. Countryman, of St. Paul, of counsel), for appellant. Tom Davis, Ernest A. Michel, and D. L. Kennedy, all of Marshall (John I. Davis, of Benson, of counsel), for respondent.

PHILIP E. BROWN, J. Green Valley is a flag station on the defendant's line of railway. At about 2 o'clock in the morning of November 15, 1910, the deceased, who had been attending a dance in Green Valley, together with five other young men, left the dance hall and proceeded, on foot, towards the place where they had left their horses and vehicles, which was on the opposite and west side of the railroad track from the place where the dance was held, and near a crossing about 100 feet south of the station, where the track was intersected by a highway running east and west. Their course was diagonal from the dance hall, in a northwesterly direction, to a point on the above-mentioned highway about 200 feet from the hall, which distance they ran. From this point they proceeded to walk westerly to a point on the east side of the track near the crossing. The track at this point runs almost north and south, and is straight and practically level for a long distance south of the highway; but to the south and on the east side of the track are the defendant's water tank, depot, and outhouse. The night was "kind of hazy." The deceased, plaintiff's son and intestate, while crossing the track upon the highway at the aforesaid crossing, was struck and killed by an engine, pulling a passenger train, which approached from the south. This action is for the recovery of damages for the death of the plaintiff's son and intestate, caused as above stated. The plaintiff had a verdict, and this is an appeal by the defendant from an order denying its alternative motion for judgment or for a new trial.

1. The defendant claims that there was no evidence of any negligence on its part. The plaintiff's contention in this regard is (1) that the train which struck the plaintiff's son was running at a dangerous rate of speed; (2) that the engine had an insufficient headlight; and (3) that no warning was given of the train's approach to the crossing, either by sounding of whistle or ringing of bell, or otherwise.

[4] The first and second grounds of negligence thus urged cannot be considered on this branch of the case, for the complaint in the action alleges merely that the defendant was guilty of negligence in the operation of its train generally, and the court, in its charge, limited the plaintiff's claim as to the defendant's negligence solely to the alleged failure to give the statutory signals, thus rendering claims not so submitted immaterial.

[1] As to the claim that the necessary and statutory signals were not given, four witnesses testified, on behalf of the plaintiff, that they were present when and where the accident occurred, such witnesses being companions of the deceased as above mentioned, and that they were in a position to have heard signals, if such had been given, and heard none. On the part of the defendant, the engineer testified that he gave the usual signal whistles, and that his fireman rang the bell. The fireman was not sworn, and the defendant offered no other evidence on this issue. We are of the opinion that the question was properly for the jury.

[2] The defendant offered no explanation of its failure to produce the fireman as a witness, and the jury had the right to consider this in determining the truth of the engineer's testimony. *Fonda v. St. Paul City Ry. Co.*, 71 Minn. 438, 452, 74 N. W. 166, 70 Am. St. Rep. 341; *Hall v. Austin*, 73 Minn. 134, 139, 75 N. W. 1121; *Barnes v. Shreveport R. Co.*, 47 La. Ann. 1218, 17 South. 782, 49 Am. St. Rep. 400; *Star Mills v. Bailey*, 140 Ky. 194, 130 S. W. 1077, 140 Am. St. Rep. 370.

[3] 2. The next claim made by the defendant is that the deceased was guilty of contributory negligence. In addition to the facts already stated, it appeared, or there was evidence sufficient to warrant a finding to the effect, that the deceased, who was 21 years old and possessed of normal senses of hearing and sight, had lived near Green Valley for many years; that the engine of the train in question was equipped with an oil burning headlight, which at the time of the accident, was dim, "like a lantern turned down"; that the engine was pulling several lighted passenger coaches; that no stop was made at the station; that the train made little noise in approaching, was behind time, and was running about 40 miles an hour, and that another train was due at Green Valley from the north at about the same time; that the engineer did not see the accident, and did not know until the following day that the deceased had been struck; that at the point where the deceased started to cross the track his view was somewhat obstructed by the buildings referred to above. None of the four witnesses, who were with the deceased, saw or heard the train until it was almost upon them, though they looked and listened for trains on approaching the crossing; and there was no direct evidence that the deceased failed to look and listen. The immediate circumstances of the accident were as follows: Two of the companions of the deceased reached the track before he did, and both crossed it safely. One of them did not see the engine until he was on the track. Both of these young men succeeded in getting across; but the deceased, who followed immediately after them, was struck and kill-

ed, after having gotten almost across. The other two of the deceased's companions who testified were so near the track that they were almost run down.

This court has quite recently announced, in two cases, the rules governing the consideration of the question of contributory negligence on the part of a deceased person, under conditions similar to those in the instant case, and these rules have been followed in subsequent cases. The cases to which we refer are *Knudson v. Great Northern R. Co.*, 114 Minn. 244, 130 N. W. 994, and *Anderson v. Duluth, etc., R. Co.*, 116 Minn. 348, 133 N. W. 806. In the *Anderson Case* the rule is stated as follows: "A very strong presumption of fact arises, where one is killed by the negligence of another, that he used due care to save himself from personal injury or death; and in such cases the question of his negligence is always one of fact, unless the undisputed evidence so conclusively rebuts the presumption that honest and fair-minded men could not reasonably draw conclusions therefrom." In the *Knudson Case* the rule is stated and applied as follows: "The question then is: Does the evidence so clearly and conclusively establish the intestate's contributory negligence that fair-minded men could not draw any other conclusion therefrom. If the accident had happened in the sunlight, but one conclusion could be fairly drawn from the evidence, namely, that the intestate must have been guilty of contributory negligence. Such, however, is not this case; and we are of the opinion, in view of the conditions under which the intestate attempted to cross the railway tracks, that the question of his negligence was one upon which fair-minded men might well differ."

The concluding sentence last above quoted expresses our views of the instant case.

3. The only other assignment of error undisposed of, is that the verdict is excessive, the same being for \$3,250. It appeared that the deceased was unmarried, and lived with his parents, rendering services on his father's farm, and also contributing about \$100 a year to his parents. We find no occasion for disturbing the verdict, after its approval by the trial court.

Order affirmed.

HENDRICKSON v. GRAND LODGE A. O. U. W.

(Supreme Court of Minnesota. Dec. 13, 1912.)

(Syllabus by the Court.)

1. INSURANCE (§ 696*)—MUTUAL BENEFIT SOCIETY—OFFICERS—AGENCY—KNOWLEDGE.

An officer of a fraternal insurance order represents such order in the performance of the duties of his office, so that his knowledge and action in reference to a matter within the scope of such duties, in the absence of fraud,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

may be considered as the knowledge and action of the order.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1837; Dec. Dig. § 696.*]

2. INSURANCE (§ 755*)—MUTUAL BENEFIT SOCIETY—PROHIBITED OCCUPATION—WAIVER.

A by-law of the defendant, a fraternal insurance company, provided that if a member should enter into the business or occupation of selling at retail intoxicating liquors as a beverage his membership should cease, and the insurance certificate and all rights thereunder should become forfeited. Plaintiff's husband, a common laborer, while a member, accepted work in a village saloon as a temporary substitute for the bartender for five or six weeks, during which time he paid an assessment that came due on the membership certificate. This assessment was accepted and retained by the officers of the local lodge. Three days after the insured quit the said temporary employment he died. After his death, and with knowledge of his said employment, defendant's grand recorder requested further proofs, not only as to his occupation, but as to burial. Assuming that the temporary employment forfeited the insurance, it is held that the trial court's finding that there was a waiver of the forfeiture is sustained by the evidence.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.*]

Appeal from District Court, Wright County; Arthur E. Giddings, Judge.

Action by Gertie Hendrickson against the Grand Lodge of A. O. U. W. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. B. Anderson, of Minneapolis, for appellant. Woolley & Johnson, of Buffalo, for respondent.

HOLT, J. The defendant is a so-called fraternal insurance association, and plaintiff sues to recover on the policy or membership certificate of insurance issued by defendant to her deceased husband, whereby defendant, in case of his death, agreed to pay her \$2,000. The case was tried to the court, and findings made directing judgment in favor of plaintiff. From the judgment thereupon entered, defendant appeals.

The defense was that plaintiff's husband, the insured, had entered a prohibited occupation—that of selling intoxicating liquors at retail—which ipso facto annulled the insurance contract. Plaintiff pleaded in reply, and the court found, that defendant waived the forfeiture by accepting and retaining an assessment on the policy with knowledge that the insured was engaged in the prohibited occupation, and also that after the death of the insured, and after being informed that he had been so employed, defendant again waived the forfeiture by requesting plaintiff to furnish additional proof of death, which she did, at some expense and trouble. The defendant challenges the waiver found, and the consequent conclusion of law that the policy sued on is a subsisting contract, entitling plaintiff to judgment. It is by no means clear that a forfeiture ever occurred in this case. Section 98 of the by-laws of

the order enacts that any member "who shall hereafter enter into the business or occupation of selling by retail intoxicating liquors as a beverage shall by his so entering into such business or occupation, alone and without any action" by the grand or local lodge, or any officer of either, stand suspended, and from and including the day upon which he so enters into such business or occupation his beneficiary certificate shall be void, and all rights thereunder shall be forfeited. This provision is viewed somewhat differently than one which does not undertake to absolutely abrogate the policy. For instance, stipulations are found in some insurance contracts which declare that, if the insured should enter a more hazardous occupation, a loss directly traceable thereto is not covered by the policy, and in other policies it reduces the recovery. This distinction appears in the two cases of *Abell v. Modern Woodmen of America*, 98 Minn. 494, 105 N. W. '65, 906, and *Johnson v. Modern Brotherhood of America*, 109 Minn. 288, 123 N. W. 819, 27 L. R. A. (N. S.) 446. Entering into the prohibited calling does not merely suspend, or modify, but absolutely annuls, the insurance here in question.

If there be any uncertainty in the wording of a contract which attempts such dire consequences to the insured, courts construe it so as to avoid a forfeiture. One definition given by the lexicographers of the word "occupation" is: "That to which one's time and attention are habitually devoted." The court found that the insured was a common laborer, who for five or six weeks prior to his last illness had found temporary employment to tend bar in a saloon while the regular bartender went out to operate a threshing engine. Whenever the latter returned, the insured was to quit. The bartender returned, and the insured left the employment the day before he was taken ill. No claim is made that his illness or death two days thereafter was in any measure due to his previous employment in the saloon. There are those whose regular employment is that of selling intoxicating drinks at retail for others, ordinarily called bartenders, and probably it is a fair construction of the by-law referred to to say that it was intended to exclude bartenders, as well as saloon keepers, from membership in the order. But it will hardly be claimed that every member of the order who might enter upon the sale of intoxicating drinks for however short a period, or under every circumstance, is thereby ipso facto expelled. In some of the restaurants and cafés of our large cities a waiter sells and serves more intoxicating drinks in a day than would some temporary bartender in a village saloon in a week, and yet we doubt whether this order, or any court, would say that such waiter, by reason of his employment, could not retain

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

his membership, if he had one. The by-law does not use the expression "employed in or assisting in the sale," which might have been expected if the intention was to exclude from membership others than those who, as saloon keepers, engaged in selling intoxicating drinks. So that it may be contended, and with reason, that it is not clear that one who temporarily acts as a substitute for a bartender does, within the meaning of this by-law, enter into the business or occupation of selling at retail intoxicating liquors as a beverage. Courts rightly construe the language of an insurance contract of even a fraternal organization most favorably to the insured, when the writing is susceptible of two constructions, one of which results in a forfeiture, and the other in the enforcement of policy. *Finch v. Grand Grove*, 60 Minn. 308, 62 N. W. 384. And this principle is again announced and exemplified in the facts upon which the decision in *Cook v. Modern Brotherhood of America*, 114 Minn. 299, 131 N. W. 334, is based.

We shall not, however, place our decision of this case upon the ground that the work which the deceased took up temporarily in the saloon was not a violation of defendant's by-law which forfeited his membership, because no claim was made by plaintiff in this case that the insured's occupation was not prohibited. What has been said above as to the doubtful effect of the insured's employment may be sufficient to indicate that neither he nor any one of those who acted for defendant with knowledge of the true situation is to be charged with an attempt to defraud, either in the payment or acceptance of the assessment. We then come to the evidence, viewed in the light of legal principles, to see if the trial court was warranted in predicated a waiver of the forfeiture set up as a defense. It is settled law that forfeiture of an insurance policy or contract may be waived. *Mee v. Bankers' Life Ass'n*, 69 Minn. 210, 72 N. W. 74, and cases there cited. And this is so, notwithstanding provisions to the contrary in the contract, as in the case here. *Andrus v. Maryland Casualty Co.*, 91 Minn. 358, 98 N. W. 200. Waiver is defined as an intentional relinquishment of a known right. Therefore there can be no waiver here, unless knowledge that the insured had entered upon the prohibited occupation was brought home to defendant, or to those who, in a legal sense, represent it, and, possessing such knowledge, an act was done, or a position assumed, which indicates an intention to consider the contract of insurance as still in force. *Parsons v. Lane*, 97 Minn. 98, 106 N. W. 485, 7 Ann. Cas. 1144.

[1] The defendant is a corporation, and hence must of necessity act through officers or agents. That the local lodge is agent of defendant in the matter of collecting and remitting assessments, so that if such lodge knew of the work the insured was engaged in, and, so knowing, received and remitted

the September assessment, waiver would have resulted, cannot be successfully controverted. *Leland v. Modern Samaritans*, 111 Minn. 207, 126 N. W. 728. We do not, however, regard knowledge or inaction of some, or even a majority, perhaps, of the members of the local lodge, as important, or such as would affect defendant, inasmuch as no duty to enforce discipline or collect assessments is imposed on the individual members. But the local lodge, to the knowledge of defendant, acts through its officers, so that such lodge, and through it defendant, may be bound by the knowledge and conduct of such officers acting in the discharge of their duties.

The defendant relies on *Graves v. Modern Woodmen of America*, 85 Minn. 396, 89 N. W. 6, for the rule that an officer of a local lodge cannot, by any act of his, waive a right of the grand lodge. When that decision, as well as that of *Elder v. Grand Lodge*, 79 Minn. 468, 82 N. W. 987, also cited, is examined in the light of the facts therein, we do not think there is any departure from the principle that an agent, when acting within the scope of his employment, in the absence of fraud, represents his principal, so that the knowledge and doings of the agent conclude the principal. In neither the *Graves* nor the *Elder* Case had the agent acted on the matter which caused the forfeiture. The dues or assessments were in default, and the attempt was made to show that the condition in the insurance contract which provided for forfeiture on default had been waived by the conduct of the collecting officer of the local lodge in receiving assessments after default on previous occasions. But the facts also established that the lodge never recognized such a custom, but, on the contrary, insisted on prompt payment. The officer's violation of his instruction, not known to or recognized by the lodge, was held not to be a waiver of the condition of the policy as to future assessments. The officer had no authority to establish a custom for the lodge as to when future payment should be made; but, as to an act required of an officer of a local lodge in its behalf, it should shoulder the consequences. In this case the only one ordained to receive the assessments was the financier, and the master workman was the officer whose duty it was to take care that payment of the sums collected was promptly remitted to the grand lodge. It would seem that these officers, in accepting the assessments from the insured and remitting to defendant, are not mere machines, but do their work with reference to the rights and duties, not only of the members, but of defendant and the local lodge, to which they report in detail; and knowledge obtained in the performance of these duties is the knowledge of the local lodge and defendant. To hold otherwise would be to relieve the officers and agents of an association like defendant, and defendant also, of all responsibility, and

throw it on its members. The officers of the local lodge are elected by the members because of confidence in their ability and integrity to represent the lodge and act for it in the discharge of their several duties. Such is the holding of the courts in *Pringle v. Modern Woodmen of America*, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231, *Collver v. Modern Woodmen of America (Iowa)* 185 N. W. 67, *Supreme Court of Honor v. Sullivan*, 26 Ind. App. 60, 59 N. E. 37, and the cases referred to therein. This rule appears to us more conducive to just results than the one apparently adopted in *Brown v. Great Camp of Knights of Modern Maccabees*, 167 Mich. 123, 132 N. W. 562.

[2] The financier of the local lodge of the insured in the case at bar was charged with the duty of collecting and remitting to defendant the assessments against members. In the middle of September, 1910, when the insured was employed as stated in a saloon, he paid the last assessment (none other came due prior to his death). Owing to a change previously made by him in the amount of insurance and beneficiary, the financier could not then determine the exact amount, but received more than sufficient to cover it, and returned the surplus, together with a proper receipt, to the insured October 4, 1910. The insured resided, as did also the financier and master workman of the local lodge, at Hancock, Minn., which is a small village of some 500 inhabitants. One-half of the members of the local lodge resided in the village, and the other half in the adjoining farming district. The financier of this local lodge was employed in the bank, situate where the two principal streets of the village intersect, and the saloon in which the insured worked was less than a block away on one of these streets. It was admitted that the financier would testify that he did not know that the insured was so employed till after his death; but we cannot say that the trial court was bound to accept this as true, in view of the situation and other evidence in the case. The master workman of the local lodge was in the saloon, and saw that the insured worked therein about two weeks prior to his death, but did not suggest to him that his membership in the order was annulled or imperiled by the employment. One duty of the master workman of the local lodge is to "take care that all beneficiary funds, the per capita tax, and all claims of the grand lodge upon the said subordinate lodge are forwarded, as required by the provisions of this constitution, or paid promptly, as the case may be." The financier is required to collect all assessments and dues, and keep accurate account with each individual member, report to the lodge, and pay these over to the receiver. If, then, the master workman performed his duty in taking care that all assessments were promptly forwarded or paid, there was room for the trial court to find that this September assessment, paid by the insured while em-

ployed as temporary bartender, was accepted and retained with knowledge of the true facts on the part of the master workman. We think that the master workman and financier of the local lodge act in respect to the receipt, retention, and forwarding of assessments, as the agent of the defendant, and, in the absence of fraud, their knowledge and conduct in regard to a waiver of forfeiture may properly bind the defendant; the provision in its constitution and by-law to the contrary notwithstanding.

In addition, another circumstance supports the finding of waiver. It appears that in each local lodge there is an officer known as "District Deputy Grand Master Workman," appointed by the Master Workman of the Grand Lodge from among those members in the local lodge who have attained the rank of Past Master Workman. This officer shall be, as far as his authority extends, a representative of the Grand Master Workman in the local lodge. He "shall promptly report to the Grand Master Workman any violation of their duties by the officers" of the local lodge, or any illegal action by the lodge itself. This District Deputy Grand Master of the local lodge well knew the insured, who worked for him prior to the employment in the saloon, and knew that he was so engaged temporarily while the regular bartender was out threshing. This officer did not discuss the bearing the insured's employment had upon his membership, because it was so short and temporary that he considered it had no effect thereon. Failure of these officials, representing the defendant, to appreciate that a forfeiture of insured's membership had occurred, if it ever did, when the assessment was accepted and retained, would none the less constitute waiver, if he knew the true facts. Their misapprehension of the legal result would not prevent their acts, with full knowledge of the actual situation, from constituting a waiver, if otherwise such were the consequences.

The court also found a waiver in that, after knowledge of the facts constituting the alleged forfeiture, defendant required additional proof of death at expense and trouble to plaintiff. Defendant contends that this finding is unsupported by the evidence. The facts appear to be these: After the death of the insured, she requested the financier of the local lodge to assist her. He had blank proofs of death provided by defendant. Plaintiff gave the necessary information for him to fill in the answers to the questions found in the blank proofs of death; then she signed and swore to the same before him. One of the questions requiring an answer was whether the insured had at any time been engaged in the sale by retail of intoxicating liquor as a beverage, and other enumerated employments, and, if so, when? The answer was, "Engaged in retail liquor for several weeks as assistant bartender." As a part of this proof of death the master workman, the

financier, and recorder also appended a certificate as to the insured's age, standing in the order, illness, death, funeral, and other details, stating therein that: "His occupation when taken sick, or when last engaged, was assistant bartender several weeks." Although this certificate by the principal officers of the local lodge fully covered the place of death, and burial attended by 18 members of the lodge, the grand recorder, on receipt of these proofs, wrote plaintiff that it appears therefrom "that the deceased was engaged in the retail liquor traffic for several weeks as assistant bartender. Kindly fill in the dates when he engaged, and if he was engaged in the liquor traffic at the time of his death. * * * There is no proof as to where the deceased was buried." Plaintiff thereupon obtained proof from the undertaker at some trouble and expense of 25 cents, and also gave information by letter as to the time the insured was working in the saloon.

The contention of defendant is reasonable that where an answer called for by a question in a proof of loss or death is indefinite, so that it is left in doubt whether the contract under which a claim is made is forfeited or not, the insurer, by calling for additional and definite proof in that respect, does not in any sense waive a forfeiture. And if the proof furnished had contained only plaintiff's answer touching the insured's occupation, or if the additional proof called for had related to that feature alone, we should hold unhesitatingly that no waiver followed a demand and compliance therewith. But here the certificate of the officers of the lodge, a part of the proof, clearly showed that, if the employment of the insured did forfeit the insurance, it had taken place. In that situation the grand recorder, not only called for more detail upon this subject, but also requested proof as to burial. While it is true that the grand recorder does not pass on the proof, or the right of the beneficiary to the insurance, he is nevertheless the agent of defendant in receiving proofs, and it is undoubtedly understood that he acts within the scope of his duties, and therefore in behalf of the Grand Lodge when requesting additional proof. Although the law abhors forfeitures, and is eager to lay hold of a reason to avoid so declaring, we confess to a reluctance in holding that, after loss, an insignificant outlay and effort imposed by the insurer upon the beneficiary is a waiver of the forfeiture. But if it be imposed with knowledge of the facts establishing the forfeiture, the conduct is inconsistent with any other position than a waiver, and a recognition of the subsistence of the contract, and such waiver becomes binding when the beneficiary complies with the condition imposed. We cannot say that there is no evidence to sustain the finding that, by calling for and obtaining the additional proof of burial af-

ter full knowledge that the forfeiture now claimed existed, the defendant has waived such forfeiture.

The judgment must be affirmed.

BAKKE v. MELBY.

(Supreme Court of Minnesota. Dec. 6, 1912.)

(*Syllabus by the Court.*)

1. ALTERATION OF INSTRUMENTS (§ 29*)—EVIDENCE—SUFFICIENCY.

In an action to recover upon a promissory note, the evidence is *held* to support the verdict upon the issue whether, subsequent to the delivery of the note, a material alteration thereof was made without the knowledge or consent of the maker.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 259-263; Dec. Dig. § 29.*]

2. APPEAL AND ERROR (§ 686*)—REVIEW—QUESTIONS OF FACT—DECISION OF MOTION FOR NEW TRIAL.

To justify this court in reversing an order denying a new trial, and in ordering a new trial upon the ground that one of the jurors was not sworn as required by law, the fact that the juror was not sworn should affirmatively and clearly appear. Where on the showing made the question is left in doubt, the decision of the trial court will be treated as final.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2892; Dec. Dig. § 686.*]

3. GROUNDS FOR NEW TRIAL—ASSIGNMENTS OF ERROR INSUFFICIENT.

Numerous assignments of error considered, and *held* not to present grounds for a new trial.

(*Additional Syllabus by Editorial Staff.*)

4. ALTERATION OF INSTRUMENTS (§ 28*)—MATURITY—COLLATERAL MATTER.

In an action on a note, where the only issue was whether it was altered before delivery in 1905, evidence of a conversation with defendant's attorney in 1908 in relation to the alteration was inadmissible to show that defendant was mistaken in saying that he first knew of it in 1910, there being no issue of ratification or subsequent acquiescence.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 248-258; Dec. Dig. § 28.*]

Appeal from District Court, Steele County; Arthur B. Childress, Judge.

Action by O. H. Bakke against Benedick Melby. From an order denying a motion for judgment or new trial, defendant appeals. Affirmed.

Victor M. Peterson, of Minneapolis, for appellant. Einar Holdale and H. L. Holdale, both of Minneapolis, for respondent.

BROWN, J. Two separate actions were brought by plaintiff against defendant to recover upon two promissory notes. They were consolidated and tried together in the court below, resulting in a verdict for plaintiff. Defendant appealed from an order denying his alternative motion for judgment or a new trial.

The making and delivery of the notes, one for \$350, and one for \$150, was admitted in defendant's answer. He pleaded in de-

fense that the note for \$350 had since its delivery been altered and changed in a material respect, was therefore void, and he demanded a recovery against plaintiff, as a counterclaim, the aggregate amount of several payments made thereon prior to the commencement of the action. The pivotal issue on the trial below was whether the note had been changed subsequent to its delivery without the knowledge or acquiescence of defendant. The jury found that no such change had been made.

The short facts are: The parties to the action were practicing physicians; plaintiff being located at the village of Blooming Prairie, and defendant at the village of Hayfield, this state. Some time in January, 1905, defendant purchased plaintiff's practice at Blooming Prairie, together with certain personal property, giving to plaintiff in part payment of the purchase price the promissory notes here in suit. The transaction was completed on January 17, 1905. The note for \$350 was made out on the 16th, and was signed by defendant as maker and one Moore as surety. As so made and signed, it bore the date January 16th. It was delivered the following day to a bank at Blooming Prairie for plaintiff. The date of the note, as originally written, was, either before or after its delivery, changed from the 16th to the 17th. There is no controversy on this point. The change was made by writing the figure "7" over the figure "6." The question submitted to the jury was whether this change and alteration was made before delivery of the note.

[1] 1. Our examination of the record leads to the conclusion that the evidence supports the verdict to the effect that the alteration of the note was made with the knowledge of defendant before the same was finally delivered in consummation or completion of the transaction. The record contains evidence tending to the opposite conclusion, but its force and effect was for the consideration of the jury and trial court. The strongest item of evidence tending to support defendant's contention is the condition of the collection register of the bank, where the note was entered as bearing the date January 16th. This was not conclusive. The effect thereof was sufficiently overcome by the further evidence offered by plaintiff in the form of a special agreement, made and entered into by the parties on the 17th, in the following language: "Agency at Blooming Prairie, Pra., Jan. 17, 1905. It is hereby agreed that, whereas, I have made my promissory note of date Jan. 17th, 1905, for principal \$350, due three years from date, also signed by E. E. Moore, said note is drawn up with 6% interest, which is not the rate agreed to be paid, and I do hereby agree to pay interest upon said note at the rate of 8% from its date until fully paid. Benedick Melby."

There is no dispute about this special

agreement, and defendant testified that it was read to him before he signed it, though he further testified that he did not notice that the writing described the note as bearing the date January 17th. It was for the jury to say whether he in fact understood the contents of the writing. It was made and signed on the 17th, at the time of and as the concluding part of the transaction. The date of the note must have been changed before the interest agreement was signed, for it expressly refers to the note as bearing date of January 17th. This, in connection with the testimony of the cashier of the bank, who had charge of the matter, is well-nigh conclusive that defendant knew of the change in the note and consented to it. At any rate the question was one of fact.

[3] 2. This brings us to the question whether any errors were committed on the trial of a nature to justify or require a new trial. A large number of assignments challenge the correctness of various rulings upon the admission or exclusion of testimony, and portions of the instructions to the jury. We have examined all these alleged errors, and find no sufficient reason for reversing the order appealed from. It may be conceded that some of the rulings of the court were erroneous; but they were in respect to collateral issues and unsubstantial matters, and in no proper sense prejudicial. It would serve no useful purpose separately to refer to these assignments. We have considered them all, with the result stated.

[4] 3. One of the attorneys for plaintiff was called as a witness on the trial, and was permitted over defendant's objection to relate a conversation had with defendant's attorney in respect to the alleged alteration of the note. This conversation occurred some two years prior to the commencement of the action. The court in its instructions called attention to this evidence, saying that it was proper for consideration by the jury, in so far as it might throw light upon the question whether defendant consented to a change in the date of the note, but not for the purpose of showing a subsequent ratification of the change. Defendant had testified that he knew nothing about the change in the date of the note until about the time the action was brought against him, which was early in August, 1910. In contradiction of this testimony plaintiff offered the conversation with defendant's attorney, which occurred in 1908. From this plaintiff claimed that, since defendant's attorney knew of the change in 1908, defendant must have been mistaken when he said that he first knew of it in 1910. This was clearly a collateral matter. There was no issue of ratification or subsequent acquiescence in the case. The sole issue was whether the change was made before the note was finally delivered to the bank on January 17, 1905. The mere fact that defendant may or may not have discov-

ered the change at some subsequent date would have no particular relevancy to the real issue. We think the admission of the conversation between the attorneys was error. But it was not a matter of substance, and would require a strain to say that it was prejudicial to the rights of defendant. The court clearly directed the attention of the jury to the precise point in the case, namely, whether the date of the note was changed before delivery, saying, further, that a subsequent discovery, and payments thereon, with knowledge of the alteration, would not amount to a ratification. It seems clear that the pointed instructions of the court removed any possible prejudice that might have resulted from the evidence referred to. That the jury was not misled is conclusively shown by the special verdict, to the effect that the date of the note was changed before its delivery.

[2] 4. It is further claimed that one of the jurors impaneled to try the case was not sworn as required by law, or at all. The affidavits upon the subject leave the question whether the juror was sworn in some doubt. However, the matter was presented to the trial court, and its general order denying the motion for a new trial must be taken as a finding that the juror was sworn in proper manner. This precludes further inquiry by this court. To warrant this court in setting aside a verdict upon this ground, the failure to swear the juror should affirmatively appear, and be not left in doubt. Where, on the showing made, the question is left in doubt, the decision of the trial court will be treated as final.

This covers all that need be said. We discover no error of a nature to justify a new trial.

Order affirmed.

PARKS v. BYRNE et al.

(Supreme Court of Minnesota. Dec. 20, 1912.)
HUSBAND AND WIFE (§ 209*)—TORTS—RIGHT OF ACTION.

An unlawful interference with a lawful right to abide in a home selected by plaintiff and his wife entitles them to recover for damages shown to have approximately resulted therefrom.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 766-773; Dec. Dig. § 209.*]

Appeal from District Court, Renville County; G. E. Qvale, Judge.

Action by Darwin D. Parks against John Byrne and others. From an order overruling a demurrer, defendants appeal. Affirmed.

J. M. Freeman, of Olivia, for appellants. Homer Morris, of Minneapolis, for respondent.

PER CURIAM. This is an appeal from an order overruling a demurrer to a complaint alleging in substance that plaintiff and his wife were in possession of a dwelling house and appurtenances in Morton, Minn., wherein they made their home; that the defendants conspired together to use threats to cause plaintiff and his wife to remove from Morton and prevent them from living in that village, contrary to their desires and interests; that pursuant to such conspiracy, and at the direction of one of the defendants, the others, with malice, and to put plaintiff and his wife in fear, entered and trespassed upon plaintiff's premises, and invaded his home in an angry and threatening manner, and threatened to visit upon plaintiff and his wife great bodily and personal injury if they did not leave their home and said village; and that by reason thereof plaintiff and his wife were compelled to remove from their home, and his work, which removal caused certain specified expenses, inconvenience, and loss.

The contention of defendant is that, there being no physical assault or injury, the fear produced by mere threats does not constitute actionable wrong. But a fair construction of the pleading indicates a trespass in the nature of a wrongful invasion of the home. Plaintiff and his wife had a lawful right to abide in the home they selected, unmolested by threats and intimidations wrongfully designed to drive them away. *Lesch v. Great Northern Ry. Co.*, 97 Minn. 503, 106 N. W. 955, 7 L. R. A. (N. S.) 93. An unlawful interference with this right is an actionable wrong, entitling to a recovery for such damages as are shown to have proximately resulted therefrom. It is unnecessary now to discuss whether threats alone, which caused no actual injury, damage, or loss, are actionable.

Order affirmed.

PARKS v. BYRNE et al.

(Supreme Court of Minnesota. Dec. 20, 1912.)

Appeal from District Court, Renville County; G. E. Qvale, Judge.

Action by Frances Parks against John Byrne and others. From an order overruling a demurrer, defendants appeal. Affirmed.

J. M. Freeman, of Olivia, for appellants. Homer Morris, of Minneapolis, for respondent.

PER CURIAM. The complaint herein is an alleged cause of action by the wife for the same wrongs for which her husband brought an action, wherein his complaint was sustained against a demurrer. *Darwin D. Parks v. John Byrne et al.*, supra, just decided. Her complaint is substantially the same as his, and must be upheld as stating a cause of action.

Order affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(Supreme Court of South Dakota. Dec. 3, 1912.)

1. SEDUCTION (§ 40*)—EVIDENCE—SUBSEQUENT INTERCOURSE.

Testimony of prosecutrix in seduction to her acts of intercourse with defendant, subsequent to the alleged seduction, is admissible for purpose of corroboration.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 72, 76, 79; Dec. Dig. § 40.*]

2. SEDUCTION (§ 40*)—EVIDENCE—CONDITION OF FEMALE.

Evidence that prosecutrix in seduction was enceinte is admissible as proof of intercourse, a fact necessary to be established.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 72, 76, 79; Dec. Dig. § 40.*]

3. CRIMINAL LAW (§ 1036*)—APPEAL—REVIEW—OBJECTIONS BELOW.

Grounds of objection not presented to the lower court to evidence admitted cannot be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1631-1640, 2639-2641; Dec. Dig. § 1036.*]

4. CRIMINAL LAW (§ 448*)—EVIDENCE—CONCLUSIONS.

The question to prosecutrix in seduction whether she would have permitted defendant to have intercourse except for his promise of marriage is not objectionable as calling for her conclusion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035-1039, 1041-1043, 1045, 1048-1051; Dec. Dig. § 448.*]

5. CRIMINAL LAW (§ 683*)—EVIDENCE ON REBUTTAL.

Though the state, by way of corroboration of prosecutrix's testimony that she was seduced on a certain night, gave some evidence of defendant having been at her home that evening, defendant in making the defense that he was not there at that time introduced a new issue, which the state could refute by further evidence that he was then there.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615-1617; Dec. Dig. § 683.*]

6. CRIMINAL LAW (§ 684*)—RECEPTION OF EVIDENCE—ORDER OF ADMISSION—DISCRETION.

Admitting in rebuttal further evidence that defendant was at prosecutrix's home the evening she claimed he seduced her was not an abuse of discretion, constituting error, even if it properly belonged to the state's case in chief.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1618; Dec. Dig. § 684.*]

7. CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

The jury having been clearly warranted in finding prosecutrix was chaste prior to her alleged seduction, there being no evidence contrary to her testimony that prior thereto she had had intercourse with no one, any error in the charge that till the contrary is shown a woman is presumed chaste was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163; Dec. Dig. § 1172.*]

8. SEDUCTION (§ 46*)—EVIDENCE—CORROBORATION.

Under the Code provision as to corroboration of prosecutrix as to seduction under promise of marriage, it may be found from her testimony alone that she was an unmarried female of previous chaste character, and that there was an act of intercourse under promise of mar-

riage; but there must be testimony other than hers tending to prove defendant was the guilty party.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. § 46.*]

9. CRIMINAL LAW (§§ 763, 764*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

The charge, in seduction, that it is sufficient to constitute corroborating evidence to connect defendant with the offense if the jury find the parties kept company with each other, and acted as lovers usually do, and other like circumstances, if any, is merely on the law applicable to the facts, and does not invade the province of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. §§ 763, 764.*]

10. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REQUESTS COVERED BY CHARGE.

A requested instruction need not be given; it being substantially embodied in the court's charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

11. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Even if it be the law that there can be no conviction of seduction under promise of marriage, if prosecutrix consented to intercourse in part through lust or passion, though such a promise was given, and was part of the inducement of her consent, yet a charge that there could be no conviction, though they had intercourse, if it was by mutual consent in gratification of passion, and not in truth under promise of marriage, was as favorable as defendant was entitled to, he having denied any intercourse, and she testifying to intercourse with him, stating she would have had none except for his promise of marriage.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.*]

Whiting, J., dissenting.

Appeal from Circuit Court, Charles Mix County; R. B. Tripp, Judge.

Carl Holter was convicted, denied a new trial, and appeals. Affirmed.

Charles P. Bates and Charles H. Bartelt, both of Sioux Falls, and Perrett F. Gault, of Watertown, for appellant. Royal C. Johnson, Atty. Gen., M. Harry O'Brien, Asst. Atty. Gen., Ambrose B. Beck, State's Atty., of Geddes, French & Orris, of Yankton, J. E. Tipton, of Geddes, and G. M. Caster, of Lake Andes, for the State.

CORSON, J. Upon an information duly filed by the state's attorney of Charles Mix county the defendant was tried and convicted of the crime of seduction under a promise of marriage, and from the judgment of conviction and order denying a new trial the defendant has appealed to this court.

It is disclosed by the evidence that the prosecutrix was a young lady 22 years of age, and that the defendant was a young man residing in the vicinity of the family of the prosecutrix. It is claimed by the prosecutrix that on the evening of June 18, 1911, she was seduced by the defendant un-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

der a promise of marriage. There was evidence tending to prove that the defendant took the prosecutrix out riding occasionally, visited her at the home of her parents prior to the date of the alleged seduction, and that, after the alleged seduction, defendant continued his attentions, and that there were other acts of illicit intercourse between the defendant and the prosecutrix in July and August, and that by reason of her seduction she became enceinte.

[1] On the trial the prosecutrix, called as a witness on the part of the state, testified that she was seduced by the defendant under promise of marriage on the evening of the 18th of June, 1911, and that the first act of illicit intercourse with the defendant was had at that time. She was then permitted to testify over the objection of the defendant that she had illicit intercourse with the defendant at three different times in July and August following. It is contended by the appellant that in the admission of this evidence as to subsequent acts of illicit intercourse the court committed error for which the judgment should be reversed and a new trial granted. It is contended by the prosecution, however, that this evidence was introduced and admitted for the purpose of corroborating the testimony of the prosecutrix, and was therefore admissible. We are inclined to take the view that the state is right in its contention. While there seems to be a conflict in the decisions on this question, we are of the opinion that the weight of authority is in favor of its admission. The appellant relies mainly upon the cases of *People v. Clark*, 33 Mich. 112, *People v. Payne*, 131 Mich. 474, 91 N. W. 739, and *Pope v. State*, 137 Ala. 56, 34 South. 840. The state relies mainly upon the case of *State v. Robertson*, 121 N. C. 551, 28 S. E. 59, and cases cited therein, and 13 Cyc. 1356. A number of other authorities were cited by the respective counsel, but, as the questions seem to have been raised in cases of rape or incest, we do not deem it necessary to cite them in this opinion. In *State v. Robertson*, supra, the learned Supreme Court of North Carolina held in the headnote as follows: "In a prosecution for seduction, it is competent for the state to show other acts of sexual intercourse between defendant and prosecutrix since the date of the act alleged." And in the opinion that learned court says: "The state asked * * * the prosecutrix if, subsequent to September, 1891, there were other illicit acts committed by them of a carnal character. This was objected to by defendant, but allowed by the court, and the witness answered in the affirmative that there had been other acts since the first. This ruling of the court is sustained by *Whart. Cr. Ev.* § 35; *Sherwood v. Titman*, 55 Pa. 77; and by a note in *Weaver v. Bachert*, 44 Am. Dec. 172, where *Sherwood v. Titman* is quoted with approval."

[2] It is contended by the appellant that the court erred in admitting evidence over the objections of the defendant that the prosecutrix was in a family way, for the reason that it did not tend to corroborate the alleged seduction, but this contention is clearly untenable, as it does, in our opinion, tend to prove in connection with proof of previous chastity of the prosecutrix that she had been seduced by some one. While it might not tend to prove directly that such illicit intercourse was had under promise of marriage by the defendant, still it did tend to prove one fact necessary to be established, namely, illicit intercourse with some one. *State v. Wickliff*, 95 Iowa, 336, 64 N. W. 282; *State v. Burns* (Iowa) 78 N. W. 681; *State v. Hughes*, 106 Iowa, 125, 76 N. W. 520, 68 Am. St. Rep. 288; *Merrell v. State* (Tex. Cr. App.) 70 S. W. 979; *State v. Meister*, 60 Or. 469, 120 Pac. 406; *People v. Goodwin*, 132 Cal. 368, 64 Pac. 561. In the analogous case of *People v. Goodwin*, supra, the court held, as appears by the headnote, that: "On a prosecution for seduction under promise of marriage, it was not error to allow the prosecutrix to testify that she got in a 'family way' by the defendant two months after the alleged seduction, as this evidence tended to show, in connection with evidence of her previous chastity, that she had been seduced prior to that time." It will be observed from the statement of facts in that case that there was evidence tending to prove that the prosecutrix had become enceinte some two months after the first alleged act of illicit intercourse, and that similar evidence was given in the case at bar by the prosecutrix and corroborated by the testimony of the physician. It seems to be generally held that proof of pregnancy or the birth of a child is competent evidence as proof of illicit intercourse between the prosecutrix and some man, and tends to corroborate the prosecutrix in her statement as to illicit intercourse with some one. If, therefore, there was sufficient evidence to satisfy the jury that the accused was the party with whom the prosecutrix had the illicit intercourse, the jury was warranted in finding the defendant guilty, providing, of course, that the illicit intercourse with the defendant was had under promise of marriage.

[3, 4] It is further contended by the appellant that the court erred in permitting the prosecutrix to testify as to the motive which induced her to consent to sexual intercourse. On the trial she was asked the following question: "Would you have permitted him to have had sexual intercourse with you at that time except for his promise of marriage?" To this she answered over the objection of the defendant: "I would not." The objection made to the question by defendant's counsel in their brief is that it was calling for a conclusion of the witness, but it has been called to our attention by the

respondent that on the trial the question was objected to "as being leading, suggestive, incompetent, and irrelevant." It will be noticed that it was not objected to on the ground that "it called for a conclusion of the witness," and, of course, the grounds of objection not presented to the trial court cannot be considered by this court. But, assuming that the objection was properly made, we are of the opinion that the contention of counsel as to its admissibility is untenable. 35 Cyc. 1351, in its article on Seduction, says: "It has been held that the prosecutrix cannot testify to the motive which induced her to submit to intercourse with defendant, but the better opinion is to the contrary." As sustaining our position, see *State v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642; *Ferguson v. State*, 71 Miss. 805, 15 South. 66, 42 Am. St. Rep. 492; *State v. Bennett*, 137 Iowa, 427, 110 N. W. 150; *People v. Jensen*, 66 Mich. 711, 33 N. W. 811; *Armstrong v. People*, 70 N. Y. 38; *State v. Raynor*, 145 N. C. 472, 59 S. E. 344.

[5, 6] It is further contended by the appellant that the court erred in permitting the prosecution to introduce evidence in rebuttal of defendant's evidence that properly belonged to the prosecution's case in chief. On the trial the evidence of the prosecutrix tended to prove the commission of the offense on the evening of the 18th of June, the time alleged in the information, and evidence was introduced on the part of the state tending to prove that the defendant was at the home of the prosecutrix that evening. The defendant as a part of his defense introduced testimony tending to prove that he was not at the home of the prosecutrix on the evening of the 18th of June. The state in rebuttal of this evidence on the part of the defense was permitted, over the objection of the defendant, to introduce further testimony tending to prove that the defendant was there at that time. It is contended on the part of the state that the defense interposed by the defendant was an alibi, an affirmative defense, and that such a defense must be affirmatively proven by the defendant, and that it was competent, therefore, for the state to introduce evidence rebutting the alibi, and, even if it was not admissible upon this ground, the admission or rejection of such evidence was within the sound judicial discretion of the trial court, and, unless there was an abuse of such discretion, the ruling of the trial court would not be reversed by this court.

We are of the opinion that the evidence was admissible upon both grounds. It is true that the prosecution in making out its case in corroboration of the statements of the prosecutrix introduced evidence of two witnesses tending to prove that the defendant was at the home of the prosecutrix on the evening of June 18th, and this evidence constituted sufficient corroboration of the pros-

ecutrix, unless controverted by the defendant by claiming that he was not at the home of the prosecutrix on the evening designated. Clearly, therefore, the defendant in making his defense that he was not at the place that evening introduced a new issue which the prosecution had a right to rebut by additional evidence. Even if this view were not correct, we cannot say that there was any abuse of the court's discretion in admitting the evidence under the peculiar circumstances of this case. We are of the opinion, therefore, that the court committed no error in permitting the prosecution to make the proof objected to. *State v. Watson*, 102 Iowa, 651, 72 N. W. 283; *Kastner v. State*, 58 Neb. 767, 79 N. W. 713; *People v. Mar Glin Sule*, 11 Cal. App. 42, 103 Pac. 951; *Lo Toon v. Territory*, 16 Hawaii, 351; *People v. Tidwell*, 4 Utah, 506, 12 Pac. 61; *State v. Webb*, 18 Utah, 441, 56 Pac. 159; *State v. Klein*, 19 Wash. 368, 53 Pac. 364; *State v. Hunter*, 118 Iowa, 686, 92 N. W. 872; *State v. Seligman*, 127 Iowa, 415, 103 N. W. 357; *State v. Robbins*, 109 Iowa, 650, 80 N. W. 1061.

[7] It is further contended by the appellant that the court erred in giving the following part of its charge to the jury: "With reference to this provision of the law in regard to previous chaste character, the court charges that the law presumes a woman to be of chaste character until the contrary is shown, but, if there is a reasonable doubt as I will hereinafter define it of her chastity under all the evidence, he would be entitled to the benefit of that doubt." There is a conflict in the decisions as to the correctness of the court's charge to the jury, but, in the view we take of the case, it will not be necessary to express any opinion as to the correctness or incorrectness of the court's charge in the case at bar, as there was no reversible error committed in the charge of the court, for the reason that the prosecutrix had testified that she had had no intercourse with any one previous to the time of her seduction by the defendant on the 18th of June; and, as there was no evidence introduced on the part of the defendant questioning her chastity prior to that time, the jury were clearly warranted in finding her to be a chaste female prior to the time of her alleged seduction upon her evidence, and it is immaterial, therefore, in this case whether the court's instruction is or is not held to be erroneous. The testimony of the prosecutrix did not require corroboration, and, in the absence of any evidence to the contrary, the jury were authorized to regard her statement as to the fact of her chastity as conclusive. *State v. King*, 9 S. D. 628, 70 N. W. 1046; *State v. Miner*, 107 Iowa, 656, 78 N. W. 679; *State v. Bollerman*, 92 Iowa, 460, 61 N. W. 183. Numerous authorities are cited by the respective counsel in support of their respective contentions, but, in the view we have taken of the case, it will not

be necessary to review these authorities in this opinion.

[8] It is further contended by the appellant that the court erred in the following portion of its charge to the jury: "That she was an unmarried female of previous chaste character, and that there was an act of sexual intercourse under a promise of marriage, are facts which may be found from her evidence alone, if you believe beyond a reasonable doubt that to which she has testified on these subjects, but you cannot find that he is the guilty party, unless, as stated, there is evidence other than that of * * * [the prosecutrix] tending to prove that fact." It is conceded by the learned counsel for the appellant that the language of this instruction was taken verbatim from the opinion of this court in *State v. King*, supra, but it is contended that that decision of this court is not sustained by the authorities and that the law as announced in that case cannot be sustained, and counsel cites cases holding a different view. Upon an examination of these cases it will be found that the decisions were based upon statutes very different from that of our state. After a careful review of the decisions in the case of *State v. King*, supra, we are not inclined to modify or change that opinion as in our judgment the same gives the correct construction of our section of the Code requiring corroboration of the prosecuting witness. We are, therefore, of the opinion that there was no error in the instruction of the court referred to, following as it did the decision of this court in the case above cited.

[9] The appellant also contends that the following portion of the court's charge to the jury was erroneous: "If you find from the evidence that these young people * * * [prosecutrix and defendant] kept company with each other, and acted as lovers usually do, and other like circumstances, if you find any are disclosed by the evidence, are sufficient to constitute corroborating evidence to connect the defendant with the offense within the meaning of the law." Upon an examination of the whole charge we are of the opinion that the court committed no error in the portion of the charge referred to. The charge of the court was fair and impartial. In our opinion it correctly presented the law of the case to the jury, and the claim made on the part of the appellant that the court invaded the province of the jury is untenable. It is the court's duty to instruct the jury upon the law applicable to the facts in the case, and this, apparently, was all the court did in the case at bar.

[10] The defendant requested the court to give the following instruction which the court refused: "If the jury find that the defend-

ant had illicit connection with the prosecuting witness, and that she consented to the same either wholly or in part through lust or passion, the defendant should be acquitted, although a promise of marriage was then made by him to her and was part, though not the sole, inducement that caused her to give such consent." It is doubtful if there is sufficient evidence in the case to warrant such an instruction, but, assuming that the instruction stated the law correctly, the court committed no error in refusing to give the same as it in its charge to the jury substantially embodied the requested instruction.

[11] The court charged the jury as follows: "Nor could there be any conviction if you should find from the evidence that there had been illicit intercourse between them, but that it was by mutual consent in gratification of passion, and was not in truth under promise of marriage." It will thus be seen that the court stated the law to the jury as favorably to the defendant as the law would warrant, as the prosecutrix testified that she would not have had illicit intercourse with the defendant except for his promise of marriage, and the defendant as a witness in his own behalf testified that he never had any intercourse with the prosecutrix at any time or place. If the jury believed the testimony of the prosecutrix, they were fully justified in finding the defendant guilty as charged in the information.

It is contended by the appellant that the court erred in sustaining a number of objections made by the prosecution to the introduction of evidence on the part of the defendant, but, after a careful examination of the rulings of the court upon these various questions, we are of the opinion that there is not sufficient merit in these assignments of error to require separate consideration of them in this opinion.

The judgment of the circuit court and order denying a new trial are affirmed.

WHITING, J. (dissenting). I think the court's instruction that the finding of certain facts would be "sufficient to constitute corroborating evidence" might have, and, in view of the extreme paucity of the evidence (other than the evidence of prosecutrix) tending to show that these young people "kept company * * * and acted as lovers usually do," I think it must have, led the jurors to believe that, if they found any evidence of this nature, it was sufficient corroboration, and that it was therefore not left to them to determine whether there was sufficient corroboration. Without the jurors so construed the instruction complained of, I am unable to understand how they could ever have found the verdict returned.

STRAUB v. LYMAN LAND & INVESTMENT CO.

(Supreme Court of South Dakota. Dec. 3. 1912.)

1. CORPORATIONS (§ 507*)—PROCESS—SERVICE—NOTICE TO OFFICER OUTSIDE OF STATE—"DUE PROCESS OF LAW."

Code Civ. Proc. § 110, provides for the service of summons against a private corporation by delivering a copy to the president or other officers thereof, except where service is on a foreign corporation, when it may be had only when it has property in the state, or the cause of action arose therein, or when such service shall be made within the state personally upon the president, treasurer, secretary, or duly authorized agent thereof. Personal service had on a treasurer of a domestic corporation residing in another state was objected to as insufficient to confer jurisdiction. *Held*, that the purpose of the statute is not to bring the nonresident officer within the jurisdiction, but to bring the domestic corporation within the jurisdiction; and, as such service would give sufficient notice of the pendency of the action or proceeding, which is the fundamental principle involved in "due process of law," it was sufficient (citing 3 Words and Phrases, 2251).

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971-2000; Dec. Dig. § 507.*]

For other definitions, see Words and Phrases, vol. 8, p. 7644.]

2. STATUTES (§ 220*)—CONSTRUCTION—BINDING EFFECT ON COURTS.

Though Code Civ. Proc. § 110, providing for service of process on domestic and foreign corporations, was amended by Laws 1911, c. 226, which provides that service on a domestic corporation may be made by delivering a copy to a designated officer of the corporation, "either within or without the state," and such amendment should be determined to be a legislative declaration of the insufficiency of the previous statute to authorize such service, a legislative declaration as to the construction to be given a previous statute would not conclude or bind a court, which may determine that the previous statute authorized such service.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 298; Dec. Dig. § 220.*]

Appeal from Circuit Court, Lyman County; William Williamson, Judge.

Action by F. A. Straub against the Lyman Land & Investment Company. From an order denying a motion to vacate a judgment against defendant, it appeals. Affirmed.

Davis, Lyon & Gates, of Sioux Falls, for appellant. James Brown, of Chamberlain, for respondent.

SMITH, J. Appeal from an order of the circuit court of Lyman county denying defendant's motion to vacate a judgment against appellant. The complaint in the action alleges the breach of an agreement by defendant to sell and convey to plaintiff certain farm lands situated in Lyman county, and demands damages in the sum of \$300, with interest. The defendant is a domestic corporation organized and existing under the laws of this state. The summons and complaint were served by one Phillips, a deputy sheriff of Lyon county, Iowa, by de-

livering to and leaving the same with one Charles Shade, the treasurer of said corporation, a resident of Lyon county, Iowa, on the 7th day of February, 1908, in Lyon county, Iowa. No appearance or answer was made in the action, and the summons, complaint, and return of service, as stated, were filed in the office of the clerk of the circuit court of Lyman county, February 26, 1910, and on March 15, 1910, judgment was entered against the defendant corporation in the sum of \$403.95, damages and costs. Thereafter, on the 21st day of August, 1911, defendant appearing specially moved the court, upon affidavit and the files and records of the court, to set aside and vacate the alleged pretended judgment, upon the ground that the court was without jurisdiction to enter the same. The affidavit accompanying the motion discloses the mode of service as indicated; that there was no affidavit or order for publication of summons; and that no other service was made or attempted than as above stated, and no appearance made in the action by defendant, or by any one in its behalf. In resistance of the motion plaintiff's counsel filed an affidavit of M. A. Brown, stating that summons was issued in said cause on January 8, 1908, and an attempt made to serve the same upon officers of said corporation, residents of this state; whereupon it was disclosed that all the resident officers of said corporation had resigned, and that Charles Shade, the treasurer, was a resident of and in Lyon county, Iowa; whereupon service was made upon him, as stated. Upon the hearing an order was entered, denying defendant's motion to vacate the judgment, to which ruling defendant excepted, and has brought the action to this court for review, alleging error in the denial of the motion to vacate the judgment.

[1] It is appellant's contention that service of the summons upon an officer designated by statute as one of the officers upon whom service of process may be had, but who resides and is served outside of the state, does not constitute due process of law in an action against a domestic corporation, so as to authorize a judgment for damages against such corporation.

It is respondent's contention, on the other hand, that section 110 of the Code of Civil Procedure authorizes such service in an action against a domestic corporation, and that such service constitutes due process of law. Section 110 provides: "The summons shall be served by delivering a copy thereof as follows: 1. If the action be against a private corporation, to the president or other head of the corporation, secretary, cashier, treasurer, a director or managing agent thereof; but such service can be made in respect to a foreign corporation only when it has property in this state, or the cause of action arose therein, or when such serv-

ice shall be made within this state personally upon the president, treasurer, secretary, or duly authorized agent thereof. * * * Service made in any of the modes provided in this section shall be taken and held to be personal service. * * *

None of the other provisions of the section affect the question involved in this appeal. It seems plain to us that the clauses of the section above quoted are intended to distinguish broadly between domestic and foreign corporations as to the mode of service of summons. It will be observed that as to domestic corporations service may be made upon "the president or other head of the corporation, the secretary, cashier, treasurer, a director or managing agent thereof"; while as to foreign corporations such service can only be made upon "the president, treasurer, secretary or duly authorized agent thereof." The section also expressly provides that as to foreign corporations such service shall be made *within this state, personally*, upon the officers named; while as to domestic corporations the statute does not say that service shall be made within the state. It is almost universally held that service of process within the state upon officers of a foreign corporation, pursuant to statutory enactments, is sufficient to bring the foreign corporation within the jurisdiction of the state court, and to authorize the entry of judgment against such corporation in any case; and such statutes are upheld by an overwhelming weight of authority.

If service upon an officer of a foreign corporation within this state may be deemed due process of law, we see no reason why service of process upon an officer of a domestic corporation *residing in a foreign state* may not likewise be deemed due process as well. A domestic corporation is necessarily resident within the state, and cannot remove itself therefrom, either permanently or temporarily. Such corporation is at all times to be deemed an inhabitant of the state, and never beyond the territorial jurisdiction of its courts. A natural person may voluntarily remove from the state, either temporarily or permanently. Where the removal is temporary, the statute prescribes a mode in which process may be served and jurisdiction of the absent defendant obtained by leaving a copy of the summons at the usual dwelling place, with a member of the family over 14 years of age—a mode of substituted service. Such service is upheld by the courts, upon the theory that it is reasonably designed to give the defendant notice of the proceeding in court, and an opportunity to be heard in defense of the action. A corporation is an artificial person, and can be served with process only through its agents. The statute does not say that service of the summons upon a domestic corporation *shall* be made within the state; and upon principle we see no reason for adding such limitation by construction.

Such a corporation is at all times within the territorial jurisdiction of the state courts, and service upon its agents or officers designated by the statute, without the state, is as reasonably certain to convey notice of the pendency of the action as would like service upon the same officer within the state. The theory of such statutes is that any of the officers designated, when so served, will take proper and necessary steps to protect the interests of the corporation in the pending proceeding. It appears to have been held at common law that jurisdiction of a corporation could not be acquired by service of process on its officers outside of the state which gave it existence. *McQueen v. Middleton Mfg. Co.*, 16 Johns. (N. Y.) 6; *Barnett v. Chicago & Lake R. R. Co.*, 4 Hun (N. Y.) 114; *Peckham v. North. Parish*, 16 Pick. (Mass.) 286. In almost all if not in every state of the Union, statutes have been enacted which provide that if a foreign corporation engages in business in the state it will be suable there in regard to such business; and service within the state on its officers designated by statute is sufficient to bring the corporation within the jurisdiction of the state courts. *Moulin v. Insurance Co.*, 24 N. J. Law, 234; *Baw-knight v. Liverpool, London & Globe Ins. Co.*, 55 Ga. 195; *National Bank of Commerce v. Huntington*, 129 Mass. 444; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *Hagerman v. Empire Slate Co.*, 97 Pa. 534; *McNichol v. U. S. Merc. Rep. Ag.*, 74 Mo. 457. The latter case also holds that such service may become the basis of a judgment in personam. *Town of Hinckley v. Kettle River R. Co.*, 70 Minn. 105, 72 N. W. 835; *Clearwater Merc. Co. v. R. J. & R. Shoe Co.*, 51 Fla. 176, 40 South. 436, 4 L. R. A. (N. S.) 117, 120 Am. St. Rep. 153. In the latter cases it is held that if the mode of service provided in the statute is, under the circumstances, reasonable and appropriate to the case, it is "due process of law," and, as to a resident of the state, will give jurisdiction of the person and support a personal judgment. It is also held that due process of law does not require that there be actual personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is offered him to defend. 3 Words and Phrases, 2251, citing *Happy v. Mosher*, 48 N. Y. 313; *In re Union Elevated R. Co.*, 112 N. Y. 61, 19 N. E. 664, 2 L. R. A. 359; *City of Indianapolis v. Holt*, 155 Ind. 222, 57 N. E. 966, 968, 1100; *Gilchrist v. Schmidling*, 12 Kan. 263; *Kansas City v. Duncan*, 135 Mo. 571, 37 S. W. 513.

The purpose of such a statute is not to bring the nonresident officer of the corporation within the jurisdiction of the court, but to bring the domestic corporation within its jurisdiction. It does not seek to have the process of the court affect the personal or

beyond the territorial limits of the state within which it is established. It follows that the only question really involved is whether or not such service constitutes due process of law within the state. The fundamental principle involved in "due process of law" is that it shall give sufficient notice of the pendency of the action or proceeding, and a reasonable opportunity to a defendant to appear and assert his rights before a tribunal legally constituted to adjudicate such rights. And whenever a statutory mode of service is reasonably designed to accomplish that end service in accordance therewith constitutes due process of law, and confers jurisdiction on the state court.

[2] Counsel for appellant note the fact that chapter 226, Laws of 1911, being an amendment to section 110, C. C. P., provides that service on a domestic corporation may be made by delivering a copy to a designated officer of the corporation, "either within or without the state," and urge that this enactment is a legislative recognition of the insufficiency of the existing statute to authorize such service. A legislative declaration as to the construction to be given a previous statute is not conclusive or binding on the courts. The amendment, however, may be regarded as an express legislative adoption of the principle announced in this decision as to what constitutes due process of law. No question of discretion is involved in the ruling of the trial court. It is not alleged that the defendant corporation did not receive notice of the pendency of the action, nor that it has a good defense thereto. We are clearly of opinion respondent is right in his contention, and that the principle underlying the decisions in *Clearwater Merc. Co. v. R. J. & R. Shoe Co.*, 51 Fla. 176, 40 South. 436, 4 L. R. A. (N. S.) 117, 120 Am. St. Rep. 153, *Hinckley v. Kettle River R. Co.*, 70 Minn. 105, 72 N. W. 835, and the cases there cited, is controlling in this case.

The order and judgment of the trial court are therefore affirmed.

JOHN W. TUTHILL LUMBER CO. v. McMACKIN et al.

(Supreme Court of South Dakota. Dec. 3, 1912.)

DRAINS (§ 49*)—CONSTRUCTION—MATERIALMEN—RIGHT TO LIEN—STATUTES.

Under Code Civ. Proc. §§ 713-721, providing for liens to subcontractors, Drainage Act, § 713, providing that every person furnishing material to any contractor with any county for construction or repair shall have a lien on all money in the control of such county due under the contract, and section 721, limiting that article to materials furnished to any contractor with the county for improvements upon streets, public grounds, or any land the title

by a contractor for the construction of a drainage ditch under the provisions of Laws 1907, c. 134, as amended by Laws 1909, c. 102, is not entitled to a lien against the county.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 59; Dec. Dig. § 49.*]

Corson and Haney, JJ., dissenting.

Appeal from Circuit Court, McCook County; Joseph W. Jones, Judge.

Action by the John W. Tuthill Lumber Company, a corporation, against Willard McMackin for a money judgment, and against the County of McCook to enforce a mechanic's lien. Judgment for plaintiff against the county, and the county appeals. Reversed.

E. H. Wilson, of Salem, and M. A. Butterfield, of Montrose, for appellant. Aikens & Judge, of Sioux Falls, for respondent.

WHITING, J. The defendant McMackin entered into a contract for the construction of, and he constructed thereunder, a drainage system, within the limits of defendant and appellant county. This contract was entered into and the work done under the provisions of chapter 134, Laws of 1907, as amended by chapter 102, Laws of 1909, being what is known as the "Drainage Act." The plaintiff and respondent furnished to McMackin certain of the materials used by him in the construction of the drainage system, and, not having been paid for the same, it brought this action, seeking a money judgment against McMackin and a mechanic's lien upon certain funds due and unpaid to McMackin, and remaining within the control of defendant county. The defendant county demurred to plaintiff's complaint. This demurrer was overruled, and it is from the order overruling such demurrer that the county has appealed to this court.

As we look at the issues raised upon this appeal, the real question before us for answer is whether or not a materialman who has furnished material used by a contractor in the construction of a drainage ditch constructed under the provisions of chapter 134, Laws of 1907, as amended by chapter 102, Laws of 1909, and known as the Drainage Act, is entitled to a mechanic's lien, under the provisions of article 2 of chapter 31 of the Code of Civil Procedure, against a specific fund, raised in accordance with the provisions of said Drainage Act and due said contractor. Said article 2 provides liens in certain cases to subcontractors and laborer on public improvements. At the time of passage of the act which afterwards is and is now article 2 of chapter 31 Code of Civil Procedure, there was state a drainage law. Sections 713-721 Compiled Laws. We think no one would contend that said article 2 of chap

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series

broad enough to give a mechanic's lien to a subcontractor or materialman who did work or furnished material in the construction of a ditch under the old Drainage Act. Is such lien law so broad in its terms that it gives a lien to such subcontractors and materialmen under our present Drainage Act? The following are the only sections of said law necessary for our consideration in reaching a decision in the matter now before us. These sections read as follows:

"Sec. 713. Every person who shall perform any labor or furnish any material for the construction or repair of any work for any county or municipal or public school corporation in this state to any person who shall have made any contract for such work with such corporation, upon complying with the provisions of this article shall have for his labor done or materials furnished a lien upon all moneys in the control of such corporation due or to become due under such contract."

"Sec. 721. This article shall apply to and include all cases and contracts under which work and materials shall heretofore have been or shall hereafter be done or furnished to any contractor for the construction or repair of any improvement for any county or municipal or public school corporation, upon any street, public highway or public ground, or upon any land the title to which shall have been at the time of making the contract or thereafter in such county or municipal or public school corporation and for the purpose of which any appropriation of the funds of such corporation shall have been or shall hereafter be made or raised by such corporation; and this article shall also apply to and include actions and claims now pending for work done or materials furnished under any such contract; provided, that the provisions of this section shall not apply to any case where the improvement has been completed before the passage of this article except as to moneys left in the hands of such public corporation and to which the contractor would be otherwise entitled."

The respondent contends that section 713, supra, is in no manner limited in its application by section 721, and that under the provisions of section 713 it is clearly entitled to a lien against the fund remaining within the control of the appellant corporation. Without in any manner intimating our views as to whether or not under said section 713 the respondent would be entitled to a lien, we think it is clear that it was the intent and purpose of the Legislature in enacting said section 721 to define the scope of the law of which it forms a part, and that such section limits the application of said law to the specific cases therein mentioned. We cannot agree with respondent's contention that the clear purpose of the enactment of said section was to make the entire law "retroactive in its application to certain specified cases," If such had been their purpose, the framers

of this legislation would certainly not have included in this section the words, "or shall hereafter be." The rule for the construction of mechanic's lien laws, as sustained by the great weight of authority, is that announced in 27 Cyc. 20: "Where the question is whether the particular case is within the statute, a strict construction should be given, but where the circumstances are such that there is clearly a right to a lien under the statute, and the question is whether the claimant has taken the proper course to establish his lien, the statute should be liberally construed." See, also, *Nanz v. Park Co.*, 103 Tenn. 290, 52 S. W. 999, 47 L. R. A. 273, 76 Am. St. Rep. 650; *Fidelity Storage Corp. v. Trussed Concrete Steel Co.*, 35 App. D. C. 1, 20 Ann. Cas. 1157. Applying this rule of strict construction in determining whether the facts in this case bring it within the limitations of section 721, is it possible to hold that a subcontractor, supplying material for the construction of a drainage ditch constructed under our Drainage Act, is entitled to a lien upon funds in the hands of a county and due the contractor? A drainage system is certainly not an improvement upon a street, public highway, or public ground. There is nothing in the Drainage Act which either expressly or by inference makes a drainage system or any part thereof either a public highway or public ground. Is the establishment of a drainage system the construction or repair of any improvement for any county upon any land the title to which shall have been at the time of making the contract or thereafter in such county, and for the purposes of which an appropriation of the funds of such county shall have been or shall thereafter be made or raised by said county?

The Drainage Act in its main features provides in substance as follows: Upon a petition signed by one or more owners of real estate whose lands will be affected by the establishment of the drainage system, and which petition sets forth that the construction of the drainage ditch or ditches will be conducive to public health or practicable for the drainage of agricultural land, the county commissioners of the county wherein it is proposed to establish such drainage system, are required to proceed, with the aid of certain other officials and persons, to determine the necessity for and practicability of the proposed system. To this end public hearings are provided for, and right of appeal given. The petitioners are required to give a bond to secure the expenses of the preliminary investigations. The county commissioners may make an assessment against the lands within the drainage district to cover expenses of preliminary investigations and to pay damages for any property that will be taken or damaged by the drainage system. All assessments shall be in proportion to the benefits to be derived by the several tracts of land within the drainage district. If the

commissioners determine in favor of the construction of such system, they shall enter into a contract or contracts for construction of same, and may provide in such contract for the payment of the construction either in cash or in drainage warrants or assessment certificates. For the purpose of covering the costs of preliminary investigations, damages, and construction of the system, the commissioners, if they so elect, may issue bonds payable out of moneys assessed against the lands within the drainage district, or, without the issuance of such bonds, they may issue warrants payable out of moneys collected on drainage assessments, or may issue assessment certificates; and they may pay for the expenses, damages, and construction with the money derived from the sale of such bonds or with such warrants or certificates. (In passing we would state that the contract set forth in the complaint herein provided for the payment to be made either in warrants or assessment certificates.) The property owners may unite in a written stipulation, agreeing upon a division of the cost of constructing a drainage system, and, upon the filing of such stipulation with the county commissioners the commissioners may proceed as they otherwise would under a petition. The care of the ditch is intrusted to the county commissioners, but all expense for such care and maintenance, including the expenses of the commissioners and other officers, is borne by the land within the district. The title of the right of way may be procured, but the statute does not provide that title in fee shall be procured, nor does it state in whose name any title shall be taken, and we doubt if the statute contemplates the acquiring of anything more than an easement, which easement would become appurtenant to and vest in the owners of the dominant estates. Though the statute provides for the giving of a name to each separate drainage district, there is no provision making such a district a corporate entity.

Even if under the statute the title to the right of way for the ditch was taken by and vested in the county, is the establishment of such ditch an improvement to the land comprised in the bed of such ditch, or is it an improvement to the land outside of the ditch and comprised within the drainage district? Certainly the latter, and in this land the county has no interest.

The respondent relies upon the authority of the case of *Bates County v. Mills*, 190 Fed. 522, 111 C. C. A. 354, and has quoted freely from same. This was also an action brought upon a drainage contract, under a law somewhat similar to our Drainage Act. All that was held in that case was that a contractor could sue the county. The law before the court in that case specifically provided that the contract should be made for and on behalf of the county. No question of right to

mechanics' lien arose in that case, and we are therefore unable to see wherein the holding of the federal court throws much light upon the question presented to us. Even if it be conceded that the contract entered into by the county commissioners is the contract of the county, and even if it should be conceded that under such contract the contractor would have a right of action against the county, yet it would not follow that, under section 721, supra, a subcontractor would have any lien against any property or fund in control of the county. In the *Bates County Case*, attention is called to the fact that the proceedings in the establishment of a drainage system are somewhat analogous to those followed in establishing paving and sewer districts. While it is true that the method of procedure is somewhat analogous, yet the analogy extends no farther than in the method of procedure. Even if it should be held that the methods followed in the establishment and construction of drainage systems were, in every respect, analogous to those followed in laying out paving and sewer districts, it does not follow that drainage systems would come under the limitations of section 721 simply because paving and sewer work do come under same. There is, as will be noticed, a specific provision for a lien for work or materials furnished for improvements upon streets and highways. It is well also to notice some of the fundamental differences between a drainage system, such as contemplated by our statute, and improvements upon streets and highways. In the establishment of a public street or highway, or in an improvement thereon, the main purpose in view is the conferring of a benefit upon the public to whom is given the free use of such streets and highways. There flows an incidental benefit to certain property, and it is owing to the peculiar benefit received by the adjacent property that the law often requires that the expense of opening or improving the highway be borne solely by such property. Frequently, however, such highways are established by the use of the public funds, and they are almost invariably kept in repair by such fund. In the case of a drainage system, while the law recognizes that there must be a certain element of public benefit, as otherwise there would be no constitutional authority for taking land for right of way, yet the principal purpose in view is the benefit which will flow to the property within the district. It is not contemplated that, when the system is established, the public shall have any other than an incidental interest therein or benefit therefrom. The public has no direct right whatsoever in such drainage system. It has no right to enter thereon, no right to use the water therefrom, or to receive any other than the mere incidental benefit flowing from increase of taxes or improved sanitary conditions. The county, at its own expense, is

not authorized to improve the same or keep it in repair. The establishment of a drainage system is, in its nature, as much a private enterprise as is the establishment of a water power system, or as would be the establishment of an irrigation system. Let us suppose that there was a statute providing that, upon the petition of one property owner owning real estate riparian to a stream of water, proceedings could be instituted to have all of the lands riparian to such stream incorporated into an irrigation district; such law providing that, upon the presentation of such a petition, some certain officer or body of officers should investigate the necessity of such district, and, if they found the same would be a public benefit, should proceed to the establishment of such district and the laying out of a complete irrigation system therein. Suppose such law provided for the establishment of a complete system of ditches for the distribution of the waters of said stream throughout such district and for the condemnation of land for right of way of the ditches, the expenses for all of which should be borne by the lands benefited thereby. Would the mere fact that into the hands of a certain officer or officers was given the passing upon the petition and the looking after this work, in any manner make such an enterprise one for the city, county, or other municipal district of which such person or body of men might be officers, when the public, as such, would have absolutely no direct rights in such irrigation system and be entitled to no direct benefits therefrom? We think not. It seems to us clear that enterprises of this kind, which merely for convenience of and to safeguard the rights of all parties are placed under the charge of and are carried out by public officers are no more public in their nature, and give to the municipality no more right or title in and to the lands improved, than would such municipality have in the same providing that such an enterprise should be established under sanction of law through the united efforts of the property owners without the intervention of any municipality or officer thereof.

The order overruling the demurrer to the complaint is reversed.

SMITH, J. I concur in the conclusion announced by Justice WHITING, but prefer to place the decision upon the ground that the act creating the lien limits the application of the act itself to proceedings in which "an appropriation of the funds of the corporation" is involved. It follows that where no appropriation of county funds—"funds of the corporation"—is made, or is necessary, the act creating the lien has no application. And even though no appropriation of county funds to pay for the ditch be necessary—because the fund is otherwise provided—still an appropriation "of funds of the corpora-

tion" is necessary to render the lien statute applicable. The drainage law itself appropriates the fund raised by special assessment to pay for the ditch, but such fund is not thereby made a "fund of the corporation." The statute expressly exempts the county and its funds from liability for the costs of construction of drainage. It seems to me the guarded and explicit language used in the act relating to liens results in a "casus omissus," which the courts are not justified in attempting to correct.

CORSON, J. (dissenting). I am unable to concur in the opinion of the majority of the court as in my judgment the facts stated in the complaint clearly bring the case within the provisions of section 721 if not under section 713 of the Code referred to and quoted in the opinion. In my judgment the title to the land over which the drainage ditch is constructed became the public property of the county, and therefore the facts presented by the complaint bring the case clearly within the provisions of section 721, and hence the construction of a drainage ditch is an improvement upon public ground of the county. By section 3 of chapter 102, Laws of 1909, amending section 5 of chapter 134, Laws of 1907, it is provided that the commissioners "shall assess the damages sustained by each tract of land or other property through which the same shall pass, and the damages as compensation for the land taken for the route of such drainage." By section 25 of the act of 1907 it is provided that "*the title to the right of way of drainage may be derived by consent or purchase from the owners of the lands through which the same may pass as well as by the method of condemnation herein provided.*" This, it seems to me, shows conclusively that by the condemnation proceedings referred to the title to that portion of each tract of land over which the ditch is constructed passes from the owner. To whom then does it pass? Clearly it does not pass to the owners of the land within the drainage district, as such owners are not made a corporation or vested with the power to take and receive the title. As the county is the party that exercises the right of eminent domain in acquiring the property over which the ditch is constructed, it necessarily follows that the county is the party that acquires the title to the same, in trust, of course, for the benefit of the persons owning property within the drainage district. If this were not so, no person or corporation would be authorized to institute a suit for the protection of said drainage ditch from injury or destruction or to recover damages resulting from such injury or destruction. It will be noticed that the title to the land over which the ditch is to be constructed may be acquired by purchase as well as by the exercise of the right of eminent domain. When the right is acquired by purchase, who

the title to the property over which the ditch is constructed and taken by condemnation proceedings or by voluntary conveyance of the parties vested in no individual or corporation. Construing, therefore, the Drainage Act in connection with section 721 quoted in the opinion, it seems to me clear that the title to the drainage ditch is vested in the county and is public property.

In the recent case of *Bates County v. Wills*, 190 Fed. 522, 111 C. C. A. 354, the United States Court of Appeals of this circuit, in construing the Drainage Act of Missouri, which seems from the opinion to be very similar to the Drainage Act of this state, says: "Viewing the legislation of the state relative to these drainage districts, we think it apparent that drainage districts were merely political subdivisions of the county for the special purposes of drainage, and were not at the time the contract was entered into created corporations capable of suing and being sued. The whole proceeding for the establishment of drainage districts, construction of ditches, assessing property therefor, and providing the funds to pay for the construction, was vested in the county court. * * * That the district formation was for the purpose of designating the territorial part of the county to be assessed for the payment thereof. Contracts of this character are analogous to those of a city, which establishes paving and sewer districts, issues paving and sewer district bonds, in which the real estate in the particular district only is assessed for the improvement, the work being done on the theory that it is a local benefit, and the expense borne by the property specially benefited." *Davenport v. County of Dodge*, 105 U. S. 237, 26 L. Ed. 1018. It is hardly necessary to state that the county court of Missouri has the same powers and duties as boards of county commissioners in this state.

It will be observed by the provisions of the Drainage Act that the contract for the expenses incurred by the construction of the drainage ditch is to be made by the county, and under the ruling of the Supreme Court of the United States in the case of *Davenport v. County of Dodge*, supra, and in the opinion in the *Bates Case*, supra, the action upon the contract may be properly brought against the county and a special judgment entered providing for the payments of the same by taxes levied and collected from the property within the drainage district. By a fair construction, therefore, of the Drainage Act and in view of these decisions by the Supreme Court of the United States and the appellate court of this circuit, I am clearly of the opinion that the title to the land over which the drainage ditch is constructed is vested in the county.

this specific purpose, but in my opinion no appropriation was necessary as the drainage law itself appropriates the fund derived from the assessment of the property to the payment of damages and the expenses of constructing the ditch. The demand for judgment in the complaint in this case only requires the county to pay over to the plaintiff the amount due the contractor. The plaintiff, therefore, does not seek to recover any of the county funds proper, but simply demands judgment adjudging him to have a lien upon the amount so due said contractor, and that the same be paid over to the plaintiff. Assuming as we may from the fact that the contractor makes no defense to the action that the amount claimed by the plaintiff is justly due him for materials furnished in the construction of the drainage ditch, I am of the opinion that the statute should be liberally construed in favor of the plaintiff as it is clearly not material to the county whether the amount so due the contractor shall be paid to him or to the plaintiff.

HANEY, J. I think the order appealed from should be affirmed.

McMANUS v. MALLOY.

(Supreme Court of South Dakota. Dec. 8, 1912.)

1. APPEAL AND ERROR (§ 93*)—DECISIONS REVIEWABLE—ORDER INVOLVING SUBSTANTIAL RIGHT.

Under Code Civ. Proc. § 462, subds. 1, 2, allowing appeals from an order affecting a substantial right which in effect determines the action and prevents a judgment from which an appeal might be taken, an order of the circuit court remanding an action of forcible entry and detainer for trial by the justice's court because not involving a question of title involves the merits of the action, and is appealable.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 643-647; Dec. Dig. § 93.*]

2. JUSTICES OF THE PEACE (§ 36*)—JURISDICTION—TITLE TO REAL PROPERTY.

Justice's Code, § 8, provides that a justice shall not have jurisdiction in an action involving title to real property, and section 43 confers jurisdiction of forcible entry and detainer. Forcible entry and detainer the complaint alleged that defendant's lessor by warranty assigned to plaintiff all his rights under an lease, and the right of possession. The defendant denied such allegations, and set up the oral and possession thereunder, and that neither lessor nor plaintiff had given defendant of intention to terminate the lease, and that plaintiff had any right, title, or interest in the premises, or right of action. For plaintiff as grantee of the lessor was to maintain the action, and that the deed in evidence would be only a transfer of the right to possession, action did not involve title to real property and was within the jurisdiction of court.

[Ed. Note.—For other cases, see *the Peace*, Cent. Dig. §§ 83-97 36.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Ser.

3. LANDLORD AND TENANT (§ 291*)—UNLAWFUL DETAINER—PERSONS ENTITLED TO SUE—ASSIGNEE OR LESSOR.

Under Justice's Code, § 44, which provides that forcible entry and detainer is maintainable where a lessee or special tenant holds over after the termination of his lease, or fails to pay his rent for three days after it is due, such action may be maintained by the lessor or his assignee, the object of the statute being to provide a summary remedy to recover possession of the premises, without resort to ejectment.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1217-1269; Dec. Dig. § 291.*]

4. LANDLORD AND TENANT (§ 70*)—RIGHTS OF PARTIES—TENANT'S ESTATE.

A tenant, while complying with the terms of his lease, has an estate in the premises leased, but no title to the property.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 215, 216; Dec. Dig. § 70.*]

5. LANDLORD AND TENANT (§§ 63, 65*) — LANDLORD'S TITLE—ESTOPPEL BY TENANT—ASSIGNEE OF LANDLORD.

A tenant cannot question the title of his landlord without surrendering possession of the property and thereby terminating the tenancy, and the title of an assignee or grantee of the lessor is likewise not subject to question by the lessee.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 159, 176; Dec. Dig. §§ 63, 65.*]

6. JUSTICES OF THE PEACE (§ 36*)—JURISDICTION—ACTION INVOLVING TITLE TO REAL PROPERTY—FORCIBLE ENTRY AND DETAINER.

A mere claim by defendant in forcible entry and detainer that he has an estate, and that title is involved, is not sufficient to oust the jurisdiction of the justice's court, but it must affirmatively appear on the pleadings or evidence that such title is necessarily in issue.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 83-97; Dec. Dig. § 36.*]

Appeal from Circuit Court, Yankton County; Robert B. Tripp, Judge.

Action by Michael McManus against Mark Maloy. From an order of the circuit court remanding the cause for trial by the justice court, defendant appeals. Affirmed.

C. J. B. Harris and C. J. Novotny, both of Yankton, for appellant. French & Orris, of Yankton, for respondent.

CORSON, J. This is an appeal by the defendant from an order of the circuit court of Yankton county remanding the cause back to the justice court for trial. The action was one of forcible entry and detainer, and was instituted by the plaintiff in the justice court. Paragraph 1 of the complaint is as follows: "That heretofore, to wit, in the year 1911, one E. G. Edgerton leased orally to the defendant the following described real property situate in the county of Yankton and state of South Dakota, to wit: * * * said lease to expire the last day of February, 1912, and the said defendant entered into the possession of said premises under said lease and ever since has and still does re-

tain possession thereof." The second paragraph of the complaint reads: "That thereafter, and on the 3d day of February, 1912, said E. G. Edgerton, for value, executed an assignment of all his rights under said oral lease to plaintiff, and at the same time assigned to plaintiff the right to possession of said real estate on and subsequent to the first day of March, 1912, by executing a warranty deed for said land to plaintiff, which said deed was delivered to plaintiff on or about the first day of March, 1912." The third paragraph alleges service of notice to quit on defendant more than three days before the commencement of the action, and the filing of said notice with the justice before the commencement of the action. It is then alleged that defendant holds over and refuses to surrender possession to plaintiff. By way of answer the defendant among other things alleged: "That on or about the 15th day of January, 1911, he hired the premises described in the complaint from E. G. Edgerton, who was then the owner of said premises, by an oral contract made and entered into by and between the said Edgerton and the defendant, for a term not specified in the said contract nor by the parties thereto, and the defendant then took possession of said premises and has continued in the possession thereof until the present time. That the said premises are farm lands, and not lodgings, and the said hiring was presumed to be for one year from its commencement; there being no usage on the subject to the contrary. That neither the said Edgerton nor the plaintiff nor any other person has ever prior to the expiration of said hiring given defendant notice of his intention to terminate the said hiring, and for such neglect to give such notice the said hiring has been renewed and extended for one year from its termination, to wit, to the 15th day of January, 1913." He admitted in part the notice set forth in paragraph 3 of the complaint, but alleged "that the defendant has no knowledge or information sufficient to form a belief as to whether the plaintiff is the owner of said premises, and further denies that plaintiff has any right, title, or interest in and to said premises or any part thereof, and denies that the plaintiff has any right to institute this action." He followed this with a general denial.

The defendant then moved the court to certify the action to the circuit court for the reason that the civil jurisdiction of the justice court extends, "to actions for forcible entry and detainer or detainer only where the title or boundary thereof in no wise comes in question," whereas this is an action of forcible entry and detainer in which the title of the real estate mentioned in the complaint comes in question as appears further from the pleadings herein, which were referred to for the purposes of the motion.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

This motion was granted by the justice court and the cause certified to the circuit court. The plaintiff thereupon moved the circuit court to remand the action for trial by the justice court, for the reason that it appears from the pleadings in said action that the title to or boundary of real property does not in any wise come in question, and that, therefore, the circuit court has no jurisdiction to try said action. The circuit court granted the motion of the plaintiff to remand, and gave judgment accordingly. From this judgment and order in pursuance therewith the defendant has appealed.

[1] The respondent has moved to dismiss the appeal taken by the appellant on the ground that the order remanding the cause to the justice court is not an appealable order, nor is it an order reviewable in this court, and is only an interlocutory order which could be reviewed by this court only after a final determination of the case. It is further contended by the respondent that the order made by the circuit court does not affect a substantial right of the appellant, nor does it determine the action, but is only a direction that the court below should proceed to the trial of the case.

Appellant contends in support of his appeal that the order is one involving the merits of the action, and therefore is an appealable order. Section 462, C. C. Proc., provides as follows: "The following orders, when made by the court, may be carried to the Supreme Court: (1) An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken. (2) A final order affecting a substantial right, made in special proceedings, or upon a summary application in an action for judgment. * * *"

The question presented is a new one in this court, and one, so far as our researches extend, that has not been decided by any appellate court, and the respective counsel seem to have been unable to find or cite any case bearing directly upon this question. In view, however, of the provisions of our Code with reference to appeals from orders, we are inclined to take the view that the order of the circuit court in the case at bar involves the merits of the action, and as such order is appealable. The decision of the circuit court was in effect that no question of title was involved in the action, and that, therefore, the justice court had jurisdiction to try and determine the same, and the decision, therefore, comes clearly within the subdivision of section 462 of the Code of Civil Procedure above quoted. The motion of the plaintiff, therefore, to dismiss the appeal is denied.

[2] This brings us to the second question, which is: Was the decision of the circuit court right in holding that, under the pleadings in the case, the question of title was not involved, and in remanding the case to

the justice court? Section 9 of our Justice's Code provides as follows: "The parties to an action in a justice's court cannot introduce evidence upon any matter wherein the title to, or boundary of, real property in any wise comes in question; and if it appear from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title to, or boundary of, real property, in anywise, the justice must suspend all further proceedings in the action, and certify the pleadings, * * * to the clerk of the circuit court," etc. It is contended by the appellant that, under the allegations in the complaint and denials and allegations in the answer, it clearly appeared that a question of title was involved which, under the provisions of section 9 of the Justice's Code, could not be determined by the justice court, for the reason that a grantee of the landlord under whom the defendant held his lease could not maintain the action under the denials in the answer without introducing in evidence his deed from Edgerton, the landlord, to himself which necessarily involved proof of title. It is contended, however, by the respondent in support of the decision of the circuit court that the grantee of Edgerton, the landlord, succeeded by virtue of the deed from Edgerton to himself to the position of the landlord, and that he was thereby able to maintain the action as against the defendant as the landlord would have been had he continued as the owner of the property, and that the fact of alleging the execution of the deed by Edgerton to the plaintiff and its introduction in evidence would simply be to show the transfer of the landlord's right of possession to the plaintiff and the plaintiff's right to maintain the action. We are of the opinion that the respondent is right in his contention. It will be observed by the second paragraph of the plaintiff's complaint that he alleges that on the 3d day of February, 1912, said E. G. Edgerton, for value, executed an assignment of all his rights under said oral lease to the plaintiff, and at the same time assigned to plaintiff the right to possession of the real estate on and subsequent to the 1st day of March, 1912, by executing a warranty deed to said plaintiff which was delivered to plaintiff on or about the 1st day of March, 1912. As this allegation is denied by the answer, on the trial the plaintiff would be required to introduce in evidence the deed, not for the purpose of establishing title to the property, but for the purpose of showing that Edgerton had transferred to plaintiff his interest in the lease and his right to the possession of the property, thereby conferring upon the plaintiff the right to institute the action and the rights of Edgerton to the possession of the property.

In *Burrus v. Funk*, 29 Okl. 677, 119 Pac. 976, decided in November, 1911, the learned

Supreme Court of Oklahoma in discussing an analogous case to the one at bar says: "The evidence discloses that defendant was in possession under a lease from the former owner which had expired, and was seeking to retain possession by holding over under an alleged new lease which he set up. Assailing plaintiff's title which was a deed from his landlord, and introduced for the purpose of proving plaintiff's right of possession, defendant sought to show that the same was void because of the alleged minority, when made, of plaintiff's grantor, and, the issue of fact being determined against him, now claims that the title to the land being thus involved the justice, and, on appeal, the county court, was ousted of jurisdiction to try the cause. Such not being a proper subject of trial, the jurisdiction of neither court was affected thereby. In *Vansellous v. Huene*, 28 Okl. 243, 108 Pac. 1102, the situation was strikingly similar. There, as here, defendant was in possession under a lease, and, after the expiration of his term, refused to deliver possession to the purchaser. The court said: 'The next objection raises the question of the sufficiency of the deed to the plaintiff, and puts in issue the title to the property. We do not deem this a proper subject for trial in the present case. "Forcible entry and detainer," or "forcible entry and unlawful detainer," is a proceeding at law, and the right to possession is the sole question involved, and evidences of title are only material in so far as they tend to show the right of possession, and no equities of parties can be determined. *Anderson v. Ferguson*, 12 Okl. 307, 71 Pac. 225. There are a great many other cases to the same effect in this jurisdiction; but the question is so well settled here and elsewhere that we do not deem it necessary to cite them.' See, also, *Powers v. Myers*, 25 Okl. 185, 105 Pac. 674." As bearing upon this question, see the following cases: *Browne v. Haseltine*, 9 S. D. 524, 70 N. W. 648; *Streeter v. Isley*, 147 Mass. 141, 16 N. E. 776; *Dunshoe v. Grundy*, 81 Mass. (15 Gray) 314; *Josselson v. Sonneborn*, 110 Md. 546, 73 Atl. 650; *Winterfield v. Stanss*, 24 Wis. 394; *Stone v. Blanchard*, 87 Neb. 1, 126 N. W. 766.

[3] The appellant cites in support of his contention the case of *Reay v. Cotter*, 29 Cal. 169. That case would support the appellant's contention if the forcible entry and detainer act of California had been at the time of that decision similar to the forcible entry and detainer act of this state. The decision, however, seems to be based upon the ground that the provisions of that act limit the right of recovery to the landlord, and therefore the act could not be extended to the assignee, heir, or other person claiming under the landlord. In that opinion the learned Supreme Court of California says: "Upon inspection of the fourth section of the act (Stat. 1863, p. 653), it will be found

that this remedy is conferred only upon 'the landlord,' and is not given in terms at least to his successors in estate." And the court held that by the act the remedy was limited to the landlord, and not given to his assignee. In the later decision of *Martel v. Meehan*, 63 Cal. 47, it appears that the act had been amended by extending the writ to "the successors in estate of his landlord if any there be."

Our Justice's Code on forcible entry and detainer provides:

"Sec. 43. Any justice of the peace within his proper county shall have power to inquire, in the manner hereinafter specified, of all cases of forcible entry and detainer, or detainer only, of real property.

"Sec. 44. This action is maintainable: * * * 4. Where a lessee in person or by his sub-tenants holds over after the termination of his lease or expiration of his term, or fails to pay his rent for three days after the same shall be due."

It will be observed that there is no limitation in this statute as to the party who may maintain the action, and it therefore seems a proper construction of that subdivision that the action may be maintained, not only by the lessor, but his assignee or grantee, as such was evidently the intention of the Legislature in adopting the provision. The object of these sections evidently is to provide a speedy and summary remedy for the landlord or his grantee or assignee to recover possession of the premises instead of resorting to the expensive and dilatory proceeding of an action in ejectment, or, more properly under our Code, an action to recover possession of the property.

Much reliance is also placed by the appellant upon the case of *Murry v. Burris et al.*, decided by the Supreme Court of Dakota Territory and reported in 6 Dak. 170, 42 N. W. 25. But, after a careful examination of the able and learned opinion of the late territorial court written by Chief Justice Tripp, we are of the opinion that the case does not sustain the appellant's contention. It appears from the statement of facts in that case that the plaintiff alleged in his complaint an unlawful entry by the defendants by force and violence, and an unlawful entry by the defendants by fraud and stealth with unlawful detention. The defendants in their answer denied generally the allegations of each count, and pleaded, in substance, that the defendants were lawfully possessed of the premises as tenants of one O'Neil, who was the owner thereof by purchase from the plaintiff, and pleaded the pendency of a former action. The Supreme Court in its opinion takes the view that, under the pleadings and evidence offered, the question of title was clearly raised in the case, and that the justice court should have certified the case to the circuit court, then the district court, for its decision. The question of the

right of an assignee of the lease or grantee from the landlord was not involved, and hence the decision in that case has but little, if any, application to the case at bar.

The contention of the appellant that the defendant by alleging that by his lease he acquired an estate in the premises and that such estate amounted to a title to the property is clearly untenable.

[4] Every tenant while complying with the terms of his lease has an estate in the premises leased but no title to the property.

[5] It is a settled rule of law that a tenant cannot question the title of his landlord without first surrendering up possession of the property under the lease and thereby terminating the tenancy. The plaintiff by virtue of his assignment of the lease from Edgerton, the landlord, and as grantee of Edgerton, acquired the right to possession of his grantor, and his title was no more subject to question by the lessee than would have been the title of his grantor, Edgerton.

[8] Therefore no question of title was properly raised by the defendant in his answer. It seems to be generally held that a mere claim by the defendant that the title is involved is not sufficient to oust the justice court of jurisdiction, but it must affirmatively appear from the pleadings or evidence that it is in fact necessarily in issue. If this were not so, the defendant in nearly every action under the forcible entry and detainer act could oust the justice court of jurisdiction by claiming that a question of title was involved. The effect of the answer would seem to be simply to raise the question of defendant's right of possession under his lease, and not plaintiff's title. This question was properly triable by the justice court.

We are clearly of the opinion, therefore, that the circuit court was right in remanding the action to the justice court, and the order appealed from is affirmed.

McKONE et al. v. CITY OF FARGO.

(Supreme Court of North Dakota. May 24, 1912. On Rehearing, Nov. 23, 1912.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 513*)—PUBLIC IMPROVEMENTS—ACTIONS TO SET ASIDE—LIMITATIONS.

An action to set aside a special assessment levied on lots to defray paving expense, where the assessment was apportioned to the property by the city special assessment commission and confirmed by the city council, and thereafter spread upon the tax lists, and more than six months having elapsed from the date of such approval and confirmation of the assessment by the city council without the commencement of an action to set aside the assessment for irregularities, it is *held* that such an action, begun after the expiration of six months from the date of such confirmation, is barred from being maintained by the statute of limitations contained in section 2790, Rev. Codes 1905 (section 155, c. 62, Sess. Laws 1906), providing

that "no action for either of said purposes shall be maintained unless it is commenced within six months after such special assessment is approved."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1188-1206; Dec. Dig. § 513.*]

2. MUNICIPAL CORPORATIONS (§ 513*)—ASSESSMENTS—LIMITATIONS—PROSPECTIVE OPERATION.

Such statute, imposing a six months period of limitation within which to commence actions to set aside assessments, is valid and enforceable, and is here applicable, notwithstanding that the title of the act specifically referred to the vacation of assessments made prior to its passage.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1188-1206; Dec. Dig. § 513.*]

On Rehearing.

3. STATUTES (§ 117*)—SUBJECTS AND TITLES—LIMITATION OF ACTIONS.

On rehearing, section 155, c. 62, Sess. Laws 1906, as to the statute of limitations concerning future assessments, *held* not unconstitutional.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 153-157; Dec. Dig. § 117.*]

Appeal from District Court, Cass County; Allen, Special Judge.

Action by A. K. McKone and others against the City of Fargo. From a judgment for defendant, plaintiffs appeal. Affirmed.

Robinson & Lemke, of Fargo, for appellants. Seth Richardson, of Fargo, filed an additional brief on rehearing in behalf of other parties similarly situated to these appellants. W. H. Shure, City Atty., of Fargo, for respondent.

GOSS, J. This action is a direct attack upon a special assessment levied for street paving. The property involved is lot 1 of block 16, and lot 14 of block 9, in Keney & Devit's addition to Fargo. A special assessment of \$1,356.98 for said purposes was levied and spread as a tax against each of said lots. Plaintiffs aver: That "said levy and special assessment was made without any authority of law, and that in all things pertaining to the construction of said pavement and contracting for the same, and the making and filing of plans and specifications therefor, and the levy of said assessment and the pretended confirmation of the same, there was no compliance with the law." "That the cost charged against said property for such pavement is confiscatory, and is more than twice the amount which it adds to the value of said property." "The plaintiffs aver that under protest they have paid one-tenth of the amount assessed against said property, and they are willing and ready to pay such further sum as may be just and equitable, and not in excess of the increased value of said property and the benefits to said property by reason of the construction of such pavement; and they do offer to pay in all 50 per cent. of the cost of said pavement, which is in excess of any benefits to said property."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The prayer for relief required defendants to set forth their adverse claims to the property, "that the validity of the same may be adjudged and determined, and that said adverse claims may be adjudged void and confiscatory, and that the pavement assessment levied against said property be adjudged void on the owners paying one-half of the sum without any interest, penalty, or cost."

The answer detailed proceedings regularly had, including a petition for paving improvements, the granting of the same on a finding of necessity for said paving, preparation by the city engineer of plans, specifications, and estimate of the cost thereof, and its consideration and approval by the city council; the advertising for bids and the letting of the contract for construction of the paving according to said plans and specifications on file with the city auditor; the completion of said work and total cost thereof; the personal inspection by the city special assessment commission, and its determination in writing of the lots subject to assessment therefor and the benefits thereto, and the proportion based thereon assessable to each tract benefited, in which report and assessment each lot involved herein was reported as subject to assessment for \$1,356.98, as based upon benefits of \$2,035.47 accruing to each tract because of said paving; the fixing of a day for the review of said assessments and notice thereof to the property owners assessed, which date was February 27, 1909; the confirmation on said hearing had by the city special assessment commission of the assessment list as filed; notice by publication of such action, and that the city council would meet on April 5, 1909, at a place designated, to act further upon said list and hear any objections thereto, and its final confirmation and approval after notice on May 3, 1909, whereupon it was certified by the city auditor to the county auditor, and the assessment as made spread against all property assessed including these lots; that plaintiffs defaulted in appearing at any of said hearings, and made no objection of any kind to said proceedings until the commencement of this action on March 1, 1910, nearly a year after confirmation of the assessment. Defendants further plead that, because this action was not commenced within six months from May 3, 1909, the date of the final approval by the city council of said assessment, this action cannot be maintained. There is no denial of any of the foregoing matters alleged by answer.

On the trial no attack is made on the regularity of proceedings conferring jurisdiction upon the city council to act and prior to letting of contracts. The plaintiffs assert that the city council lost "jurisdiction to make any assessment for two fundamental reasons: (1) The city council did not cause to be made and filed in the office of the city auditor the plans and specifications of the pavement giving all the details of the work

to be done. (2) The second assessment was confiscatory, and was not based on special benefits to the lots." The above is quoted from appellants' brief, and is a summary of their contentions on the trial and on this appeal. The case below was tried with the object in view of setting aside or modifying special assessments because of defects in the plans and specifications upon which the contract was let and under which the work was done, and also because of irregularities thereafter occurring concerning the manner of the levy of the assessments, in that the assessments are charged to have been based, not upon special benefits to the property correctly determined by the assessment commission, but, instead, that the assessment commission arbitrarily apportioned the cost of the project between these and many other lots, and from the cost computed and assessed benefits by a method used of adding to the cost one-half more than the tax the commission had previously determined the property should bear; in other words, that instead of the tax being determined proportionately from the special benefits to the property, the tax was arbitrarily assessed with reference to cost only. Plaintiffs have offered proof tending to sustain these contentions as to the method of the assessment board in determining special benefits and special assessments supposedly levied thereon as to this property and these assessments involved.

[1] But plaintiffs are met at the threshold of the merits of this case with the established facts that the assessment had been fully made prior to, and confirmed and approved in, May, 1909, and this action was not commenced until March 1, 1910, the date of the summons. The city invokes the provisions of section 2790, R. C. 1905, being section 155 of chapter 62 of the Session Laws of 1905, entitled "An act for the organization and government of cities and to provide for the limitation of actions to vacate special assessments *heretofore* made." The particular section of this act containing the statute of limitations here sought to be invoked against the maintenance of this action reads: "Whenever any action or proceeding shall be commenced and maintained before any court to prevent or restrict the collection of any special assessments or part thereof, made or levied by the officers of any city for any purpose authorized by law, and whenever any action or proceeding shall be commenced and maintained as aforesaid to vacate or set aside any sale of real estate for such special assessments, or to cancel any tax certificate or deed given under such sale, and such assessment shall be held to be void by reason of noncompliance with this act, the court shall determine the true and just amount that the property attempted to be so assessed by said special assessment should pay," and enter judgment accordingly, to have the force of a lien to be enforced by court action: "Provided that no action for either of said

purposes shall be maintained unless it is commenced within six months after such special assessment is approved, and in case of such assessment heretofore approved within six months after this act takes effect." Can this action be maintained after the expiration of such six months period of limitation? Plaintiffs claim the statute is not applicable, because of its title providing "for the limitation of actions to vacate special assessments *heretofore made*." Counsel remark: "Of course, the assessment in question was not 'heretofore made.' It did not precede the passage of the act, and so the limitation does not apply to this action"—but state that "the special assessment was made under an act of 1905," the act in question. They quote in their brief sections 142, 143, and 166 thereof, and seek to apply those provisions where they fit their side of the case, but deny the application of section 155, containing the six months statute of limitations.

[2] It is to be noticed that this is not a curative statute, but a statute of limitation of actions. It is couched in strong and unmistakable language. "That no action for either of said purposes shall be maintained unless it is commenced within six months after such special assessment is approved." Appellants do not challenge its constitutionality, so that is not before us. Neither is there any question of statutory construction involved. It is sufficient to set this statute of limitation running when two requisites exist: (1) A special assessment; and (2) its approval. With these existing, a lapse of six months bars the commencement of an action to assail the assessment. It is here conceded, both by the pleadings and the proof, that a special assessment was levied; but it is contended that it is void because of the manner of its levy as not based upon specific benefits found. The assessment in question bears all the earmarks of a valid assessment. It purports to be based upon specific benefits. Both specific benefits and tax are stated in itemized amounts upon the tax list, and are even specified to the cent with the utmost nicety. The regular statutory steps have all been taken. On the face, then, of proceedings the utmost of regularity apparently exists. Appellants now seek to go beyond the assessment altogether, and impeach it by showing different special benefits than those recited in the levy, or the use of illegal methods in their determination. More than this, they seek to draw the inference, from the levy on other lots, that the levy made as to the two tracts in question is invalid. In this, as in their whole argument, a levy of special assessments against these two lots by the proper taxing power and legal on the face of proceedings is recognized and sought to be attacked after six months from its conceded approval. The assessment at most is but voidable, not void. Having all conditions named in the statute existing to set the statute in motion, we have the exact case

before us for which it was intended to be applicable. If the statute does not here apply to bar the maintenance of this action, commenced more than six months after approval of these special assessments, it never has application to any case.

Counsel for appellants cannot maintain but that such statutes are valid and enforceable. We quote from 1 Page and Jones on Taxation by Assessment, § 141: "Statutes are frequently found which require that objections to assessments must be made within some short space of time, and that, if not so made, they shall be deemed to have been waived. Such statutes are usually held to be valid if the time given is sufficient to enable the property owner to present his objections fairly. Thirty-day limitations have been upheld as in cases of assessments for street improvements or for sewers. A three-day limitation has been upheld, even where, on account of sickness, the property owner was not able to file his remonstrance within the time limit. Such restrictions are held in some jurisdictions to apply to constitutional questions as well as to failure to comply with statutory requirements, while in other jurisdictions it has been held that they cannot apply to constitutional questions." To the same effect see Hamilton on the Law of Special Assessments, §§ 530 and 531, from which we quote: "The legal truism that the statute of limitations does not run against a municipal corporation acting in the discharge of the public duty has no application to the commencement of actions at law or suits in equity begun against such corporations for violations of statutory duty in making assessments. The various statutes limiting the commencement of actions are applicable to and include these classes of cases." "A statute providing that 'no action to set aside special assessments or to enjoin the making of the same shall be brought, nor any defense to the validity thereof be allowed after the expiration of thirty days from the time the amount due on each lot or piece of ground liable for such assessment is ascertained,' being within the jurisdiction of the Legislature, is not such a restriction upon the rights of litigants as calls for interference on the part of courts if the prior proceedings are sufficient to confer jurisdiction upon the corporate authorities to proceed." The above quotation from such treatise on Special Assessments recites the Kansas statute, and for proof of its application according to its terms see *Leavenworth v. Jones*, 69 Kan. 857, 77 Pac. 273; *Kansas City v. Gibson*, 68 Kan. 501, 72 Pac. 222; *Wahlgren v. Kansas City*, 42 Kan. 243, 21 Pac. 1068; *Topeka v. Gage*, 44 Kan. 87, 24 Pac. 82. We quote the following from the opinion in the last-named case: "The language of this statute is such as to leave little or no room for construction. Its provisions are plain, direct, and positive, and seem sufficiently broad to cut off all defenses

not asserted within the period of time named therein." "And if the Legislature was providing a special statute of limitations different from that of the general statute, we must presume that they intended it to have the effect they said it should have and cut off all defenses of whatever kind or character. This may be a harsh rule, but that fact does not furnish a reason why we should not construe the statute as it is, though it may furnish a reason why the Legislature should modify it." This is that court's opinion of a statute granting but one-sixth the period of time within which to commence action allowed in ours.

Wisconsin has a similar statute, with one year as the limitation period. See section 1210h, Wisconsin Revised Statutes of 1898, and as an example of its application see *Hamar v. Lethy*, 124 Wis. 265, 102 N. W. 588, an action brought after the one-year period to foreclose a tax certificate to which a defense of irregularity was sought to be interposed, and which the trial court on the proof made found to be a defense. On appeal the judgment was reversed, the court holding the statute of limitations to bar interposition of such defense, and that "the court below erred in admitting evidence tending to show that no valid assessment had been made and in entering judgment setting aside and canceling the tax and tax certificate." See, also, a similar statute providing a 30-day period after issuance of bonds for street improvements within which proceedings must be begun or bonds issued be conclusive evidence of the regularity of all proceedings prior thereto, construed and enforced in *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81, regarding which that court says: "The period of 30 days after the date of the warrant within which the statute permits an owner to prevent the issuance of any bond by filing an affidavit and requesting that no bond be issued gives a reasonable time to the owner within which to make his election whether he will take advantage of the extension of time afforded by the issuance of a bond, or by requesting that no bond be issued preserve such rights as he may think he has to defeat the assessment for irregularity in the proceedings. The notices having been given, he is conclusively presumed to have knowledge of his right to so elect. It should not be forgotten that at the time the assessment becomes due other persons have valuable personal property rights at stake as well as the owner." "The fact that the conclusive evidence clause of the bond act arbitrarily fixes a period of 30 days after which defects which before may have been fatal are placed beyond inquiry does not make the law unreasonable."

We believe, therefore, that section 2790 quoted bars plaintiff from maintaining this action. For this reason, it is unnecessary to decide any assignments of error urged by plaintiff.

The judgment of the trial court is affirmed, with costs.

On Rehearing.

On petition of appellants a rehearing was granted on the sole question of the constitutionality of the part of section 155 of chapter 62 of the Session Laws of 1905 as purports to limit to six months from confirmation of the assessment the time within which to begin an action to avoid the same, which, if valid, prevents the maintenance of this action; said six months period having expired before its commencement. This question was raised for the first time on petition for rehearing, and, although the rehearing was granted on this question alone, appellant in the additional brief filed has devoted but a small part thereof to the question of the constitutionality of the statute, and in the main has sought to reargue the case on the merits, which had already been decided in the opinion filed. The only matter now before us is the constitutionality of this limitation statute, upon which a brief has been filed in behalf of parties interested similarly to these appellants, though not before the court in this action, by attorney Seth W. Richardson of Fargo.

[3] Chapter 62 of the Session Laws of 1905 is entitled: "An act for the organization and government of cities and to provide for the limitation of actions to vacate special assessments heretofore made." It is a comprehensive act, and intended as in part a recodification of the law applying to the organization and government of cities. It contains over 50 pages of printed matter. That portion of section 155 of said act, after referring to the commencement and maintenance of actions to avoid taxes and special assessments, reads: "Provided that no action for either of said purposes shall be maintained unless it is commenced *within six months after such special assessment is approved, and in case of such special assessment heretofore approved within six months after this act takes effect.*" The title of the act, so far as limitation of actions is concerned, refers only to those to vacate special assessments *heretofore made*; while the body of the act, as to limitation of actions, covers specifically and definitely under separate classifications special assessments approved after the passage of the act and special assessments approved prior to the passage of the act; the act as passed embodying an emergency clause. Counsel claims the statute is unconstitutional, as contravening the terms of section 61 of the Constitution, that "no bill shall embrace more than one subject, which shall be expressed in its title." This contention is based upon the fact that the title of the act mentions only "the limitation of actions to vacate special assessments *heretofore made*," and that the act must be construed as applying only to assessments made *heretofore*—that is, before the passage of the act;

that such clause relating to assessments heretofore made must be construed as a restrictive clause in the title, and limiting the operation of the limitation statute to assessments made prior to its passage, and thereby rendering unconstitutional, as without the scope of the title so restricted, that portion of section 155 of the act providing that the six months statute of limitation might be invoked as to actions begun to avoid taxes and assessments *thereafter assessed*, and resulting in the contention that, as this assessment was some years after the passage of this act, there is no valid statute of limitation of actions barring attack on the special assessment in question. If we grant appellants' objection urged, that because the title of the act refers particularly to assessments *heretofore made* it is restrictive, we could easily arrive at his conclusion. But does it follow that because the title mentions assessments "heretofore made," and does not specifically mention assessments to be levied in the future, the latter are not properly included within the purview of the act, and it is unconstitutional?

The contention of the appellants is of necessity based upon the assumption that the clause of the title concerning past assessments is so restrictive of the balance of the title as to exclude any legislation concerning limitation of actions as to future assessments being included under the portion of the title relating to government of cities and germane to such subject, but for such alleged restrictive clause. The title of the act in the main specifies the general subject of government of cities, and such portion relating thereto is a general title. The clause of the title referring to one of the hundreds of different subjects that might be or are included in the legislation under the general title has reference to one particular limited matter, limitation of actions as to past assessments, but is also germane to the general title. We have, then, a general title, with a subtitle concerning one matter germane to the general subject, that of government of cities. The lesser, the subtitle, cannot be said to restrict legislation on any other subject than the limitation of actions concerning assessments. It is in no sense generally restrictive of the general subject, government of cities. This narrows the investigation on the point raised, then, to the question of whether this subtitle concerning past assessments shall be construed as restrictive to legislation concerning limitation of actions as to assessments both past and future, so as to exclude legislation upon future assessments, when such legislation, both future and past, is germane to and within the general subject, organization of cities, and covered by the general title. If it appears from the title of the act that no

to, restrict the statute or limitations to past assessments, and as negating an intent that the body of the act shall contain legislation concerning limitation of future assessments, we must hold accordingly that the clause of the title mentioning past assessments is restrictive and exclusive, and voids that portion of the statute of limitations here involved. All necessary rules for the construction of the title and the determination of this question have been heretofore announced by the decisions of this court. They have been summarized in an opinion by Morgan, Chief Justice, in *Powers Elevator Company v. Potter*, 16 N. D. 359, 113 N. W. 703, upon the construction of this provision of section 61 of the Constitution: "This section of the Constitution has been construed by this court in several cases. In those cases several principles have been laid down as guides in the construction of the section that should be applied in this case: (1) The law will not be declared unconstitutional on account of the defect, unless it is clearly so. (2) The title should be liberally construed, and not in a strict or technical manner. (3) If the provisions of the act are germane to the expressions of the title, the law will be upheld. (4) The object to be gained by the enactment and enforcement of the constitutional provision is to advise the Legislature and the public of the substance of the act, and to prevent surprise, fraud, and the enactment of laws upon incongruous and independent matters under one title. (5) The section of the Constitution is mandatory upon the Legislature and upon the courts."

As applied to the determination of whether an act is void because of a restrictive title, this is not the first case in this state in which the foregoing rules have been applied, as they were followed in *State v. Minneapolis & Northern Elevator Company*, 114 N. W. 482, 483, 138 Am. St. Rep. 691, 17 N. D. 23, from page 26 of which we quote: "In disposing of appellant's contention, we must be governed by certain well-established rules of statutory construction, among which are the following: A statute will not be declared unconstitutional, unless it is a plain violation of some constitutional provision. Every presumption is in favor of the validity of a statute, and in case of a reasonable doubt as to its constitutionality is the duty of a court to sustain it." on page 27 of 17 N. D., and page 483 N. W. (138 Am. St. Rep. 691), in the opinion, the court says: "The fact that the title of the act is somewhat restrictive in its terms does not render the act unconstitutional. The provisions of section 2 [La. 113] which are not expressly repeated in the title are, we think, clearly embraced by the subject-matter embraced in the reading of the title readily su

body of the act might contain provisions similar to those embraced in section 2." This case collects all the decisions of this state up to that time construing section 61 of our Constitution. As before stated, the title to this act is singular, as is the subject. The mere mention in a statute of particulars or branches of the subject which are or may be germane to the general title or main purpose does not make the title or subject plural. 1 Lewis' Sutherland, Statutory Construction, § 131, concerning which the authority says: "In such cases the Legislature is not limited to the particulars or details specified, but may enact any provision germane to the general title, unless the title is so worded as to show a clear intent to confine the act to the particulars mentioned." And the same authority further says: "The question cannot be determined by regarding the title alone, but the body of the act must be looked to; and if all the provisions of the act are fairly referable to one general subject, and that subject is expressed in the title, the act is valid."

Applying these canons of construction, can it be said that beyond reasonable doubt the Legislature intended by the latter clause of this title to restrict legislation to the particulars mentioned in such clause, to the exclusion of similar legislation concerning future assessments? And does the clause itself show a clear intent that the title shall be so restrictive? Is it not as reasonable to conclude the contrary, when we consider that under the general title, had this subtitle not been affixed, the Legislature could have enacted, without contravening section 61 of the Constitution, a statute of limitations, if reasonable and otherwise valid, concerning both past and future assessments, and that with this in mind the subtitle was probably annexed, not to narrow the scope of the legislation on the matter mentioned in the subtitle, but to bring to the attention of the Legislature that the statute concerned past legislation in this particular, presuming that legislation concerning future assessments might be covered without mention, inasmuch as all legislation, unless the contrary appears, is to be considered in the prospective and with reference to its application to future as distinguished from past events? If such a construction is as reasonable as that contended for by appellants, or if appellants' contention is in this particular not the only reasonable conclusion to be arrived at, the statute as to future assessments must be upheld under the foregoing authorities. Our conclusion is that to recognize appellants' contention as the one here applicable would be to construe this general title as unreasonably restricted by a subtitle, and this, too, in the absence of any clear intent derivable from the title and the act itself that it should be so construed. We cannot adopt the theory of the appellants, which seems narrow, unreasonable, and un-

duly restrictive, and a construction which might jeopardize much legislation, past and future, by the precedent that would hereby be established.

We consider none of the cases cited by appellants as contrary to our conclusions, or as supporting the appellants' position. To briefly refer to them, counsel cites *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841, *Richard v. Stark County*, 8 N. D. 392, 79 N. W. 863, and *State v. Nomland*, 3 N. D. 427, 57 N. W. 85, 44 Am. St. Rep. 572. In the first case cited the title of the act designated defendants as the parties against whom attorney fees should be allowed in final judgment on drainage cases, while the body of the measure, in direct conflict with the title, designated defendants as the parties entitled to fees, to be recovered of plaintiffs. The holding is merely that the court refused to hold that the word "defendants" in the title of the act was inadvertently used, and that, as the subject-matter of the body of the act and of the title could not be harmonized, the act was void. No question was there involved, as here, of whether a subtitle restricts legislation under the general title in the particulars covered by the subtitle. In *Richard v. Stark County* the substance of the holding was that a title "to increase the revenues of the state by changing or increasing the boundaries of the counties of Billings, Stark and Mercer" could not be used as a subterfuge under which to accomplish the real object, that of a change of county boundaries and to increase the area of counties. Likewise, *State v. Nomland* is a holding that, "because the subject of the act is not expressed in the title," the act was void under the provisions of the Constitution under consideration. *Megins v. City*, 97 Minn. 23, 106 N. W. 89, from Minnesota, wherein that court held the title of an act requiring notice of claim to cities in actions for personal injuries received on the streets and highways was not broad enough to include provisions in the statute itself relative to injuries other than personal injuries, was but drawing a distinction clearly outlined in the authorities concerning the subject-matter mentioned in the title of the act, and holding the legislation in the body of the act should be limited to the proper subject-matter. There is a well-recognized distinction between claims for injuries received on highways by travelers and highway users and claims for damage arising from consequential injuries to other persons than such users. The rule of law is that persons receiving consequential injuries, as damages to abutting property occasioned by the repair of highways, are not covered by the legislation mentioned in the title of the act in *Megins v. City*, concerning claims of damage to travelers because of obstruction to the highways or injuries resulting therefrom because of the use of the street or highway for highway purposes. This case but recog-

nizes a distinction already drawn in this state in *Gaustad v. City of Enderlin*, 187 N. W. 613.

Nor does section 179 of Cooley's Constitutional Limitations, to the effect that "the Legislature may make the title to an act as restrictive as they please," and that "courts cannot enlarge the scope of the title when plainly restrictive," here apply; our holding being simply that a subtitle concerning the application of a statute of limitation as to past assessments is not restrictive of the general title, or of legislation concerning limitation of actions as to future assessments under the general title and germane to the general subject of the government of cities, unless the intent shall be clear and plain that it shall be construed as restrictive. The Legislature has here enacted no legislation under a restrictive title, but, instead, under a comprehensive title concerning a broad subject. We cannot enlarge the scope of the title under the authority cited by appellants, and above referred to; and it must follow that we certainly cannot do the contrary, narrow its scope. It is a question of the construction to be given, concerning which each title must be construed by itself under general rules, in the main with liberality, but not to the extent of rendering the constitutional provisions nugatory, or, as is said in the comprehensive note to *Bobel v. People*, 64 Am. St. Rep. 72: "The alleged insufficiency of the title should be tested candidly and justly, and a liberal interpretation given"—and that, as also decided by our own court, "in construing the titles of laws statutes must be held constitutional unless they are clearly void," citing abundant authority.

Appellants have on rehearing urged this statute as unconstitutional on the grounds that "to sustain the special assessment according to the opinion herein would be to deprive plaintiffs of their property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States, and the plaintiffs claim the protection and benefit of said amendment"; the answer to which is that appellants have had their day in court in an opportunity to object to the assessment at the time they were by notice cited to appear and offer objections thereto, which hearing, so afforded, constitutes due process of law in the taking by special assessment of real property for such purposes. *Sollah v. Board*, 17 N. D. 393, 117 N. W. 125, appealed and affirmed in 222 U. S. 522, 32 Sup. Ct. 103, 58 L. Ed. 294, where the federal Supreme Court there answers finally this question of appellants in the following language: "Neither does that amendment (speaking of the fourteenth amendment) invalidate an act authorizing an appointed board to determine whether the proposed drain will be a public benefit, and to create a drainage district consisting

of land which it decides will be benefited by said drain, and to make special assessments accordingly, if, as here, notice is given and opportunity to be heard afforded the landowner before the assessment becomes a lien against his property."

The judgment is accordingly affirmed.

STATE v. BANKS et al.

(Supreme Court of North Dakota. Nov. 20, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1008*)—REVIEW—FINDINGS OF FACT.

In a law case, wherein a jury is waived, the findings of the trial court on questions of fact are entitled to the same weight on appeal as given the verdict of a jury on such questions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008.*]

2. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS OF FACT.

On the trial of a cause at law by the court, findings of fact sustained by substantial evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

3. BAIL (§ 90*)—SURRENDER—BONDSMEN—EVIDENCE.

Evidence examined in a case brought by the state to recover on a bail bond, and held, that a finding that the bondsmen did not arrest, surrender, deliver, or commit the defendant to the custody of the court or proper officer as required by law is sustained by substantial evidence.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 401-406; Dec. Dig. § 90.*]

Appeal from District Court, Ransom County; Allen, Judge.

Action by the State against James K. Banks and Charles G. Banks. Judgment for plaintiff, and defendants appeal. Affirmed.

Rourke & Kvello, of Lisbon, and E. F. Hull, of Sheldon, for appellants. Curtis & Curtis, of Lisbon, for respondent.

SPALDING, C. J. This is an action to recover on a forfeited bail bond given before trial of the principal on the charge of having committed a misdemeanor. A jury was waived and trial had by the court. The court found as a fact that the defendants in this case did not arrest, surrender, deliver, or commit the defendant in the criminal case to the custody of the court or proper officer, as required by law. A judgment was entered against the defendant bondsmen.

[1, 2] It may be conceded that the evidence on the question of surrender is in conflict, but it is elementary that if such is the case, and there is any substantial evidence to sustain the finding of the court on the facts, such finding cannot be reversed by this court. We are satisfied from an examination of the record that there is sufficient evidence to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

justify and sustain the finding above referred to by the trial court. The accused, one Christianson, was held to answer on the charge of maintaining a common nuisance on the 15th day of October, 1909. He was released on giving an undertaking for \$500, with appellants as sureties. The terms of the undertaking are fixed by the Code, and are: "That the above-named Samuel Christianson will appear and answer to the charge above mentioned, in whatever court it may be presented, and will, at all times, hold himself amenable to the orders and process of the court, and if convicted will appear for judgment and render himself in execution thereof, or if he fails to perform either of these conditions that he will pay to the State of North Dakota the sum of five hundred and no hundredths dollars." The evidence shows that he was tried and convicted at Lisbon, the county seat of Ransom county, on the 17th day of November, 1909, and that appellant James K. Banks was in attendance during the trial, but left before the jury returned a verdict. He testified that the next morning he was informed of the verdict of guilty, and in the afternoon of the same day Christianson came to his office in Sheldon, and that thereupon he called up Curtis, state's attorney, by telephone, and asked him what Christianson was doing at Sheldon; that Curtis replied that he was out on bonds, and that, if he did not want him there, to bring him back; that he informed Curtis that he did not wish to carry him back, unless it was necessary, whereupon Curtis replied that he would not be wanted for three or four days; that during the evening of the same day he received a telephone call from Curtis, telling him he better send Christianson down in the morning; that he reiterated that he did not want to unless it was necessary, and he was informed that he had better do it, because the judge had decided that he wanted him in the morning, and that he was told by Curtis to take him over to the train and deliver him to the sheriff, who would be on the train in the morning; that he looked for Christianson in the morning, and learned that he was out in the country a short distance at work; that he sent for him; that at train time he did not see anything of him; that he went to the train, met the sheriff inside a car, and told him that Curtis had told him to surrender Christianson to him; that he had agreed to do so, but that he was out in the country, and he had sent for him. While he was explaining to the sheriff, Christianson came in the car door, the train began to move, and he said to the sheriff, "Here he is now," and left the sheriff and Christianson standing talking, while he jumped off the train; that he did not know what became of Christianson; that he did not bring Christianson to the sheriff's office, nor before any court, nor any officer excepting the sheriff, to whom he delivered him; that

he had a talk with Curtis on the afternoon of the 18th, but Curtis did not ask him if he delivered Christianson to the sheriff in discharge of his bond; and that deputy state's attorney, Dwyre, did not ask him, so far as he recollected, if he had surrendered Christianson to the sheriff in discharge of his bond. On redirect examination he testified that he surrendered him for the purpose of being relieved from his bond, and did so in pursuance of the directions of the state's attorney, who said, in substance, that, if he desired to be released, he could surrender the defendant to the sheriff.

The sheriff testified that he met Banks and Christianson at the train at Sheldon when he was returning from Fargo with a prisoner. He then testified, in substance, to the conversation with Banks, the same as Banks had testified, and that he informed Banks that he would take him down to Lisbon, but that Banks did not use the word "surrender" in the conversation with him, but did bring the prisoner and deliver him to him; that he understood he was to bring him to Lisbon, and was responsible for him until he got there. He found other matters to take his attention when he reached Lisbon, and he told Conboy, his deputy, to take the prisoner to Curtis, who would tell him what to do, that he did not know what the situation was with Christianson, and for that reason told him to take him to the state's attorney.

Conboy testified that the sheriff told him to take the prisoner to the state's attorney; that he took him to the courthouse, he believed into the courtroom; that Curtis and Dwyre were there at the time, and Curtis said to let him go until after dinner, which he did, and never saw him afterwards; that he did not remember Curtis asking him if Christianson had been surrendered by his bondsmen, and telling him that, if he had not been, they had nothing to do with him; that he did not think such a conversation took place.

Curtis, the state's attorney, testified about being called on the telephone by Banks, about telling him that he could surrender Christianson to the sheriff at the train in discharge of the bond, or that he could take such steps as he wanted to pursue, but that he did not tell him he wanted him there; that he called him up as a matter of accommodation, so Banks could save the expense of bringing him down; that, when Conboy brought him into the courtroom, he asked Conboy if Christianson was surrendered in exoneration of his bond, and was informed by Conboy that he was not; that he told Conboy that they then had nothing to do with him, he was out on his bond; that later in the day he had a conversation with Banks in which he asked him particularly if, when he took Christianson to the train, he turned him over to the sheriff in discharge of his bond, and that Banks said, "No;" that Dwyre

had a conversation over the telephone which he heard one end of, and asked Banks the same thing; that he did not tell the deputy sheriff at any time to turn him loose.

Dwyre testified as to his telephone conversation with Banks, and hearing Curtis' conversation with him; that to the best of his recollection Curtis asked Banks if he surrendered Christianson in discharge of his bail; that his best recollection was that he did not himself ask Banks that question, but he testified he did ask him if he wanted him put in jail, and he said, "No."

[3] Assuming that a surrender of the defendant after verdict, but before sentence, could be made by the bondsmen to the sheriff, outside of court, without any arrest by any one, there appears to be a conflict in the evidence as to whether Banks did surrender him in exoneration of his bond. His intent is an important element in the consideration of this question, and in determining what his intent was the question testified to by Curtis, and the answer thereto, as he says it was given by Banks, that he did not turn him over to the sheriff in discharge of his bond, and the answer to Dwyre, that he did not want him put in jail, were material elements; and we think, taken altogether, the evidence is sufficient to sustain the finding of the court on this question of fact, all the time assuming that a surrender could be made as we have said in that manner. It was evident that the court did not attach much weight to the statement by Banks that he surrendered the prisoner to the sheriff for the purpose of being relieved from his bond, and that the evidence may be construed as contended by the state, to the effect that Banks simply placed him under the oversight of the sheriff, the same as he might have asked any other person to keep an eye on him, to save himself the trouble of going to Lisbon. Our assumption that a surrender could be made outside of court or in the manner indicated, and the bondsmen thereby discharged, without action of the court, if such had been the intent of the bondsmen, is only for the purpose of the case, and is not intended as even an intimation that it could be so done.

The statute governing the surrender of a defendant by bail is as follows:

Section 10266, R. C. of 1905: "Any person charged with a public offense and admitted to bail may be arrested by his bail at any time before they are finally discharged, and at any place within the state; or by a written authority indorsed on a certified copy of the undertaking of bail, they may empower any officer or person of suitable age and discretion to do so, and he may be surrendered and delivered to the proper sheriff or other officer, before any court, judge or magistrate having the requisite jurisdiction in the case; and at the request of such bail, the court, judge or magistrate shall recommit the party so arrested to the custody of the sheriff

or other officer, and indorse on the undertaking of bail, or certified copy thereof, after notice to the state's attorney, and if no cause to the contrary appears, the discharge and exoneration of such bail; and the party so committed shall be held in custody until discharged by due course of law."

Section 10267: "If, without sufficient excuse, any person who has given an undertaking in a criminal action or proceeding neglects to appear according to the terms or conditions of the same, either as a witness or for hearing, arraignment, trial or judgment, or upon any other occasion when his presence in court, or before the magistrate may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the matters to be entered upon its minutes and the undertaking of bail, or the money deposited instead of bail, as the case may be, is and shall be thereupon declared forfeited, but, if at any time before the final adjournment of the court, such person or his bail appears and satisfactorily excuses his neglect the court may direct the forfeiture to be discharged upon such terms as may be just. After the forfeiture, the state's attorney must proceed with all due diligence, by action against the bail jointly or severally in his discretion upon the undertaking so forfeited. If money instead of bail is so forfeited, the clerk of the court or other officer with whom it is deposited, must immediately after the final adjournment, or at such time as the court may direct, pay over the money deposited to the county treasurer."

Section 10269: "No action brought on an undertaking of bail is barred or defeated, nor shall judgment thereon be arrested by reason of any neglect or omission to note or record the default of any principal or surety at the term or session when such default happened, nor by reason of any defect in the form of the undertaking, if it sufficiently appears, from the tenor thereof, at what court the party or witness was bound to appear, and that the court or magistrate before whom it was taken, was authorized and required to take the same."

Section 10270: "Any surety on such undertaking may be discharged from further liability thereon, at any time before final judgment against him, by surrendering to the court or proper officer the principal in such undertaking, if such principal is held as a witness in such action and it has not been tried; or by paying to the clerk of the court the amount specified in such undertaking, with costs as the court may direct."

The last two sections quoted were enacted subsequent to the enactment of the preceding sections.

The judgment is affirmed.

GOSS, J. (specially concurring). The statement of facts in the main opinion is very

general, and tends to conceal what might be termed the equities of the defendants. All facts and circumstances in evidence, considered together, disclose that the defendants fully sensed their responsibility as bail and sought to fulfill the spirit of the law and discharge themselves as bail. But, notwithstanding their endeavors in such particular, the evidence is somewhat indefinite on the fact of the surrender to the sheriff. The delivery of the prisoner was undoubtedly intended by the defendants to have been made in exoneration of bail, but a question of fact exists as to whether the sheriff so received the prisoner; the delivery having been hastily made at the train with no time for extended inquiry or explanation. In fact, the sheriff testifies concerning such surrender that "he didn't exactly know what the situation was with Christianson, and for that reason" sent him to the state's attorney. As to who was negligent in the subsequent release resulting in the escape of the prisoner is immaterial. The fact remains that the evidence raises a conflict on facts as to whether the sheriff understandingly received Christianson from Banks in discharge and exoneration of bail, or whether he received him into his custody acting in law as an agent for Banks in conveying the prisoner previously arrested by bail to the county seat to be thereafter remanded to custody, with exoneration of bail to be entered, prior to which the release and escape occurred. On this question of fact, the findings of the trial court, contrary to the contention of the defendants, is conclusive; and upon such ground alone concurrence is had in the decision announced by the majority opinion, which, by the way, meets with the concurrence of all members of the court solely on facts, even though the contrary might be the inference from the quotations in the opinion of the various statutory provisions as to bail, none of which are interpreted or construed or passed upon in the opinion as the writer understands said holding.

SHERLOCK v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

(Supreme Court of North Dakota. Nov. 20, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 327*)—OPERATION—INJURIES AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.
A driver about to cross a railroad track at a public crossing in the country is charged with knowledge that such crossing is a dangerous place, and that it cannot be assumed that cars are not approaching from either direction. He is bound to assume that cars are coming until satisfied by direct evidence to the contrary, and to this end must vigilantly use his senses of sight and hearing, and do all that ordinary care and prudence would dictate, having in view the surrounding circumstances, to avoid

injury, regardless of whether any signal is given by an approaching train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

2. RAILROADS (§ 348*)—OPERATION—ACCIDENT AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

Where the exercise of ordinary precautions of looking and listening and making an intelligent use of one's faculties to inform himself as to the approach of a train is neglected, and when the taking of such precautions would have avoided an accident, negligence is conclusively established, in the absence of conflict in the evidence on these subjects.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.*]

3. NEGLIGENCE (§ 80*)—CONTRIBUTORY NEGLIGENCE—EFFECT.

Where an injury is due to the negligence of both parties, no recovery can be had.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 84, 85; Dec. Dig. § 80.*]

4. RAILROADS (§ 324*)—OPERATION—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

The greater the danger by reason of weather conditions rendering it difficult to see a train or hear its approach, the greater the caution necessary to constitute ordinary care.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1020-1025, 1028; Dec. Dig. § 324.*]

5. RAILROADS (§ 346*)—OPERATION—ACCIDENT AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—PRESUMPTIONS.

The law of self-preservation may usually be considered in favor of the plaintiff, where doubt exists as to his ability to see or hear an approaching train, but when no such doubt appears, and it is clear that had he looked and listened he could have seen such train, and the evidence shows that he was not in the exercise of ordinary care, no inference arising from the instinct of self-preservation is applicable in his favor.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1117-1123; Dec. Dig. § 346.*]

6. RAILROADS (§ 348*)—OPERATION—ACCIDENTS AT CROSSINGS—EVIDENCE.

While there may be exceptional circumstances excusing a party from the observance of the rule regarding looking and listening, it is held that the facts of this case disclose no such circumstances.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.*]

7. RAILROADS (§ 327*)—OPERATION—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

It is the traveler's duty to look in both directions at a crossing for trains, and this rule is emphasized where there are two tracks which render it possible for trains to approach from either direction, or pass each other at the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

8. RAILROADS (§ 327*)—OPERATION—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

The only diversion of attention excusing failure to look and listen at a railroad crossing is where the attention is so irresistibly forced to something else as to practically deprive a traveler of the opportunity to look and listen.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

9. APPEAL AND ERROR (§ 1056*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The exclusion of evidence of witnesses as to the possibility of their hearing the signals of the train, if any were given, just prior to the accident, was nonprejudicial, when it was the duty of the deceased to look and listen, regardless of signals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

10. EVIDENCE (§ 359*)—DOCUMENTARY EVIDENCE—PHOTOGRAPHS.

While great care should be exercised in receiving photographic exhibits showing elevations, they may be received when properly verified, and it is clear that conditions were the same when taken as when an accident occurred.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1509-1512; Dec. Dig. § 359.*]

11. EVIDENCE (§ 359*)—DOCUMENTARY EVIDENCE—PHOTOGRAPHS.

Plaintiff's husband was killed at a railway crossing December 14, 1906. Photographic exhibits offered in evidence were taken the following June. The record discloses that the conditions were the same as when the accident occurred except as to snow, and the removal of one building on the side of the highway not necessary to consider in relation to the issues. *Held*, that the difference in conditions, under the circumstances disclosed, was immaterial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1509-1512; Dec. Dig. § 359.*]

12. RAILROADS (§ 348*)—OPERATION—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Plaintiff's husband was driving a team and grain tank north on a highway toward a railroad crossing at a slow walk, and was killed by a train on the crossing approaching from the east at from eight to ten miles per hour. The view from the highway for at least 1,700 feet south of the crossing of the railway toward the east was unobstructed except by two houses on the east side of the highway. It was 277 feet from the most northerly house to the crossing. For that distance the view was quite unobstructed. The deceased, while passing at least between the house and the crossing, looked steadily toward the northwest. He wore a fur coat with a collar turned over his ears. The wind was from the northwest. He made no effort, at least during that distance, to ascertain the approach of any train from the east. *Held* that, assuming that no signal was given by the train, he was guilty of contributory negligence, and not exercising his senses of seeing and hearing, precluding a recovery for his death.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.*]

Appeal from District Court, Barnes County; Burke, Judge.

Action by Mary Sherlock against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

This appeal was taken from a judgment of the district court of Barnes county in favor of the defendant, and from an order denying new trial. The action was for damages for causing the death of Thomas Sherlock at defendant's crossing, and the defense was contributory negligence of said Sherlock. At the close of the case the court, on

motion, directed a verdict in favor of the defendant. The facts disclosed are about as follows:

The deceased, Thomas Sherlock, was the husband of Mary Sherlock, plaintiff. He was employed by a milling company in Valley City as a teamster. December 14, 1906, while in such employment, he was engaged in hauling wheat from the elevator in North Valley City to the mill of his employer in Valley City, and while driving a tank wagon north was hit by a train from the east, consisting of a snowplow, engine, and caboose, moving from eight to ten miles per hour. The elevator and mill were somewhat over a mile apart. He had been engaged in this occupation for some days, and was thoroughly familiar with the road leading between the two points, and with the crossing over the railroad track where he was killed. He was in the entire possession of his faculties. In making his trips he passed along a public highway, north from the city of Valley City to the elevator at North Valley City, which elevator was on the north side of defendant's railroad track, which, at the point of crossing, consisted of its main line and a side or passing track. The road over which he traveled crossed the Sheyenne river 1,700 feet south of the railroad crossing, and was graded up a foot or more above the level of the prairie, and there was snow upon the road one foot or over deep.

Defendant's line runs, at the point of crossing, a little south of east, and the crossing is nearly at right angles. This railroad is visible from the road, over which the deceased traveled, a mile or farther in an easterly direction, and can be seen from the highway at least all the distance from the Sheyenne river crossing, to the highway crossing where the accident occurred, except for two houses situated on the east side of the highway and facing west, and possibly a shack or barn close to the track, but which, on account of being low posted and setting below the track, either did not obstruct the view or obstructed it to so slight an extent as to be immaterial. The grade of the railroad track for practically the entire distance visible from the highway was considerably elevated above the surrounding prairie.

It was 277.8 feet from the track to the north line of the north house, to which reference has been made, and the distance between that and the other house, 14.75 feet. The north house had a front toward the highway of 18.25 feet, north and south, and was 24.23 feet in depth, east and west, and the more southerly house was 25.25 feet by 24.5 feet. The north house was a story and a half, and the south one one story high. The barn nearer the track was a little over 20 feet in length, east and west, and about 12.25 feet north and south. The total height of the building was 10.3 feet. It stood 94

feet south of the center of the main track, and the ground on which it stood was considerably lower than the track.

The depot building at North Valley City is 649.46 feet nearly west of the crossing. The deceased was standing up in the wagon, and had on a fur coat with collar turned up over his ears. His back, according to the uncontradicted evidence, was turned toward the east, and he appeared to be watching the depot, or a train standing near and west of the depot, apparently taking water or fuel. The day was cold, with considerable wind from the northwest and some snow blowing, and perhaps falling, but the amount of snow and storm was not sufficient to prevent a fairly clear view of the track to the east. He was seen and watched by several witnesses during more or less of the time from his passing the houses until he reached the place of the accident. One Welmer, who resided in the north house, testified that he was out of doors when the accident occurred, and saw the deceased pass his house and drive toward the track, and saw the accident; that his team was going at a slow walk, and he did not try to hurry them when he reached the track; that the deceased could see down the track for a considerable distance, but that he was looking toward the depot.

A daughter of this witness also testified to seeing deceased coming, and witnessing the accident; that she first saw Sherlock when opposite the north house; that he was looking toward the depot, and continued to look toward the depot and did not turn toward the east; that, where she was on the ground, she could see east a quarter of a mile; that the little barn might have obstructed the view a little ways; that she could see the railroad bridge a quarter of a mile east; that deceased was not looking toward the incoming train, but kept his head toward the west; that his team was walking.

One Kuester testified that at the time of the accident he was in the house farthest south; that he saw Sherlock driving past; that, when he went past, he was standing up, looking toward the depot. He saw the accident plainly. He did not see Sherlock all the time between his house and the track.

One Briggs testified that he was near the depot when the accident occurred; that he saw Sherlock about 200 feet before he got to the railroad track; that he was looking northwest; that he last saw deceased right close to the crossing; and that he was still looking west, and the train just a few feet from him; that he seemed to be looking toward the depot all the time; that he first saw the train coming three-quarters of a mile east, and could see it clearly and plainly as it continued up to the crossing; that the barn to which reference has been made did not obstruct the view between the high-

way and the railroad for any one driving along; that cars were visible over the top of it; that the snow was blowing some, but not enough to obstruct the vision; that he could see clearly and plainly.

There is a conflict in the evidence as to whether the whistle was blown or bell rung. Photographs taken the 13th of June, 1907, were received in evidence. The photographer testified that he had been engaged in the business for more than 20 years; that the writing on the back of the photographs were notations made and measurements taken by him when he made the photographs; that they were correct, and represented the location of his camera and the direction in which it was pointed; that he had been familiar with the location of North Valley City since it started; that he was familiar with the buildings in question on the 14th of December, 1906; also with the changes which had been made between that time and the time of the photographs; that everything remained in the same condition as when the accident occurred, except the snow had disappeared and a building on the west side of the highway had been removed.

In Exhibit No. 1 the camera was placed 50 feet south from the main line of the railroad, in the center of the road, and pointed west. It shows an unobstructed view between the depot, where the witness Briggs was at the time of the accident, and the highway to the crossing.

In Exhibit No. 2 the camera was placed in the same position, but pointing easternly, and shows an unobstructed view of the track toward the east from this point until the railroad strikes the hills to the southeast, which is a mile or more.

Exhibit No. 3 is a photograph taken looking easternly, with the camera placed in the center of the road, 290 feet south of the main track; it showing between the two houses referred to. It shows an unobstructed view of the track for a short distance, looking between the two houses.

Exhibit No. 4 shows the track looking easternly from a point in the road 100 feet south of the main line, and the view includes the barn to which reference has been made. It shows the view at this point of the track unobstructed until it reaches the hills, and also shows to some extent the elevation of the track above the surrounding ground and the barn.

Exhibit No. 6 was taken in the center of the road, 230 feet south from the main line, looking east, and also shows an unobstructed view of the track, east to the point where it enters the hills, except that it indicates that the barn, if the deceased was no higher from the ground than the camera, would partially obstruct the view of the track for a few feet—the length of two or three cars.

Exhibit No. 8 shows an unobstructed view of the track for a long distance, from a

point in the road 25 feet south of the main line, looking east.

There was no conflict in the evidence except as to the engineer giving a signal, and as to the extent to which the storm and snow obstructed the vision, but no witness testified that the conditions were such as to obscure the sight of the train for less than half a mile. One witness testified that he watched the train coming three-quarters of a mile.

Errors are assigned on the direction of the verdict for defendant, and upon various rulings on the admission and rejection of evidence. Sufficient reference will be made to these latter as considered.

M. A. Hildreth, of Fargo, for appellant. Lee Combs and L. S. B. Ritchie, both of Valley City (A. H. Bright, of Minneapolis, of counsel), for respondent.

SPALDING, C. J. (after stating the facts as above). The evidence of which we have stated what we consider the material parts may be resolved into a showing that there was no material physical obstruction to the view of the train for nearly a mile from any point in the highway between the north house and the track, a distance of over 277 feet; that, although stormy, the storm was not severe enough to prevent any one looking down the track to the east from seeing the train nearly or quite a mile; that the deceased's team was proceeding during the distance mentioned at a slow walk; and that he was observed by at least four witnesses part of the way from the house to the track, and at all times when so observed had his fur coat collar turned over his ears, and was looking to the northwest.

One witness saw him from the time he passed the house until he reached the crossing, and stated that he seemed to be looking toward the northwest all the time. It is thus clear that he made no observation calculated to inform himself of the approach of the train from the east. Presumably his attention was attracted by the blowing off of steam of the train standing back and west of the depot. There were two tracks, so it was possible for a train to approach the station from each direction, east and west.

For the purposes of deciding this appeal, it must be assumed that no signal was given from the approaching train. Whatever the personal views of the members of this court may be regarding the contributory negligence of the deceased, the rule on the subject has been firmly established in this state, and we do not feel justified in departing from it, especially in view of its being supported by the great weight of authority from other courts, although counsel for appellant cites a few very respectable authorities which might seem to justify a reversal.

[12] We first proceed to consider the law with reference to the facts, and later shall

briefly consider the assignments regarding the admission and rejection of evidence.

[1] The driver of a team about to cross a railroad track at a public crossing in the country is charged with knowledge that such crossing is a dangerous place, that it cannot be assumed that cars are not approaching from either direction, or that there is no danger therefrom. He is bound to assume that cars are coming until satisfied by direct evidence to the contrary, and to that end he must vigilantly use his senses of sight and hearing in endeavoring to avoid injury, and to do all that ordinary care and prudence would dictate to avoid injury, having in view all the surrounding circumstances; and this whether or not any signal is given by an approaching train. *Hope v. Railway Co.*, 19 N. D. 438, 122 N. W. 997, and authorities cited; *West v. N. P. R. Co.*, 13 N. D. 221, 100 N. W. 254, and authorities cited; *Pendroy v. G. N. R. Co.*, 17 N. D. 483, 117 N. W. 581; 23 A. & E. Ency. Law, 765.

[2] Where the exercise of the ordinary precautions of looking and listening and making an intelligent use of one's faculties to inform himself as to the approach of a train are neglected, and when the exercise of such precautions would have avoided the accident, negligence is conclusively established. It is apparent in the case at bar that Sherlock would have seen the train had he looked to the east or listened for it any time in the 277 feet between the north house and the crossing, and without much doubt he could have seen it had he looked toward the east at any time after crossing the Sheyenne river, 1,700 feet south of the railroad crossing. Had he looked and seen it, or listened and heard it, after passing the houses, the natural instinct of self-preservation would most certainly have caused him to avoid it. The evidence fails to show that he changed the speed of his team while passing that distance. In fact, it was, as has been stated, proceeding but very slowly and must have been under his control at all times.

[3] If the failure to give a signal from the train was negligence on the part of the defendant, the negligence of the deceased contributed to the accident, and the case, therefore, comes under the rule that, where an injury is due to the negligence of both parties, no recovery can be had. *West v. N. P. R. Co.*, supra.

[4] The deceased was not excused by the weather from the exercise of ordinary care, even if it was sufficiently thick to render it difficult to observe the train or to hear its approach. The greater the danger the greater the care necessary for him to exercise, and the greater the caution necessary to constitute ordinary care. *Pendroy v. G. N. R. Co.*, supra; *West v. Railway Co.*, supra; *Hope v. Railway Co.*, supra.

[5] It is argued that the law of self-preservation must be taken into consideration by this court as an element of great importance,

and that the presumption is that the deceased would, in the observance of that law, have stopped had it been possible for him to see the train, and that, therefore, he did not knowingly and recklessly attempt to cross the track. This law is entitled to great weight in a proper case, and usually may be considered in instances where doubt exists as to one's ability to see the train or hear it, but no such doubt is disclosed by the record in this case. See supplemental opinion in *Kunkel et al. v. Soo Ry.*, 18 N. D. 382, 121 N. W. 830. And the law of self-preservation, as above observed, would have worked in the deceased's favor, and could not well have done otherwise, had he used his senses as he might and should have done. Where all the evidence shows that the deceased was not in the exercise of ordinary care, no inference arising from the instinct of self-preservation is applicable in his favor. *Gahagan v. Boston, etc., R. Co.*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426; *Baker v. Chicago, etc., R. Co.*, 95 Iowa, 163, 63 N. W. 667.

[9] It is also urged that, because deceased's attention appeared to have been diverted by the train standing opposite and west of the depot, the circumstances are rendered exceptional, and that, therefore, the general rule relating to contributory negligence is not applicable, and that the case, therefore, became one for the jury. Numerous authorities may be found holding that extraordinary conditions and circumstances take cases out of the general rule. See *Davy v. G. N. R. Co.*, 21 N. D. 43, 128 N. W. 311.

[7] But we do not consider this case as coming within such an exception; the rule applicable being rather as laid down by many authorities that it is the plaintiff's duty to look in both directions for trains.

[8] It is obvious that this rule must be emphasized rather than relaxed where there are two tracks at the crossing, rendering it possible for trains to approach from each direction, or to pass each other, and the only diversion of attention excusing the failure to look and listen is where the attention is so irresistibly forced to something else as to deprive a traveler of the opportunity to look and listen. *Guhl v. Whitcomb et al.*, 109 Wis. 69, 85 N. W. 143, 83 Am. St. Rep. 889. The facts in the above-cited case are very similar to those of the case at bar. *Hain v. C. & St. P. R. Co.*, 135 Wis. 303, 116 N. W. 20; *Smith v. C. & St. P. R. Co.*, 137 Wis. 97, 118 N. W. 638; *Clemons v. C. & St. P. R. Co.*, 137 Wis. 387, 119 N. W. 102; *Grimm v. Mid. Elec. Ry. & Light Co.*, 138 Wis. 44, 119 N. W. 833; *White v. M. & St. P. & S. St. M. Ry. Co.*, 147 Wis. 141, 133 N. W. 148. That the deceased did not exercise the care with which he is charged in law under the authority of the foregoing and numerous other cases is clear. The minds of reasonable men could not disagree on this. It is consequently apparent that, in the ab-

sence of reversible error on questions of evidence, the court did not err in directing a verdict for the defendant.

[8] Regarding the errors assigned relating to the admission and rejection of evidence, most of such assignments relate to questions concerning the probability or possibility of witnesses hearing the locomotive bell ring or its whistle blow just prior to the accident. As to these assignments, in view of our conclusion that it was the duty of the deceased to make use of his senses by looking and listening for the approach of trains, and regardless of whether signals were given or not, it is apparent that they were immaterial, and, if their rejection was error at the time it occurred, it was error without prejudice.

[10] Error is assigned on the overruling of an objection to the admission of the photographic exhibits in evidence, on the ground that there was no evidence that they were true pictures of the situation at the time of the accident. This court held, in *Higgs v. Minneapolis, St. P. & S. St. M. R. Co.*, 16 N. D. 446, 114 N. W. 722, 15 L. R. A. (N. S.) 1162, 15 Ann. Cas. 97, that, if properly verified, photographs may be received in evidence to show locations and conditions.

[11] In the case at bar there can be no question of the photographs being correct representations of the place of the accident and its surroundings when taken in the following June. The only ground for the contention that they are inadmissible would seem to be that the accident occurred in December when the ground was covered with snow, and that one building had been removed between the date of the accident and the date of the photographs. The evidence is clear and definite that, except in these two particulars, conditions were the same. We are unable to see how the snow on the ground and the absence of snow can constitute a material difference or have any material bearing on the issues. If it has it is in favor of the plaintiff, because with a foot of snow on the highway, and the wagon of the deceased elevated accordingly above the surface of the dirt road, and the train on the rails not correspondingly raised, the power of observation of the deceased would have been greater when the accident occurred than is shown by the photographs after the snow had disappeared. The removal of the building on the west side of the highway in no manner affected the accuracy of the photographs as to the location of the houses and the track to the east, and the ability of the deceased to perceive a train coming from the east from any point between the houses and the crossing. We are not unmindful of the fact that great care should be exercised in receiving photographic exhibits showing elevations. Much of the power to judge of distances from the pictures depends upon the kind of camera used, its focus, and its elevation; but the photographic exhibits in

this case are of such a nature that they do not, we think, misrepresent the situation in the respects for which they were offered in evidence.

Other assignments are without merit.
The judgment is affirmed.

BURKE, J., being disqualified, did not participate.

STATE v. MOELLER.

(Supreme Court of North Dakota. June 29, 1912. On Rehearing, Dec. 16, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 539*)—EVIDENCE—TESTIMONY AT FORMER TRIAL.

Upon a former trial of this action in the district court, one Dr. E. was a witness for the state. He was asked a question upon cross-examination to which an objection was sustained by the trial court, which ruling was held to be error by this court upon a former appeal. At the present trial below the said Dr. E. was outside of the jurisdiction of the trial court, and his testimony was given by the official reporter of the former trial from his shorthand notes. Appellant contends that this testimony was improperly admitted, because he had no opportunity to cross-examine the witness upon the former trial. However, the statement of the case shows that substantially the same question was asked the doctor upon the former trial, and that he answered the same without objection. The statement of the case upon the former appeal being narrated and much abbreviated, and the state failing to call the facts to the attention of the court, misled this court at that time. Under the facts now shown, it is held that defendant had a full opportunity to cross-examine the witness upon the former trial, and that his objection to the testimony upon the second trial upon that ground was properly overruled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1230; Dec. Dig. § 539.*]

2. CRIMINAL LAW (§ 736*)—EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATORS—DETERMINATION.

Whether one Dale was an accomplice with defendant in the commission of the offense, and whether his acts, as such, in furtherance of the common object tended to show the guilt of defendant, were facts for the jury to determine; and the testimony offered at the trial of acts done by Dale, in furtherance of such common purpose, towards the commission of the offense were properly admitted, and the instructions of the trial court were full, fair, and accurate.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1219, 1220, 1701, 1702, 1705, 1716; Dec. Dig. § 736.*]

3. CRIMINAL LAW (§ 485*)—EVIDENCE—EXPERT TESTIMONY—ADMISSIBILITY.

Dr. W., sworn as an expert, was asked two hypothetical questions, based upon the testimony of all of the state's witnesses, including that of Dr. E., and calling for his opinion as to the cause of the death. Held, that the questions were proper; the testimony of Dr. E. being held properly admitted in paragraph 1.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 485.*]

4. CRIMINAL LAW (§ 728*) — PRESENTING QUESTIONS IN TRIAL COURT—NECESSITY FOR TIMELY OBJECTION—REMARKS OF COUNSEL.

The assistant state's attorney, during his remarks to the jury in summing up the case,

referred to the defendant as a "professional abortionist," "a Moloch who kills unborn children for the almighty dollar," etc., but the defendant's attorneys "did not care to interrupt the argument," and did not give the trial court any opportunity to stop the language or rebuke counsel, but made the objection after the argument had ceased. Held, following State v. Knudtson, 21 N. D. 562, 132 N. W. 149, that this court will not reverse the trial court for objectionable language of counsel, not called to his attention by timely objection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1689-1691; Dec. Dig. § 728.*]

Appeal from District Court, Ward County; Leighton, Judge.

Thor Moeller was convicted of murder in the second degree, and appeals. Affirmed.

Palda, Aaker & Greene, of Minot, for appellant. D. L. Nash, State's Atty., of Minot, for the State.

BURKE, J. Defendant stands convicted of murder in the second degree; it being alleged that he caused the death of a certain young woman upon whom he performed a criminal operation. This is his second conviction; the first having been set aside by this court. See same title, 20 N. D. 114, 126 N. W. 568. At this time he does not challenge the sufficiency of the evidence received to sustain the conviction, but complains of certain rulings of the trial court and misconduct of the assistant prosecuting attorney. Owing to the excellent presentation of this appeal, we are able to dispose of the case with the minimum amount of labor. Appellant groups his assignments of error under four heads, and we will dispose of them in order.

[1] (1) Upon the first trial of this case one Dr. Engstad was sworn as a witness and testified that he had examined the girl some six days prior to her death, and had found her in robust health. Upon his cross-examination he was asked by appellant's attorneys whether an infection, caused by an injury to the uterus, might not remain dormant a greater or less period of time before it spread out and gave evidence of its presence. This question was objected to by the state, and the objection sustained. In the former opinion this court held that this ruling was error. The said ruling being based upon the statement of the testimony at that time presented; it being deemed proper to show that the girl might have already inflicted upon herself the wound that caused her death, and that the doctor was mistaken in stating that her health was good at the time he examined her. At that trial, however, the testimony of the doctor was narrated, and this court, not having had its attention called thereto, was misled and made the ruling alleged; but at the present time it appears from a fuller statement of the testimony that practically the same question had been asked the doctor,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and that he had answered it without objection from the state. Thus the ruling of the trial court in the former trial was error, if at all, without prejudice. All of this becomes relevant to this appeal, when we find that upon the present trial Dr. Engstad was out of the state, and could not be found. His testimony, given upon the former trial, was thereupon offered in evidence to prove the same facts. Appellant does not seriously dispute that the testimony of the doctor, taken at the former trial, might have been used if a proper foundation were laid therefor, but insists that such foundation was not laid. In particular they assert that upon the first trial defendant was denied the right to fully and fairly cross-examine Dr. Engstad. As we have already shown, this is apparently so only. It thus follows that the testimony of the doctor taken upon the former trial was admissible.

[2] (2) The second group of errors relate to the admission of certain testimony showing acts of one Dale, whom the state alleges to be a fellow conspirator with the defendant and the girl in procuring the abortion. Objection is also made to the instruction of the trial court in mentioning conspiracy at all. Dale, it is alleged, was the man responsible for the pregnancy of the girl. It was shown at the trial that he came to Minot a day before the girl, and engaged the room at the hotel wherein she died, and that he was seen in consultation with the defendant; that he bought for the use of the girl and doctor certain articles, such as distilled water, that were found later in the girl's room; that he was seen frequently in the room just before her death; that he was seen carrying the slop jar from the room, and that it was afterwards found to be bloody; that when the girl died defendant sent a man across country 60 miles to bring Dale into Minot. Defendant admitted that Dale was the person who had asked him to attend the sick girl. All of these acts took place between the 3d and 7th of October. Upon these facts the trial court instructed the jury that they might consider the acts of Dale only if they found a conspiracy existed, and that if they did not find such conspiracy the actions of Dale should be disregarded. We believe the testimony was properly admitted, and that the instructions of the court were proper. All of the acts were in furtherance of the offense, and part of the *res gestæ*. The statements of Dale not so related to the offense, and which were condemned by this court upon the first appeal, were not offered upon this trial. For a full discussion of this subject, see the famous Anarchist Case (*Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, note at page 478).

[3] (3) The next group of assignments of error relate to two hypothetical questions asked of the expert, Dr. White. In para-

graph 1 we have held that the testimony of Dr. Engstad, given upon the first trial, was properly received at the second trial. After this question had been received, Dr. White was asked a very lengthy hypothetical question, based upon the assumption that all of the state's evidence, including Dr. Engstad's, was true. The material parts of Dr. Engstad's testimony were that the girl had called upon him October 1st, and had been by him examined, with the result that he found nothing wrong with her lungs, heart, or other organs, and that she appeared to him to be in excellent health. He had seen her a day or two later upon the street, with a satchel, going towards the Great Northern depot, and she seemed in good health. He also testified that she had no temperature upon the first examination, and that she was pregnant. All of these facts were assumed as correct in the question asked Dr. White, and were well within the rules. Then Dr. White was asked: "In your opinion, assuming these facts to be true, what was the cause of death?" Of course, the testimony of all the witnesses in the case was included in the first question and also in the second. As we have already held the admission of Dr. Engstad's testimony proper, the principal ground of complaint is disposed of. There was plenty of evidence to justify the questions, and the competency of Dr. White is conceded. Therefore there was no error in allowing him to answer. To be true Dr. Engstad admitted the possibility that the girl might have been carrying the germs that caused her death at the time of his examination; but he says that it was a *possibility* only, and not a probability. Until mankind is much farther along upon the road to learning, it will not be safe to disregard the testimony of a witness because he admits the possibility of an error in his judgment.

[4] (4) This brings us to the final group of assignments. It relates to alleged misconduct of an attorney who was assisting the state's attorney during the trial. This attorney, Mr. Sinkler, in closing his remarks to the jury, used language of which defendant now complains. It will not be necessary to set much of it out in this opinion; but the gist of the statement is as follows: "A Moloch who kills unborn children for the sake of the almighty dollar," "professional abortionist," etc. It is claimed that these statements are not supported by evidence, and prejudicial to the defendant. The conduct of the state's attorney and his assistants should be dignified, truthful, and honorable, and yet vigorous and convincing. It is hard to lay down fast rules to cover every possibility that may arise. The state's attorney may be driven to make indiscreet statements by taunts of opposing counsel, or he may be induced to make passionate remarks by some action of the defendant himself. In the case at bar it ap-

pearls from Mr. Sumner's remarks that the defendant had smiled at some of his statements made to the jury. In the heat of combat something may be said or done that needs correction. The trial court is there for that purpose. If the state's attorney makes remarks such as the above, the defendant must make complaint at once, or the trial court may conclude that they are not objectionable. In the case at bar no complaint was made to the trial court, because, as counsel states, "he did not care to interfere with the argument." Some attorneys take swift advantage of the sympathy of the jury for any one in trouble, and use the remarks of the state's attorney as a basis for a "fair play" appeal to the jury. In the absence of complaint, the court may have assumed that such was the intention of defendant's attorneys. The matter is one largely in the discretion of the trial court, who heard all of the argument, and heard and saw the possible provocation. This court in the case of *State v. Knudtson*, 21 N. D. 562, 132 N. W. 149, has passed squarely upon this point, and we see no reason to disagree with the rules therein established. Without approving of the remarks made, we must decline to reverse the case, in the absence of timely objection and a ruling by the trial court. The other assignments of error are covered by the foregoing, or are unsupported in appellant's brief.

Finding no error, the judgment is affirmed.

GOSS, J., disqualified. NUCHOLS, District Judge, sitting in his stead.

On Rehearing.

PER CURIAM. On the former appeal of this case we held that a certain ruling excluding an answer to a question propounded by the defendant's counsel to the witness, Dr. Engstad, on cross-examination, constituted error. This holding was made toward the end of the opinion and after other controlling questions had been decided in defendant's favor, necessitating a new trial, and was in the nature of a pronouncement upon a rule of evidence for the guidance of the lower court on the second trial. It was unnecessary to the decision that we should have determined whether, in the light of the whole record, such ruling was prejudicial; nor was this phase of such ruling argued by counsel or considered by the court. Moreover, the record on the former appeal gives the testimony only in the narrative form, while on the present appeal it is set out fully by questions and answers. Our attention was not called to this fact by counsel. These facts are sufficient to explain our

oversight on the former appeal. If, indeed, it can correctly be contended that we there in effect held such error prejudicial. Notwithstanding these facts, and conceding, for the sake of argument, that a fair interpretation of our former decision leads to the conclusion that we held such ruling to be prejudicial error, it does not follow as a necessary conclusion that such ruling is, on this appeal, controlling and decisive, or that it was controlling and decisive in the trial court, under the doctrine of the law of the case, upon the question here presented, as to whether a sufficient preliminary foundation had been laid for the introduction of the former testimony of Dr. Engstad by showing that, as a matter of fact, a full and fair opportunity was afforded the defendant for cross-examination of such witness at the former trial. The question thus decided on the former appeal is not the *same* question confronting us on this appeal; and the doctrine of the law of the case so earnestly invoked by appellant's counsel is not applicable. The question thus before us on the former appeal involved the correctness of a ruling upon a certain objection to a specific interrogatory propounded to the witness Engstad, and, if found to be erroneous, then, perhaps, whether such ruling was prejudicial to the defendant. The precise question confronting us on this appeal not only was not raised, but it could not have been raised on the former appeal. It involves the question, as before stated, as to whether, as a matter of fact, as disclosed by the entire record, the defendant was accorded a full and fair opportunity to cross-examine such witness. While the questions are, in a sense, closely related, we are clear that there is nothing in the former decision on this point which can correctly be said to be binding on us on the present appeal.

In the light of the record clearly disclosing that the subject embraced in the question thus propounded to Dr. Engstad was in substance and effect fully covered by other questions and answers not objected to, we are forced to conclude that a full and fair opportunity was in fact accorded defendant for cross-examination; and consequently a sufficient foundation in this respect was laid for the introduction of such testimony on the last trial.

The question now attempted for the first time to be raised in this court, that a proper foundation was not laid for the introduction of Engstad's testimony by showing his absence from the jurisdiction of the court, will not be considered, as such question comes too late.

The judgment is affirmed.

ROBERTSON LUMBER CO. v. SWENSON
et al.

(Supreme Court of North Dakota. Dec. 10, 1912.)

(Syllabus by the Court.)

1. MECHANICS' LIENS (§ 183*)—PROCEEDINGS TO PERFECT—STATEMENT OF CLAIM.

Sections 6237 and 6238, Rev. Codes 1905, authorizing the filing of a mechanic's lien for labor and materials furnished "for the construction or repair of any work of internal improvement or for the erecting, alteration or repair of any building or other structures upon land," etc., construed, and held to authorize the filing of such lien against two or more buildings and the land upon which they stand, where such labor or material is furnished under an entire contract. Chapter 158, Laws 1906, which amends section 6237, Rev. Codes 1905, does not change the former law in this respect.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 315-322; Dec. Dig. § 183.*]

2. MECHANICS' LIENS (§ 281*)—ENFORCEMENT—SUFFICIENCY OF EVIDENCE.

The finding of the trial court that the material for the two dwellings was furnished by plaintiff under an entire contract is sustained.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 565-572; Dec. Dig. § 281.*]

3. MECHANICS' LIENS (§ 183*)—RIGHTS TO LIEN—PROPERTY SUBJECT.

Appellant's contention, to the effect that under the statute a mechanic's lien statement can be filed only against the building and the particular lot upon which the same is situated, is held without merit. The two dwellings having been constructed from material furnished under a single contract, it was permissible to file a lien statement against both buildings and the four contiguous lots upon which they are situated.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 315-322; Dec. Dig. § 183.*]

4. MECHANICS' LIENS (§ 157*)—PROCEEDINGS TO PERFECT—ITEMIZED ACCOUNT.

Chapter 158, Laws 1906, requiring a separate itemized account to be kept of materials furnished, should be given a reasonable interpretation, and where a separate itemized account is, in good faith, kept, but through an unintentional mistake or clerical error an item of minor importance is included therein which belongs to another account, such fact will not operate to deprive the materialman of the right to a lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 268-274; Dec. Dig. § 157.*]

5. MECHANICS' LIENS (§ 154*)—PROCEEDINGS TO PERFECT—LIEN STATEMENT—VERIFICATION.

Where the lien statement is duly signed by the materialman, but he omits to sign the affidavit of verification, such omission is not fatal to the lien, where it appears that he, in fact, made oath to the truth of the facts stated in such affidavit. In other words, it is not a necessary essential to the validity of such an affidavit that the affiant should subscribe his name thereto, although this is the usual and better practice.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 261-267; Dec. Dig. § 154.*]

6. MECHANICS' LIENS (§ 157*)—PROCEEDINGS TO PERFECT—LIEN STATEMENT—CLERICAL ERROR.

To entitle a materialman to a lien, he must comply with section 6240, Rev. Codes 1905, which requires him to file with the clerk of the district court "a just and true account of the demand due him after allowing all credits," etc. Appellant's contention that this statutory requirement was not complied with by plaintiff is held without merit. Except as to the item of \$10.83, which was included in the account through a clerical error, such account is held to correctly state the various items of debits and credits, and the fact that, in striking a balance, by subtracting the total credits from the total debits a mistake of \$100 was made, does not operate to defeat the lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 268-274; Dec. Dig. § 157.*]

7. MORTGAGES (§ 186*)—LIEN—PRIORITY—MECHANICS' LIENS.

Appellant's contention that the mortgages held by him represented the purchase price of the lots, and that they are therefore entitled to priority over plaintiff's mechanic's lien, is held untenable; there being no proof in support of such contention.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 449-455; Dec. Dig. § 186.*]

8. DEPOSITIONS (§ 83*)—SUPPRESSION—GROUNDS.

Appellant moved in the court below to suppress the deposition of a witness for plaintiff upon the ground that sufficient time was not afforded him in which to appear and cross-examine such witness. The taking of the deposition was noticed for October 14, 1911, at Pontiac, Mich., and service of the notice was made at Grand Forks on October 10th. No claim is made that appellant was in fact prevented from appearing or being represented at the taking of the deposition, and furthermore we think sufficient time for this purpose was afforded him, and the ruling of the trial court in refusing to suppress the deposition is therefore sustained.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. §§ 219-226; Dec. Dig. § 83.*]

9. DECISION CORRECT—JUDGMENT AFFIRMED.

Upon a trial de novo of the entire case, we reach the conclusion that the decision of the trial court was in all things correct, and its judgment is, accordingly, affirmed.

(Additional Syllabus by Editorial Staff.)

10. MECHANICS' LIENS (§ 281*)—PROCEEDINGS TO PERFECT—STATEMENT.

In an action to foreclose a mechanic's lien, evidence held to show that certain payments by the owner to the lienor were properly applied to other indebtedness to that for which the lien was made, and hence were properly omitted from the lien statements as credits.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 565-572; Dec. Dig. § 281.*]

Appeal from District Court, Grand Forks County; Charles F. Templeton, Judge.

Action by the Robertson Lumber Company against Nils Swenson and others. From judgment for plaintiff, defendant Sidney Clarke appeals. Affirmed.

H. A. Bronson, of Grand Forks, for appellant. Scott Rex, of Grand Forks, for respondent.

FISK, J. This action originated in the district court of Grand Forks county and was

brought for the purpose of foreclosing a mechanic's lien on lots 5, 6, 7, and 8 of block 18, Budge & Eshelman's third addition to the city of Grand Forks. The material, for the purchase price of which the lien is claimed, was sold and delivered by plaintiff to the defendant Nils Swenson for the construction of two dwellings on said lots, one on lots 5 and 6, and the other on lots 7 and 8. Several other parties, including the appellant Clarke, were joined with Swenson as defendants, but the appellant Clarke is the only defendant who made any appearance in the action. He is the assignee of two certain mortgages of \$200 each, covering the property in question, executed and delivered by Swenson, and he asserts the superiority of the liens thus held by him over plaintiff's mechanic's lien. He also attacks the validity of plaintiff's alleged lien on several grounds which will be hereafter noticed, and also contends that certain payments have been made on the plaintiff's claim which have not been credited. These, in brief, are the issues involved. Plaintiff had judgment in the court below from which this appeal is prosecuted, and the appellant has specified that he desires a review of the entire case in this court.

In his printed brief and argument appellant's counsel argues his various contentions under ten separate points, and we will consider and decide such points in the order presented.

[1] Under point 1 appellant contends that, even conceding that the sale by plaintiff to Swenson of the material for the two dwellings was made under an entire contract, still under our mechanic's lien statute plaintiff was not authorized to file a joint lien statement against both buildings and the several lots described. This contention is based on the phraseology of chapter 158, Laws of 1909, which amended section 6237, R. C. 1905. As thus amended, this section gives a lien to each person who shall perform labor or furnish materials for the erection, alteration, or repair of "any building or other structure." Prior to such amendment the words corresponding to those quoted were "any buildings or other structures." By such amendment the following provision was also added: "Provided, no person, furnishing material * * * for any of the purposes aforesaid, shall be entitled to a lien * * * unless he shall keep an itemized account thereof, separate and apart from all other items of account against the purchaser." Said statute was also amended in other particulars not material to this controversy. It is argued that, because the singular number is substituted for the plural form in referring to the edifice to be built, when taken in connection with the requirement that the materialman must keep an itemized account thereof, separate and apart from all other items of account against the purchaser, a legislative intent is manifested of limiting a mechanic's lien to

one dwelling or structure only. We are unable to view the matter in this light, and we think it clear that there was no legislative purpose to effect any change in the former statute in this respect, for, if so, the Legislature would most certainly have also changed section 6238 from the plural to the singular number in referring to the edifices or structures upon which liens might be claimed. The plural form is still retained in the latter section. It is manifest that the only change contemplated by such amendment was to impose on lien claimants the necessity of keeping a separate itemized account of materials furnished from all other accounts against the purchaser and against the contractor or subcontractor, and also amending the statute with reference to the notice to be given the owner where material has been furnished to a contractor or subcontractor. Appellant's counsel recognizes the fact that there is lack of harmony between section 6237 as amended, and section 6238; but, as we understand him, he contends for a construction of the latter section which will make it harmonize with the other, and to this end he urges that section 6238 should be construed as giving the materialman a lien on each separate dwelling or structure, although the material was sold under an entire contract, provided a separate itemized account is kept of the material sold for each building. The insuperable obstacle in the way of such a construction is the plain wording of the statute to the contrary, for the language clearly confers the right to file a single lien upon all the buildings, erections, or improvements where the labor is done or material furnished therefor under a single contract, and it provides that upon the foreclosure of such a lien the court may, where such buildings, erections, or improvements are upon separate farms, tracts, or lots, apportion the amount of the claim among the several farms, tracts, or lots in proportion to the enhanced value of the same, caused by means of such labor or materials, where such apportionment is necessary to protect the rights of third persons. That plaintiff was authorized to file one lien statement covering both buildings is settled in this jurisdiction. *Stoltze v. Hurd*, 20 N. D. 412, 128 N. W. 115, 80 L. R. A. (N. S.) 1219, Ann. Cas. 1912C, 871; *Meyer Lbr. Co. v. Trygstad*, 184 N. W. 714. See, also, *Johnson v. Salter*, 70 Minn. 146, 72 N. W. 974, 68 Am. St. Rep. 516, and cases cited. We are forced to conclude, therefore, that appellant's contention under point 1 is without merit.

[2] Under point 2 appellant's counsel asserts as a legal proposition that "where there is a divisible contract, or two contracts for the furnishing of materials in the erection of two dwellings upon two different lots, even though owned by the same party and constructed about the same time, a single or joint lien cannot be filed therefor upon

both buildings and lots." We find it unnecessary, however, to consider this question, for we agree with the trial court that the material was furnished by plaintiff under but one contract. The finding to such effect by the trial court is, we think, in accordance with the weight of the testimony. The record discloses that the building material in question was used in the construction of two dwelling houses upon a single tract of land having a frontage of 100 feet on Budge avenue and consisting of four contiguous lots; the dimensions of each being 25x140 feet. These dwellings were constructed between April 25 and July 14, 1910. The witness Crawford, who was in plaintiff's employ and had charge of the sale and delivery of stock from its yards at the time in question, testified as follows: "Q. At the time Mr. Swenson agreed to accept your figures of \$331, what is the fact as to whether he ordered the material for the second house at the same price? A. He said he would buy the two houses provided I would add 600 feet of casing and 8 rolls of string felt, *and we closed the deal on that basis.*" Swenson does not directly contradict Crawford on this point, and we think the trial court was amply justified in accepting such testimony as controlling. It is true that there is considerable testimony in the record tending directly, as well as indirectly, to show the existence of two contracts; but, when the entire testimony is weighed and considered together, much of the testimony which appears to be inconsistent with Crawford's testimony above quoted is susceptible of explanation and is explained so as to harmonize therewith. It would serve no useful purpose to review such testimony at length in this opinion. Suffice it to say, as above stated, that we are satisfied with the correctness of the trial court's findings on this issue, and appellant's second point need not be further considered.

[3] Under point 3 it is contended that under the statute a mechanic's lien can only be filed against the building and the particular lot upon which the same is situated, and that, because one of these buildings was erected on lot 5 and the other on lot 7, a lien filed on the entire property was and is a nullity. We do not think there is any merit to such contention. These four contiguous lots should be treated as a single tract 100x140 feet in size; but, in any event, under the provisions of section 6238, R. C., it was proper, in view of the fact that these dwellings were constructed under a single contract, for plaintiff to file a single lien upon both buildings and the lots upon which they stand, and we think lots 6 and 8 surely must be deemed appurtenant to lots 5 and 7, respectively, within the meaning of the mechanic's lien statute. See Am. & Eng. Encyc. of Law (2d Ed.) 286, and cases cited.

[4] Under point 4 appellant contends that, even though it be conceded that the contract

herein is single and entire, and, further, that a lien for a single contract can be spread upon buildings situated upon different lots, the alleged lien is a nullity because plaintiff did not comply with chapter 158, Laws of 1909, by keeping a separate itemized account of the materials furnished for such buildings. It is true the statute is explicit on this point, and any material departure therefrom will deprive a person of the right to file a lien. The record discloses, however, that a separate itemized account was kept by plaintiff in accordance with the statute, with the exception of one item amounting to \$10.83 for materials furnished to Swenson to be used elsewhere, which found its way in this account purely through a clerical error, and we do not think a fair construction of the statute requires us to hold such unintentional mistake or clerical error by plaintiff's clerk or employé fatal to plaintiff's right to file a lien. The construction contended for, as applied to the facts in this case, would be grossly unjust and unreasonable. We cannot believe that it was the legislative intent to deprive a person of a lien who, in good faith, has attempted to comply with the statute, but, through an unintentional mistake or clerical error as to an item of minor importance, has failed to literally comply therewith. A liberal rule for the construction of mechanic's lien statutes has been adopted by this court. *Turner v. St. John*, 8 N. D. 245, 78 N. W. 340; *Salzer Lbr. Co. v. Claffin*, 16 N. D. 601, 113 N. W. 1036. Our views, as above expressed, find support in the following authorities: *Turner v. St. John*, supra, 8 N. D. 245, 78 N. W. 340; *Griff v. Clark*, 155 Mich. 611, 119 N. W. 1076, 29 L. R. A. (N. S.) 305, and case note, 130 Am. St. Rep. 582; *Coughlan v. Longini*, 77 Minn. 514, 80 N. W. 695; 27 Cyc. 200, 20 Am. & Eng. Encyc. of Law, 406.

[5] Under his point 5 appellant asserts that the alleged lien is a nullity because the lien statement contains no proper verification; it appearing that Crawford, who made the same, omitted to sign it. Our attention is called to the fact that the only evidence upon the question as to whether Crawford subscribed and swore to the affidavit is that of the witness Haggerty, the notary, who testified that the same was signed and sworn to by Crawford before him, as a notary public, on the date which it bears. The original statement for lien is before us, and it appears therefrom that Crawford signed the same as agent for plaintiff, but he did not sign the affidavit of verification which is on the same sheet immediately following such statement, nor do we think it was necessary that he should do so. Section 7266, R. C. 1905, defines an "affidavit" as a written declaration under oath. It seems to be well settled that, in the absence of a statute or rule of court requiring the affiant to subscribe his name to the affidavit it is

not necessary for him to do so. *Bates v. Robinson*, 8 Iowa, 318; *Norton v. Hauge*, 47 Minn. 405, 50 N. W. 368; *City v. White*, 152 Cal. 190, 92 Pac. 177; *Hotaling v. Brogan*, 12 Cal. App. 500, 107 Pac. 711; 2 Oyc. 26, and numerous cases cited. It is true the rule as announced by a few courts is to the contrary, but the great weight of authority holds, and we think the better rule is, as we have stated. There is nothing in the opinion in *Turner v. St. John*, 8 N. D. 245, 78 N. W. 840, which conflicts with our holding as above announced.

[6] Under point 6 appellant contends that the plaintiff did not comply with section 6240, R. C., which requires the lien claimant to file with the clerk of the district court "a just and true account of the demand due him after allowing all credits," etc. In support of such contention, our attention is called to the fact that in the lien statement, as well as in the itemized account attached thereto, a claim is made for \$100 more than the amount due. Appellant's contention is without merit. The itemized account shows the total debits to be \$940.22, and the total credits \$101.70, and in striking a balance an error of \$100 was made in subtracting the credits from the debits. It is apparent on the face of the exhibit that this was a mere mistake, and such error in the balance naturally found its way into the lien statement. Under the authorities heretofore cited, it is clear that such an error will not nullify the lien. For the same reason the item of \$10.83, heretofore mentioned, and which was through error included in the account and lien statement, does not affect the validity of plaintiff's lien. The trial court properly deducted these two items from the amount of plaintiff's recovery.

[10] Appellant also asserts that the itemized account is not just and true for the reason that it omits two credits which he claims should be made, one for \$150, and the other for \$400, and this necessitates an inquiry as to the correctness of such contention. The trial court found in plaintiff's favor on this issue, holding that the only credits to which Swenson was entitled are the amounts credited in the account, aggregating \$101.70. We are satisfied with the correctness of the trial court's finding. The item of \$150 consisted of a check delivered by one Hatcher to Swenson, but made payable to the Robertson Lumber Company, and represented the proceeds of certain loans negotiated by Swenson through Hatcher. So far as the evidence discloses, Swenson had the right to direct the application of such payment wherever he pleased. The check represented money belonging to him. But whether, as between himself and Hatcher, this is true or not, plaintiff had no notice which would interfere with its right, as well as its duty, to make such application as Swenson directed. The notation "Budge Ave. Cottages" in the lower left-hand cor-

ner of the check was of no significance so far as plaintiff was concerned, and it did not operate to impute to plaintiff any notice, even of Hatcher's desire, that the check should be applied on any particular indebtedness owing by Swenson to plaintiff. That Swenson directed the application thereof on indebtedness other than the account in question is, we think, very clearly established by the weight of the evidence. Most of it was applied in payment of a note held by plaintiff against Swenson, which note was at the time canceled and delivered to him, and the balance on another account.

Much of what we have said of the alleged payment of \$150 is applicable to the alleged payment of the \$400 item. Except as to the latter, the check was drawn by Hatcher and made payable directly to Swenson, who indorsed the same to plaintiff. The money represented by such check belonged to Swenson, and, so far as plaintiff is concerned, Swenson had the right to direct its application, and we think it reasonably clear from the testimony that he directed it to be applied, not on the account in question, but on another and older account owing by him to the plaintiff, and we are convinced from the record that the findings of the trial court on this issue are correct. Under the facts there is no room for applying the equitable doctrine governing applications of payments invoked by appellant's counsel.

[7] It is next asserted by appellant that the lower court erred in holding the lien of appellant's mortgages inferior to plaintiff's lien; it being asserted by appellant that such mortgages were given to secure the purchase price of the lots. Such contention must likewise be overruled for the obvious reason that there is no evidence from which it can be determined that the mortgages were given for such purpose. It is true Hatcher testified that these lots were sold to Swenson on contract in January, 1910, and that a deed was given to him in June of that year, and that Hatcher Bros. made four loans secured by mortgages on these lots "to assist in the payment of labor and material entering into the construction of the houses, and partly to cover the balance due on the purchase price of the lots." But such loans were not closed until after these dwellings were constructed or were in course of construction, and he admits knowledge of the fact that such houses were being constructed on the property and that plaintiff was furnishing the material therefor. There is no proof of what the purchase price was, nor as to what part, if any, of such purchase price was included in the notes secured by the two mortgages now held by appellant, and manifestly there was no foundation in the evidence for a finding that any part of such notes represents such purchase price.

[8] Next, it is appellant's contention that the trial court erred in not suppressing the

deposition of the witness Crawford which was taken at Pontiac, Mich., on October 14, 1911; the notice to take such deposition having been served on appellant's counsel on October 10, 1911. We do not think there is any merit in this point. No claim is made that, owing to the brief time allowed, appellant was in fact prevented from appearing, and, furthermore, we think there was in fact sufficient time allowed in which an appearance might have been made by the use of due diligence.

[9] We have considered the other questions raised by appellant's counsel and find no merit therein, and we are convinced, from the entire record, that the decision of the trial court was in all things correct.

The same is, accordingly, affirmed.

STATE ex rel. RED RIVER BRICK CORPORATION et al. v. DISTRICT COURT OF GRAND FORKS COUNTY et al.

(Supreme Court of North Dakota. Nov. 20, 1912.)

(Syllabus by the Court.)

1. COURTS (§ 204*)—APPELLATE JURISDICTION—SUPERINTENDING CONTROL.

Under the provisions of sections 86 and 87 of the Constitution, the Supreme Court is given superintending control over inferior courts and has the power to issue any of the writs therein named and such others as may be necessary to the proper exercise of such control.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 499, 504, 758½, 791; Dec. Dig. § 204.*]

2. COURTS (§ 204*)—APPELLATE JURISDICTION—SUPERINTENDING CONTROL.

The superintending power of the Supreme Court is primarily over courts and was granted to insure the harmonious working of our judicial system to meet emergencies and for cases where other relief provided is inadequate or incomplete, and not for purposes of review as by appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 499, 504, 758½, 791; Dec. Dig. § 204.*]

3. COURTS (§ 204*)—APPELLATE JURISDICTION—SUPERINTENDING CONTROL.

Whether the remedy by appeal is adequate or speedy must be determined by the exercise of the sound discretion of this court, applied to the facts in each given case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 499, 504, 758½, 791; Dec. Dig. § 204.*]

4. COURTS (§ 204*)—APPELLATE JURISDICTION—SUPERINTENDING CONTROL.

The primary function of this court is the determination of appeals, and its appellate jurisdiction is the one which must be sought by litigants seeking relief wherever it is applicable and furnishes them adequate and speedy protection, and its superintending power should not be exercised except in case of emergency, exigency, or when necessary by reason of the lack of any other adequate remedy, or when the ends of justice make its exercise imperatively necessary.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 499, 504, 758½, 791; Dec. Dig. § 204.*]

5. MANDAMUS (§ 4*)—REMEDY BY APPEAL—SUPERINTENDING CONTROL.

Proceedings were instituted in the district court of Grand Forks county for the purpose of

punishing certain parties for alleged contempt, consisting in disobedience to the prohibitions of a judgment theretofore entered in an action in that county pending an appeal to this court. On application for a writ commanding the district court in which such proceedings were maintained to vacate its order dismissing the contempt proceedings, and commanding it to punish the parties named for contempt, held, that relator has an adequate remedy by appeal, and that no such emergency is disclosed, and no such failure of justice appears imminent, as will warrant this court in the exercise of its power of superintending control to make the alternative writ permanent, and it is therefore quashed and the proceeding dismissed.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 9-34; Dec. Dig. § 4.*]

Mandamus by the State on the relation of the Red River Brick Corporation, Falconer Township, and School District No. 59, against the District Court of the First Judicial District and W. J. Kneeshaw, Judge of the District Court of the Seventh Judicial District, sitting at the request of the Judge of the District Court of the First Judicial District. Writ quashed.

George A. Bangs, of Grand Forks, for relators. J. B. Wineman, of Grand Forks, for respondents.

SPALDING, C. J. Briefly, the history of the matter involved in this proceeding is as follows: The city of Grand Forks, under the authority of section 2825, et seq., R. C. 1905, as amended by chapter 47, Laws of 1907, chapter 58, Laws of 1909, and chapter 47, Laws of 1911, attempted to extend its boundaries so as to embrace and include something over 700 additional acres, including 10 acres belonging to the Red River Valley Brick Corporation, one of the relators herein. In proceedings thereafter instituted in the district court, Hon. Chas. F. Templeton, as judge of Grand Forks county, entered judgment holding such proceedings void and the attempted annexation invalid, and restraining the city and its officers and agents from exercising or attempting to exercise any authority or jurisdiction by reason thereof, and particularly from assessing, for purposes of taxation, the property situated in the territory so attempted to be annexed.

May 22, 1912, defendants perfected an appeal to the Supreme Court from such judgment. The appeal was taken by service of notice, and the giving of bond was especially waived. Whereupon the city assessor of Grand Forks, acting upon the advice of the city attorney, is alleged to have proceeded to assess the property lying within the proposed extension. The corporations of which it had been parts did the same. The city assessor's assessment was certified by him to the city board of equalization; the township assessments, to the county board. The assessment by the city was made May 27, and the books were certified June 1, and the relators' knowledge thereof was acquired

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

June 5, 1912. Relators thereupon immediately applied to Hon. O. F. Templeton, judge of said district, for an order requiring the city and its officers to show cause why they should not be punished for contempt for the violation of the injunctive portion of the judgment. Owing to the illness of Judge Templeton, such order was made returnable before Hon. W. J. Kneeshaw, of the Seventh district, by whom it was heard. It is claimed by relators that on the hearing held June 19th the assessor and city attorney expressly admitted the violation of the injunction. The court, at the conclusion of the hearing, made its order dismissing the order to show cause and the contempt proceedings.

This court is asked, in the exercise of its superintending control over inferior courts, to review the action of the district court and direct it to find the parties mentioned guilty of contempt and punish them accordingly, on the theory that their admission of a violation of the injunctive portion of the judgment deprived the district court of discretion in the premises, and that it was its duty to find them guilty of contempt. On the hearing on the return day of the alternative writ the defendants submitted a motion to quash, and also made return. The conclusion which has been reached by this court makes it unnecessary to enter into details regarding the motion and return. Sufficient reference will be made to them in the course of this opinion.

The history of the supervisory control of courts of last resort over inferior courts is a very interesting study, but to enter into a consideration thereof would unduly extend this opinion, and it can be so readily found in most comprehensive yet condensed form, in books accessible generally to the bar, that we feel no useful purpose would be served by reviewing it at this time. We call especial attention to *State ex. rel. v. Johnson et al.*, 103 Wis. 591, 79 N. W. 1081, and the comprehensive note to that case, found in 51 L. R. A. 33; also the several opinions of the learned judges of the Supreme Court of Wisconsin, in *State ex. rel. v. Helms*, Circuit Judge, 136 Wis. 432, 118 N. W. 158; *State v. Williams*, 136 Wis. 1, 116 N. W. 225, and note 20 L. R. A. (N. S.) 942; and the opinion of Chief Justice Brantley in *State v. District Court*, 24 Mont. 539, 63 Pac. 395.

[1] The sections of the Constitution bearing on the subject of the supervisory control of the Supreme Court over inferior courts are as follows:

"Sec. 86. The Supreme Court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the state and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law.

"Sec. 87. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction and such other original

and remedial writs as may be necessary to the proper exercise of its jurisdiction, and shall have authority to hear and determine the same."

[2] The legislative assembly has made regulations regarding the issuance of the writ of mandamus which we need not notice further than that they provide for the writ to be directed to an inferior tribunal to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station, or to compel the admission to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by any inferior tribunal. Section 7822, R. C. 1905. And that the writ must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. Section 7823, R. C. 1905. It is apparent from the foregoing constitutional provisions that this court is possessed of several separate and distinct classes of power, only one of which need be considered here. It is unquestionably given superintending control over inferior courts, and it has the power to issue any of the writs named, and such others as may be necessary to the proper exercise of such control. In several cases this court has passed upon its power to issue prerogative writs, and has held that it would issue them only when the sovereignty of the state, its prerogatives, or the liberties of its citizens were involved, or the matter was public juris. The respondents cite and rely upon such cases. They, however, are not authority when the court is requested to exercise its superintending control.

In other instances we have been called upon to supervise and review the proceedings of inferior courts, but it has generally been held that a proper case was not presented for the exercise of this power. *Gunn v. Lauder*, 10 N. D. 389, 87 N. W. 999; *State v. Fisk*, 15 N. D. 219, 107 N. W. 101; *Murphy v. District Court*, 14 N. D. 542, 105 N. W. 728, 9 Ann. Cas. 170; *State v. District Court*, 13 N. D. 211, 100 N. W. 248; *Schouweller v. Allen*, 17 N. D. 510, 117 N. W. 866; *Selzer v. Bagley*, 19 N. D. 697, 124 N. W. 426; *Stockwell v. Crawford*, 21 N. D. 261, 130 N. W. 225.

This superintending power conferred by the Constitution of this state, as well as by most of the other Constitutions, is primarily over courts, and was granted so there might be some method by which the harmonious working of our judicial system could be insured, and to meet emergencies, and where other relief provided is inadequate or incomplete. Its relation to litigants is only incidental. It was not intended to grant, by this provision, the power of review as by appeal. That power is the first power enumerated in section 86, and is separate and distinct from the superintending power. *People v. Richmond*, 16 Colo. 278, 26 Pac. 929; *State*

v. Johnson et al., supra; State v. Helms, supra; State v. District Court, 24 Mont. 539, 63 Pac. 395. It is held in the last-cited case that the writs enumerated in the Constitution are not the appropriate writs for the exercise by the Supreme Court of its superintending control, but, in effect, that the character of the writ must be determined on the facts and by the necessities of each case, and that it should be denominated, whatever its character, a "supervisory writ." We deem the appellation of the writ as wholly immaterial.

[3] When a proper case arises for the exercise of this power, the writ necessary to fit the case may take the nature of a command or of a prohibition, or to enable the court to determine its character it may be found necessary to issue a preliminary writ requiring records to be certified up, and this may be done. We are satisfied that the authorities to which reference has been made are applicable here, and that their determination of the purpose of the Constitution framers in granting this superintending control is correct. It has been so intimated in several of the cases decided by this court, to which reference has been made. Whether or not the remedy by appeal is adequate or speedy must be determined by the exercise of the sound discretion of this court, applied to the facts in each given case. State v. Fisk, 15 N. D. 219, 107 N. W. 101. And this rule has been held to apply to the original writs when not sought to control the action of an inferior court. Among other authorities, see State ex rel. v. McLean County, 11 N. D. 358, 92 N. W. 385; State v. Wilcox, 11 N. D. 329, 91 N. W. 955; Duluth Elevator Co. v. White, 11 N. D. 534, 90 N. W. 12; State v. Willis, 19 N. D. 209, 124 N. W. 708.

[4] We are satisfied that the power of superintending control is very broad, but in line with the authorities cited, and many more which have been examined, we feel constrained to hold that this power should not be exercised except in case of emergency or exigency, or when made necessary by the lack of other adequate remedy, or when the ends of justice imperatively demand it. It has been repeatedly held that the primary function of this court is the consideration of appeals. If it was intended by the Constitution framers that this court should exercise its superintending power over the inferior courts, at the behest of litigants, for the purpose of reviewing and revising their decisions, there would have been no occasion to make a separate specification of appellate power, as was done. The appellate jurisdiction of this court is the one which must be sought by defeated litigants seeking relief, in all cases where it is applicable and furnishes adequate and speedy protection to them. Cases may well be imagined, and they do some times arise, where no other provision has been made, or where an appeal

would be partially or wholly ineffectual by reason of the exigencies of the situation. It was entirely appropriate that provision should be made for such emergencies, and this has been done by granting the power which we are considering.

In State v. District Court, 13 N. D. 211, 100 N. W. 248, application was made to this court for a writ of mandamus directed to the judge of the Fourth judicial district, commanding him to proceed forthwith to hear and determine on the merits an application which he had dismissed, or to show cause, etc. The proceeding which had been dismissed was one instituted for the purpose of removing a sheriff from office. It was held that the writ was not available where there was another plain, speedy, and adequate remedy in the ordinary course of law to accomplish the same purpose; that it would not lie for the purpose of controlling an inferior court in the exercise of its judicial discretion, or, if the court had decided erroneously, it was an error in the exercise of its jurisdiction, to be corrected on appeal; that it would not be compelled to reverse the decision on mandamus; and that a dismissal did not deprive the relator of an adequate remedy.

In Schouweller v. Allen, supra, the writ was denied because the relators had an adequate remedy by appeal, although the application was to this court to exercise its superintending control.

In State v. Fisk, 15 N. D. 219, 107 N. W. 101, this court issued a writ of prohibition against the judge of the district court prohibiting further proceedings in an action seeking to enjoin a board of drainage commissioners from acting regularly within its exclusive jurisdiction, because that court had exceeded its jurisdiction, and to permit it to proceed would delay a public improvement of importance; but held that the remedy should be cautiously granted.

In Selzer v. Bagley, supra, a writ was denied because the right of appeal existed, and it was held that the fact that an appeal could not be heard as speedily as the writ would act did not furnish grounds for issuing the writ.

In Lewis v. Gallup, 5 N. D. 384, 67 N. W. 137, a writ of certiorari was denied against a justice of the peace, for the same reason.

In Huron v. Campbell, 3 S. D. 309, 53 N. W. 182, the Supreme Court of that state held that, under the provisions of its Constitution regarding superintending control, that court has ample authority, to be exercised within its judicial discretion, to issue a writ to review the proceedings of subordinate courts, where the action complained of is beyond the discretionary powers of such courts, or where there is an abuse of such discretion, and the remedy by appeal is inadequate and the case is urgent and the circumstances require prompt action on

710, 9 Am. St. Rep. 248, the California court held that the propriety of the issuance of the writ in any case must depend upon whether, under the law of the state where the litigation arises, the determination was intended to be final, and, if not, as to whether the system of practice furnishes any other adequate remedy; that where the determination was not intended to be final, but there is another plain, speedy, and adequate remedy, the writ cannot issue, as it was not designed to usurp the place of other remedies; but that it must issue where no other adequate remedy is provided, as otherwise there would be an admitted wrong without a remedy, and a failure of justice.

[5] We now proceed to determine whether, by the record on the instant application, a case is presented coming within what we have construed to be the proper and legitimate province of this court under its superintending control grant of power. As we have seen, a judgment was entered by the district court enjoining the defendants from doing certain acts. An appeal was taken from that judgment to this court. By stipulation of the parties the giving of a supersedeas bond was waived. No contention is made that the effect of the appeal was different from what it would have been had a bond been given. We must assume that the defendants proceeded to do the acts forbidden by the judgment. The district court initiated proceedings to punish them for civil contempt. There is a diversity of opinion as to whether the appeal superseded the judgment. It is maintained by the defendants that it did, and that they were therefore free, while the appeal was pending and undetermined, to perform their official duties, though prohibited by the judgment. On the other hand, the relators herein contend that the character of the acts to be performed was of a nature not covered by an appeal, but that the prohibition and injunction still remained in force. It is apparent that on the determination of this question depended the fact of a contempt. The court discharged the contempt proceedings and declined to punish the defendants, whereupon these proceedings were instituted to compel the court, by the exercise of the superintending control of this court, to revoke its order of dismissal and proceed to punish the defendants for disobedience of the mandates of the district court judgment. It appears by the record that at the hearing the defendants frankly admitted the doing of some of the acts prohibited. Their excuse is legal advice to the effect that the appeal relieved them of the injunction. The court did not, of record, determine this question, but held that there had been no intentional contempt committed,

is the fact that the property of a considerable number of citizens, located in the territory sought to be included within the corporate limits of the city of Grand Forks, has been assessed by the city, and that the assessment will be spread upon the tax rolls of the county, and that the financial affairs of the minor municipal corporations of which this territory had constituted parts of the city, county, and state, will become involved by reason thereof, and because of the delay occasioned by an appeal. Our attention is called to the Wisconsin cases hereinbefore cited, and others, as authority for this court to direct the district court not only to proceed with the matter in question, but how to do so and how to decide it. This on the theory, which is strenuously urged, that the district court had no discretion in the premises; that its refusal to hold the defendants was in violation of law and the rights of the parties. We deem it altogether unnecessary to determine any questions as to the effect of the appeal on the provisions of the judgment of the district court. Some very broad language is contained in some of the Wisconsin authorities, but it is evident that the language of the opinions must be read in the light of the facts dealt with, and when so read these authorities clearly and fully recognize that it is not the duty of the Supreme Court to direct or control the judgment or discretion of a trial court, at least not so except in case of an emergency and when great injustice would necessarily result from not so doing.

The facts involved in the Wisconsin cases are too complicated and extended to set out fully. It is sufficient to say that in *State v. Johnson*, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33, the court held that by the grant of superintending control the Supreme Court is endowed with a separate and independent jurisdiction which enables and requires it, in a proper case, to control the course of ordinary litigation in inferior courts—that is, power and the right to hear and determine the cause on the writ, including the determination of questions of fact—and that no part of such power can be taken away by statute; that under such power the Supreme Court will compel an inferior court to perform a duty imposed by statute, not discretionary in its nature, and also compel action where discretion is to be exercised, when it clearly appears that such discretion has not been exercised, or that action had been taken in manifest disregard of duty, or without semblance of legal power, and where it further appears that there is no remedy by appeal, or, if there is, that it is entirely inadequate, and that the exigency is of such an extreme nature as to justify the interposition of this extraordinary power. So far

as need be stated, the records of that case disclose that the affairs of an insolvent bank were involved, that its assets consisted largely of commercial paper, uncollected, on which suit had not been brought and on which the statute of limitations would run in a very short time and before an appeal could afford any adequate remedy; and the writ was accordingly granted.

In *State v. Johnson*, 105 Wis. 164, 83 N. W. 320, the same insolvent estate was again involved. The district court did not comply with the terms of the order made in the case before cited, in all respects, and a writ was granted; but it was said that: "It has always been understood to be, what it is in fact, a power to be used only when there is no other remedy under our judicial system that will meet the situation and prevent irreparable mischief, and when that mischief springs from something other than mere error of judgment," and that it was evident that the proceedings of the trial court were ruled by a misconception of the statutory rights of petitioning creditors, and that that court had assumed and exercised power which it did not possess, and refused to exercise power which it was clearly called upon to exercise, by statute, that thereby the statute was nullified, and that the wrong perpetrated could not be redressed in any other way than in the summary method of appeal to the constitutional superintending power of the Supreme Court.

In *State v. Helms*, 136 Wis. 432, 118 N. W. 158, the writ was denied; the facts being that complaint had been made before a justice of the peace against an individual, charging him with an offense; that he had been convicted and sentenced by the justice and had appealed to the circuit court; that before a jury was impaneled by the circuit court in the case a motion was made and granted to quash the complaint and for the discharge of the defendant because the complaint failed to state facts sufficient to constitute an offense under the laws of the state, and the court refused to proceed further with the action. The Supreme Court, while recognizing the general rule that mandamus will not issue under the superintending control to serve the purpose of a writ of error to review judicial action of a trial court, held that that rule was subject to limitations which were applicable to criminal cases, and which need not be mentioned here; but it held that, where it appears that the duty of the court below is plain, the refusal to perform such duty clear, the result of the refusal prejudicial, and the remedy by writ of error or appeal utterly inadequate, this was sufficient to arouse the jurisdiction of the Supreme Court under its power of superintending control. It then considered the question of an exigency warranting the exercise of that power, and held that, in view of the facility with which fur-

ther prosecution might be maintained, if found necessary, no such serious prejudice would result from the action of the trial court as to call for the exercise by the Supreme Court of this power of superintending control. Appended to the opinion in the last cited case is a lengthy review by Judge Marshall, of that court, of the Wisconsin authorities on subject, and a keen analysis of the different powers possessed by the appellate court. This review is worthy the perusal of every student of our judicial system.

It was again held, in *State v. Halsey*, 149 Wis. 551, 136 N. W. 285, that, "in order to justify the exercise of that extraordinary jurisdiction, the duty of the lower court must be plain, its refusal to proceed in the performance of that duty clear, the results of such refusal prejudicial, the remedy by appeal or writ of error utterly inadequate, and the application for relief by mandamus prompt."

It will be seen from these statements, notwithstanding the broad language used in the first case cited, from the Wisconsin court, the doctrine there prevails that there must be an emergency or exigency, or some special and pressing reason why the superintending power should be exercised.

In the case at bar we are unable to reach the conclusion, even though the decision of Judge Kneeshaw was erroneous, or even, in some degree, arbitrary, which we do not determine, that this power should be put forth. The right of appeal from the original judgment existed, it has been exercised, the case is in this court, and in the ordinary course of procedure will be heard within a comparatively short time. If that judgment is affirmed and the tax levied, and the assessment, directly or indirectly, found invalid and void, it cannot be assumed that the officials, either city or county, will fail to do their duty in the premises, and if they do so no serious detriment will be occasioned the relators. The record shows that the property in the territory in question has been assessed by the officials of the other municipal corporations, and hence, in case of affirmation, they will not lose the revenue to which they are entitled, while, if the trial court is reversed, they are not entitled to such revenue.

No appeal is taken which does not cause one or both parties more or less inconvenience and delay in securing their rights; but irreparable injury will not result, so far as we are able to ascertain, from the delay occasioned by the pending appeal, and no such emergency exists as would justify this court in granting the permanent writ. Should we do so in every case in which some inconvenience is occasioned by the delay incident to an appeal, we should be utterly unable to hear and determine cases here on appeal, which it has been said and held is the primary function of this court.

It is argued by defendants that, an appeal having also been taken from the order dismissing the contempt proceedings, we should not consider this application. We do not notice that contention further than to remark that on such appeal the action of the district court can be more fully and fairly reviewed than under the present proceedings, and if it should be determined that its action was erroneous, in view of the record before it, the relators will still have as ample opportunity to recoup themselves for the expenses incurred as they would have if the writ were now granted.

It is urged that the writ should issue for the purpose of asserting and maintaining the respect due to the judgments of the courts and for other similar reasons. We are not unmindful of the fact that it is the duty of all courts to maintain their proper authority and to insist upon obedience to their orders and judgments. It is only by so doing that courts are able to serve the public by which they are maintained, and insure the due administration of justice and protect the lives, the liberty, and the property of the citizens. No trifling by litigants or others should be permitted with the mandates of the courts. They are constituted for the purpose of settling differences and in recognition of the fact that there must be some final arbiter of legal controversies, and if the result of litigation is to be minimized or destroyed by trifling of parties and the indifference of courts to their own judgments and orders, the purpose for which they are established is largely, if not wholly, nullified, and litigants are without protection; but charges of contempt in trial courts are at least primarily determinable in the forum where or against which they are alleged to have been committed.

In addition to the foregoing, we may say that it has been held by courts of at least two states specifically that a final order of a trial court refusing to punish for willful contempt of its orders cannot be reviewed under a writ of mandamus, and that where contempt proceedings have been dismissed the appellate court will not by mandamus compel the trial court to punish. *Heilbron v. Toulare County Court*, 72 Cal. 96, 13 Pac. 160; *State v. Horner*, 16 Mo. App. 191.

The writ is denied, and the alternative writ quashed.

BANNER MERCANTILE CO. v. HENDRICKS et al.

(Supreme Court of North Dakota. Nov. 20, 1912.)

(Syllabus by the Court.)

HUSBAND AND WIFE (§§ 19, 229, 232*)—ACTION FOR NECESSARIES—LIABILITY OF WIFE—PLEADING—CONSTITUTIONAL LAW.

Action to recover for family necessities consisting of food and clothing sold and delivered by plaintiff to defendant C. J. Hendricks.

His wife is joined with him as defendant, and liability as against her is asserted under the provisions of chapter 136, Laws 1907, wherein it is provided "that husband and wife shall be jointly and severally liable for any debts contracted by either while living together, for necessary household supplies of food, clothing and fuel for themselves and family," etc. A recovery against the wife is sought to be reversed upon the grounds that both the complaint and the evidence are insufficient to justify such recovery, and that chapter 136 is unconstitutional. Each of such contentions is held without merit.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 121-133, 816-834, 841-843, 844-848; Dec. Dig. §§ 19, 229, 232.*]

Appeal from District Court, Nelson County; Charles F. Templeton, Judge.

Action by the Banner Mercantile Company against C. J. Hendricks and Anna Hendricks. Judgment for plaintiff, and Anna Hendricks appeals. Affirmed.

Frich & Kelly, of Lakota, for appellant. A. V. A. Peterson, of Aneta, for respondent.

FISK, J. This action originated in justice court, where appellant recovered judgment. An appeal was taken to the district court, where judgment was rendered in respondent's favor pursuant to a verdict directed by the court, from which judgment this appeal is prosecuted by the defendant Anna Hendricks alone.

The assignments of error relate to the sufficiency of the complaint as against this appellant; and also to the sufficiency of the evidence thereunder. The assignments of error predicated upon certain rulings in the admission and exclusion of testimony need not be specially noticed, as they are based upon the appellant's contentions relative to the sufficiency of the complaint and the proof offered in support thereof.

The complaint, omitting formal parts, is as follows: "Plaintiff for its complaint alleges: That it is a corporation organized and existing by virtue of the laws of North Dakota, and defendants are husband and wife, living together during the times hereinafter mentioned; that, at the special instance and request of the defendants, it sold and delivered to them certain merchandise, consisting of household supplies, food, and clothing, between the 15th day of June, 1909, and the 9th day of April, 1910, both dates inclusive; that said goods and merchandise was of the reasonable value of \$101.15, and no part of the same has been paid except \$30, although often payment was demanded: Wherefore, plaintiff demands judgment against defendants and each of them for \$71.15, with interest since April 9, 1910, at the rate of 7 per cent. per annum, together with the costs and disbursements herein." While such complaint, when literally construed, states a cause of action against both defendants upon the theory that the merchandise therein mentioned was sold and de-

livered by plaintiff to them jointly at their special instance and request plaintiff's counsel at the trial expressly disclaimed any intention of asserting any liability on the part of this appellant, Anna Hendricks, as a purchaser of such merchandise, stating that his "object and purpose in this action is to endeavor to hold the defendant, Anna Hendricks, liable under chapter 136 of the Session Laws of 1907." Nor is there any evidence in the record from which the recovery against her can be sustained upon the theory that she was a joint purchaser with her husband of such merchandise; the evidence disclosing that plaintiff sold the goods to the husband and upon his credit alone.

We are therefore called upon to determine, first, whether the recovery against Anna Hendricks, the appellant, can be sustained under the complaint; second, if so, whether the proof is sufficient to sustain such recovery; and, if these questions are answered in the affirmative, then, third, whether chapter 136, Laws 1907, is constitutional.

The sufficiency of the complaint is challenged by appellant's counsel, first, because it fails to allege that she has a separate estate, describing the same; second, it fails to state that the goods were purchased by either spouse for use in their family, or that such goods were consumed by the family; and, third, it fails to point out the particular statute under which it is attempted to hold her liable. Numerous authorities are cited in support of such contentions, among them being the cases of *Smith v. Sherwin*, 11 Or. 269, 3 Pac. 686; *Glass v. Steadman*, 86 Ga. 696, 12 S. E. 1067; *Fitzmaurice v. Buck*, 77 Conn. 390, 59 Atl. 415. In *Smith v. Sherwin*, supra, the action was brought against the wife alone, and the complaint charged the sale and delivery of the goods to her at her special instance and request, alleging her promise to pay their reasonable value. Her answer was a general denial. In the opinion of the court it is, among other things, said: "This action was apparently founded upon section 9 of the act of 1878, which provides: 'Contracts may be made by a wife, and liabilities incurred, and the same enforced by or against her to the same extent and in the same manner as if she was unmarried.' Section 10 of the same act makes the property of both husband and wife chargeable with family expenses, but there is nothing in the complaint, in the present action, to indicate that it is the liability thus created by positive statute that is sought to be enforced. The complaint in this instance does not state the facts which would make the respondent liable under section 10 of this statute, and we cannot regard the action as founded upon it." (The italics are ours.) We think the language thus italicised differentiates that case from the case at bar. In the case at bar all the facts showing defendant's liability under chapter 136, Laws 1907, are stated, with the excep-

tion of the fact that the household supplies were purchased "for themselves and family." The portion of said statute material to this controversy reads: "Provided, however, that husband and wife shall be jointly and severally liable for any debts contracted by either while living together, for necessary household supplies, of food, clothing and fuel for themselves and family, and for the education of their minor children."

The complaint alleges that defendants are and were at all times therein mentioned husband and wife living together, and that the merchandise sold and delivered consisted of household supplies, food, and clothing. These allegations must be treated either as surplusage or as tending to show a joint and several liability on the part of the defendants for the debt contracted by one of them under the provisions of chapter 136. The complaint should be construed liberally as against the attack here made, and, when thus construed, we think it sufficient to support the recovery. From the facts thus alleged and from the undisputed evidence in the record, we think a fair inference arises that the debt contracted was for necessary household supplies for the defendants and family, and this appellant was fairly apprised from the allegations of the complaint that plaintiff sought to hold her liable with her husband therefore under the provisions of chapter 136 aforesaid. We have examined the other cases cited by appellant, and find nothing therein which militates against our conclusion as above announced. The rule quoted from 21 Cyc. 1561, by appellant's counsel, is not applicable, for chapter 136 does not make the wife's separate estate alone liable, but, in the language of such statute, she and her husband are made "jointly and severally liable for any debts contracted by either while living together, for necessary household supplies," etc. Therefore the wife is made personally liable, and a separate estate owned by her is not a prerequisite to her liability for such supplies. The true rule applicable to this case is stated in 21 Cyc. 1560, as follows: "Where, however, a married woman may be sued and a judgment obtained against her as a feme sole, it is not necessary to allege that she possesses a separate estate"—citing numerous authorities. It was clearly not necessary to plead the statute under which it is sought to hold appellant liable. It is a general statute, and it was only necessary to allege facts from which such statutory liability arose.

But it is contended by appellant that, even though the complaint and the proof are sufficient to sustain the recovery, still there must be a reversal because the evidence discloses that, as between the plaintiff and appellant's husband, the account was stated and the cases of *Kelly v. Canon*, 6 Colo. App. 465, 41 Pac. 833, and *Holmes v. Page*, 19 Or. 232, 23 Pac. 961, are cited in support thereof. There is no merit in this conten-

tion. Plaintiff is not seeking to hold appellant on an account stated, and, of course, could not for the simple reason that she was not a party thereto. The cases cited merely hold to this principle. In the Colorado case suit was brought against both husband and wife on notes executed by the husband alone, and it was held that no recovery could be had against the wife for the reason that she was not a party to the notes, although the complaint alleged that such notes were given for an indebtedness for expenses of the family of the defendants, and in the Oregon case it was merely held that the wife is not liable on a contract based on an account stated between the husband and the plaintiff and to which she had not assented. In this connection, see *McCartney v. Carter*, 129 Iowa, 20, 105 N. W. 339, 3 L. R. A. (N. S.) 145, and *Marquardt v. Flaughner*, 60 Iowa, 148, 14 N. W. 214. As the complaint discloses in the case at bar, the action is not on an account stated, and the appellant is sought to be held liable under the statute aforesaid.

The only other remaining question is that of the constitutionality of chapter 136. This question is not argued by appellant, and we deem an extended discussion unnecessary. It is contended that said chapter violates section 213 of the Constitution of this state. That section reads: "The real and personal property of any woman in this state, acquired before marriage, and all property to which she may after marriage become in any manner rightfully entitled, shall be her separate property and shall not be liable for the debts of her husband." We do not think there is any merit in appellant's contention. The statute in question does not seek to make the wife liable for the husband's debts, but it merely modifies and broadens the common-law rule regarding liability for family necessities. Under the common-law doctrine the wife had no separate estate, and, when this rule was changed by our statute so as to permit the wife to hold property in her own right the same as a feme sole, it was, we think, a wise and just act on the part of the Legislature to change the rule relative to liability for necessities of the family, and that the Legislature possessed the power so to do is, we think, entirely clear. No authority is cited to the contrary by appellant's counsel, and we believe none exists.

It follows that the judgment appealed from is correct, and it is accordingly affirmed.

ILLINOIS STEEL CO. v. TREU et al.

(Supreme Court of Wisconsin. Dec. 10, 1912.)

1. EJECTMENT (§ 49*)—PARTIES—OBLIGATION OF TENANT.

Though, at common law, in actions of ejectment the only necessary parties defendant were those in the actual occupancy of the premises in controversy, and the tenant in possession

was a necessary party and his landlord not, a tenant made a defendant in ejectment must, as required by St. 1898, § 2197, notify the landlord of the action.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 144; Dec. Dig. § 49.*]

2. EJECTMENT (§ 46*)—PARTIES—OBLIGATION OF TENANT.

Under St. 1893, § 3073, authorizing ejectment for the recovery of real estate, or for the possession thereof, and section 3075, providing that if the premises are actually occupied the actual occupant shall be made a defendant, tenants in actual occupation of the premises at the time of the commencement of the action are necessary parties.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 133, 139; Dec. Dig. § 46.*]

3. EJECTMENT (§ 47*)—PARTIES—OBLIGATION OF TENANT.

Under St. 1898, §§ 3073, 3076, 3079, 3084, 3086, authorizing actions in ejectment for the recovery of real property or for the possession thereof, and authorizing plaintiff to join as defendant, with any actual occupant, any person claiming title, and authorizing a judgment for plaintiff on his proving right of possession, etc., ejectment lies for the recovery of possession only; and a plaintiff suing for possession only may join as defendants, with the occupants, persons claiming title, but he need not do so.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 140-142; Dec. Dig. § 47.*]

4. JUDGMENT (§ 684*)—ACTION AGAINST TENANT—EFFECT ON RIGHT OF LANDLORD.

A judgment in ejectment against a tenant who is made a party does not deprive the landlord, not made a party, of his title, or of his future right of possession.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1207; Dec. Dig. § 684.*]

5. JUDGMENT (§ 707*) — CONCLUSIVENESS — PARTIES CONCLUDED.

A judgment is, as a general rule, binding only on parties and their privies.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. § 707.*]

6. JUDGMENT (§ 684*) — CONCLUSIVENESS — PARTIES CONCLUDED.

Under the rule that no one is privy to a judgment, within the rule that the judgment is binding only on the parties and their privies, whose succession to the rights of property affected occurred previously to the institution of the suit, there is no privity between a landlord and tenant so as to make a judgment against the tenant binding on the landlord.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1207; Dec. Dig. § 684.*]

7. ADVERSE POSSESSION (§ 45*)—SUSPENDING RUNNING OF LIMITATIONS—ACTIONS.

Where the only possession which a grantee in a deed conveying no title had was that of his tenant, an action in ejectment for possession, brought against the tenant alone, interrupted the running of limitations in favor of the grantee, who could, after the expiration of the statutory period, be joined as a party and concluded by a judgment for plaintiff.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 232-254; Dec. Dig. § 45.*]

8. ADVERSE POSSESSION (§ 47*)—DENIAL OF RIGHT OF POSSESSION—ACTS CONSTITUTING.

Mere verbal denials by the owner of the right of adverse occupancy, or loose claims of title, or ineffectual protests short of a disturbance of the rights of the adverse claimant, and short of an assertion of a right of the owner in himself, will not interrupt the running of

limitations; but challenging the right of the occupant by suing him is such an assertion of right.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 234, 235; Dec. Dig. § 47.*]

Appeal from Circuit Court, Milwaukee County; J. C. Ludwig, Judge.

Action by the Illinois Steel Company against William Treu and others. From a judgment for plaintiff, defendant Christina Kohnke appeals. Affirmed.

On September 10, 1897, the plaintiff herein commenced an action against the defendants William Treu and wife to recover possession of certain property; the complaint alleging an estate in fee in the plaintiff and the unlawful withholding and occupancy thereof by the defendants. On September 23, 1897, the defendants William Treu and wife answered, alleging, among other things, that they were tenants of Andreas Kohnke, now deceased, and that he was a necessary and proper party defendant. On March 31, 1906, in accordance with a previous order of the court making Christina Kohnke, wife of Andreas Kohnke, deceased, a party defendant, the plaintiff served an amended complaint on the defendants. On April 13, 1906, the defendant Christina Kohnke answered, setting up as a defense adverse possession by her grantors and predecessors for a period of more than 20 years immediately preceding the commencement of the action. On March 5, 1912, on leave of the court, the defendant Christina Kohnke served and filed an amended answer, in which she alleged 10 years' adverse occupancy under a written instrument, and as a new defense pleaded the 10-year statute of limitations applicable to the facts set forth.

On the trial the defendants introduced testimony to show that in the summer of 1891 Henry Troy built a house on the property in question and took up his residence there; that in 1892 he removed therefrom and rented the premises to one Charles Tessler, who continued to occupy the place; that in August, 1893, Troy and wife sold the property to Andreas Kohnke, and that Tessler continued to occupy the same, paying rent thereafter to Kohnke, until some time in 1896, at which time William Treu became a tenant of Kohnke, and resided on the premises with his wife until shortly after the commencement of this action in 1897; and that thereafter the premises were occupied by various parties, who were tenants of Christina Kohnke. At the close of the trial judgment was entered on a directed verdict in favor of the plaintiff, and from such judgment the defendant Kohnke appeals.

Fielsing & Killilea, of Milwaukee (H. J. Killilea and Moritz Wittig, both of Milwaukee, of counsel), for appellant. Theodore Kronshage, Jr., and John H. Paul, both of Milwaukee, for respondent.

BARNES, J. (after stating the facts as above). There was evidence tending to show that in 1893 one Henry Troy sold and conveyed the land in dispute to Andreas Kohnke. Troy was apparently a squatter, who had no title to the land which he sold. Kohnke died in 1905, and his widow succeeded to his rights in the property, and is now one of the defendants in the action. The premises were occupied by the Kohnkes or their tenants from the time of the purchase until the action was tried in 1912. In 1897, when the action was commenced, William Treu and wife occupied the premises as tenants, and the action was begun against them only. Mrs. Kohnke was not made a party defendant until 1906. She claims uninterrupted adverse possession from the time of the purchase in 1893 until she was made a defendant in 1906. She further claims that her husband took possession of the premises under claim of title, which claim was founded on a written instrument of conveyance, and that she now has good title by virtue of the 10-year statute of limitations. Section 4211, Stats. Plaintiff traced the original title to itself.

As we view it, the appeal presents but one question, and that is: Did the action which the plaintiff brought against the tenants in possession operate to interrupt the running of the 10-year statute of limitations in favor of the landlord? If this question should be answered in the affirmative, the circuit court was right in directing a verdict, no matter what the grounds of its decision were.

[1] It was the general rule at common law that in actions of ejectment the only necessary parties defendant were those in the actual occupancy of the premises over which the controversy arose. Under this rule it was held that the tenant in possession was a necessary party, and that his landlord was not. 15 Cyc. 82, 83, 84; 10 Am. & Eng. Ency. of Law, 528; 7 Ency. of Pl. & Pr. 301, 304. The existence of this rule of law was probably one of the reasons for the passage of section 18 of chapter 91, Stats. 1858, now section 2197 of our statutes, by which it is made the duty of the tenant to notify the landlord of any proceeding brought for the recovery of the leased property or the possession thereof.

[2] The statutory action of ejectment may be brought for the recovery of real property, or for the recovery of the possession thereof. Section 3073, Stats. 1898.

If the premises are actually occupied, such actual occupant must be made a defendant. Section 3075, Stats. 1898. Treu and wife were the actual occupants of the premises in suit when the action was commenced, and were necessary parties to the suit under this statute.

[3] The plaintiff may join as defendants with the occupants those claiming title; but he is not obliged to do so if the party who

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

makes the claim is not in possession, and plaintiff seeks to recover possession only. Section 3076, Stats. 1898. Plaintiff is entitled to judgment if he succeeds in proving right of possession. Section 3079, Stats. 1898. These statutes, as well as sections 3084 and 3086, Stats. 1898, clearly show that an action of ejectment may still be maintained when recovery of possession only is sought.

[4] The appellant insists that there was no privity between the landlord and the tenant, and that neither the commencement of the action against the tenant, nor the final judgment against him, could affect the landlord, who was not a party to the suit, and that the action was not commenced against Mrs. Kohnke until the summons was served on her in 1906. The following cases, among others, are cited and relied on to support her contention: *Levy v. Wilcox*, 96 Wis. 127, 132, 70 N. W. 1109; *Webster v. Pierce*, 108 Wis. 407, 418, 83 N. W. 938; *Wisconsin River Land Co. v. Paine Lumber Co.*, 130 Wis. 398, 396, 397, 110 N. W. 220; *Kent v. Lasley*, 48 Wis. 257, 261, 4 N. W. 23; *Mariner v. Chamberlain*, 21 Wis. 251; *Smith v. Prety*, 22 Wis. 656, 657; *Village of Pewaukee v. Wis. Lakes I. & Co. Co.*, 110 Wis. 67, 85 N. W. 660; *Cypreanson v. Berge*, 112 Wis. 260, 87 N. W. 1081, and *Prahl v. Rogers*, 127 Wis. 353, 106 N. W. 287.

Without undertaking to discuss these cases in detail, it may be said that they are to the effect that a judgment in an action of ejectment against a tenant who is a party does not operate to deprive a landlord, who is not a party, of either his title or of his future right of possession. They do not hold that the commencement of an action against the tenant does not interrupt the running of the statute of limitations in favor of the landlord. The authorities passing upon this question directly are not numerous. The Texas court has passed upon it, and held that where one person was holding possession of lands by his tenant that possession ceased to be peaceable when the tenant was sued for possession. Continuing, the court said: "A claimant of land, who brings his action against the party whom he finds in possession, thereby stops the running of limitation in favor of that party's landlord. There is such privity between the tenant and landlord that, for the purpose of stopping limitation, the suit against the tenant is as effectual as if brought against the landlord also." *Read v. Allen*, 56 Tex. 180, 181. Other cases to the same effect are *Read v. Allen*, 58 Tex. 380; s. c., 66 Tex. 13, 17 S. W. 115; *Stout v. Taul*, 71 Tex. 438, 9 S. W. 329; *Galbrath v. Howard*, 11 Tex. Civ. App. 230, 32 S. W. 803, 807.

A question closely akin to the one under discussion was before this court. The action was one to quiet title; plaintiff claiming to have been in possession of an interest in the premises by virtue of the occupancy of the land by a tenant. An action of ejectment

had been commenced and prosecuted to judgment against the tenant by another claimant to the land; the landlord not being made a party to such suit. The plaintiff recovered judgment, and the tenant against whom the action was brought then leased the premises from such plaintiff. The effect of the judgment was considered, and it was held that the possession was adversely and completely changed by virtue of the judgment, and that "the landlord is so far bound by the judgment, notwithstanding the want of notice, though he is not bound as to the title or future right of possession. The tenant who neglects to give notice violates his allegiance to his landlord; but that is only a matter between him and his landlord, and not one which can affect the party who has recovered possession from the tenant, except the recovery be collusive, or obtained by tampering with the tenant. It is the same as if the tenant had delivered over the possession wrongfully to another person. The landlord must bring an action of ejectment to recover it." *Stridde v. Saroni*, 21 Wis. 173, 178. The court holds in this case that the judgment operates to change the possession from the landlord to the plaintiff in the action, although it is not conclusive as to title or future right of possession. If such is the effect of a judgment where the tenant only is made a party defendant, it would seem to follow logically enough that the commencement of the action to recover possession would interrupt the running of the statute of limitations in favor of the landlord.

[5, 6] The general rule is, of course, well settled that judgments are binding only on parties and their privies. It is also laid down as a general proposition that there is no privity between landlord and tenant, because the landlord does not derive his title from, through, or under him. "No one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit." *Freeman on Judgments*, par. 162.

[7] But it is not correct to say here that there was no privity between Andreas Kohnke and his tenants. The deed which he obtained to the premises apparently did not convey a shred of title. It only served to shorten the period of adverse possession that would be necessary to acquire good title in that manner. The only possession which Kohnke or his wife had up to the time the action was commenced against Mrs. Kohnke was the possession obtained by virtue of the occupancy of the premises by their tenants. It was solely through this possession that they could claim the benefit of the statute of limitations. The defendant Kohnke would not be entitled to the protection of such statute if an action were brought against her or her husband during the 10-year period. The Kohnkes having possession through their tenants only, any challenge of the possession

of the tenant was necessarily a challenge of the possession of the landlord.

Where the owner of a parcel of land finds some person in the actual occupancy thereof, and commences an action to oust such occupant and recover possession, this is a pretty substantial assertion on the part of the owner of intention to claim what belongs to him. We have and can have no exact definition of what a disseised owner must do in the way of reclaiming his property in order to interrupt the running of the statute. It is said, in *Illinois Steel Company v. Budzisz*, 115 Wis. 68, 87, 90 N. W. 1019, 1026: "The most essential element in such a case is the 'animus clamandi,' and that may be inferred from circumstances. It is not necessary that it should be made manifest by any formal declaration to anybody. The necessary purpose being clear, if the element of notoriety is sufficient to bring the situation home to the attention of the adverse occupant, if he is paying such heed to his possession as a person under the circumstances would ordinarily pay, that is sufficient."

[8] Mere verbal denials of the right of the adverse occupant by the owner, or loose claims of title in himself, or ineffectual protests short of a disturbance of the rights of the adverse claimant in a legal sense, and short of an assertion of right in himself, will not interrupt the running of the statute. 1 Cyc. 1069; *Illinois Steel Co. v. Budzisz*, supra. But challenging the right of the occupant by bringing him into court is as direct and as positive an assertion of right as could well be made.

Our statutes of limitation deal quite liberally with the invader who hoists a hostile flag over that which does not belong to him. Where the true owner finds the intruder, and proceeds to assert his rights by taking the necessary legal steps to evict such intruder, we think it should be held that thereafter the statute of limitations ceases to run, either in favor of the actual occupant, or one who occupies the relation of landlord to such occupant. It follows from what has been said that the judgment appealed from is correct.

Judgment affirmed.

EHNERT v. MEWS.

(Supreme Court of Wisconsin. Dec. 10, 1912.)

MUNICIPAL CORPORATIONS (§ 706*)—COLLISION IN STREET—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action for injuries from being struck, while driving a horse and buggy, by a horse and wagon driven by the defendant, evidence held to warrant a finding that the plaintiff was not guilty of contributory negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.*]

Appeal from Circuit Court, Milwaukee County; F. O. Eschweiler, Judge.

Action by Florence H. Ehnert against Carl Mews. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought to recover for personal injuries resulting to the plaintiff while she was riding in a single top buggy going southerly on the west side of Eleventh street in the city of Milwaukee. The defendant, who was driving a team of horses, collided with the plaintiff on Eleventh street at the intersection of Vilet street, causing the injuries complained of. The answer admits the collision and denies all other allegations of the complaint. A motion for directed verdict in favor of the defendant was denied, and the jury returned the following verdict:

"Question 1: Was the defendant guilty of a want of ordinary care, which was a proximate cause of plaintiff's injury? Answer: Yes.

"Question 2: Ought the plaintiff, in the exercise of ordinary care, to have seen defendant's team in time to have avoided the injury? Answer: No.

"Question 3: Was the plaintiff driving at an unreasonable rate of speed at and just prior to the time of the accident? Answer: No.

"Question 4: If you answer either question 2 or question 3 'Yes,' then was such want of ordinary care so found a proximate cause of plaintiff's injury? Answer:

"Question 5: At what sum do you assess plaintiff's damages? Answer: \$4,000."

Motions were made for judgment in favor of the defendant notwithstanding the verdict, to change the answers to the first, second, and third questions of the verdict, and for judgment upon the verdict as so amended, and for a new trial, all of which were denied. Due exceptions were filed to the rulings of the court in the various particulars above named. Judgment was entered in favor of the plaintiff upon the verdict, from which this appeal was taken.

Reukema & Lemke, of Milwaukee, for appellant. Churchill, Bennett & Churchill, of Milwaukee, for respondent.

KERWIN, J. (after stating the facts as above). The jury answered all the questions in favor of the respondent, and the controlling question in the case is whether such findings are supported by the evidence. The assignment of errors raises two questions: (1) Whether the evidence is sufficient to support the verdict; and (2) whether the court below erred in instructing the jury, and in refusing to instruct.

There is no doubt whatever but what the evidence is ample to warrant the jury in finding that defendant was guilty of negligence which proximately caused the injury,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

and the only room for contention is upon the contributory negligence of the respondent. Counsel for appellant very strenuously urges upon us both in his brief and on oral argument that there is not sufficient evidence to support the finding of the jury that the plaintiff was not guilty of contributory negligence. In view of counsel's insistence upon this point, we have carefully examined all the evidence touching the question, and are forced to the conclusion that the finding has support in the evidence. The collision occurred at the intersection of Eleventh and Vliet streets in the city of Milwaukee in the evening of October 12, 1910. It was getting dark. Eleventh street runs north and south, and Vliet street east and west. A city ordinance was put in evidence, limiting the speed of vehicles drawn by horses to 8 miles an hour, and to 4 miles an hour crossing streets running north and south. The ordinance further provides that on streets and highways of the city vehicles going in a northerly or southerly direction shall have the right of way over vehicles going in an easterly or westerly direction. At the time of the collision the respondent was driving south along the west side of Eleventh street in a buggy drawn by one horse, which was very gentle, a family-broke horse, kept for hire to families and women. The buggy was a new, strong livery buggy. The appellant was driving west on Vliet street in a baker's delivery wagon drawn by two young, lively horses. Respondent was driving at a "moderate rate"—"not as fast as five or six miles an hour." Appellant was driving at a "faster gait"—"going at a pretty good rate of speed." The evidence further tends to show that, when respondent got near Vliet street, she looked up and down the street east and west to see if everything was clear, that she saw nothing in sight, and drove across over the north track, and then heard the crash. She did not go fast, because the horse would not go fast. She was perfectly familiar with Eleventh street, and the crossing where the accident occurred, and knew it was an intersection of several streets, and that it is a busy place at that hour of the day. Respondent's buggy was badly smashed, the right hind wheel was entirely torn off, and the top smashed entirely by the collision. The place of collision was at a point about 20 feet east of the west curb line of Eleventh street. Respondent testified that she did not see appellant's team before the accident happened, and did not see how the team ran into the buggy.

There is some evidence that respondent turned to the southwest to pass a team just before the accident. This is denied by respondent. One of respondent's witnesses on cross-examination testified: "A team was going westward on Vliet street, and Mews was also going westward or northwesterly on Winnebago street. That team from Vliet

street crossed Eleventh street, going straight up Vliet street. Plaintiff passed that team and went ahead of it. When plaintiff went ahead of that team, Mews was right aside of that team. That team and Mews were both going westward, and Mews was right next to that team. Miss Ehnert went south ahead of that team, and after she passed that team is when Mews ran into her. In order to pass Mews' team, she made a little bow there that brought her over Eleventh street on the crossing. She made that bow in order to be able to pass the other team. If she had not made that bow, she would have run into that other team, and would have run into Mews."

The evidence of respondent is quite positive that she drove carefully across and was on the lookout for the entire distance of 40 feet north of the north curb line of Vliet street. There is also evidence that there was another team coming down Vliet street at the time of the collision, and that the three teams came together on Eleventh and Vliet streets; that the appellant's team was going at a fair speed, but slackened down when he got close "into the bunch there"; that he tried hard to stop, but still the team went into respondent's buggy. There is evidence that at the time of the collision appellant came up, and respondent tried to get out of his way; that appellant had a young team, and tried to check them, and naturally, in checking the team, the pole went in through the wheel, and hit the top, and knocked the buggy around.

It would serve no useful purpose to review the evidence in detail. It clearly tends to show that the respondent was where she had a right to be, on the west side of Eleventh street, and was going at a lawful rate of speed, and had the right of way under the ordinance; that the appellant was going at quite a rapid rate of speed, exceeding the speed limit under the ordinance; and that he drove into the respondent, without any fault or negligence on her part—at least the jury would be entitled to so find. Under these circumstances, the question of respondent's negligence was clearly for the jury.

The numerous railway crossing cases cited by appellant, bearing upon the "look and listen" rule, for obvious reasons, are not controlling here. Much stress is placed upon *Weber v. Swallow*, 136 Wis. 46, 116 N. W. 844, by counsel for appellant; but a careful examination of that case will show that it is very different in its facts from the instant case. The collision there occurred between a bicycle and an automobile, and the relative position of the parties, the opportunities for seeing and observing, and the duty resting upon the plaintiff to have observed and avoided the automobile when it emerged from behind the car, were so conclusively established as to leave no question for the jury on the issue of contributory negligence.

The instant case presents no such situation. Much stress is also placed upon the fact that the injury was occasioned by respondent turning out. But the evidence as to turning out or curving is denied, and, even if true, it by no means establishes negligence on the part of respondent as matter of law. Respondent was instantly put in a place of danger without fault on her part by getting into the "bunch." Even if she did turn or curve under such circumstances, it was for the jury to say whether such act was negligence which contributed to the injury.

Appellant excepts to certain parts of the charge. We have carefully examined the charge, and find that it contains no prejudicial error. Certain requests to charge were made, which were refused, which refusal is assigned as error. We think the requests were properly refused.

We cannot say upon the record that the damages are excessive.

The judgment is affirmed.

WOTESHEK v. NEUMANN.

(Supreme Court of Wisconsin. Dec. 10, 1912.)

1. FRAUD (§ 41*)—FALSE REPRESENTATIONS—COMPLAINT.

Where a complaint alleged that plaintiff was induced to make an exchange of property with defendant by defendant's false representation as to the amount of special taxes assessed against his property, charging that though defendant knew, or had reason to know that, the taxes on his lots amounted to \$458.83 a year, he represented to plaintiff that they did not exceed \$200, and that plaintiff relied on such statements, and by reason thereof sustained damage in the sum of \$266.83, it sufficiently charged misrepresentation, falsity, scienter, deception, and damage, and was therefore sufficient.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 36, 37; Dec. Dig. § 41.*]

2. FRAUD (§ 58*)—EVIDENCE—SUFFICIENCY.

Where, in an action for fraud in misrepresenting the amount of taxes on defendant's land exchanged to plaintiff, plaintiff testified that defendant specifically made the false representations alleged, and plaintiff was supported by another witness, while defendant and some members of his family, who were present and heard a part of the conversation between them, denied that the representations were made, a verdict for plaintiff was not objectionable as not supported by clear and satisfactory testimony.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

3. FRAUD (§ 22*)—FALSE REPRESENTATIONS—TAX LIENS—EXAMINATION OF RECORDS—DUTY.

Where defendant, in order to effectuate an exchange of certain city lots for plaintiff's property, misrepresented that the lots were subject to special assessment taxes not to exceed \$200, when, in fact, the special tax lien amounted to \$458.83, plaintiff was entitled to rely on defendant's representation as to the amount, and was not bound to examine the city records to ascertain the fact.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 10-23; Dec. Dig. § 22.*]

4. BROKERS (§ 105*)—NOTICE TO BROKER—CONSPIRACY TO DECEIVE PRINCIPAL.

Where a broker acted as agent for both parties in an exchange of property, and defendant stated to him the true amount of taxes on defendant's lots, which amount defendant had misrepresented to plaintiff, and requested the agent not to disclose the fact to plaintiff, because, if he did, the deal would not be consummated, such notice to the broker was not notice of the true amount of taxes to plaintiff, under the rule that, where a third person acts in collusion with an agent to defraud his principal, the latter will not be charged with notice of any information which the agent receives in the course of, or relative to, such collusive transaction.

[Ed. Note.—For other cases, see Brokers. Cent. Dig. § 145; Dec. Dig. § 105.*]

5. FRAUD (§ 52*)—FALSE REPRESENTATIONS—EXCHANGE OF PROPERTY—VALUE.

Where defendant, in negotiating an exchange of property with plaintiff, misrepresented the amount of special taxes on defendant's lots, which misrepresentations defendant denied when sued for fraud, evidence of the relative value of the two properties exchanged was admissible as bearing on the probability of the trade as having been made as claimed by defendant.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 48; Dec. Dig. § 52.*]

6. TRIAL (§ 351*)—SPECIAL VERDICT—DENIAL—DISCRETION.

St. 1898, § 2858, as amended by Laws 1903, c. 390, § 1, provides that the court in its discretion may, and when either party, before the introduction of any testimony in his behalf, shall so request, shall direct the jury to find a special verdict. *Held*, that where, in an action for fraud, the only issue was as to whether defendant had falsely represented to plaintiff that the special taxes on his lot did not exceed \$200, and defendant did not request a special verdict until the close of the testimony, it was not an abuse of the trial court's discretion to refuse it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 834-839; Dec. Dig. § 351.*]

Appeal from Circuit Court, Milwaukee County; Warren D. Tarrant, Judge.

Action by Louis Woteshek against A. M. Neumann. Judgment for plaintiff, and defendant appeals. Affirmed.

Action to recover damages for false representations made in a transaction resulting in the exchange of certain real estate between plaintiff and defendant. The complaint alleges, in substance, that on the 29th of December, 1910, the defendant and plaintiff entered into an agreement whereby the former, in exchange for certain lands, agreed to transfer to the latter certain lots situated in the city of Milwaukee; that the plaintiff agreed to assume and pay the taxes on said lots, both general and special, for the year 1910; that the defendant, as an inducement for the exchange of properties, represented, stated, and warranted to the plaintiff that the only special taxes levied against said lots were such as were levied for the grading and macadamizing of Burleigh street, which adjoins them, and that in no event would said assessment exceed the sum of \$200; that, relying upon such statements and representa-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tions made by the defendant in regard to such taxes, the plaintiff entered into an agreement for the exchange and transfer of the properties. The complaint further alleges that the special tax levied against said lots for the grading and macadamizing of Burleigh street was not the only special tax levied against them, as was stated and represented by said defendant, but, on the contrary, there were special taxes levied against them for the improvement of Twenty-Eighth street, which fact the defendant well knew or had reason to know, of which the plaintiff was ignorant, and which fact the defendant fraudulently concealed from the plaintiff; that the taxes on said lots were not less than \$200, as represented by the defendant, but, on the contrary, were \$458.83, which fact defendant well knew or had reason to know, and of which said plaintiff was ignorant, and which fact the defendant fraudulently concealed from the plaintiff; that as the result of plaintiff's relying upon the statements and representations of defendant, and as a result of defendant's fraudulent concealment of facts which induced plaintiff to enter into the trade, the plaintiff has suffered a loss of \$266.83 damages and costs.

The answer of the defendant admitted the ownership of the property mentioned in the complaint, the making of the agreement, and the assumption of the general and special taxes by the plaintiff for the year 1910, but denied the allegations as to fraud. Before the taking of any testimony, the defendant objected to the admission of any evidence under the complaint, for the reason that it did not state facts sufficient to constitute a cause of action, which objection was overruled. The cause was submitted to a jury upon a general verdict, and they found for plaintiff in the sum of \$258.83. The court ordered judgment for plaintiff for said amount. The case was tried originally in the civil court of Milwaukee county. Upon an appeal by the defendant from such judgment to the circuit court of Milwaukee county, the judgment of the civil court was affirmed, and the defendant appealed from such judgment of affirmance.

Friedrich, Teall & Hackbarth, of Milwaukee, for appellant. W. B. Rubin, of Milwaukee (Max Schoetz, Jr., of Milwaukee, of counsel), for respondent.

VINJE, J. (after stating the facts as above). [1] In support of the demurrer *o* tenns, counsel for defendant argue that the complaint is insufficient because it does not allege all the essential facts and elements necessary in cases of fraud; that, though the complaint alleges representations were made to the plaintiff that the defendant fraudulently concealed the amount of special taxes, and that plaintiff relied upon the representations made, yet it does not allege that such representations or statements were

false or untrue. They further argue that the complaint does not specify the means or method by which the defendant made the alleged representations or concealed the facts from plaintiff, nor does it allege that plaintiff was unable by the use of due diligence to obtain knowledge of the facts, nor that the defendant, by the use of any trick or artifice, prevented him from obtaining such knowledge or information, and in support of their position they cite *Supervisors of Kewaunee v. Decker*, 30 Wis. 624; *Riley v. Riley*, 34 Wis. 372; *Landauer v. Vietor*, 69 Wis. 434, 439, 34 N. W. 229; *New Bank of Eau Claire v. Kleiner*, 112 Wis. 287, 87 N. W. 1090. An examination of those cases will at once disclose that the allegations therein with reference to what constituted the false and fraudulent representations were materially different from those in the case at bar. Here the complaint alleges that the defendant knew, or had reason to know, that the taxes on his lots amounted to \$458.83, and yet he represented to plaintiff that they would not exceed \$200; that plaintiff relied upon such statements, and by reason thereof sustained damage in the sum of \$266.83. Such allegations sufficiently charge misrepresentation, falsity, scienter, deception, and damage. When it is charged that a person knows or ought to know what the fact is, and that he makes representations contrary to such fact, there is a sufficient allegation of false representations and of knowledge on his part that they are false, and when it is alleged that the party to whom they are made relies upon them, and by reason thereof sustains damage, deception and damage are sufficiently averred. It is not necessary in all cases of fraud that the deception should have been by means of any trick or artifice. A plain, unvarnished falsehood relative to a material fact is often sufficient. The complaint states a good cause of action. It alleges that the defendant made representations relative to a material fact, which were not true, and which were or ought to have been known by the defendant at the time they were made to be untrue, that the plaintiff was ignorant of their falsity, and believed them to be true, and that, acting in reliance thereon, he was damaged. Such allegations sustain an action for fraud. *Helberg v. Hosmer*, 143 Wis. 620, 128 N. W. 439.

[2] The claim is made that a motion for nonsuit should have been granted on the ground that the fraud was not proven by clear and convincing testimony, as the law requires. *Denoyer v. First Nat. Accident Co.*, 145 Wis. 450, 130 N. W. 475; *Richards v. Millard*, 146 Wis. 552, 131 N. W. 385. A careful perusal of the evidence shows that there is a direct conflict as to whether or not the defendant made the representations claimed by the plaintiff to have been made. Plaintiff's testimony is to the effect that the defendant specifically made such representations. In this he is supported by another

witness. The defendant and some members of his family who were present and heard at least a part of the conversation deny that the representations were made. The jury found for the plaintiff, and we cannot say, upon such state of the evidence, that they were not convinced of the truth of their finding by clear and satisfactory testimony.

[3] Defendant presumed to know that the taxes on his lots would not exceed \$200, and plaintiff had a right to rely upon his positive statement to that effect. No duty devolved upon him to examine the city records on the subject in view of the assertions made relative thereto by the defendant. There was nothing suspicious or improbable about the fact that the taxes would not exceed \$200, and defendant cannot now be heard to say that the plaintiff should not have believed him when he made the statement. *Jacobson v. Whitely*, 138 Wis. 434, 120 N. W. 285; *Hall v. Bank of Baldwin*, 143 Wis. 303, 127 N. W. 969.

[4] There is evidence tending to show that one Herman Guettel acted as agent for both parties in the exchange of the properties, and that the defendant stated to him the amount of the taxes on his lots, but requested him not to disclose the fact to the plaintiff, for the reason that, if he did, the deal would not be consummated. It is now claimed that notice to Guettel of the amount of taxes was notice to his principal, the plaintiff. But it cannot be successfully maintained that Guettel was plaintiff's agent so far as such information was concerned. If the testimony be true, then plaintiff's agent and defendant entered into a conspiracy to defraud plaintiff, and the rule is well settled that, where a third person acts in collusion with an agent to defraud his principal, the latter will not be chargeable with notice of any information which the agent receives in the course of, and relative to, such collusive transaction, and it applies especially where the agent is requested not to communicate such knowledge to his principal. *Cole v. Getzinger*, 96 Wis. 559, 71 N. W. 75; 31 Cyc. 1596.

[5] The court received testimony as to the value of the properties exchanged. It is claimed this was error. The testimony was introduced for the purpose of showing that plaintiff's contention that he assumed not to exceed \$200 of taxes was correct. The relative value of the two properties would bear upon the question of the probability of such trade having been made as claimed by the defendant. 20 Cyc. 145. It is elementary that evidence of any fact relevant to any fact in issue is admissible. Moreover, in actions for fraud great latitude in the introduction of evidence is allowed. *Kalk v. Fielding*, 50 Wis. 339, 344, 7 N. W. 296.

[6] At the close of the testimony the defendant requested the submission of a special verdict. This the court refused, and it is claimed that such refusal was an abuse of

discretion. Section 2858, Stats. (1898), as amended by section 1, chapter 390, Laws of 1903, provides: "The court, in its discretion, may, and when either party, before the introduction of any testimony in his behalf, shall so request, the court shall direct the jury to find a special verdict." The request for a special verdict not having been made until the evidence was all in, the defendant was not entitled to it as a matter of right. In a case of this kind, where the only issue made by the testimony was as to whether or not the defendant had falsely represented to plaintiff that the taxes on his lots would not exceed \$200, there was no abuse of discretion in refusing to submit a special verdict. The issue could be as clearly defined and as succinctly placed before the jury in the form of a general verdict as in the form of a special verdict.

Other errors relied upon to reverse the judgment are not deemed of sufficient importance to merit separate treatment.

Judgment affirmed.

MICHALSKI v. CUDAHY BROS. CO.

(Supreme Court of Wisconsin. Dec. 10, 1912.)

MASTER AND SERVANT (§ 278*)—ACTION FOR INJURIES — EVIDENCE — NEGLIGENCE OF MASTER—DEFECTIVE MACHINERY.

Evidence in a servant's action for injuries from an alleged defective packing of an engine, so that steam leaked and caused the piston to descend, *held* to show that defective packing could not have caused the injury and to show no negligence on the part of the master.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

Appeal from Circuit Court, Milwaukee County; J. C. Ludwig, Judge.

Action by John Michalski, a minor, by guardian, against the Cudahy Bros. Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to dismiss the complaint on the merits.

This is an action for personal injuries. The plaintiff, a minor, not quite 18 years of age, suffered an accident by which he lost parts of both hands while putting in order a sausage-stuffing machine in the defendant's packing works at Cudahy, Wis., January 17, 1910. He had been in the defendant's employ about four years, and he had operated the machine on which he was injured about a year and a half. The stuffing machine is a kind of pump which ejects the sausage meat through faucets at the bottom into the casings. There is a large can or bucket into which the prepared meat is put, and above the can a cylinder or steam chest in which a piston moves up and down, having a plunger on the lower end which just fits into the can or bucket just mentioned, and presses down on the meat, thus crowding it out

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the fauce at the bottom of the can. The can tilts automatically to one side as the plunger reaches its highest elevation in order that the meat may be conveniently placed in it. It returns to the upright position as the plunger descends. The piston and plunger are operated by a lever in front of the operator, which he moves up and down, and which controls a slide valve by which live steam at 75 or 80 pounds pressure is let into the steam chest either above or below the piston head, as it is desired to lower or raise the plunger. This lever may be placed at the middle, in which case no steam enters either above or below the piston, and the plunger remains stationary at any point where it is desired to place it. There is no automatic discharge of exhaust steam, nor can there be any such discharge into the exhaust pipe, unless the lever is either raised or lowered sufficiently to allow steam to enter one side or the other of the steam chest, in which case an escape into the exhaust from the other side is likewise opened. There can be no entry of steam into either side when the lever is exactly at the middle point. The accident happened on Monday, just before the closing hour of the factory. The plaintiff had operated the machine successfully during the day, and had stopped it by placing the lever at the middle point in order to wash the machine. He also took off and washed a certain spring or rim which was screwed on to the bottom of the plunger head, and which fitted the inside of the can. Having concluded the washing operations, he started to put the spring or rim upon the plunger head, in which operation he was assisted by Ed. Schlueter, who worked by his side, tying sausages as they were stuffed. He first let down the plunger head several inches by the use of the lever and set the lever at the halfway point, so that no steam should enter either chamber. The plunger head was then just above the top edge of the can or bucket, and perhaps an inch and a half distant at the farthest point. The can had not yet returned entirely to its upright position, and hence the distance of its edge from the plunger was greater on one side than the other. The plaintiff claims that just at this juncture the plunger head descended without warning, and without the touching of the lever by any one. The fact is that in some way the plunger head was caused to descend, and the plaintiff's hands were caught between it and the edge of the can, cutting off a number of fingers from each hand.

The plaintiff claims that the plunger descended because the steam leaked around the piston by reason of defective and worn-out packing, and that the defendant was negligent in permitting the packing to become defective, and in not warning him of the danger. The defendant denied that there was any defect in the packing, and claimed

that it was a mechanical impossibility for the accident to have happened from leakage of steam. The jury by special verdict found negligence proximately causing the injury both in the conditions of the packing and in the failure to warn, exculpated the plaintiff from contributory negligence, and assessed the plaintiff's damages at \$8,500. Judgment for the plaintiff was rendered on the verdict, and the defendant appeals.

Harper & McMynn, of Milwaukee, for appellant. Barton & Kay, of St. Paul, Minn., and Glicksman, Gold & Corrigan, of Milwaukee, for respondent.

WINSLOW, C. J. (after stating the facts as above). Here is one of the many cases which vividly illustrate the absolute necessity of workmen's compensation laws, if we wish to approximate justice to the working-man in these days of powerful machinery and many operatives. Perfect as the machinery may be, there are and probably must ever be deadly perils dogging the footsteps of every man who works about it, perils which are only awaiting a moment's inattention or a thoughtless move on his part to do their work. The plaintiff here is just entering on manhood seriously maimed, while endeavoring to perform his duty in the care of his machine. He was not willfully negligent, and, at the worst, was only guilty of momentary inattention or thoughtlessness, yet, because we feel compelled to say that the evidence demonstrated that leakage of steam could not possibly have caused the accident, we are obliged to deny him all relief. It is practically admitted in this case, and if it were not admitted it is proven beyond doubt or cavil, that the sausage-stuffing machine in question was perfect in its design and original construction. The steam chest, steam pipes, exhaust pipe, slide valve, lever, and piston were admirably fitted to accomplish the purpose desired, namely, to operate the plunger head downward into the sausage can, and lift it out again just as rapidly and just as slowly as the operator wished, or the necessary details of the work required, and to halt the plunger at any desired point without danger of unexpected motion. All this could be done simply by the proper manipulation of the lever, which operated an eccentric controlling the slide valve, which, in turn, let in or shut off the supply of steam to the steam chest, both above and below the piston head. By moving this lever one way, the slide valve let in live steam above the piston head, and at the same time opened the exhaust pipe, so that any steam below the piston head would at once be discharged. By moving the lever the other way, the slide valve let in live steam below the piston head, and any steam remaining above was discharged into the exhaust. By placing the lever at the middle point both the entrances and the exits of steam were clos-

ed, and the piston with its plunger was stopped wherever it might be at the time with live steam both above and below the piston head. According to the plaintiff's testimony, the lever was at this middle point before and at the time when the plunger suddenly descended without warning and without having been touched by himself or any one else. It had been placed at that point a few minutes before at the close of the day's stuffing, and just before the plaintiff washed the plunger and can, which he testifies was done at the end of the day's work. It is apparent that there had not been time before the happening of the accident for any considerable condensation of the steam in the steam chest to have taken place. It is shown beyond dispute that the friction of the piston head against the sides of the steam chest, together with the friction of the piston itself on the packing and stuffing box, where the piston enters the steam chest, is considerable, and will not allow the plunger to descend of its own weight nor unless overcome by a considerable weight attached to the plunger.

In view of all these facts, it is entirely certain that the plunger could not descend when the lever is not moved except by the escape of imprisoned steam from below the piston head, sufficient in amount so that the greater pressure of the imprisoned steam above the piston head would force down the piston and plunger. There was absolutely no place where such escape could take place except around the circumference of the piston, where it enters the stuffing box at the bottom of the steam chest, and here is where it is claimed by the plaintiff that the escape actually took place. The plaintiff's hands were just a few inches below this place as he was at work putting on the spring or rim at the time of the accident. With only the layman's knowledge of the qualities of steam and its enormous expansion as it turns from water into steam (at 75 pounds pressure its volume is 310 times its water volume), and remembering that the steam in the steam chest stood at or near 75 pounds pressure, it would seem very certain that an escape of steam around the piston sufficient to cause a sudden drop of the piston head must be very large, and make it impossible for an operative to do any work about it.

We are not left to a layman's speculations on this point, however. The very machine in question was thoroughly tested by a competent and disinterested expert mechanical engineer before the trial in the most careful and painstaking manner. With the steam in the steam chest at the usual pressure and the lever at the middle, he deliberately loosened the nuts holding the gland on the piston rod stuffing box so as to cause leakage,

and carefully observed by chronograph, as well as by the eye, the results. By the first and most inconsiderable loosening of the gland and stuffing box there was leakage of hot water, but no steam. For five minutes the condition remained the same, but there was absolutely no movement of the piston. The nuts were then further loosened, so that there was leakage of both water and steam, and the result observed for another five minutes, and still there was no movement of the piston. The nuts were then loosened so as to permit leakage of boiling water and steam so considerable in extent that a person could not work about or below the steam chest without blistering his hands, and still there was no motion downward of the piston. The expert further testified that had he loosened the gland further, so that there would have been a larger escape of water and steam, he could not have gotten his hands near it on account of the escaping steam and hot water.

So far as all material facts were concerned, the tests were made under conditions identical with the conditions at the time of the accident. The fact that the leakage was caused by loosening the nuts of the gland, instead of by defective packing, can make no difference in the volume of steam. It must escape in the same place whichever be the cause, and if the volume of steam escaping be the same, the results must be the same. From the tests so made the expert testified that it was a mechanical impossibility for leakage no greater than that which he produced while making his third test to cause any movement of the plunger head. It is unquestionable under the evidence that there was no leakage even as great as that which existed during the third test, for neither the plaintiff nor his assistant had any difficulty, so far as steam or water was concerned, in adjusting the spring immediately below the piston. There is nothing in the evidence which in any way throws doubt on the facts testified to by the expert or his conclusions; on the other hand, both his facts and conclusions agree entirely with what common sense and common knowledge of the properties of steam tell us. We are obliged to say that the accident could not have happened from escaping steam, because, if steam had escaped in sufficient quantities to cause the piston to descend, it would not have been possible for the plaintiff to be working where he was working. Hence there is no negligence proven on the part of the defendant. This result renders unnecessary the consideration of any other question.

Judgment reversed and action remanded, with directions to dismiss the complaint on the merits.

**JONES v. PROVIDENCE WASHINGTON
INS. CO. et al.**
**FRANKEL v. AMERICAN CENT. INS. CO.
et al.**

(Supreme Court of Wisconsin. Dec. 10, 1912.)
APPEAL AND ERROR (§ 1106*)—DECISION—SUPERINTENDING CONTROL—REMITTING RECORDS FOR HEARING ON MOTION FOR NEW TRIAL.

The Supreme Court may, by virtue of its power of superintending control over inferior courts, conferred by Const. art. 7, § 3, remit the record to the trial court to enable appellant to move there for a new trial on the ground of evidence discovered since the taking of the appeal, since there is no other adequate remedy for appellant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4386-4398, 4585; Dec. Dig. § 1106.*]

Appeal from Circuit Court, Waukesha County; Martin L. Lueck, Judge.

Actions by one Jones against the Providence Washington Insurance Company and another, and by one Frankel, assignee, against the American Central Insurance Company and another. From judgments for plaintiffs, defendants appeal. Motions to remit the records to the trial court to enable appellants to move for new trials on the ground of newly discovered evidence granted.

Gill & Barry, of Milwaukee, for appellants.
C. E. Armin, of Waukesha, Wis., for respondents.

WINSLOW, C. J. These cases having come here by appeal from judgments in favor of the plaintiffs on fire insurance policies, motions are now made by the appellants to remit the records in both cases to the trial court for a limited time, in order that the appellants may make motions to set aside the verdicts and judgment, and to grant new trials in that court, based on affidavits setting forth very fully the discovery of evidence since the appeals were taken, showing that the insured buildings were destroyed by fire deliberately set by the insured as the result of a conspiracy to defraud the defendant insurance companies. The appellants resort to this method of procuring a return of the records to the trial court, instead of dismissing their own appeals, because the judgments against them were rendered more than 60 days since, and they fear that if they dismiss their appeals they will incur the heavy forfeitures prescribed by section 1974, Stats. Wis., against any insurance company which continues to do business without paying a judgment against it, or prosecuting an appeal therefrom within 60 days after the rendition of the judgment.

The defendants' counsel interposed no objection to the motion—in fact, he very properly consented that the order might be made at once—but as it seemed that there might be a question of jurisdiction involved we took

time before making the order to consider that subject.

We do not now decide whether, in case of dismissal of the appeals, there could be a conviction, under the statute cited, for doing business pending the hearing and decision of the motion for a new trial. If the statute be construed literally, it seems that there could be; and, at least, it is clear that there might easily be troublesome and expensive prosecutions brought which, if successful, might compel the payment of greater sums by way of forfeitures than the judgments here involved. The affidavits filed make a strong prima facie case for a new trial, and clearly the defendants ought, if possible, to be given the privilege of making their motions in the trial court without incurring the risk of losing more than they could possibly gain. These considerations have led us to carefully examine the question whether, after an appeal has been taken from a final judgment and the record transmitted to this court, the trial court has jurisdiction to make any order in the cause which may affect the judgment, even if this court transmits the record to the trial court, so that the same is physically present when the order is made. This court has frequently remitted the record to the trial court after an appeal has been duly taken, in order that the court below might, on motion, correct the bill of exceptions, or make other minor but necessary additions to the record; and this court has for years recognized sub silentio the power of the trial court, after the appeal has been duly taken and the record sent here, to make an entire bill of exceptions and transmit the same to this court by supplemental return.

These matters, however, may be well considered as merely incidental or subsidiary proceedings and, perhaps, of a different nature from the order 'which is desired in the present case, namely, an order by which the judgment appealed from will be set aside, and the subject-matter of the appeal practically taken from the hands of this court after it has acquired full jurisdiction of the case, and that, too, by an inferior court.

The exact question here presented has not been met before, so far as our investigation shows. It has been said by this court that "the appeal removes the subject-matter, and all matters connected therewith, to this court, and is henceforth within its control" (*Waterman v. Raymond*, 5 Wis. 185); also that "this court * * * cannot recognize the right of the lower court to dispose of cases that have been removed to this court in the way pointed out by statute" (*Congregation, etc., v. Hellstern*, 105 Wis. 632, 81 N. W. 988), and that "both courts cannot have jurisdiction over the cause." *Ott v. Boring*, 131 Wis. 472-487, 111 N. W. 833 (11 Ann. Cas. 857).

While none of the cases cited attempt to pass authoritatively upon the question before

us, the implication is quite clear that this court has acted generally upon the assumption that after jurisdiction had been fully obtained here by appeal from a final judgment the trial court could not take any action affecting in any way that judgment or the exclusive power of this court to deal therewith. We see no necessity for questioning that proposition in this case. Here the trial court has not attempted to take any action in the case, but application is made to this court for an order transmitting the records to the trial court, and directing that court to hear and decide a motion for new trial; no other court having power to pass upon such a motion, and a sufficient showing of diligence having been made to excuse the delay.

If this court has power to make such an order, it seems that it must be by virtue of the constitutional grant of "a general superintending control over all inferior courts." Article 7, § 3, Constitution Wis. This jurisdiction has been called "high and transcendent" and said to be as "broad as the exigency of the case demands." *State ex rel. Bank v. Johnson*, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33. It is ordinarily used to compel inferior courts to take action within their powers, or to prevent them from taking action outside of their powers, where there is no other adequate remedy, the exigency grave, and the application prompt. It was clearly given to this court with the intention of thereby clothing the court with the most ample power to do justice in every controversy which might legitimately be brought before it. When the proper showing is made, no reason is perceived why it may not properly be used in aid of the appellate power when, without its use, a serious miscarriage of justice may probably occur, as in the present case.

If it be said that this is an attempt by this court to confer jurisdiction upon the circuit court when it has none by law, the reply is that, notwithstanding the positive language used in the cases cited, it has been recognized for many years that there is a qualified jurisdiction after appeal still remaining in the circuit court, which may be called into activity by permission of this court. It may be said further that nowhere do the appeal statutes say expressly or by fair implication that the trial court entirely loses jurisdiction of an action after appeal. The implications are rather the other way. An appeal is fully perfected by the giving of the notice and bond for costs; but further proceedings are not stayed in the trial court, unless an undertaking to stay them be given. Even when this last-named undertaking is given, the effect is to stay action on the judgment or order appealed from; and the court is at liberty to proceed "upon any other matter included in the action not affected by" such judgment or order. Wis. Stats. § 3066. So

it is clear that jurisdiction, in a qualified sense at least, remains in the trial court, subject to the stay of proceedings imposed in aid of the appeal. While the question is not free from difficulty, we reach the conclusion that in a serious exigency like the present, where justice seems to require it, and no other remedy is adequate, this court may properly, by virtue of its power of superintending control over inferior courts, suspend the operation of the stay in the inferior court for the time being, and authorize a motion for new trial to be made and decided, even though the result may be to set aside the judgment appealed from.

The motions are granted.

STATE v. CITY AND COUNTY OF MILWAUKEE.

(Supreme Court of Wisconsin. Dec. 10, 1912.)

1. LIMITATION OF ACTIONS (§ 11*)—APPLICATION TO STATE.

Under St. 1898, § 4229, providing that the limitations prescribed shall apply to actions by the state, and its amendment (Laws 1905, c. 1), fixing a six-year limitation for the recovery of a penalty accruing to the state, the right of the state to recover fines collected by municipalities and belonging to the school fund may be barred by limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 35-39; Dec. Dig. § 11.*]

2. LIMITATION OF ACTIONS (§ 4*)—APPLICATION TO STATE—SCHOOL FUND—CONSTITUTIONAL LAW.

Const. art. 10, § 2, providing that moneys derived by the state from fines shall be set apart as a school fund to be exclusively applied to school purposes, does not prohibit the Legislature from applying limitation statutes to bar recovery by the state of the proceeds of fines collected by municipalities.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 10, 11; Dec. Dig. § 4.*]

3. LIMITATION OF ACTIONS (§ 102*)—APPLICATION OF STATUTE—TRUSTEE.

The rule that limitations do not run against the trustee of an express trust applies only in equitable actions between the trustee and the cestui que trust, and does not apply to an action by the state, as trustee of the school fund, against municipalities for the proceeds of fines collected.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 494-505; Dec. Dig. § 102.*]

4. LIMITATION OF ACTIONS (§ 11*)—APPLICATION OF STATUTE—TRUSTEE.

St. 1898, § 4229, making the limitations prescribed by statute applicable to the state, applies where the state sues as trustee of the school fund, as well as where it seeks to enforce demands in its proprietary capacity.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 35-39; Dec. Dig. § 11.*]

Appeal from Circuit Court, Milwaukee County; F. C. Eschweiler, Judge.

Action by the State of Wisconsin against the City and County of Milwaukee. From an order overruling plaintiff's demurrers to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

those parts of defendants' answers setting up the statutes of limitation, plaintiff appeals. Affirmed.

The state seeks in this action to recover certain moneys, "the clear proceeds of all fines collected * * * for any breach of the penal laws" in Milwaukee county between January 1, 1859, and January 1, 1909. It is alleged that the defendants were legally bound to pay these moneys to the state without demand, but that the defendants have used these moneys in performing their legitimate municipal functions. Interest is also demanded on the various sums from the dates when it is alleged they became due to the state. Attached to the complaint is an itemized statement of the moneys alleged to be due the state. The answers of the defendants deny the allegations of the complaint, and set up various statutes of limitation in bar of the right of the state to recover certain of these moneys. The state interposed demurrers to those parts of the answers setting up the statutes of limitation. This is an appeal from the order of the court overruling the demurrers, in so far as the statutes of limitation pleaded by the defendants affect sums of money accruing to the state prior to February 1, 1899.

L. H. Bancroft, Atty. Gen., and Russell Jackson, of Madison, for the State. Daniel W. Hoan, City Atty., W. H. Timlin, Jr., First Asst. City Atty., W. C. Zabel, Dist. Atty., and W. L. Tibbs, Asst. Dist. Atty., all of Milwaukee, for respondents.

SIEBECKER, J. (after stating the facts as above). On the former appeal of this action, it was determined that the state may maintain an action against the county and city for moneys received by them, to the use of the state, as the clear proceeds of fines collected, if they have retained such moneys, and have applied and used the same for legitimate municipal purposes. *State v. Milwaukee*, 145 Wis. 131, 129 N. W. 1101, Ann. Cas. 1912A, 1212. The present complaint alleges facts sufficient to constitute such a cause of action.

[1] The defendants respectively allege that recovery is barred by the statutes of limitation, and set forth various limitation statutes as applicable to the case. The trial court held that the alleged causes of action are barred by the limitation statutes as to all sums of money that accrued prior to February 1, 1899, and ordered that the demurrers to the answers be overruled as to all claims for sums due prior to that date. It is the claim of the state that this ruling of the trial court is erroneous, for the reason that none of the limitation statutes were intended to apply to an action by the state for the recovery of moneys for the benefit of the school fund, and that if it should be held that the Legislature did intend to so bar recovery in an action of this

nature the statute is invalid, because it contravenes the provisions of the Constitution creating the school fund.

[2] Section 4229, Stats., provides: "The limitations prescribed in this chapter shall apply to actions brought in the name of the state or for its benefit in the same manner as to actions by private parties." By amendment of this section (chapter 1, Laws of 1905), a six-year limitation is prescribed for bringing actions for the recovery of "a penalty or forfeiture accruing wholly or in part to the state," and the same limitation is prescribed for certain actions or proceedings "for the forfeiture of the rights, privileges and franchises of any railroad company * * * within the state." "Any other action in favor of the state, whether created by statute or otherwise, must be commenced within ten years after the cause of action therefor has accrued." The significance and scope of these statutes were fully considered and the former adjudications on the subject in this court reviewed in the case of *State v. Chicago & N. W. R. Co.*, 132 Wis. 345, 112 N. W. 515, and it was held that the provisions of the statute were plainly intended to apply to the state in the same manner as to private parties. From the construction of these statutes there adhered to and applied, it is clear that they embrace the instant case, unless appellant's claim that the provisions of section 2, art. 10, of the Constitution of this state, renders them inapplicable to this class of actions is sustained.

Under this section of the Constitution, all moneys derived by the state from the various sources therein specified "shall be set apart as a separate fund to be called 'the school fund,' the interest of which and all other revenues derived from the school lands shall be exclusively applied to the following objects, to wit: 1. To the support and maintenance of common schools in each school district, and the purchase of suitable libraries and apparatus therefor. 2. The residue shall be appropriated to the support and maintenance of academies and normal schools, and suitable libraries and apparatus therefor."

All sums of money realized as "the clear proceeds of all fines collected in the several counties for any breach of the penal laws" are to be paid to the state and become part of this school fund. To accomplish this end in the city of Milwaukee, provision is made by section 2515, Stats., which requires the Milwaukee city clerk to account for and pay to the county treasurer annually all fines and penalties collected in criminal cases; and the county treasurer, pursuant to section 715, Stats., is required, at the time he pays the state tax, to turn such money over to the state treasurer, less the amount due him thereof as legal fees. It is urged on behalf of the state that "the school fund is a trust fund, and is placed by the Constitution beyond the power of the Legislature to divert

it to any other use than the support of the schools of the state" (State ex rel. v. Cunningham, 88 Wis. 81, 57 N. W. 1119, 59 N. W. 503), and that a statute barring recovery of the clear proceeds of fines and penalties collected in criminal cases by municipalities is an indirect diversion of such money from the school fund, such as is not permitted by the constitutional provision creating the fund. The context of the constitutional provision contains no express prohibition on the power of the Legislature to enact laws in respect to it; and therefore it is to be presumed that it was intended that the Legislature was to exercise its legislative power as to this fund in all ways in which it is appropriately empowered to prescribe regulations for the protection and enforcement of rights pertaining to matters of like nature. This proposition the Attorney General concedes, but claims that the relation of the state to this fund is that of a trustee of an express trust, and that the constitutional provision creating it clearly implies that any statute which limits the state in enforcing the collection of moneys for the benefit of such fund constitutes, in effect, a regulation by which money becomes diverted therefrom. But we discover nothing in the nature of the right to such moneys for the benefit of this fund different from the rights the state has to moneys due it for other purposes, wherein, as we have pointed out, the state has by legislative action voluntarily submitted itself to the limitation statutes as they apply to private individuals. We perceive nothing in the provisions of the Constitution that prohibits the Legislature from applying limitation statutes to bar recovery by the state of moneys for the benefit of this fund.

[3] It is claimed, furthermore, that the statutes of limitation do not apply to the demand in this cause, because the state is acting in the capacity of a trustee of an express trust as to this fund. The principle thus invoked applies only in equitable actions between the trustees of an express trust and the cestuis que trustent, which is not the case here. This is an action for a money demand by the state, the trustee, for the benefit of this fund, against a third party; and hence is not within the exception contended for by the state. *Howell v. Howell*, 15 Wis. 55; *Boyd v. Mutual Fire Ass'n*, 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, 61 L. R. A. 918, 96 Am. St. Rep. 948; *Williams v. Williams*, 82 Wis. 393, 52 N. W. 429; *Wood on Limitations*, § 200.

[4] The contention that the provisions of section 4229, Stats., making the limitations prescribed by statute, within which actions must be commenced after the cause of action accrues, applicable to the state, apply only to actions wherein it seeks to enforce demands in its proprietary capacity is not well founded, and is repudiated by the decision of this court. The subject was involved in

State v. Railway Co., supra, and it was there held that the limitation statutes applied to a cause of action for unpaid license money due from the railroad in lieu of taxes. That was certainly a demand due the state in its governmental function, and not in its proprietary capacity, but it was there considered that the limitation statutes were applicable to such a demand; and we find no good reason for departing from the ruling in that case. A ruling to the same effect was made by the Supreme Court of Minnesota, in the case of *City of St. Paul v. Chicago, Milwaukee & St. Paul Ry. Co.*, 45 Minn. 387, 48 N. W. 17; the court declaring that the reasons for applying the limitation statutes to the state existed "with equal force when brought to assert what is denominated a 'sovereign right' * * * as when brought to assert a right such as a private person may possess."

The cases decided by the Indiana court are not applicable here. There the constitutional provisions creating the school fund provide that the portion of the fund held by a county shall be held by it in the capacity of an express trustee; and hence a suit against it by the state, as beneficiary of the trust fund, exempted the cause of action from the limitation statute, upon the ground that the trustee of an express trust cannot interpose the defense of the statute of limitations in such an action.

We are persuaded that the trial court ruled correctly that the demurrers must be overruled as to all the demands specified in the order.

The order appealed from is affirmed.

TIMLIN, J., took no part.

MEYER v. MENOMINEE & MARINETTE LIGHT & TRACTION CO.

(Supreme Court of Wisconsin. Dec. 10, 1912.)

1. ELECTRICITY (§ 16*)—INJURIES INCIDENT TO PRODUCTION AND USE—LICENSEES AND INVITEES.

Where an electric light company, whose wires were strung less than two feet above a lumber pile, knew that boys were accustomed to be on such lumber piles, it was bound to anticipate that injury might result in consequence of the location and condition of the wires and to use due care in the management of its poles, wires, and current, to protect children and others, who might be expected to be there, from injury.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 9; Dec. Dig. § 16.*]

2. ELECTRICITY (§ 19*)—ACTIONS FOR INJURIES—WEIGHT AND SUFFICIENCY OF EVIDENCE.

Where the evidence showed that for many years before an accident, children were accustomed to play about a lumber yard and on the piles of lumber, it was sufficient to warrant a finding that an electric light company, whose wires were strung less than two feet above a lumber pile, knew or should have known that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

children were likely to be on the lumber pile and be injured by contact with the wires.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

3. **ELECTRICITY (§ 19*)—ACTIONS FOR INJURIES—WEIGHT AND SUFFICIENCY OF EVIDENCE.**

In an action against an electric light company whose wires were strung less than two feet above a lumber pile on which children were accustomed to play, evidence held sufficient to warrant the jury in finding that defendant was negligent.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

Appeal from Circuit Court, Marinette County; Samuel D. Hastings, Judge.

Action by Regina Meyer, special administratrix of Francis Meyer, against the Menominee & Marinette Light & Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This action was brought to recover damages for the death of a boy about 14 years of age who came in contact with the highly charged wires of the defendant. The accident occurred on what is known as Hamilton & Merryman Company Island in the city of Marinette, where the Republic Lumber Company as lessee was engaged in the lumber business. The defendant's wires extended across a lumber pile where the boy was at the time he came in contact with the wires.

The negligence charged, in substance, is that the defendant disregarded its duties in many respects, and, among others, that it negligently erected poles and strung electric wires upon poles which were so short that the electric wires carrying high voltage and deadly and dangerous electric currents were but 26 feet 3 inches above the ground at the point where the same passed over the lumber pile in question, and failed and neglected to inspect said wires, poles, and fastenings, and failed to keep the wires, poles, and fastenings in repair, and negligently and carelessly permitted the wires to become slack and sag down, and permitted the insulation on said wires to become rotten and worn off, and suffered said wires to become so slack and so sagged down as to be but 1 foot 9 inches above the top of the lumber pile in question; that said poles were set 169 feet apart at the place in question; that the poles by the exercise of ordinary care could have been erected so that the wires would have remained at least 7 feet or more above the top of the lumber pile.

The jury returned the following verdict:

"First question: Was said Francis Meyer, deceased, killed by a shock received from one of the defendant's electric light wires, which he took hold of while on the top of a lumber pile? Answer: Yes (by court).

"Second question: Was said wire, as then charged, placed, and strung, dangerous to children being on top of said pile? Answer: Yes.

"Third question: Was said defendant negligent in using said wire so charged, placed, and strung at the time and place of the death of said deceased? Answer: Yes.

"Fourth question: Ought the defendant in the exercise of ordinary care to have reasonably anticipated that by using said wire, so charged, placed, and strung, some child would be injured thereby? Answer: Yes.

"Fifth question: If you should answer the second question, 'No,' then answer this: Was said death caused by any defect in the condition of the insulation of said wire, at the place where the deceased took hold of it? Answer:

"Sixth question: If you should answer the fifth question, 'Yes,' then answer this: Was the defendant negligent in using said wire at that place with such defective insulation? Answer:

"Seventh question: If you should answer the sixth question, 'Yes,' then answer this: Ought the defendant in the exercise of ordinary care to have reasonably anticipated that by using said wire with such defective insulation it would cause some child to be injured thereby? Answer:

"Eighth question: Was said deceased, Francis Meyer, guilty of any want of ordinary care which contributed to his injury and death? Answer: No.

"Ninth question: Was Joseph Meyer, the father of said deceased, guilty of any want of ordinary care which contributed to the injury and death of said Francis Meyer? Answer: No.

"Tenth question: Was the mother of said Francis Meyer, deceased, guilty of any want of ordinary care, which contributed to the injury and death of said Francis? Answer: No.

"Eleventh question: At what amount do you assess the damage of the plaintiff father and mother resulting from the death of their said son, Francis? Answer: \$1,500."

The usual motions were made by the defendant to change the answers of the jury to questions in the special verdict, for judgment upon the verdict as changed, and for new trial, which were denied, and judgment entered for the plaintiff upon the verdict, and the defendant appealed.

E. W. Miller, of Marinette (F. J. Trudell, of Menominee, of counsel), for appellant. E. C. Eastman, of Marinette, for respondent.

KERWIN, J. (after stating the facts as above). The only question presented on this appeal is whether there is sufficient evidence to support the verdict. It was established upon the trial that the Hamilton & Merryman Company and the Republic Lumber Company, its lessee, had for many years car-

These three questions require no answers if you should answer the second question "Yes."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 138 N.W.—64

ried on a sawmill and lumber manufacturing business on what is known as Hamilton & Merryman Company Island, in the city of Marinette; that tramways were constructed leading from the sawmill to distant portions of the lumber yard upon which lumber was hauled and placed in piles adjacent to said tramways; that said tramways were from 13 to 14 feet high; that the lumber piles were from 24 to 26 feet high; that the lumber pile in question was erected one year before the death of Francis Meyer and was 24 feet 6 inches high; that lumber had been piled to the height of about 24 feet 6 inches at this point for some 10 years previous to the death of said Meyer; that electric light wires of defendant had been strung upon poles in the lumber yard for 9 or 10 years prior to the accident; the wires crossing this lumber pile were attached to a pole 88 feet east of the pile 36 feet above the ground, and to a pole 81 feet west of the pole 23 feet above the ground, making a span of 169 feet, and the wires were so loose and sagged as to be only 1 foot 9 inches above the top of the lumber pile. There was also credible evidence that the wires were very slack and should have been tighter, that the span of 169 feet between the poles allowed a greater sag than is ordinarily and customarily allowed in stretching electric wires of that character, and that the insulation was worn or rotted off from the wires where they passed over the lumber pile in question. The evidence further shows that a great many children had been in and about this lumber yard for many years before the accident, and that about 50 children, ranging in ages from 6 to 15 years, lived with their parents in and about this lumber yard at the time of the death of said Francis Meyer, and that such children were accustomed to play about and upon the tramways and lumber piles, including the pile in question; that deceased lived with his parents about 90 feet from the lumber pile in question; that a plank road some 16 feet wide ran through a portion of the leased premises and was used by the lumber company in conveying lumber from its mill, and the lumber was piled on either side of said road; that the two wires in question were about 28 inches apart and each carried 2,300 voltage; that this plank road, while not a duly laid out street, was traveled by a great many people aside from the employees of the lumber company, and the poles and wires were erected along the south side of this road; that the lumber pile in question was immediately adjacent to this road and easy of access by children, there being steps on the side of the pile by boards protruding close to the plank road and extending to the top of the pile; that defendant was notified and warned as to the condition of the wires and poles in September, 1909, the fall before the death of Francis Meyer, which death occurred in May, 1910.

The main contention of counsel for appellant, as we understand it, is that the defend-

ant owed deceased no duty, he being a mere trespasser, and further that the element of reasonable anticipation necessary to make a case of actionable negligence was wanting; hence there could be no recovery. The deceased was on top of the lumber pile, took hold of the wires, one in each hand, and was instantly killed. Counsel for appellant say they have found no case "where recovery was had by reason of the taking hold of electric wires." *Lomoe v. Superior W. L. & P. Co.*, 147 Wis. 5, 132 N. W. 623, is directly against appellant upon this proposition.

Counsel for appellant rely mainly upon adjudications from foreign jurisdictions. While it may be difficult to reconcile all decisions upon the subject, the confusion, or seeming confusion, results more from failure to fully appreciate the distinction upon facts, than from any conflict in propositions of law upon the same state of facts. This we think will appear obvious from an examination of the cases cited by appellant from other jurisdictions. Cases may be found where one cannot recover for injuries sustained while trespassing, while others may be found holding that the mere fact that plaintiff was trespassing on the defendant's property when injured will not in all cases bar recovery. So, too, it has been held that a bare licensee or invitee may recover for injuries sustained while on the defendant's premises caused by the defendant's negligence. In *Busse v. Rogers et al.*, 120 Wis. 443, 98 N. W. 219, 64 L. R. A. 183, plaintiff, a child, was injured while playing upon a lumber pile situate on the highway adjacent to defendant's premises, yet it was held that recovery could be had for the injuries sustained through the negligence of the defendant. See, also, *Connell v. Keokuk E. Ry. & P. Co.*, 131 Iowa, 622, 109 N. W. 177.

[1] But whether deceased in the instant case was a bare licensee or invitee when upon the lumber pile, if defendant knew or ought to have known that boys of his age were accustomed to be there, it was chargeable with due care in the management of its poles, wires, and current so as to protect children and others who might be expected to be there from injury, and was bound to anticipate that some injury might result to some one in consequence of the location and condition of the wires. *Nagle v. Hake*, 123 Wis. 258, 101 N. W. 409; *Wilbert v. Sheboygan L. P. & R. Co.*, 129 Wis. 1, 106 N. W. 1058, 116 Am. St. Rep. 931; *Lomoe v. Superior W. L. & P. Co.*, supra; *Bright v. Barnett & R. Co.*, 88 Wis. 299, 60 N. W. 418, 26 L. R. A. 524; *Burnett v. Ft. Worth L. & P. Co. et al.* (Tex. Civ. App.) 117 S. W. 175; *Temple v. McComb C. E. L. & P. Co.*, 89 Miss. 1, 42 South. 874, 11 L. R. A. (N. S.) 449, 119 Am. St. Rep. 698, 10 Ann. Cas. 924; *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154; *Connell v. Keokuk E. Ry. & P. Co.*, 131 Iowa, 622, 109 N. W. 177; *Daltry v. Media E. L. H. & P. Co.*, 208 Pa. 403, 57 Atl. 833; *Ambroz v. Cedar Rapids*

E. L. & P. Co., 131 Iowa, 336, 108 N. W. 540; *Braun v. Buffalo G. E. Co.*, 200 N. Y. 484, 94 N. E. 209, 34 L. R. A. (N. S.) 1089, 140 Am. St. Rep. 645, 21 Ann. Cas. 370; *Guinn v. Delaware & A. T. Co.*, 72 N. J. Eq. 276, 62 Atl. 412, 3 L. R. A. (N. S.) 988, 111 Am. St. Rep. 668.

[2, 3] In the case at bar the evidence was ample to warrant the jury in finding that for a long time before the accident the defendant knew, or ought to have known, that children were likely to be upon the lumber pile and be injured by contact with the wires, and that defendant was guilty of negligence in the use of its wires at the time and place of the death of the deceased. There is also sufficient evidence to entitle the jury to find that neither the deceased nor his parents were guilty of contributory negligence. In many of the cases cited by appellant's counsel the danger was not reasonably to be apprehended, and most, if not all, of them are readily distinguishable from the case at bar. It would serve no useful purpose to discuss them. Perhaps one of the strongest cases cited in support of appellant's contention is *Cumberland Telegraph & Telephone Co. v. Martin*, 116 Ky. 554, 76 S. W. 394, 77 S. W. 718, 63 L. R. A. 469, 105 Am. St. Rep. 229, decided in 1903; and this case is out of harmony with a later decision of the same court. *Rodgers v. Union L. H. & P. Co. (Ky.)* 123 S. W. 293, decided in 1909.

There are no exceptions to the charge or objection to the special verdict, and no request was made for further findings. We think the judgment of the court below is right and should be affirmed.

The judgment is affirmed.

STACK v. HICKEY et al.

(Supreme Court of Wisconsin. Dec. 10, 1912.)

1. VENDOR AND PURCHASER (§ 130*)—TITLE OF VENDOR—"MARKETABLE TITLE"—DEED UNDER JUDICIAL SALE—"CLOUD ON TITLE."

Where a vendor tendered title under the foreclosure of a first mortgage, leaving outstanding a sheriff's deed to a third person, executed on foreclosure of the second mortgage, such deed, being a claim under judicial sale and not showing its invalidity on its face, or in connection with its first foreclosure, constituted a cloud, and rendered the vendor's title unmarketable.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 245, 246, 247; Dec. Dig. § 130.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1233-1235; vol. 5, pp. 4388-4390; vol. 8, p. 7717.]

2. VENDOR AND PURCHASER (§ 133*)—TITLE OF VENDOR.

Under a contract to convey a good title by warranty deed, the purchaser is not bound to accept a title which will require litigation to determine whether it is good.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 234-237; Dec. Dig. § 133.*]

3. SPECIFIC PERFORMANCE (§ 130*)—RELIEF—CONDITIONS—DISCRETION OF COURT.

Plaintiff in specific performance contracted to purchase farm land, giving in consideration a sum of money and a conveyance of city lots. Plaintiff did not tender a clear title to the city lots till the trial. *Held*, that there was no abuse of the trial court's discretion, on decreeing specific performance, in charging plaintiff with interest on the money to be paid by him, rents of the city lots, taxes, insurance, repairs on the farm property paid by defendants, and with the expense of bringing plaintiff's abstract down to date and the costs of the action, less taxes, insurance, and repairs on the city lots paid by him, rent of the farm property, and the expense of bringing the abstract of the farm property down to date.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 424, 425; Dec. Dig. § 130.*]

Appeal from Circuit Court, Milwaukee County; W. J. Turner, Judge.

Action by Stephen S. Stack against Thomas J. Hickey and others. Judgment for plaintiff, and he appeals. Affirmed.

This is an appeal from part of a judgment in an action for specific performance of a land contract. Judgment was entered for the appellant for specific performance, but imposed upon him certain terms and conditions named in the findings and judgment. By the terms of the contract, the respondents were to convey certain lands to the appellant, in consideration of which the appellant agreed to pay respondents \$11,500 and transfer to them, free and clear from incumbrances, except the right to dig and maintain a tunnel under the surface of a part of the grounds, a good title by warranty deed, and furnish abstract of title to certain lands in the city of Milwaukee, which included lots 8 and 9, in block 1, in Carl Buschardt's subdivision, being a subdivision of lot No. 3.

The controversy in the case arises out of whether or not a good title to these lots was tendered before the commencement of this action, and, if not, whether the accounting was correct. The lots in question were incumbered with two mortgages, the first known as the Walz mortgage, and the other, or second mortgage, known as the Draves mortgage. The question of whether the title was a good title, within the meaning of the contract, results from the foreclosure of these mortgages.

One Sivyer held a sheriff's deed upon the foreclosure of the second mortgage, which was recorded and showed title in him to said lots 8 and 9 when this action was commenced. Upon production on the trial of a deed from Sivyer to respondents, specific performance was adjudged on the terms set forth in the findings. The court below held the Sivyer deed a cloud upon the title, and that respondents were entitled to interest on the \$11,500, and on accounting the court concluded: " * * * That the defendant is entitled to receive from said plaintiff said item of interest, namely, seven hundred six-

ty-six dollars and sixty-six cents (\$766.66), said item of rent received by said plaintiff, namely, seven hundred twelve dollars (\$712), said item of taxes paid by the defendants on said farm property, namely, the sum of one hundred eighteen dollars and ninety cents (\$118.90), said item of insurance paid by said defendants, namely, the sum of six dollars and sixteen cents (\$6.16), said item of repairs by said defendants, namely, the sum of eight dollars and seven cents (\$8.07), or a total of one thousand six hundred eleven dollars and seventy-nine cents (\$1,611.79), together with the costs and disbursements of this action and an abstract of plaintiff's property brought down to date, free of expense to said defendants. That the plaintiff is entitled to an offset against the said sum of one thousand six hundred eleven dollars and seventy-nine cents (\$1,611.79) and the costs and disbursements of this action for said item of taxes paid by the plaintiff, namely, the sum of one hundred twenty-eight dollars and eighty cents (\$128.80), the said item of rent received by the defendants for said farm property, namely, the sum of two hundred seventy-five dollars (\$275), the said item of insurance paid by the plaintiff, namely, the sum of seventeen dollars and forty-two cents (\$17.42), the said item of repairs paid by the plaintiff, namely, the sum of eighty-three dollars and forty-five cents (\$83.45), or a total of five hundred four dollars and sixty-seven cents (\$504.67), together with the sum of one hundred twenty-five dollars (\$125) damages, as found in the fifteenth finding of fact, or a total of six hundred twenty-nine dollars and sixty-seven cents (\$629.67). That said plaintiff is also entitled to receive from said defendants an abstract of said farm property, brought down to date, free of expense. * * *

O'Connor, Schmits & Wild, of Milwaukee, for appellant. William E. Burke, of Milwaukee, for respondents.

KERWIN, J. (after stating the facts as above). [1,2] But two questions are involved upon this appeal: (1) Whether there was a cloud upon the title to lots 8 and 9 in question, such as to render it unmarketable under the agreement to convey a good title, and (2) whether the accounting was proper.

1. The contention of the appellant is that the foreclosure of the Walz or first mortgage cuts off all rights of the mortgagee Draves in the lots under the second mortgage, and that, the title acquired under the first foreclosure having passed to the appellant before this action was brought, appellant had and tendered a good title; therefore was entitled to specific performance at the time of such tender. On foreclosure of the second mortgage the sale was confirmed by the court and the property bid in by Frederick Sivyer, administrator de bonis non of the estate of Draves, and a sheriff's deed executed to him, which was duly recorded.

We are furnished by counsel on both sides with very able and exhaustive briefs as to what constitutes marketable title and cloud upon title to real estate. On the part of appellant many authorities are cited to the point that the foreclosure of a prior mortgage, when a second mortgagee is a party, cuts off such second mortgagee, and also that a deed from a stranger to the title does not create a cloud, nor a deed void upon its face. Also that a mortgage by one having no title or foreclosure thereof is not a cloud upon title; or, if the invalidity of that which is alleged to be a cloud appear on the face of the record by which it is shown to exist, it may be no cloud so as to render the title unmarketable. In determining what is a cloud, it is sufficient, however, that the defect in title be at least an apparent cloud, rendering resort to evidence allunde the record necessary in order to show its invalidity. *Pier v. Fond du Lac*, 38 Wis. 470; *Suring v. Rollman et al.*, 145 Wis. 490, 130 N. W. 485.

The claim or title under the Sivyer deed was a claim under a judicial sale, and cannot be said to show its invalidity upon its face, nor in connection with the first foreclosure. Many facts allunde the record may have existed and entered into the adjudication upon the second or Draves foreclosure sale, which gave Sivyer title or interest in the property notwithstanding the first foreclosure. The mere fact that Sivyer held under a sheriff's deed upon a judicial sale, fair upon its face, rendered the title to the lots unmarketable.

The respondents, under the agreement, were entitled to a good title, one that they could hold in peace, and not be obliged to litigate to determine whether the deed to Sivyer on judicial sale conveyed any interest or not. *Dobbs v. Norcross*, 24 N. J. Eq. 327; *Zane v. Weintz*, 65 N. J. Eq. 214, 55 Atl. 641; *Fleming v. Burnham et al.*, 100 N. Y. 1, 2 N. E. 905. A title which is open to judicial doubt is not marketable. *Gates v. Parmly et al.*, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739; 36 Cyc. 634; *Speakman v. Forepaugh*, 44 Pa. 363; *Swain & Abell v. Fidelity Ins. T. & S. D. Co.*, 54 Pa. 455; *Street v. French et al.*, 147 Ill. 342, 35 N. E. 814; *Moore v. Williams*, 115 N. Y. 586, 22 N. E. 233, 5 L. R. A. 654, 12 Am. St. Rep. 844; *Daniell v. Shaw*, 166 Mass. 582, 44 N. E. 991. There can be no doubt upon the record before us that the deed to Sivyer constituted a cloud and rendered the title unmarketable, within the meaning of the agreement; therefore respondents were not obliged to accept it.

[3] 2. After action was commenced, and upon the trial, appellant tendered a quitclaim deed from Sivyer to respondents of lots 8 and 9, and thereupon the court below awarded specific performance, but charged the appellant with the sums heretofore set out in the statement of facts as properly chargeable against him, on the ground that

until he tendered the deed. We think the court below was clearly right in holding that the sheriff's deed to Sivyer upon foreclosure of the second mortgage was a cloud upon the title to said lots 8 and 9; hence that the title offered by appellant before action brought was not a good title, within the meaning of the contract. This being so, we cannot say that the court below abused its discretion in stating the account between the parties as appears from the statement of the case herein. The right to specific performance rests largely in the discretion of the court, and will not be decreed when, for any reason, it would be inequitable. *Northwestern N. B. of Superior v. Superior*, 103 Wis. 43, 79 N. W. 54; *Hunholz v. Helz et al.*, 141 Wis. 222, 124 N. W. 257; *Park et al. v. Minneapolis, St. P. & S. Ste. M. R. Co.*, 114 Wis. 347, 89 N. W. 532; *Menasha v. Wisconsin C. R. Co.*, 65 Wis. 502, 27 N. W. 169; *Williams v. Williams*, 50 Wis. 311, 6 N. W. 814. We find no ground for disturbing the judgment.

The judgment is affirmed.

KATZ et al. v. DE WOLF et al.

(Supreme Court of Wisconsin. Dec. 10, 1912.)

1. CORPORATIONS (§ 320*)—APPOINTMENT—JURISDICTION OF COURT.

On suit of a stockholder charging defendant, another stockholder and officer, with misconduct in commingling corporate with personal funds, wrongfully retaining commissions, failing to render an account to the stockholders, and failing to keep the corporate funds in a bank designated by the directors, and demanding the removal of defendant from office, that a time and place be fixed for an election of a proper board of directors, an account, and that defendant be required to deposit in some bank moneys belonging to the corporation, the circuit court, without express statutory authority, has power to appoint a receiver pendente lite.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1426-1439; Dec. Dig. § 320.*]

2. APPEAL AND ERROR (§ 947*)—REVIEW — ERROR IN ASSUMING WANT OF JURISDICTION.

When the court has discretion to grant a motion, but denies it on the erroneous theory of want of power, the order will be reversed and the case remanded in order that the discretion of the court may be exercised; but this rule does not apply where no sufficient ground is shown for the exercise of a discretion, or where the court decided that it had no power, but that if it had it would deny the motion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3813; Dec. Dig. § 947.*]

3. CORPORATIONS (§ 320*)—GROUNDS OF APPOINTMENT—CONTROVERSY BETWEEN STOCKHOLDERS.

Where one stockholder charged another stockholder, who was an officer and director, with misconduct in commingling corporate with personal funds, in wrongfully retaining commissions, in failing to account to the stockholders, and in failing to keep corporate funds in a bank designated by them, and demanded defendant's removal from office, the election of a new board of directors and an accounting, and

the charges were fully met by the answer, and it appeared that there was no imminent danger of loss of the corporate property or of any other injury to the plaintiff which could not be fully compensated by final decree, the application for a receiver of the corporate property pendente lite upon affidavits in advance of a trial on the merits was properly denied.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1426-1439; Dec. Dig. § 320.*]

Appeal from Circuit Court, Milwaukee County; William J. Turner, Judge.

Suit by Herman Katz and another against John E. De Wolf and others. From an order denying a motion for the appointment of a receiver pendente lite, plaintiffs appeal. Affirmed.

Frank M. Hoyt, of Milwaukee (Glicksman, Gold & Corrigan, of Milwaukee, of counsel), for appellants. Adolph Hubschmann, of Milwaukee (Thomas H. Gill, of Milwaukee, of counsel), for respondents.

TIMLIN, J. The plaintiffs own one-half of the shares and the defendant John E. De Wolf in his own right and as administrator of William De Wolf owns half of the shares in the defendant Avenue Rent Company, a stock corporation organized under the general statutes of this state and having an authorized capital stock of 500 shares of the face or par value of \$100 each. The corporation is entitled to but three directors. The defendant John E. De Wolf is now a director, president, and treasurer, and the plaintiff Voss is a director, and the shareholders are unable to agree upon or to elect a third director or to agree upon the proper manner of conducting the corporate business. This deadlock was brought about as follows: The business of the corporation is buying, selling, and dealing in real and personal property, leases and leasehold interests, constructing buildings, renting and leasing buildings, etc. It owns a 99-year lease of a certain parcel of land with buildings and improvements and sublets the same. By the articles of organization the president has general supervision of the business and affairs of the corporation subject to the control of the board of directors. The president and treasurer must be directors, while the secretary need not. The treasurer is to have the custody of the moneys of the corporation and disburse the same as prescribed by the by-laws or as authorized by the board of directors. A by-law requires that all money belonging to the company shall be by the treasurer deposited in such bank as the board of directors shall approve, to be thence drawn out by checks by both president and treasurer. There was originally a smaller amount of capital stock and three shareholders each having an equal number of shares, but by purchase one shareholder was eliminated, and the capital stock was increased, and it came about that the principal persons interested as shareholders

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

were Herman Katz and John E. De Wolf. The plaintiff Voss holds one share under Herman Katz, and William De Wolf held one share which he received from John E. De Wolf. With the consent of Mr. Katz, John E. De Wolf, William De Wolf, and Mr. Katz constituted the board of directors. The offices were so distributed that Mr. Katz was president, John E. De Wolf was vice president and treasurer, and one Reitman, an employé of John E. De Wolf, was made secretary. John E. De Wolf resided in Milwaukee and was more or less engaged in the real estate business. Mr. Katz was required or disposed to spend a great deal of time in Europe in pursuit of his regular business. Mr. Katz resigned as president, and John E. De Wolf resigned as vice president, and he was elected president, and William De Wolf was elected vice president, all with the consent of Mr. Katz. It was agreed between them that John E. De Wolf should have charge of the corporate affairs, which consisted of making subleases, collecting rents, paying for repairs, insurance, and taxes and such like. For this John E. De Wolf was to receive as full compensation 5 per cent. of the amount of rent received.

So far there is no dispute, but at this point the defendant denies that the 5 per cent. was agreed to be in full compensation. Returning from Europe, Mr. Katz found that, in addition to this 5 per centum on rents collected, John E. De Wolf had charged to the corporation 2 per cent. on the total amount of the leases for procuring tenants or negotiating leases; such commissions amounting to \$2,497.50. This the complaint avers to have been done fraudulently, without right or consideration, with intent to defraud, etc. The answer avers that it was pursuant to the agreement between the parties and a customary charge in Milwaukee. John E. De Wolf had been collecting the rents and mingled them so collected with his own funds and refused to deposit the money in bank as required by the by-laws. This is met by a claim that John E. De Wolf collected these funds as real estate agent and turned them over thereafter to himself as treasurer of the corporation, and that no bank had been designated by the directors, but that he had nevertheless deposited them in a bank. It is averred in the complaint that Katz and De Wolf met on January 14, 1911, and agreed upon a settlement of the above matters, whereby John E. De Wolf should continue to receive 5 per centum on rents collected and should have but 1 per centum for commissions on leases in question, making \$1,248.75 instead of \$2,497.50, and also should have 1 per cent. on certain leases negotiated by him thereafter with provisions for a conditional refund, and that all moneys remaining on hand after paying the necessary disbursements should be divided equally between them and quarterly reports made and the

money divided each quarter, and that Mr. Katz should resign as a director and Arthur Voss, his bookkeeper, be elected in his stead, and that, all the stock being represented at this transaction, the meeting should be written up as a stockholders' meeting voluntarily held, and thereafter a resolution should be passed by the directors embodying this agreement. It is then averred that De Wolf failed to carry out this agreement in several particulars, and that he did not enter up the same correctly and did not pay over, etc., whereupon on April 11, 1911, Katz rescinded the agreement and relies on the original transaction as a fraudulent conversion of corporate funds, misconduct in office, etc. On November 7, 1911, William De Wolf died, leaving a vacancy in the board of directors, and John E. De Wolf was appointed his administrator. The charges of misconduct are therefore: (1) The commingling of corporate with personal funds; (2) retaining wrongfully the commission on leases; (3) failure to render an account of all funds of the corporation to the stockholders; (4) failure to keep the corporate funds in a bank designated by the directors. Each of these charges of misconduct is met by the answer in denial or by new matter in the way of explanation and denial.

The complaint demands relief appropriate under section 3237, Stats. 1898, namely: That the defendant John E. De Wolf be removed from his office as president and treasurer, and these offices declared vacant, that a time and place be fixed by the court for the holding of an election to elect a successor as director of William De Wolf and to elect a proper governing body and board of directors of said corporation, that John E. De Wolf be required to account for, pay over all moneys of the corporation in his hands, etc., and that he be required to deposit in the name of the corporation moneys belonging to it in some bank, and that a receiver be appointed to take charge, possession, and control of the business, property, and affairs of said corporation with the usual power of receivers in such cases to conserve such property and the assets. In addition to the foregoing, there is a prayer for relief not expressly authorized by section 3237, *supra*, viz., that, in the event that no board of directors can be elected, a receiver of the corporation be appointed with the usual power of receivers in such cases made and provided to sell and dispose of the property and wind up the affairs of the corporation. There is no claim made that either the plaintiff Katz or the defendant John E. De Wolf or the corporation is irresponsible or insolvent.

[1] It is contended by the appellant that the learned circuit court refused to appoint a receiver on the sole ground that he lacked the power so to do. The order appealed from states that, "solely for the reasons stated in

tiff's motion to appoint a receiver be and the same hereby is denied." The learned circuit court in the opinion mentioned stated: "I think the statutes of this state have superseded the common law, and that the authority to dissolve the corporation and appoint a receiver must be found to expressly exist by statute. I do not believe that the court has power to administer the affairs and assets of a perfectly solvent corporation engaged in business. Jurisdiction to do so only exists when facts are shown which bring the case under the provisions of the statute." He also said in closing this opinion: "When it is made to appear to the court that the governing body of the corporation is carrying it on successfully and with profit to the stockholders, that the corporation is solvent, and as in this case that the management of it does not involve the employment of a large force of clerical assistants or the expenditure of large sums of money, then there is no danger of mismanagement in that behalf, and that the managing officer is abundantly able to respond for any losses that there may be on account of his mismanagement, it would not be proper for the court to appoint a receiver. The motion will therefore be denied."

[2] The situation then is that the court decided by the order appealed from that he had no power to appoint a receiver in this case, and that he would not appoint one if he had the power. Upon the proposition that he lacked power, the learned circuit court erred. There is a class of cases authority for the proposition that, when discretionary power exists in the court to grant or deny a motion, if the denial was based on the erroneous assumption that the power did not exist, the order must be reversed and the case remanded to the circuit court in order that the discretion existing in the circuit court might be exercised. *Binder v. McDonald*, 106 Wis. 332, 82 N. W. 156; *Whitham v. Mappes*, 89 Wis. 668, 62 N. W. 430; *Hart v. Godkin*, 122 Wis. 646, 100 N. W. 1057.

Reflection must convince one that this rule has no application to cases in which there is no sufficient ground shown for the exercise of the discretion which the court below failed to exercise, or to cases in which the court decided it had no power, but that if it had it should in its discretion deny the motion. The situation here is quite novel, and the appellant cites and relies upon the fundamental principle that equity adjusts its reliefs and its remedies to new conditions, illustrating this by reference to the cases of *Boothe v. Summit Coal M. Co.*, 55 Wash. 167, 104 Pac. 207, 19 Ann. Cas. 1255; *State ex rel. Conlan v. Oudin & Bergman Fire Clay, etc., Co.*, 48 Wash. 196, 93 Pac. 219; *Weymouth v. Oudin*, 56 Wash. 315, 105 Pac. 1027; *Gibbs v. Morgan*, 9 Idaho, 100, 72 Pac. 733; *Sternberg v. Wolff*, 56 N. J. Eq.

St. Rep. 494; a. c., 56 N. J. Eq. 555, 42 Atl. 1078; *Featherstone v. Cooke*, L. R. 16 Eq. 298; *Merrifield v. Barrows*, 153 Ill. App. 523; *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; *Columbian Athletic Club v. State*, 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 727, 52 Am. St. Rep. 407. In some of these cases and under various circumstances a receiver of the corporate property and affairs was appointed because of a deadlock between the shareholders.

The respondent meets this with a proposition that, independent of statute, a court of equity has no power to dissolve a corporation by selling and dividing the proceeds of its property among its stockholders at the suit of an individual stockholder in his own behalf and in his own name, citing *Strong v. McCagg*, 55 Wis. 624, 13 N. W. 895; *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. 21; *Brahm v. M. C. Gehl Co.*, 132 Wis. 674, 112 N. W. 1097. To the point that a deadlock in the affairs of a corporation does not justify the appointment of a receiver, respondent cites: *Einstein v. Rosenfeld*, 38 N. J. Eq. 309; *Alabama Coal, etc., Co. v. Shackelford*, 137 Ala. 224, 34 South. 833, 97 Am. St. Rep. 23; *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa, 313, 70 N. W. 216, 38 L. R. A. 122, 63 Am. St. Rep. 389; *American Loan & Trust Co. v. Toledo Ry. Co. (C. C.)* 29 Fed. 416; *Loomis v. McKenzie*, 31 Iowa, 425; *Laurel Spring Land Co. v. Fougeray*, 50 N. J. Eq. 756, 26 Atl. 886, reversing *Fougeray v. Cord*, 50 N. J. Eq. 185, 24 Atl. 499, and other cases.

The development of corporation law began with a strictness of analogy between municipal and stock corporations which is no longer fully observed. The change from the ancient mode of creating corporations by a special act to permit organizations by public declaration or contractual undertakings acknowledged and filed in a public office and the great multiplication of corporations thereunder caused some further change. There is unquestionably a broad power of equity applicable wherever wrong is shown of such a nature as to arouse the equitable jurisdiction. Whether, in case of a mere deadlock between two or more contending groups of stockholders, a court of equity would by final decree appoint a receiver and decree a sale of the corporate property and a distribution among the shareholders is not before us, and the disposition of this motion is not to be taken to affect that question.

[3] But, where there is no imminent danger of loss of the corporate property or of any other injury to the moving party which cannot be fully compensated by the final decree, the courts will not, upon affidavits and in advance of a trial on the merits, by placing the property in the hands of a receiver, wrest the possession of the corporate property from the corporation and from those of-

ficers who are duly elected and who prima facie are entitled to administer the affairs of the corporation. That is the situation shown here. The charges of misconduct made in the complaint against defendants are fully met by the answer. The truth in this regard can be ascertained only after a trial. Their present possession of the corporate offices and affairs by John E. De Wolf and Reitman was taken with the consent of and by the act of the plaintiff Katz, and it is prima facie lawful. A deadlock in corporate affairs, or rather in the matter of electing directors, may be a serious thing forced upon the plaintiff, or he may have himself brought it about. It could hardly be expected that any shareholder owning half the stock could have a receiver at pleasure by merely refusing to agree to the election of any director proposed by the other stockholder or stockholders. The effort of the parties here to agree was apparently not very strenuous. The plaintiffs cast 250 votes for the two plaintiffs for directors of the corporation giving them the majority and control of the board of directors, while the defendants John E. De Wolf and his brother cast 250 votes for themselves, the existing directors, giving them control of the board of directors, or perpetuating the control they already possessed. An affidavit used in resisting the motion for the appointment of a receiver states that John E. De Wolf offered a resolution at the stockholders' meeting, reciting that it was apparent that none of these persons could be elected by a majority vote, and resolving that some disinterested person be agreed upon to act as the third director. Also, that a list of names of 19 competent and unbiased men was submitted to the shareholders from which the plaintiff might select one, but the plaintiff Herman Katz refused so to do. What explanation or disapproval shall develop when this case is tried on its merits and the litigants and their witnesses subjected to the test of cross-examination we cannot now know; but there is here no sufficient showing to authorize the circuit court, in the exercise of a just discretion, to appoint a receiver of the property of this corporation pendente lite.

Order affirmed.

KATZ et al. v. DE WOLF et al.

(Supreme Court of Wisconsin. Dec. 10, 1912.)

Appeal from Circuit Court, Milwaukee County; William J. Turner, Judge.

Action by Herman Katz and another against John E. De Wolf, administrator, etc., and others. From an order denying a motion for the appointment of a receiver pendente lite, plaintiffs appeal. Order affirmed.

Frank M. Hoyt, of Milwaukee (Glicksman, Gold & Corrigan, of Milwaukee, of counsel), for appellants. Adolph Hubschmann, of Milwaukee (Thomas H. Gill, of Milwaukee, of counsel), for respondents.

TIMLIN, J. This case relates to a different corporation, but otherwise presents the same questions as the preceding case of Katz et al. v. De Wolf et al., 138 N. W. 1013, and is ruled by the decision in that case.

Order affirmed.

VAN DINTER v. WORDEN-ALLEN CO.

(Supreme Court of Wisconsin. Dec. 10, 1912.)

Dissenting Opinion, Dec. 12, 1912.)

1. MASTER AND SERVANT (§ 219*) — ASSUMPTION OF RISK.

The danger of the tipping up of the rear ends of two unfastened planks by the operation of a hoisting apparatus, so arranged that the weight of the article being raised (350 to 400 pounds) and part of that of the apparatus comes on the few inches of the planks extending beyond their support, is so apparent that a carpenter of many years' experience will be held as matter of law to have assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

2. MASTER AND SERVANT (§§ 204, 228*)—ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE—STATUTES.

The defense of assumption of risks and contributory negligence are not abolished by St. 1893, § 1636—81, providing that one employing another to perform labor in the erection of a building shall not furnish for the performance of such labor hoists which are unsafe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546, 670, 671; Dec. Dig. §§ 204, 228.*]

3. MASTER AND SERVANT (§ 154*)—DUTY TO WARN OF DANGER.

The master is under no duty to warn of the danger an employé who fully knows and appreciates the situation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 308, 309; Dec. Dig. § 154.*]

4. MASTER AND SERVANT (§ 203*)—"ASSUMPTION OF RISK" — "CONTRIBUTORY NEGLIGENCE."

Assumption of risk and absence of contributory negligence may coexist; the former relating to assumption by an employé of a risk already in existence when assumed, and the latter to conduct on his part increasing an existing risk or creating or contributing proximately to a new one.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. § 203.*]

For other definitions, see Words and Phrases, vol. 1, pp. 589-591; vol. 8, pp. 7584, 7585; vol. 2, pp. 1540-1547; vol. 8, p. 7617.]

Timlin and Kerwin, JJ., dissenting.

Appeal from Circuit Court, Milwaukee County; W. J. Turner, Judge.

Action by Peter Van Dinter against the Worden-Allen Company. From an order setting aside the verdict and granting a new trial, defendant appeals. Reversed and remanded, with directions.

Action for personal injuries. The defendant was engaged in building an addition to the plant of the Power & Mining Company, at the village of Cudahy, under an independent contract. The plaintiff, a man 44 years of age, who had worked at the carpenter

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

trade for 28 years, was employed by defendant as such carpenter and joiner. On the 6th of July, 1910, plaintiff was directed by the defendant to receive, place, and lay in the third story of the building then under construction, beam joists for the support of the floor to be laid in such story. The longitudinal timbers for the support of such beam joists were in place for receiving them. These extended east and west, and the joists that were to be laid extended north and south. The space between the timbers upon which the joists were to be laid was about 16 feet, and the joists were being placed or set in these timbers crosswise about 4 feet apart. The joists were about 16 feet in length and about 5x12 inches thick. The plaintiff was standing on the north longitudinal timber receiving the joists to be set in place as they were hoisted from the ground. The hoisting was being done by the men below by means of a block and tackle attached to a so-called "horse," which rested on the joists that were already set in place. This horse device consisted of a plank 12 inches wide by 3 inches thick and about 20 feet long, set edgewise, with two legs consisting of 2x4 timbers fastened to the sides about 8 feet from the front and V-shaped, and each resting upon a board, which lay flat on the joists and projected in front of the last joist laid and ran back parallel with each other to the tail end of the horse about 20 feet. There was a spread of 3 or 4 feet between the legs at their bottom. As the apparatus was being operated by the plaintiff and his helper, also a carpenter, when a joist was to be raised they placed the legs of the horse near the front ends of the two boards, a little forward of the last joist that had been placed. The tail end of the hoist, which was set edgewise and formed the back of the horse, was lashed to a joist by means of a rope, leaving the two boards on which the legs of the horse rested loose. One end of the rope which passed through the pulleys of the block and tackle was fastened to the joists to be raised, and the men below, five or six in number, pulled at the other end of the rope, thereby raising the joist. Each joist weighed from 350 to 400 pounds. When it reached the proper level, it was received by plaintiff and set in place. They would then untie the tail end of the horse, move the apparatus forward about four feet to the joist which had just been placed, and the same operation would be repeated. While one of the joists was being thus hoisted and the plaintiff was standing to the side on the north longitudinal timber waiting for the joist to come up, one of the loose boards on which the legs of the horse rested, by reason of the pressure exerted at the front end, tipped up at the rear and slued around, knocking the plaintiff off the timber on which he was standing, as the result of which he fell to the ground and sustained the injury for which this action was brought.

A special verdict was returned finding: (1) That the hoist which was being used and operated at the time the plaintiff was injured was not safe, suitable, or proper, and not so constructed, placed, and operated as to give proper protection to the life and limb of a person so employed or engaged as the plaintiff was at the time of the accident; (2) that the use of the hoist in that condition was the proximate cause of plaintiff's injury; (3) that the defendant in the exercise of ordinary care ought reasonably to have anticipated that said hoist was unsafe, unsuitable, or improper and not so constructed, placed, and operated as to give proper protection to the life and limb of a person employed or engaged as the plaintiff was at the time he was injured; (4) that the plaintiff at the time he was working with said hoist did not know and comprehend the danger from using said hoist in the condition in which it then was; (5) that the defendant in the exercise of ordinary care ought to have known and appreciated that, unless the boards on which the legs of the hoist rested were securely fastened or held down at or near the rear end of said hoist, they were liable to tip up during the operation of hoisting as it was being carried on, and to cause some such accident as the one which happened to the plaintiff; (6) that the defendant in the exercise of ordinary care ought to have discovered and appreciated such danger before the accident; (7) that the defendant in the exercise of ordinary care ought to have notified and warned the plaintiff of the danger of operating the said hoist unless the boards on which the legs of the hoist rested were securely fastened or held down at or near the rear end of said hoist, as they were liable to tip up during the operation of hoisting as it was being carried on, and to cause some such accident as the one which happened to the plaintiff; (8) that such failure to warn the plaintiff was the proximate cause of his injury; (9) that no want of ordinary care on the part of the plaintiff contributed proximately to his injury; and (10) damages, \$6,500.

Defendant objected to the submission of question 7 on the ground that there were no issuable facts to make its submission proper also to question No. 1. After verdict, defendant moved for judgment, either on the verdict or on the evidence, and, failing that, that question 7 be stricken out, the answer to question 8 changed from "yes" to "no," and the answer to question 9 changed from "no" to "yes," and for judgment on the verdict as so changed. The plaintiff also moved for judgment upon the verdict, and, failing that, moved that the answers to questions 5 and 6 be changed from "yes" to "no," and for judgment upon the verdict as so changed, and, failing that, moved for a new trial on the ground of the verdict being inconsistent.

The court ordered the verdict set aside, granted a new trial, and denied all the other

motions. From such order the defendant appealed.

Flanders, Bottum, Fawcett & Bottum, of Milwaukee, for appellant. Harry M. Sheets, of Milwaukee (Jared Thompson and H. J. Piper, both of Milwaukee, of counsel), for respondent.

VINJE, J. (after stating the facts as above). [1] There is practically no dispute in the evidence as to how plaintiff was injured. The statement of facts shows precisely what happened and how it happened. The legs of a hoist, which was required to support a weight of from 350 to 400 pounds, in addition to a portion of its own weight, rested upon the ends of two one-inch horizontal boards in front of their support; the rear ends being unfastened. It is apparent that the fastening of the tail end of the plank of the hoist would have no tendency whatever to prevent the weight on the legs from tipping up the rear ends of the loose horizontal boards. That the natural and inevitable tendency of the weight on the legs was to lower the ends on which they rested and tip up the other ends is a fact of which every child using a teeter or seesaw is fully aware. That they would so tip up whenever the weight in front of the support overcame the weight to the rear thereof is equally obvious. That a weight of from 350 to 400 pounds, in addition to the weight of about two-thirds of the hoist, though applied only a few inches in front of the support, was likely to overcome the weight of that portion of the boards lying back thereof, is also quite apparent. It is inconceivable that a carpenter of 28 years' experience should not be cognizant of these facts. He knew just how the hoist was placed, how it was fastened, and what work it had to do. He knew, also, that any downward pressure or weight upon the legs would tend to raise the rear ends of the boards on which they were placed. In short, he knew everything the master could have told him relative not only to the manner in which the hoist was constructed and placed, but also to the effect of using it in such manner as it was used. The mechanical appliance, operation, and resultant danger were so simple and obvious that comment thereon serves only to confuse. One who cannot appreciate such danger from a view or mental picture of the situation itself is not likely to do so through the medium of argument or explanation. Fully knowing and appreciating such situation, plaintiff must be held as a matter of law to have assumed the risk.

[2] Section 1636—81, Stats., does not abolish the defense of assumption of risk or contributory negligence. *Koepp v. National Enameling & Stamping Co.*, 139 N. W. 179, decided herewith; *Williams v. Wagner Co.*,

110 Wis. 456, 86 N. W. 157; *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367; *Caddy v. Interborough Rapid Transit Co.*, 195 N. Y. 423, 88 N. E. 747, 30 L. R. A. (N. S.) 30; *Schmidt v. Rohn*, 127 App. Div. 220, 110 N. Y. Supp. 1086; *O'Maley v. South Boston G. L. Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161. This question is fully treated in the first case cited, and it is deemed unnecessary to say more here than merely to refer to it.

[3] It follows logically, from what has been said, that no duty devolved upon the defendant, though found to exist in answer to question 7, to warn plaintiff of the danger. For somewhat analogous cases, see *Dougherty v. West Superior Iron & S. Co.*, 88 Wis. 344, 60 N. W. 274; *Dahlke v. Illinois S. Co.*, 100 Wis. 431, 76 N. W. 362; *Faber v. C. Reiss Coal Co.*, 124 Wis. 554, 102 N. W. 1049; *Rahles v. J. Thompson & Sons Mfg. Co.*, 137 Wis. 506, 118 N. W. 350, 119 N. W. 289, 23 L. R. A. (N. S.) 296; *Ladwig v. Jefferson Ice Co.*, 141 Wis. 191, 124 N. W. 407; *Brotzki v. Wisconsin Granite Co.*, 142 Wis. 390, 125 N. W. 916, 27 L. R. A. (N. S.) 982; *Brown v. Connors*, 149 Wis. 403, 135 N. W. 857.

[4] That the answers to questions 5, 6, and 9 are not inconsistent is decided and clearly shown in the case of *Campshire v. Standard Mfg. Co.*, 137 Wis. 155, 118 N. W. 633. Assumption of risk and absence of contributory negligence may coexist. The former relates to the assumption by the plaintiff of a risk already in existence at the time it is assumed; the latter, to conduct on his part that increases an existing risk, or creates or contributes proximately to a new one.

The court should have changed the answer to question 7 from "yes" to "no," and, upon the verdict so changed, rendered judgment for defendant.

Order reversed, and cause remanded, with directions to change the answer to question 7 from "yes" to "no," and, upon the verdict so changed, to render judgment for defendant.

TIMLIN, J. (dissenting). This is an appeal from an order granting a new trial on the ground that the special verdict was inconsistent. There is no question, I think, but that the findings of the special verdict are inconsistent with one another; but the majority opinion disposes of the case on the merits and orders judgment for the defendant on the theory that the undisputed evidence shows assumption of risk.

I cannot assent to this disposition of the case, but think the order appealed from should be affirmed. The statement of facts in the majority opinion is correct and need not be here repeated except in one particular, and that is the point upon which the case turns.

The two "boards" mentioned in the majori-

ty opinion upon which the legs of the "horse" rested were plank 3 inches thick and 20 feet long and probably 12 inches wide. They projected 18 or 20 inches east of the easterly joist, and the legs of the "horse" rested on them 8 inches or a foot east of the east joist. (East is toward the high end of the "horse" to which the hoisting tackle was fastened, west to the low end of the "horse" which was tied down to a joist with a rope.) When this is added, it is not quite so obvious that these "boards" would tip up in hoisting a piece of timber weighing 350 to 400 pounds. We must bear in mind that the burden of proof is upon the defendant and omissions in the evidence count in favor of the plaintiff. The appliance has been in use several years, although it was new to the plaintiff. There is evidence that he handled and adjusted it as directed by the superintendent, and that he had hoisted into place with it one joist with safety; but, while hoisting the second one, he was injured by one of these plank tilting up and swinging sidewise and striking him. Upon these facts and at common law no negligence of the defendant was shown, but defendant's negligence results from the statute (section 1636—81). Now the assumption of risk is found on the foregoing facts by the majority opinion notwithstanding this burden of proof, and notwithstanding the plaintiff testified he did not know of this danger, and notwithstanding that no member of this court can now say without making experiment that 350 or 400 pounds, or rather one-half of that weight, would tilt up a 3-inch 20-foot plank with a leverage of 8 inches or a foot. It is not even shown of what timber these planks were, nor is there any estimate of their weight nor of the weight which would be required to up tilt the plank when applied 8 inches or 1 foot from the fulcrum, 17½ feet of the plank projecting on the other side of this fulcrum. It is also noticeable that only one of the plank tilted up and swung around, and that there is affirmative evidence that the tilting and swinging of this was caused by the hoisting crew on the lower floor pulling sideways, thus making a case of an appliance condemned by statute with negligence of fellow servants contributing to cause the injury. The defendant introduced this plaintiff to the appliance in question, which had been used by defendant for several years as a derrick or hoist. The defendant's superintendent states that he instructed the plaintiff in general language to fasten down the rear end of the contrivance. Plaintiff denies this and claims he was instructed to fasten down with a rope the lower end of the so-called "horse." This it is admitted he did.

Mr. Justice KERWIN, I am authorized to say, concurs in this dissent.

In re REYNOLDS' WILL.

(Supreme Court of Wisconsin. Dec. 10, 1912.)

1. WILLS (§ 802*) — CONSTRUCTION — RENOUNCEMENT BY WIDOW.

Where, under a will which, after creating various bequests, provided that the residue was given in trust to certain persons for 10 years for the purpose of investing same, receiving the income therefrom, and distributing the residue to testator's wife and others in stated percentages, it appeared, in view of the circumstances under which the will was executed, that testator intended that no part of his estate should become intestate, the residue bequeathed to his widow, upon being renounced by her, went to the residuary legatees generally, without restriction of a particular part thereof to each one.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2091–2098; Dec. Dig. § 802.*]

2. WILLS (§ 802*) — CONSTRUCTION — RENOUNCEMENT BY WIDOW—EFFECT.

The renouncement by a widow of the benefits conferred upon her by testator cannot disturb the will except as to the provision for her, and will not defeat the intended disposition of testator's other property where her renunciation does not necessarily interfere therewith.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2091–2098; Dec. Dig. § 802.*]

3. WILLS (§ 802*) — CONSTRUCTION — "RESIDUE."

The "residue" of testator's estate, as the term was used in his will, consisted of the part that remained of the general estate after deducting the debts and the widow's legal share.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2091–2098; Dec. Dig. § 802.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6169–6171; vol. 8, p. 7789.]

4. WILLS (§ 440*)—CONSTRUCTION.

A testator's intent must be gathered from the entire will under the facts and circumstances surrounding him.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.*]

5. WILLS (§ 740*)—DISTRIBUTION—STIPULATION.

Where a will disposes of the whole of the residuum of testator's estate to the residuary legatees, no part being left to become intestate, a stipulation of the parties for a distribution contrary thereto must be disregarded.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1888–1896; Dec. Dig. § 740.*]

6. WILLS (§ 634*)—CONSTRUCTION—VESTING OF INTERESTS.

A will giving property to the residuary legatees subject to a trust for ten years, free from conditions which might defeat the gift when the trust expired, vested a present title in the residuary legatees, though it postponed the distribution until the expiration of the trust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. § 634.*]

Appeal from Circuit Court, Milwaukee County; Lawrence W. Halsey, Judge.

Probate of the will of Edwin Reynolds, deceased. Appeal from a judgment of the Circuit Court affirming a judgment of the Probate Court with certain exceptions. Affirmed.

Edwin Reynolds died February 19, 1909, leaving surviving him his widow, who was his

second wife, and an adopted daughter. His will, executed September 9, 1905, was duly offered for probate. By this instrument he made various specific bequests and provided certain annuities, among them an annuity of \$3,000 per year for his wife for a period of ten years. The residue of the estate was disposed of as follows:

"Nineteenth. All the rest, residue and remainder of my estate, both real and personal, I give, devise and bequeath in trust to Charles F. P. Pullen, Nellie M. Reynolds and Fred W. Niles of Milwaukee, Wisconsin, to have and to hold the same for the period of ten (10) years after my death, for the purpose of investing the same, receiving the income therefrom, distributing the residue as hereinafter provided, and carrying out all of the provisions of this will; and I authorize and empower them to sell and convey any part of my estate, either real or personal, at any time in their discretion, and to reinvest the proceeds thereof in such income producing securities as in their judgment will be for the best interests of my estate.

"Twentieth. I direct that my trustees above named, shall before the expiration of said trust, convert all of the property and estate remaining in their hands into money for the purpose of distributing the same among the beneficiaries hereinafter named, and I direct that they shall pay therefrom, and I give and bequeath the said residue of my estate as follows, to wit: To my wife, Nellie M. Reynolds, thirty (30) per cent. thereof, to Arthur Fairchild, five (5) per cent. thereof, to Emma R. Robinson, five (5) per cent. thereof, to Dorothy Cunningham, five (5) per cent. thereof, to Charlotte Smith, five (5) per cent. thereof, to Jane A. Cunningham, five (5) per cent. thereof, to Mrs. Emily Rogovsky, five (5) per cent. thereof, to the Protestant Home for the Aged of Milwaukee, Wisconsin, five (5) per cent. thereof, to the Teachers' Pension Fund of Providence, R. I., five (5) per cent. thereof, to the judge of probate of the county of Tolland, Conn., and his successors in office in trust for the purpose of using the income thereof, and such portion of the principal as may be necessary for the maintenance of the Reynolds family burying plot in Mansfield, Conn., five per cent. (5%) thereof, to Myra H. Robinson of Mansfield, Conn., two and one-half (2½) per cent. thereof, to Edwin R. Robinson of Mansfield, Conn., two and one-half (2½) per cent. thereof, to Winthrop Reynolds, son of John D. Reynolds, of Andover, N. J., two and one-half (2½) per cent. thereof, to G. Osmar Reynolds, Jr., of Pelham Manor, N. Y., two and one-half (2½) per cent. thereof, to Grace B. Reynolds of Pelham Manor, N. Y., two and one-half (2½) per cent. thereof, to Mrs. Emma J. Gardner of Mansfield, Conn., two and one-half (2½) per cent. thereof, to Nellie M. Cahoon, two and one-half (2½) per cent. thereof, to Mrs. Harriet M. Bowes, two and one-half (2½) per cent.

thereof, to Esther Hoffer, two and one-half per cent. thereof and to Susie Johnson, two and one-half (2½) per cent. thereof.

"Twenty-first. The annuity provided in paragraph II to be paid to my wife, Nellie M. Reynolds, during her life, shall nevertheless terminate at the expiration of the trust hereinbefore created, at the end of ten (10) years from my death if she be then living."

Emma R. Robinson, the adopted daughter and heir at law of the deceased, filed objections to the probate of the will, alleging mental incompetency in the deceased and undue influence exercised by a brother. The widow renounced the provisions of the will for her benefit and elected to take in lieu thereof the share of the testator's estate as provided by sections 2171 and 2172, Stats., under the following stipulation, filed with the court on December 23, 1909: "It is hereby stipulated and agreed by and between the heirs at law of Edwin Reynolds, deceased, and the legatees and beneficiaries under the last will and testament of said deceased, dated September 9, 1905, and filed for probate in the county court of Milwaukee county, Wisconsin, as follows: First. That the objections filed by Mrs. Emma R. Robinson to the probate of said will be withdrawn and that said will be immediately admitted to probate. Second. That in consideration of the withdrawal of such objections, and to avoid all further controversy and litigation concerning the admission of said will to probate, the widow of said deceased, Nellie M. Reynolds, does hereby elect to take the share of the estate of said deceased as provided by law under sections 2171 and 2172 of the Statutes of the State of Wisconsin, which is understood to be a dower interest in any lands of which the deceased died seised, and one-third of the net personal estate of said deceased which shall be in lieu of the annuity and legacy provided to be paid to her under said will. Third. The legacy to Nellie M. Reynolds of thirty (30) per cent. of the residue of the estate having lapsed by reason of her election to renounce such legacy and take the provision allowed her under the laws of the state of Wisconsin, the amount of such lapsed legacy being 30 per cent. of the residue of the estate of said deceased, descends to Mrs. Emma R. Robinson as sole heir at law of said deceased, and shall be paid to her as such heir at law by the executors of said will at the time of the payment of the specific legacies and widow's share of such estate, which distribution shall be made as soon as practicable after the expiration of the time limited for creditors to file claims against said estate under the laws of the state of Wisconsin. October 5, 1909."

This stipulation was signed by all the legatees and beneficiaries under the will except the Milwaukee Protestant Home for the Aged and the guardian for the minor legatees. The attorney for the Milwaukee Protestant

Home for the Aged signed the stipulation with the exception of the last paragraph. The guardian ad litem filed a statement objecting to the stipulation and agreement "so far as they attempt to announce the law relating to the time when, the manner in which, and the persons to whom disposition shall be made of that portion of the estate renounced by the widow." February 24, 1911, the attorney for the Milwaukee Protestant Home for the Aged and the guardian ad litem petitioned the probate court for construction of the will, alleging their "doubt about the proper construction, meaning, and effect of said will taken in connection with the stipulation and agreement of the widow to take the provision made by law." The court held it had power to construe the provisions of the will without reference to the provisions of the stipulation, and that the 30 per cent. of the residue of the estate, which under the will was to go to the widow upon the termination of the trust estate, by reason of the widow's election to take the provision made for her by law, remained part of the residue of the estate and was to be distributed at the end of the trust period as provided by the will. On appeal to the circuit court, the judgment of the probate court was affirmed, except as to the payment of a small annuity and the distributive shares going to each residuary legatee, and as so modified the judgment was approved. The modifications made by the circuit court are immaterial to this appeal, except what the circuit court held as to the vesting of the interests in the residue, which was to be distributed at the end of the trust period. As to these the court held that the vesting of these interests was postponed until that time. This is an appeal from the judgment of the circuit court.

Edgar L. Wood and A. C. Umbreit, both of Milwaukee, for appellant. T. L. Kennan, W. W. Wight, and H. K. Curtis, all of Milwaukee, for respondent.

SIEBECKER, J. (after stating the facts as above). [1] The controversy presents the question: What disposition was made by the testator of the 30 per cent. of the residue of the testator's estate, which by the provisions of the will he bequeathed to the widow? The widow renounced this bequest by electing to take the provision made for her by law. The appellants contend that the effect of the widow's election is that the portion of the estate so bequeathed to her becomes undisposed of property, and passes to the testator's adopted daughter as his heir at law; while the respondents assert that the provisions of the will show that the testator intended this portion of his estate to be a part of the residuum specified in the will, and that it passes to those persons whom he designated as residuary legatees. The trial court held that the portion of the residue bequeathed to the widow remained

part of the residuum and passed to the residuary legatees after the widow dropped out of this class. The controlling inquiry is: What disposition did the testator make of this portion of his estate? It is urged that by his will he specifically limited this bequest to his widow, and that by her renunciation thereof there is a failure of disposition of it, and hence that it devolves as intestate property. If the testator intended that the residuary legatees, other than his widow, should receive the residuum, including the part she was to take under the will, that solves the inquiry and fixes the disposition thereof. We are of opinion that it is manifest from the provisions of the will that the testator intended that the residue of his estate, as fixed by his will, should go to the residuary legatees generally, without restriction of a particular part thereof to each one. Approaching the situation as the testator did, it is clear that he considered the persons who were to be the objects of his bounty under three classes, namely, those upon whom he intended to bestow specific bequests, then his widow, and finally the class which was to receive the residuum; and he parceled out his estate with this in view. It also appears that it was his definite purpose and object that no part of his estate, except a small portion of the residuum, should go to his adopted daughter, and that no part of his estate should devolve as intestate estate. The scheme of intrusting and bequeathing the residue of the estate to the three selected trustees, who were to hold the property for ten years and then distribute it as directed, is persuasive evidence of his intent that the residuum was to belong generally to those whom he selected as residuary legatees, and to that end he invested the trustees with extensive powers of management and control over the same, with directions to hold the accumulations thereof for 10 years, after converting all of the residue into money, "for the purpose of * * * distributing the residue as hereinafter provided" among his beneficiaries. It is significant that, in dealing with the residue, the testator treated it throughout as a separate quantum of his estate, which should be held for a period of years for the purpose of distributing it among the residuary legatees, and that this scheme appealed to him as the best legal means for gathering and holding this residuary estate for those whom he designated as its beneficiaries.

[2] The fact that the widow renounced the benefits he conferred upon her as a residuary legatee does not disturb the will of Mr. Reynolds, except in the particular provision intended for her, and cannot operate to defeat the intended disposition of his other property, unless her renunciation necessarily interferes therewith. Appellants lay much stress on the case of *In re Bradley's Will*, 123 Wis. 186, 101 N. W. 393, 3 Ann. Cas. 716,

as applicable to and controlling the instant case. The principal question there considered was how to ascertain the residue of the testator's estate; his wife, to whom was bequeathed a part thereof, having predeceased him, and his second wife, who survived, having demanded the one-third of his estate to which she was entitled under the law.

[3] This court there held that under such circumstances, and under the provisions of the will, the testator used the word "residue" in the sense in which it is commonly employed, and that the "residue of the testator's estate," under these conditions, consisted of the part that remained of the general estate after deducting the debts and the widow's legal share.

[4] This rule for ascertaining the "residue" is to be applied here, but the case in no way aids us to ascertain what disposition Mr. Reynolds made of the residue of his estate by the provisions of his will. That intention must be gathered from the four corners of the instrument under the facts and circumstances surrounding him. We are persuaded that he intended that the whole of the residuum of his estate should go to the residuary legatees, and that no part thereof should under any circumstances become intestate property. While the widow's renunciation may affect the quantity of the residue, it cannot affect his disposition thereof, and it must be held by the trustees for the purpose of distributing the same among the beneficiaries he designated; that is, the residuary legatees after the widow dropped out.

[5] In view of this disposition of the property under the will, it must follow that the stipulation of the parties for a distribution of the estate contrary thereto must be disregarded, and that the executors and trustees must carry out and execute the will in accordance with its terms. Will of Dardis, 135 Wis. 457, 115 N. W. 332, 23 L. R. A. (N. S.) 783, 128 Am. St. Rep. 1033, 15 Ann. Cas. 740; Cowie v. Strohmeier, 136 N. W. 956.

[6] The trial court held as a conclusion of law that the residuary legatees under the will did not take a vested estate in the property constituting the residue and held in trust for their benefit, and that their interests would not become vested until the period of the trust expired and the time for distribution arrived. The will gives the property to the residuary legatees, subject to the trust, for the period of 10 years, free from conditions or contingencies which might defeat the gift or terminate their right there to when the trust expired. As declared in *Ohse v. Miller*, 187 Wis. 474, 119 N. W. 93: "The gift will be held to vest, if such appears to have been the testator's intention, even though it be expressed in a mere direction to pay. * * * The real inquiry is whether the element of time is annexed to the gift itself as a condition precedent or merely to the payment of it." It is obvious from the con-

text of the will that the testator intended by the words used to make a present grant and to postpone the distribution thereof to the time when the trust expires. *Williams v. Williams*, 135 Wis. 60, 115 N. W. 342; *Will of Prasser*, 140 Wis. 92, 121 N. W. 643.

There is no reversible error in the record. The judgment appealed from is affirmed.

CADY v. HENES.

(Supreme Court of Wisconsin. Dec. 10, 1912.)

1. COVENANTS (§ 116*)—ACTIONS FOR BREACH—COMPLAINT—SUFFICIENCY.

A complaint for breach of a covenant against incumbrances in a deed dated June 9, 1910, alleging that a special assessment for street improvements for the year 1909 was duly and legally levied under the Milwaukee Charter, and was, at the time of the sale, a legal and valid subsisting lien, then remaining due and unpaid, and was, at the time of the delivery of the deed, a lien and incumbrance on the land, was sufficient, since it would permit the introduction of evidence that all the requirements of the charter to charge the land with costs of the improvement were complied with, and that the assessment constituted a lien prior to January 1, 1910, and hence was a breach of the covenant in view of St. 1898, § 1153, as amended by Laws 1909, c. 293, providing that as between a grantor and grantee, when there is no express agreement as to which shall pay taxes, the grantor shall pay them if the land is conveyed after the 1st day of January.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. §§ 209, 210; Dec. Dig. § 116.*]

2. MUNICIPAL CORPORATIONS (§ 519*)—PUBLIC IMPROVEMENTS—ASSESSMENTS FOR BENEFITS—LIEN ON LAND.

Under the express provisions of Milwaukee Charter, c. 7, §§ 13, 15a, a special assessment for street improvements is a lien on the land benefited from the time of the issuance of certificates to the contractor for the amounts due from each lot owner.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1220-1227; Dec. Dig. § 519.*]

Appeal from Circuit Court, Milwaukee County; Warren D. Tarrant, Judge.

Action by Anna L. Cady against Catherine Henes. From an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded, with directions.

Charles E. Hammersley, of Milwaukee, for appellant. Arthur Breslauer, of Milwaukee, for respondent.

SIEBECKER, J. [1] The complaint alleges that on June 9, 1910, the defendant, by warranty deed, conveyed to the plaintiff, for a valuable consideration, certain real estate in the city of Milwaukee.

The deed contains this covenant respecting the premises, "that the same are free and clear from all incumbrances whatever," subject to an agreement. The complaint alleges that at the time the premises were conveyed the premises were not free from incumbrances, but were subject to a special assessment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for street improvements for the year 1909, which was a legal and valid lien upon the premises at the time the conveyance was made, and which was then due and unpaid. It is also alleged that the price paid by the plaintiff included the value of the street improvement, and that there was nothing in the appearance of the premises to warn the plaintiff that the improvements had been made recently. The plaintiff was compelled on January 31, 1911, to pay \$261.30 to free the premises from the lien of the special assessment, and it is alleged that, by reason thereof, she was damaged in this sum. It is alleged that demand has been made by the plaintiff on the defendant, and that defendant has refused to pay the sum. Judgment is demanded for the amount paid by the plaintiff, with interest and costs of the action.

The allegations of the complaint are that this amount was "duly and legally levied under and pursuant to the provisions of the charter of the city of Milwaukee, as special improvement tax, and was, at the time of the sale of this property to the plaintiff, a legal and valid subsisting lien upon the real estate conveyed by the defendant to the plaintiff, and was then remaining due and unpaid, and was, at the time of the delivery of said deed, a lien and incumbrance by law upon said premises." The allegations of the complaint must be liberally construed. In the light of this rule we deem the allegations sufficiently broad and definite to state a good cause of action for recovery of damages for the breach of the covenant against incumbrances.

[2] Respondent concedes that the special assessments for street improvements are taxes, but maintains that they are not a lien on property until properly assessed and levied and until certificates have been issued therefor as provided by law. Section 13, c. 7, of the charter of the city of Milwaukee, provides that, when street improvements have been completed, a certificate shall issue to the contractor, signed by the board of public works, and countersigned by the city comptroller, stating the amount chargeable to the lots described therein, which certificate may be paid by the owner of the land to the city treasurer for the benefit of the certificate holder at any time before the sale of such land for the nonpayment of taxes. Section 13a of this chapter of the charter provides, if such amount is not paid by the lot owner to the city treasurer before the time for making out the annual tax list, then the amount shall be assessed against the land, and be collected as other taxes on real estate. It is also provided that all certificates issued pursuant to the charter provisions "shall be liens upon the lots or parcels of land against which the same shall respectively be chargeable, from and after the time when such cer-

tificates shall be countersigned and registered by the city comptroller." It is manifest from these provisions that the alleged special assessment became a lien on the land from the time the certificate issued pursuant to these provisions of the charter.

It is argued that the complaint fails to allege facts showing that these steps were taken so as to charge the lands conveyed for the cost of the assessment as a tax. We are of opinion that the language of the complaint sufficiently alleges these matters to permit the introduction of evidence showing that all the requirements prescribed in the charter to charge this land with the cost of the street improvement were complied with, and that they constituted a lien prior to January 1, 1910. If then the allegations of the complaint are sustained by evidence upon the trial of the case, showing that a lien for taxes on the land conveyed was existent before January 1, 1910, then the covenant in the deed against incumbrances would be breached, and the plaintiff would be entitled to recover the amount she was compelled to pay to free the land from such tax lien. See section 1153, St. 1898, as amended by chapter 293, Laws of 1909, and *Mitchell v. Pillsbury*, 5 Wis. 407; *Peters v. Myers*, 32 Wis. 602.

The allegations of the complaint state facts sufficient to constitute a cause of action.

The order appealed from is reversed, and the cause remanded to the trial court, with directions to enter an order overruling the demurrer to the complaint, and for further proceedings according to law.

PEERLESS MINERAL SPRINGS CO. v. GERMAN AMERICAN INS. CO. OF NEW YORK.

(Supreme Court of Wisconsin. Dec. 10, 1912.)

1. CONTINUANCE (§ 26*)—ABSENCE OF WITNESSES—DILIGENCE.

Where issue was joined July 9, 1910, and the case was not called for trial until May 13, 1912, it was not error to then deny an application of defendant for a continuance because of the absence of a witness who resided in Chicago, defendant having made no attempt to take her deposition, notwithstanding it was shown that, under the laws of Illinois, she could not have been compelled to give her deposition before a notary; there being no showing that such deposition could not have been taken under letters rogatory.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 74-93; Dec. Dig. § 26.*]

2. INSURANCE (§ 389*)—INTEREST OF INSURED—TRUSTEE—"MORTGAGE."

Where a fire policy provided that the loss, if any, was payable to R., trustee, as his interest might appear, and the interest of R. was that of a trustee under a deed securing bonds issued by insured, such interest would be treated as a mortgage, and the insurer estopped to deny liability on the ground that it did not know the nature and character of the trust.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1028-1031; Dec. Dig. § 389.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4596-4606; vol. 8, p. 7725.]

Appeal from Circuit Court, Milwaukee County; F. C. Eschweiler, Judge.

Action by the Peerless Mineral Springs Company against the German American Insurance Company of New York. Judgment for plaintiff, and defendant appeals. Affirmed.

Gill, Barry & Mahoney, of Milwaukee, for appellant. Lorenz & Lorenz, of Milwaukee, (Carl Muskat, of Milwaukee, of counsel), for respondent.

TYMLIN, J. This is an action to recover on a policy of insurance against loss by fire in the sum of \$5,000 covering the sanatorium of the respondent and running from June 16, 1909, to June 16, 1910, containing also the following: "Subject to all the stipulations, provisions and conditions of this policy the loss if any on building is payable to D. S. Roberts, trustee, as his interest may appear." D. S. Roberts was made a defendant in the action, and the complaint prayed that his interest be ascertained and determined.

[1] Error is assigned because the circuit court refused a continuance on application of the defendant made on May 13, 1912, after the case was called for trial. Issue had been joined since July 9, 1910, and the alleged ground for continuance was the inability to procure the testimony of one Mrs. Cobine, who resided in Chicago. There was no attempt to take her deposition during the time the cause was pending. Counsel contend that, under the laws of Illinois, such deposition could not be taken, citing *McIntyre v. People*, 227 Ill. 26, 81 N. E. 33, and *Martin v. People*, 77 Ill. App. 311. These cases merely decide that a witness cannot be compelled to give her deposition before a notary public. We do not understand that the courts of Illinois refuse to extend the comity of letters rogatory to the courts of other states. There was no reversible error in denying the application for a continuance on the ground of lack of diligence. The defendant D. S. Roberts answered to the complaint setting up a copy of the instrument under which he claims, calling it a mortgage or trust deed, securing 20 bonds of the plaintiff aggregating \$10,000. Thereupon the de-

fendant amended his answer to allege that the plaintiff's interest was not that of unincumbered and sole owner of the insured property, but that D. S. Roberts was the owner under this trust deed. It is contended that upon this showing the complaint should have been dismissed.

[2] When the defendant executed this policy making the loss, if any, payable to D. S. Roberts, trustee, as his interest might appear, it contracted with the insured for the benefit of Roberts as trustee to that extent. It cannot be heard to say, after making such an indorsement on its policy, that it did not know he was trustee, and it must at its peril ascertain the nature and character of his trust. It would be a strange sort of commercial morality which would justify one in contracting with another to pay what might become due on the contract to a third person as trustee as his interest might appear, and then defeat the obligation of the contract upon proof that such third person was a trustee. But the so-called trust deed is in the form ordinarily used to secure railroad and other negotiable bonds. It is in substance and legal effect a mortgage for the purposes of insurance. *Wis. Cent. R. Co. v. Wis. River L. Co.*, 71 Wis. 94, 36 N. W. 837; *Cent. Trust Co. v. Burton*, 74 Wis. 329, 43 N. W. 141. *Marvin v. Titsworth*, 10 Wis. 320, is overruled by *Goodrich v. Milwaukee*, 24 Wis. 422, in its most vital and essential part, but even there it was said: "There can be little question that under the circumstances a court of equity upon a proper application would have given effect to that intention as an equitable mortgage notwithstanding the irregularity of the instrument." Dictum from this overruled case cannot however now be put forward as authority. To now go back to the theory that a mortgage security could not be taken in the form of a trust deed would unsettle many titles and many securities in this state. So far as the writer's observation goes, this is a common form of securing bonds of private and quasi public corporations. This is how it was treated by the covenant in the policy to pay the trustee as his interest should appear, and this is what it is in law as to such insurer.

Judgment affirmed.

GASTON v. MAY et al.

(Supreme Court of Minnesota. Dec. 27, 1912.)

*(Syllabus by the Court.)***EJECTMENT (§ 95*)—EVIDENCE—FINDING FOR PLAINTIFF.**

Action of ejectment to recover possession of land of which, the complaint alleged, the plaintiff's intestate died seised. The answer alleged title in one of the defendants, under whom the others claimed, by adverse possession. Evidence as to such adverse possession considered, and *held*, that the finding of the trial court to the effect that the intestate died seised of the land is not sustained by the evidence.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 280-295; Dec. Dig. § 95.*]

Appeal from District Court, Washington County; P. H. Stolberg, Judge.

Action by Hugh P. Gaston, administrator, against Kenneth May and others. Finding for plaintiff. Motion for new trial overruled, and defendants appeal. Reversed, and new trial granted.

Manwaring & Sullivan and J. C. Nethaway, all of Stillwater, for appellants. Daniel W. Doty, of St. Paul, for respondent.

START, C. J. This action was brought in the district court of the county of Washington to recover from the defendants the possession of lot 4 of section 23, in township 31, range 20. The complaint alleged that plaintiff's intestate was the owner of the land in fee at the time of his death, and that the defendants were in possession thereof and wrongfully withheld it from the plaintiff. The answer of the defendant May denied that the plaintiff's intestate died seised of the land, and alleged title thereto in himself by adverse possession thereof, by virtue of a tax deed therefor, and also asserted a lien upon the land for taxes paid, in case his title for any reason failed. The reply put in issue the affirmative allegations of the answer, and alleged that the rental value of the land during the time it was occupied by the defendant May equaled the amount of the taxes paid. The case was tried by the court without a jury, and findings of fact and conclusions of law were made to the effect that the plaintiff's intestate died seised of the land, and that the plaintiff have judgment for possession thereof, and that none of the defendants has any title or right to or in the same. The defendants made a motion for a new trial, on the ground that the trial court erred in its finding of fact as to the ownership of the land, for the reason that it is not sustained by the evidence, and on the ground of newly discovered evidence. The motion was denied, and the defendants appealed from the order denying it.

The controlling question presented by the record for our decision is whether the finding as to the ownership of the land, eliminating all questions as to the validity of the tax

deed, is sustained by the evidence. The question involves a consideration of the evidence as to the defendants' adverse possession. The evidence, which is practically undisputed, establishes the evidentiary facts following: A patent for the land was issued by the United States to Henry McKinty, who, on September 18, 1858, conveyed the land to Angalina G. Waage, who, on June 21, 1887, executed a deed purporting to convey the land to William K. Gaston, the plaintiff's intestate. He never recorded his deed, but it was recorded after his death, and on December 18, 1908. No taxes on the land were ever paid by any of the holders of the record title since 1858. The land was sold for the taxes thereon for 1859 to 1871, and a tax deed purporting to convey the land was made to Morgan May on September 17, 1872, and recorded on that day. He and those claiming under him paid annually all the taxes thereon from 1872 until 1908, when this action was commenced. When May got his tax deed, he owned land on three sides of the land in question. There was a tamarack swamp and a cranberry marsh on part of the land, and the rest of it was better adapted for pasture than for cultivation. Morgan May and those claiming under him, after he received and recorded his tax deed, pastured the land, controlled the cranberry crops thereon, by permitting parties to gather them on shares, and cut fence posts thereon from time to time. In the latter part of August, 1888, 25 acres of the land was inclosed with a fence, which was kept up until April 1, 1903, or for 14 years and 7 months. The land was used by Morgan May and his tenants as a pasture. The land was not actually inclosed by a fence between April 1, 1903, and the year 1907, nearly all of the fence having been removed on the first-named date; but a portion of the fence posts remained standing during this time, and Morgan May and those claiming under him continued to pay each year the taxes on the land. Other than this, there is no evidence that there was any abandonment of the possession of the land when the fence was removed. On June 5, 1905, Morgan May conveyed the land by quitclaim deed to his son, the defendant Kenneth May, who, in the year 1906, granted permission to his co-defendants to erect a summer cottage on the land. They did so, and have ever since occupied it.

The law applicable to the evidentiary facts is well settled. Adverse possession of land may be shown by a variety of acts, depending on its location, nature, and beneficial uses to which it may be reasonably applied; but they must be such as clearly to indicate that a permanent occupation and appropriation of the land in hostility to the true owner is intended. There may be, in exceptional cases, adverse possession without either buildings, fences, or actual residence on the land.

Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060; Wheeler v. Gorman, 80 Minn. 462, 83 N. W. 442; Holmgren v. Isaacson, 104 Minn. 84, 116 N. W. 205. A careful consideration of the undisputed evidence, and the evidentiary facts which they prove, have led us to the conclusion that the preponderance of the evidence is so manifestly against the court's finding to the effect that plaintiff's intestate died seised of the land in question that there must be a new trial, on the ground that the finding is not sustained by the evidence.

We do not deem it necessary to discuss the evidence in detail. It shows beyond a reasonable controversy that the holders of the record title of the land never paid a dollar for taxes thereon for some 50 years, and that the holder of the tax title and those claiming under him annually paid the taxes during that time, which clearly indicates that he in good faith believed and claimed that he owned the land, and, further, that for 14 years and 7 months the land was inclosed by a fence, and so used as concededly to constitute adverse possession during the time stated. The mere fact that the fence was then removed, leaving the posts intact, does not justify the inference that the continuity of the adverse possession was interrupted. It is unnecessary to discuss or decide the question as to the validity of the tax deed.

Order reversed, and new trial granted.

EMERSON v. CHICAGO, B. & Q. R. CO.
(Supreme Court of Minnesota. Dec. 20, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 94*)—CARRIAGE OF GOODS—ACTIONS—EVIDENCE.

A particular shipment of a car of potatoes over defendant's road imposed upon defendant the duty to inform plaintiff of the refusal of a prospective purchaser to accept the same within 48 hours. The evidence is *held* to justify the conclusion that the purchaser refused to accept the consignment, and that defendant negligently failed to notify plaintiff thereof.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. § 94.*]

2. EVIDENCE (§ 546*)—EXPERT TESTIMONY—DISCRETION OF COURT.

The opinion of an expert of the value of a partly frozen car load of potatoes *held* properly admitted in evidence. The rule that the admission of such evidence is discretionary with the trial court followed and applied. McDonough v. Cameron, 116 Minn. 480, 134 N. W. 118.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2363; Dec. Dig. § 546.*]

Appeal from District Court, Ramsey County; Frederick N. Dickson, Judge.

Action by C. C. Emerson, trading as C. C. Emerson & Co., against the Chicago, Burlington & Quincy Railroad Company. From an order denying a new trial, defendant appeals. Affirmed.

Morton Barrows and Arthur A. Stewart, both of St. Paul, for appellant. Walter L. Chapin, of St. Paul, for respondent.

BROWN, J. The complaint in this action contained four separate causes of action, only two of which, the second and fourth, survived the trial below, upon which the court directed a verdict for plaintiff. Defendant appealed from an order denying a new trial.

[1] The short facts are as follows: In respect to the second cause of action it appears that on February 19, 1910, plaintiff delivered to defendant a car load of potatoes consigned to himself at Kansas City, Mo., to be by defendant transported to that place. The usual bill of lading was issued and delivered to plaintiff, which, together with the draft for the price of the potatoes drawn upon Woodson Bonded Brokerage Company, to whom the potatoes were to be sold, was transmitted to a bank at Kansas City for collection. Defendant was instructed to notify that company of the arrival of the potatoes. We understand from appellant's brief that this method of the shipment of merchandise is quite common, and that the practice is for the railroad company to notify the intending purchaser of the arrival of the car, and to notify the consignee of his failure, within 48 hours, to take and remove the property. The shipment in question reached its destination some time about February 23d or 24th, and the Woodson Company was duly notified of the arrival. That company, however, failed to take up the draft, and refused to accept the shipment, of which refusal it is claimed defendant failed to notify plaintiff. The potatoes remained in the car at Kansas City until March 18th, when they were sold by plaintiff at a loss. The only question raised on this appeal is whether the evidence is sufficient to justify a finding that the Woodson Company refused to accept the potatoes, thereby imposing upon defendant the duty to so notify plaintiff. There is no dispute about any of the facts, or the rights, duties, and liabilities of the parties under the contract of the shipment. Our examination of the record discloses sufficient evidence from which the court was justified in deciding the question in plaintiff's favor. The custom, evidence of which was offered by plaintiff, required defendant to notify plaintiff of the nonacceptance of the shipment, if not taken within 48 hours. The potatoes were not taken within that time, or at all. The car remained upon defendant's side track at Kansas City until March 18th, or about three weeks, and no notice of nonacceptance was given plaintiff.

[2] The fourth cause of action involved a car of potatoes shipped over defendant's line from this state to Clarinda, Iowa. The car reached its destination in due season, and it is conceded that the potatoes were frozen and damaged because of the negligence of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

after their arrival at Clarinda. The extent of this damage was the only question litigated below. Defendant offered no evidence upon the question. The potatoes were in sacks, and plaintiff's evidence tended to show that by reason of the fact that the car was left exposed in the railroad yard during severe weather, 10 degrees below zero, at least one-third of them were frozen solid. Plaintiff's witness, a dealer of long experience and familiar with the subject, was permitted as an expert to testify over defendant's objection that the entire lot of potatoes were worthless. It is contended that in this the court erred. Whether this contention is sound presents the sole question upon this branch of the case. The admission of evidence of this character rests in the sound discretion of the trial court, in the exercise of which in the case at bar we discover no error. *McDonough v. Cameron*, 116 Minn. 480, 134 N. W. 118. Plaintiff, upon finding the potatoes in the condition stated, abandoned them. What defendant did with them the record fails to disclose. Defendant offered no evidence.

Order affirmed.

VANEFF v. GREAT NORTHERN RY. CO.
(Supreme Court of Minnesota. Dec. 18, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1005*)—REVIEW—VERDICT—APPROVAL BY COURT.

Evidence in an action based upon the claim that a fellow servant of the plaintiff negligently pushed him off a crowded hand car, thus causing the injuries complained of, considered, and held sufficient to sustain a verdict for the plaintiff, after its approval by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3954; Dec. Dig. § 1005.*]

Appeal from District Court, Otter Tail County; M. D. Taylor, Judge.

Action by Numo Vaneff against the Great Northern Railway Company. A verdict was rendered for plaintiff, and from an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, defendant appeals. Affirmed.

J. D. Sullivan, of St. Cloud, and M. L. Countryman, of St. Paul, for appellant. Thos. D. Schall, of Minneapolis, and M. J. Daly, of Perham, for respondent.

PHILIP E. BROWN, J. Action to recover damages claimed to have resulted from the defendant's negligence, and also that of a fellow servant of the plaintiff. The plaintiff had a verdict for \$900, and the defendant appealed from an order denying its motion for judgment notwithstanding the verdict or for a new trial.

The complaint alleged that the plaintiff

defendant, and that while riding on one of its hand cars in the performance of his duties, near Crookston, the car was run at excessive and dangerous speed, and was so overcrowded and overloaded that a fellow workman thereon, in endeavoring to change his position, negligently jostled the plaintiff, thereby causing him to fall from the car and be injured. The defendant admitted its employment of the plaintiff as a section man, denied all other claims made by him, and alleged, in defense, his contributory negligence and assumption of risk.

The plaintiff was a Macedonian, and had lived in this country for about four years prior to the accident. His knowledge of our language was confined to his ability to speak a few words; his testimony being given through an interpreter. It appeared from the uncontradicted testimony that he worked for the defendant as a section hand from June 18, 1911, until July 8th following, and that on the latter date, in the evening, he rode towards Crookston on a hand car; the same being one of those in common use by the defendant, and being 4 feet 4 inches wide and 6 feet long, with the customary propulsion frames and handles in the center. A number of shovels and other articles were on the car. After traveling several miles, and when the car had arrived at or near the point where the plaintiff and some of his fellow workmen sometimes left it, the plaintiff, who had been standing on the front end of the car assisting in pumping with his right hand, either fell or jumped off between the rails in front of the moving car, and was injured. The plaintiff claimed that there were 14 men on the car besides the foreman during the journey on which the accident occurred; 6 section men, of whom he was one, being on the front end of the car, 6 on the rear, and 2, together with the foreman, in the center. The defendant claimed in this regard that there were only 12 men on the car, including the foreman; 4 being at each end and 4 in the center. The plaintiff claimed that the 6 men on the front end of the car stood sideways, he being on the outside corner, with their backs close to each other's breasts, crosswise of the car, and that the man standing in front of him, whose name was Tham Meik, but whom we will designate as Tham, without indicating his intention so to do, released his hold on the handle bar and turned completely around, thus causing the plaintiff to fall from the car. The defendant, while admitting that the men stood sideways on the front end of the car, as claimed by the plaintiff, denied that he stood on the outside corner, or that he was pushed or jostled from the car, or that he fell therefrom, and claimed that he, while pumping with his right hand, turned around, jumped backwards from the car with both feet at

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the same time, and fell upon his back between the rails.

The questions of the alleged excessive speed of the car and the overcrowding of the same were not submitted to the jury, and the court gave the following instructions, among others, as a part of the general charge:

"If he [plaintiff] slipped and fell because his fellow workman next in front of him negligently pushed him, and he is not chargeable with contributory negligence himself, he is entitled to damages for whatever injuries he may have sustained."

"If the man next in front of the plaintiff failed to exercise such ordinary care, but carelessly turned and pushed plaintiff, so that he fell, you can find that he was negligent; and if his negligence caused the accident, and there was no contributory negligence on the part of plaintiff himself, the defendant is responsible in damages."

"If you find that this man did negligently push him and cause him to fall, and do not find the plaintiff himself is chargeable with contributory negligence, he is entitled to a verdict."

The appellant does not claim that these instructions are improper in form, but makes the point that their impropriety consists in the absence of evidence to sustain them, and, moreover, that if there was any such evidence, yet it was manifestly and palpably insufficient to sustain the verdict rendered. These claims, and likewise the defendant's other assignments of error, raise the sole question: Was the evidence insufficient to warrant a finding that a fellow workman, carelessly, unexpectedly, and without warning, turned and changed his position on the car, thus jostling the plaintiff so that he fell therefrom.

The general principles applicable to the instant case are settled by the cases of *Hider v. Minneapolis, etc., R. Co.*, 115 Minn. 325, 132 N. W. 316, and *Steffenson v. Chicago, etc., R. Co.*, 51 Minn. 531, 53 N. W. 800. Furthermore, by analogy, these cases practically determine the instant case adversely to the contentions of the defendant. The facts of these two cases parallel those of the instant case to a remarkable degree; each of the three cases being an action by a section man to recover for injuries sustained from a fall from a slowly moving crowded hand car. In each case the car was being slowed down with a view of letting some or all of the men off. In each the plaintiff fell on his back, between the rails, in front of the car, with his feet towards the car. The facts of the two cases to which we refer are summarized and compared by Mr. Justice Brown at page 327 of 115 Minn., at page 316 of 132 N. W., in the opinion in the *Hider Case*, as follows: "We are unable to distinguish the case from *Steffenson v. Chicago, M. & St. P. Ry. Co.*, 51 Minn. 531, 53 N. W. 800. That

case was before the court on three separate appeals. On the first it was held that the railroad fellow servant statute (*Laws 1887, p. 69, c. 18*) applied to section men while employed in operating a hand car furnished them by the company for use in their work. 45 Minn. 355, 47 N. W. 1068, 11 L. R. A. 271. The negligence charged in that case was substantially that in the case at bar, namely, overloading the car, and negligence of a fellow servant. On the second appeal it was held that the evidence failed to show negligence in overloading the car, and the cause was remanded for a new trial upon the question of negligence of a fellow servant. 48 Minn. 285, 51 N. W. 610. On the third trial the jury found negligence in the conduct of the fellow servant, and the verdict was sustained. 51 Minn. 531, 53 N. W. 800. The act there charged as negligence was the sudden and unexpected turning around by one of the men on the car for the purpose of setting the brake and bringing the car to a stop, which resulted in pushing plaintiff from the car. In the case at bar the negligent act was that of two of the men suddenly and without warning jumping from the car while in motion, thus unexpectedly releasing plaintiff's support and causing him to fall from the car. There is no substantial difference between the two cases, and we follow the former decision."

And so, in the instant case, we think the two former decisions above cited should be followed. The *Steffenson Case* is peculiarly in point, for, besides the identity of facts above noted, which we have gathered from the opinion in 51 Minn. 531, 53 N. W. 800, and also from the record and briefs in the case, it appears that the defendant's contention there was the same as in the instant case, namely, that the plaintiff jumped off the car. See page 19 of appellant's brief in the *Steffenson Case*. Cases and Briefs Supreme Court, Oct. Term, 1892, Case No. 115. In that case, furthermore, it appeared from the record that warning was given that the car was about to stop, and that the brake was about to be applied by the member of the plaintiff's crew who usually applied it, and who, as claimed by the plaintiff, pushed plaintiff from the car in so doing, it being also held that the setting of the brake was necessary; whereas in the instant case it appears from the testimony of the defendant's own witnesses that nothing was said by the men on the car just prior to the accident, and no claim is made that the act of the workman in changing his position was necessary. It is true that in the instant case there was direct testimony tending to support the defendant's theory that the plaintiff jumped off the car, but at most this merely created a conflict, to which we will refer later, for the plaintiff testified positively in support of his theory that he was pushed off the car by Tham. As said in the *Steffenson*

a strong one, but the issue was so doubtful upon the evidence that we think that the verdict must be accepted as final."

In view, however, of the conflict in the evidence in the present case, which must be admitted to be of a more direct nature than in the two cases above cited, though we do not think it is more real, we will discuss the evidence herein in more detail than was done in those cases. To sustain its contention, the defendant quotes in its brief certain testimony given by the plaintiff; and if this were all of the testimony in the record to sustain the plaintiff's contention that he was jostled so that he fell from the car, or was a fair summary of the evidence in this regard, it would be very doubtful whether the court was warranted in submitting the case to the jury. It appears that the plaintiff was examined at considerable length through an interpreter, who was not proficient in our language, and his testimony, when taken apart, shows all the customary inconsistencies which accompany testimony so taken. The defendant insists, furthermore, that the plaintiff's statement that a fellow workman shoved him off the car was the result of a leading question. But in other portions of the record the plaintiff makes the same statement, both on direct and redirect examination, and it is entirely clear from his whole testimony that such was his claim, and it cannot fairly be said that it was prompted by his counsel. Neither do we think that such claim is improbable (see *Steffenson v. Chicago, etc., R. Co.*, supra), and while no witness testified in support of the plaintiff's account of the accident in his behalf, it appearing that several of his fellow workmen who saw the accident had left the locality, yet his claim was materially supported by the inconsistencies in the accounts given by the defendant's witnesses.

Thus the foreman was at first very confident as to the number of men on the car at the time and the number at work in his gang during all the time plaintiff was a member thereof, which testimony he gave by reference to his book; but, though this book is not in the record, it appears from his cross-examination that there were times, during the period in question, when there were 15 men at work in this gang. Again, one Wekne, the other witness, besides Tham and the foreman, who testified as to the details of the accident in behalf of the defendant, persisted that he did not see the car strike the plaintiff, and Tham testified that the car did not strike the plaintiff; whereas the foreman testified that the car did strike him. There was likewise a distinct discrepancy between the testimony of these witnesses as to the place where the accident occurred with reference to the plaintiff's boarding

many other matters which must have been equally within the field of their observations, the certainty and positiveness with which they all three testified that the plaintiff turned and jumped backwards from the car with both feet at the same time is at least worthy of note. How, then, can it be said that the jury was bound to discredit the plaintiff's testimony and version of the accident, because there were discrepancies therein, and because it was opposed by the testimony of the three witnesses above mentioned?

As to the negligence of Tham, the fellow workman whom the plaintiff claims jostled him and made him fall from the car, we do not think that it can be said that no negligence was shown. It requires little, if any, discussion to demonstrate that if there were either 4 or 6 men, including the plaintiff, on the front end of the moving car, standing sidewise and grasping the handle bar, on a space 4 feet 4 inches wide—packed together much like sardines in a box—if any of them turned around without warning another might easily be jostled thereby. Such an act, then, might constitute negligence, outside of the risks assumed by the workman so jostled, if it should be held that he did assume any. Said Mr. Justice Brown, at page 328 of 115 Minn., at page 317 of 132 N. W., in the Hilder Case, supra: "The question of assumption of risk was for the jury. While it is clear that the plaintiff assumed all risks incident to the overcrowded condition of the car, as he had worked under similar conditions for a considerable time, it cannot be held that he assumed the risk of negligent conduct of his fellow servants. The statute protects him from their negligence. Nor can it be held as a matter of law that plaintiff was guilty of contributory negligence by taking a position on the front end of the car with 4 other men. It was necessary that 5 men stand on one or the other end of the car, and whether plaintiff should have taken some other position was a question for the jury."

In answer to the defendant's contention that there was no suggestion that the movement of the plaintiff's fellow servant was made without warning or was unexpected, it is sufficient to say that it appears, as above stated, from the testimony of defendant's own witnesses, that there was no talk whatever between the men preceding the accident. Let us, then, examine briefly the defendant's affirmative claim, detailing the circumstances of the accident. As stated, this is in effect that the plaintiff voluntarily released his hold, turned so that his back was towards the direction in which the car was going, and then jumped backwards from the car and upon the track in front of the moving car. The only reason suggested by the de-

fendant for this extraordinary action on the plaintiff's part is that this occurred while the car was slowly moving and was near the place where the plaintiff and some of his fellow workmen ordinarily alighted to go to their boarding place—a contention strikingly similar to that of the defendant in the Steffenson Case, supra, and which in that case was discredited by the jury. The court, in the instant case, instructed the jury substantially that, if they found such claim to be true, they would have to find for the defendant. Manifestly, therefore, in view of the verdict, the jury were not impressed with this contention, and neither are we.

The only witnesses who testified concerning the accident, in behalf of the defendant, were the section foreman, the man named Tham, whom the plaintiff claims pushed him off the car, and Wekne, a young man who had been in this country less than a month. As we have already stated, there are quite as many discrepancies in their accounts of the accident, to say the least, as can be found in the plaintiff's testimony; and we think that upon the entire record there is nothing inherently unreasonable in the plaintiff's theory of the case, and nothing that necessarily discredits his account of the accident. Nor do we think that the defendant's theory is so much the more probable, or supported by such an overwhelming weight of evidence, as to require us to say, or even to justify us in saying, that the jury was manifestly and palpably wrong in accepting the plaintiff's version of the accident. Curiously enough, while arguing the improbability of the plaintiff's version and the absence of negligence on the part of the defendant, the defendant charges, in effect, that the plaintiff did the identical thing which he claims that his fellow servant did, namely, released his hold on the handle bar and turned around without warning. Loosening the hand hold and turning around might have been done without thought or anticipation of the consequences, and yet might well be held by the jury to have been dangerous to the other men, and likewise negligent, when the crowded condition of the men on the car is considered. But jumping backward from the car in the manner in which the defendant claims the plaintiff did would be deliberate folly. That the plaintiff would deliberately jump backward immediately in front of the heavily loaded, though slowly moving, car, is unlikely, and, further, is at least more improbable than that he was jostled from the car in the manner claimed by him. The jury, moreover, after hearing the evidence and the witnesses, and seeing the numerous physical demonstrations of the details of the accident, which the record shows occurred at the trial, were in a much better position to determine the truth of the respective contentions of the parties than we are. We find no

good reason for disturbing the verdict, after the trial court has refused to do so.

Order affirmed.

STRUNK v. WELLS BROS. CO. et al.
(Supreme Court of Minnesota. Dec. 20, 1912.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—DANGEROUS APPLIANCES.

In this a personal injury action, the evidence examined, and *held* not to sustain the verdict, in that it fails to show the defendants guilty of any negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954-972, 977; Dec. Dig. § 278.*]

Appeal from District Court, Ramsey County; William L. Kelly, Judge.

Action by Joseph Strunk against the Wells Bros. Company and others. Judgment for plaintiff, and defendants appeal. **Reversed.** Judgment ordered for defendants.

P. J. McLaughlin, of St. Paul, for appellants. John D. O'Brien and Dillon J. O'Brien, both of St. Paul, for respondent.

HOLT, J. In this a personal injury action, defendants appeal from the judgment entered in favor of plaintiff; their motion for directed verdict having been denied, as well as a motion for judgment notwithstanding the verdict. The only assignment of error necessary to consider is that the evidence fails to show defendants negligent. These appear to be the facts:

The defendants are corporations. The Wells Bros. Company was erecting a large business block for the Arcade Investment Company fronting west on St. Peter street, between Fourth and Fifth streets in St. Paul, Minn. For about three months prior to the accident resulting in plaintiff's injury he had been hauling crushed rock used in the concrete work of the building, hauling three or four loads each day. For convenience and safety a high fence had been erected inclosing the sidewalks adjacent to the building and part of the streets. On St. Peter street, near the middle of the building, there was a gate through which the teams passed in with materials for the structure, driving along and upon the sidewalk space. It also appears that as the building arose it was necessary to protect these teams and drivers and other workmen from material which might drop down from above, and to that end a covered way was constructed by placing a row of posts close to the building and a corresponding row near the fence mentioned, and a beam or joist was spiked with one end to the post near the building and the other to the corresponding one near the fence and at a height so that, with the braces placed slanting and somewhat lower, a man stand-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing on the load as he drove underneath would not come in contact with the joists and braces. It does not clearly appear how far each set of posts was away from the adjoining set, but from an examination of the photographs in evidence it appears to be from 15 to 20 feet. Each set was connected with the next adjoining by joists and braces. The distance between the posts nearest the building and those nearest the fence was 13 or 14 feet, except that near the gate spoken of the outside post was 25 feet 8 inches from the corresponding one near the building, so as to allow the turning of the teams and wagons in going upon the sidewalk. On top of the joists mentioned planks or boards were laid, covering the driveway on the sidewalk, and thus protecting the men and teams using it from falling material.

A watchman, presumably in the employ of defendant Wells Bros. Company, was stationed at the gate and directed the order in which the teams were to drive in. Plaintiff was not in the employ of either defendant, but hauled the crushed rock at so much per load for the one who furnished it to the concrete contractor. On June 13, 1911, as plaintiff and two other teamsters approached the gate with loads of crushed rock, a team with a load of brick also drove up. The watchman directed the brick load to go in first. As the last team drove in it turned to the right and stopped as near to the outside posts as it could, so as to allow the brick to be unloaded and piled near the fence. Concluding that there was room for the teams with the crushed rock to drive in to a place provided for unloading in the covered driveway beyond where the team with the brick load was to unload, the watchman directed Bieren, driving the first load of crushed rock, to drive in, and plaintiff to follow. The space was so narrow that one of the hubs on Bieren's wagon caught in the wagon with the brick load. The teamsters pried them apart, and Bieren drove on to his place of unloading. Then plaintiff, standing up on his load, attempted to pass by the brick load, driving up as far toward the building as he could, and then making a sharp turn to the right to pass inside of the brick wagon. In so doing he either drove too far before turning, so that the wagon tongue squarely struck the post next to the building, breaking it in two, as defendants contend, or else, as plaintiff claims, after he had made the turn, and just as he was about to pass the brick wagon, one of the front wheels struck a brick or rock, and the load, being very heavy, threw the team over toward the building, so that the neckyoke or tongue struck and broke the post. When the post broke, that part of the covered way which it supported sagged so that some of the planks fell down; one striking plaintiff on his shoulder, whereby he was thrown off the load, and in the fall his leg was broken. Along the posts spoken of

as next to the building was laid on the ground a wooden box a foot high and six inches wide in which cables ran. The box was laid against the posts, and served to protect them from the teams and the hubs of the wagons as these passed along the driveway.

The allegation of negligence is as follows: "Defendants maintain (1) a wooden scaffolding (the covered driveway above described), which was by the defendants negligently and carelessly built and maintained, of insufficient and unsuitable materials, insufficiently nailed, braced, designed, and constructed, and negligently placed, built, and maintained in such position and proximity to the place of ingress and egress to and from said premises that it would be liable to be struck by persons, teams, or materials coming upon or being brought upon said premises, and so weak, insufficient, and improperly constructed as to be liable to fall upon the application of slight force, or being struck by persons, teams, or material coming upon, or being brought upon, said premises."

There was no evidence or claim of any defect in the construction of this covered driveway, except that the post which broke was closer to the driveway than the others, and that it was burned to some extent, at least on one side. There is some confusion in the record as to which post broke, the first or the second, beginning with the pair immediately to the right of the gate as one passed in toward the building; but it is plain from the photographs in evidence that all of the posts next to the building were placed up against the cable box spoken of, and certainly no negligence may be predicated on this position, for it is apparent that they were fully protected from the wagons by the box, and it could not be reasonably apprehended that the drivers would drive the teams over or against the box so far as to endanger the posts on the other side by the pole or neckyoke.

There remains, then, only the alleged defect in the post which broke. The evidence is fairly certain that these timbers were substantial and of ample strength for the purpose intended, being 4 inches through one way and 6 inches the other. The only defect testified to by any of plaintiff's witnesses was that this post which broke had been charred or burned. One witness, Mr. Bieren, said: "The post was a little burned around the outside, but how much I didn't measure. I didn't look particularly, but the post was burned. * * * It was pretty near burned all the way around; yes. One side of it wasn't just exactly burned, but it was kind of black; but one side of it was burned about an inch deep." This witness also testified that this post was 5 or 6 inches square. The teamster who hauled the third load of crushed rock and who saw the accident, having testified to the post being burned, when asked how much, answered: "Well, I couldn't

just tell; I didn't look at it close just how much was burned; I could see it was burned around." But these witnesses testified that they had observed that this particular post stood nearer the driveway than the others, but had never noticed that it was burned before the accident.

Defendants produced, at the trial, what was claimed to be one part of the broken post, a sound piece of hemlock timber 4 by 6 inches, with no indication of crack, knot, or weakness at the point where it did break square off. It was somewhat scorched its whole length but not so as to affect its strength. Several of defendants' witnesses positively identified this piece as one of the two parts into which the post broke when the neckyoke or pole of plaintiff's team struck it. No attempt was made by plaintiff to dispute defendants' contention that the piece produced at the trial was the very piece that broke, either by calling in rebuttal his two witnesses who had noticed and testified to the condition of the post or by any other witness.

We have carefully scanned the record to see if there might be any basis on which the judgment can be sustained, but have failed. There certainly, as before stated, could be no negligence in the location of this post; for by the uncontroverted testimony of plaintiff's witnesses, and the concededly accurate photographs, it was protected, like the rest of the posts next to the building, by the cable box before mentioned. And it is manifest, also, from the photographs and the evidence, that this post, as well as each of the others, was of ample strength to sustain the weight it was designed to carry and any ordinary jar which might be anticipated. It is also clear that it was securely braced and anchored, both at the bottom and top, because it broke squarely off by the impact, and was not torn loose at either end. This covered driveway was a temporary structure, to protect the workmen and teams while the building was being built, and common knowledge teaches that as to such the same care is not taken as to location or solidity of construction as is taken in case of permanent structures. It is also entirely obvious that those constructing a driveway similar to this one, or any scaffolding around a building being erected, do not anticipate that teams will be driven against them with any considerable force, because no temporary building scaffold or structure to serve the purpose of the one in question could withstand the impact of a heavy team or wagon. And the force directed against the post in this case must have been of unusual violence to have caused the break. How long this driveway had existed does not appear, although it does appear that the covering just above where the post broke was then being placed. The posts had, however, been in place for some

time, and plaintiff was fully acquainted with the situation, and knew that it was extremely difficult to pass the brick wagon, still he undertook to drive in.

Accepting, as we must, the most favorable view of the testimony for plaintiff as to defendants' negligence, we are nevertheless forced to the conclusion that the record fails to show any, and, assuming that plaintiff was free from negligence, the deplorable accident was due to the fact, which he admits, that one of the front wheels came in contact with some obstruction, thereby unexpectedly throwing the pole or neckyoke against the post with sufficient force to break a post that as far as the evidence shows was of ample size and strength to carry all the strain which might reasonably be expected that it would be subjected to. We may assume that defendants owed plaintiff the same duty they would owe their own servants to make the driveway reasonably safe. However, they are not to be held as insurers of safety. Plaintiff knew that it was difficult to pass the brick wagon. He could observe as well as any one if obstructions were in the way. He, as well as his witnesses, his fellow teamsters, claim that they had particular occasion to notice this post, because of its location; but none had seen that it was in any manner defective or burned until after the accident. We do not think it possible, in whatever light this evidence is viewed, to hold the defendants on any ground of negligence responsible for this accident in which plaintiff was injured.

The judgment appealed from must therefore be reversed, with direction to enter judgment in favor of defendants.

STATE v. McCORMICK.

(Supreme Court of Minnesota. Dec. 20, 1912.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 626*)—ORDINANCES—UNREASONABLE DISCRIMINATION.

An ordinance of the city of Minneapolis, designed to prevent the spreading of fires and to protect human life, which singles out the "two-story frame building," and enacts that it shall be unlawful for the owner thereof to furnish or lease the third or attic floor to a person or group of persons living independently of those occupying the lower floors, is held discriminatory, unreasonable, and void, since it does not include other buildings equally exposed to danger of fire, such as "the three-story frame building," or the brick or concrete two-story buildings, not of fireproof construction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1380; Dec. Dig. § 626.*]

Appeal from Municipal Court of Minneapolis; W. C. Leary, Judge.

Margaret A. McCormick was convicted of violating a city ordinance, and appeals. Reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Mead & Bryngelson, of Minneapolis, for appellant. Daniel Fish and W. G. Compton, both of Minneapolis, for the State.

BROWN, J. Defendant was convicted of the violation of an ordinance of the city of Minneapolis, and appealed from the judgment rendered against her.

The facts are as follows: Defendant erected and was the owner of a two-story frame residence building, situated on West Lake street, and in the construction of the same completed and furnished the attic or third floor for occupancy by tenants, practically the same as the floors below were completed and furnished, making two complete flats on each of the three floors suitable for occupancy by separate families. She subsequently leased one of the third-floor flats to a family having no relation to and living independently of the occupants of the floors below. This the city contends constituted a violation of a provision of its building ordinance which prohibits the constructing or occupancy of the third floor of such a building in the manner and under the circumstances stated. The ordinance, in so far as here material, provides: "It shall be unlawful to build, furnish or occupy any room or group of rooms above the second story of any two-story frame building as the home for any family or group of persons living independently of the families on the first and second floors of such building."

The validity of this clause of the ordinance is challenged by defendant, and the soundness of her contention in this respect presents the only question for our consideration. The state seeks to sustain the ordinance as police regulation designed in a measure to prevent fires and conflagrations, and to lessen the danger to human life in the case of the burning of dwellings in which several families dwell. The state refers to certain provisions of the city charter under which it is claimed the ordinance was properly enacted. Those provisions are as follows: "To regulate the location of smoke-houses * * * and to make any other provisions to guard against fire, or to prevent the spreading of fires which the city council may deem proper," and "also to require such owner or lessee to construct, provide and furnish each and every other thing, and to do each and every other act which it may think necessary or advisable to lessen danger to human life in case of fire or accident."

It may be conceded, without stopping to consider or decide the question, that the provisions of the charter quoted confer ample authority upon the city council, within reasonable limits, to enact such ordinances and regulations, having for their purpose the prevention of fires, and the protection of human life, as the members of that body may deem necessary. But it is clear that

it does not authorize a discrimination between buildings which are equally exposed to the danger sought to be guarded against. The ordinance in question singles out the "two-story frame buildings," and declares that in a building of that character the third or attic floor shall not be furnished for the habitation of persons living independently of those on the floors below, leaving all other buildings, erected for the same purpose and equally susceptible to fire, immune and free from the operation of the law. No reason is suggested to support the theory that the "two-story frame building" is exposed to dangers peculiar to that type of residence buildings, or to differentiate it from the "three-story frame building," or the ordinary brick or concrete structure, not of fire-proof construction, the interior finish of which is composed of wooden material. All are equally exposed to the danger of fire. The reason for the attempted regulation applies to each. The result, if the ordinance be sustained, will be to exempt from its operation the latter class of buildings with no basis for the distinction. It must be held, therefore, that the ordinance—that is, the particular provision here in question—is void as class legislation, an unwarranted discrimination, and unreasonable and void.

Judgment reversed.

ANDERSON v. BROOKS SCANLON LUMBER CO.

(Supreme Court of Minnesota. Nov. 29, 1912.)

Appeal from District Court, Hennepin County; Horace D. Dickinson, Judge.

Action by Knute Anderson against the Brooks Scanlon Lumber Company. From an order overruling a demurrer to the complaint, defendant appeals. Affirmed.

Price Wickersham, of St. Paul, for appellant. Healy, White & La Du, of Minneapolis, for respondent.

PER CURIAM. The complaint in this action, though flagrantly indefinite and uncertain, and open to a motion to make its allegations more specific, and in default thereof that it be stricken out, is not demurrable. By permissible inferences the complaint states a cause of action, if in no other respects, for the negligent failure of defendant to provide plaintiff with a safe place in which to do his work.

Order affirmed.

GAMBLE-ROBINSON COMMISSION CO. v. WHITAKER et al.

(Supreme Court of Minnesota. Dec. 27, 1912.)

Appeal from District Court, Ramsey County; Oscar Hallam, Judge.

Action by the Gamble-Robinson Commission Company against John L. Whitaker and others. Verdict for plaintiff. From an order denying a new trial, defendants John B. Hoxsie & Co. appeal. Affirmed.

John R. Donohue, of St. Paul, for appellants. Walter Holsinger, of Minneapolis, for respondent.

PER CURIAM. This action has been before the court on two former appeals. 111 Minn. 452, 127 N. W. 448; 116 Minn. 79, 133 N. W. 167. The facts are there fully stated, and a restatement is deemed unnecessary. The questions presented on the different trials were practically the same, namely: (1) Whether the defendants were joint purchasers of the eggs, or whether the Peifer Company was their agent in the purchase; and (2) whether, if not so purchased, defendants were bona fide holders of the warehouse receipt.

Our examination of the record leads to the conclusion that these questions were properly submitted to the jury and that the evidence supports the verdict. Under the facts disclosed, the trial court did not err in charging the jury that defendants had the burden of establishing the good faith of their ownership of the warehouse receipt.

Order affirmed.

STEKETEE et al. v. NEWKIRK et al.

(Supreme Court of Michigan. Dec. 17, 1912.)

1. DEEDS (§ 211*)—CANCELLATION—GROUNDS—UNDUE INFLUENCE—FALSE REPRESENTATIONS—EVIDENCE.

In a suit to set aside a deed by a wife to her husband on the ground of undue influence and false representations, evidence held not to show undue influence and false representations, based on the husband procuring the conveyance on his promise to reconvey.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647, 649; Dec. Dig. § 211.*]

2. WITNESSES (§ 211*)—PRIVILEGED COMMUNICATIONS—PHYSICIAN AND PATIENT.

The testimony of a physician as to the general health and mental condition of a patient is competent, notwithstanding Comp. Laws, § 10,181, prohibiting a physician from disclosing any information acquired in attending any patient, necessary to prescribe for such patient.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 768, 773; Dec. Dig. § 211.*]

3. WITNESSES (§ 198*)—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.

Though confidential communications between attorney and client cannot be disclosed by the attorney, without the consent of the client, or after his death, of the personal representative, an attorney may testify when not stating any communications between himself and client.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 747, 753; Dec. Dig. § 198.*]

4. WITNESSES (§ 199*)—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.

A letter written by a beneficiary under a will to the testamentary trustee is not a privileged communication between client and attorney, where the letter does not disclose the existence of such a relation and there is no evidence thereof.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 749-751, 766, 767; Dec. Dig. § 199.*]

5. APPEAL AND ERROR (§ 843*)—QUESTIONS REVIEWABLE—IMMATERIAL QUESTIONS.

The question of error in excluding evidence will not be considered, where the result would not be changed by giving to the excluded evidence all the probative force it is entitled to.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3342; Dec. Dig. § 843.*]

Appeal from Circuit Court, Kent County, in Chancery; Willis B. Perkins, Judge.

Suit by Anna L. Newkirk, prosecuted after her death by Jacob Steketee, special administrator, and others, against Hawley A. Newkirk and others. From a judgment of dismissal, complainants appeal. Affirmed.

The bill of complaint in this cause was filed October 12, 1908, by Anna L. Newkirk against Hawley Newkirk and Jule F. Brower, for the purpose of setting aside two deeds of real estate in the city of Grand Rapids in this state, made in February, 1892, on the grounds of alleged undue influence and false representations. Hawley A. Newkirk and Anna L. Newkirk were husband and wife. She was one of the daughters of George B. Morton, who died in 1876, leaving a widow and two daughters, Ada B. Morton (Hughart) and Anna L. Morton (Newkirk). His property, which consisted of real estate, went, under his will, as follows: One-third to the widow in fee, and one-third in trust to each of the daughters; it being provided that the daughters should receive the income during their lives and at their death the property was to go to their issue in fee. The widow died in 1881, and the one-third of the property left her by will went, in equal shares in fee to the two daughters, giving each of the daughters one-sixth of the property in fee simple, in addition to the income from one-third of the property given each of them by the will of their father. Mrs. Anna L. Newkirk had been previously married to William Hofstra, and they had two children, Laura Hofstra and Margaret Hofstra. Laura Hofstra is now deceased, and Margaret Hofstra since married, and is the complainant Margaret H. Billingshurst. There was one child as a result of the marriage of Mr. and Mrs. Newkirk, born on November 6, 1892, and being the defendant Abigail N. Hillerman. Mrs. Newkirk died in 1909, leaving a will appointing Peter Doran and Blanche M. Butler executors and trustees. Objections having been filed to the allowance of the will, Peter Doran was appointed special administrator, and was substituted as complainant. Peter Doran died on the eve of the trial, whereupon Jacob Steketee was appointed as special administrator, and he, in turn, substituted as complainant.

Upon the death of Mrs. Newkirk in 1909, the one-third interest in the property, the income of which she had for life, became the fee-simple property of her two daughters, the complainant Mrs. Billingshurst and the defendant Mrs. Hillerman; each owning one-sixth. The title to the property stood as follows: One-third in Ada B. Hughart for life; at her death fee goes to her heirs. One-sixth in Ada B. Hughart in fee. One-sixth in Margaret Billingshurst in fee. One-sixth in Abigail W. Hillerman in fee. One-sixth in defendant Hawley A. Newkirk, sur-

from her first husband, from whom she was divorced, and after her remarriage, became fearful that some of her property might go to her former husband. This is evidenced by a letter which she wrote to Mr. Blair, in the city of Grand Rapids, on April 2, 1891, shortly after her marriage to Mr. Newkirk: "I don't intend to let the little I have got ever pass into Hofstra's hands, and shall either deed it now to Hawley [defendant Newkirk] or fix it in my will so that, in case the children die before they are of age and I die before them, Mr. Hofstra cannot get what I have." On January 6, 1892, Mrs. Newkirk called upon Mr. Wolseley, an attorney at law in the city of Chicago, for the purpose of having deeds drawn to carry out this intention. The result of this call was that Mr. Wolseley drew deeds from Mr. and Mrs. Newkirk to the defendant Brower, who was a clerk in his office, and deed from him back to them, an undivided one-half to each, which Mr. Wolseley stated was the method used in Illinois for a wife to convey an interest in property to her husband. On January 18th of the same year, Mr. and Mrs. Newkirk called at the office of Mr. Wolseley and signed these deeds. This was the first time that Mr. Wolseley had seen Mr. Newkirk with reference to the transaction. The deeds were not delivered, but the matter of creating an estate in joint tenancy was discussed. Mr. Wolseley, desiring to examine the law of Michigan on this subject, did not prepare deeds until January 22d, placing the title of the Michigan property in Mr. and Mrs. Newkirk as joint tenants.

It appears that Mrs. Newkirk owned an interest in two pieces of property in Grand Rapids; one known as the "Morton House property," and the other as the "barn property." On February 13th Mr. and Mrs. Newkirk again came to the office of Mr. Wolseley and the deeds were executed, placing the title to the "barn" property in them as joint tenants. On February 24th they again came to Mr. Wolseley's office, and at this time the deeds were executed placing the title to the undivided one-sixth of the Morton House property in Mr. and Mrs. Newkirk as joint tenants. This was done by Mrs. Newkirk deeding the property to Brower, who immediately deeded this interest to Mr. and Mrs. Newkirk as husband and wife. The deeds were left with Mr. Wolseley, who forwarded them to Grand Rapids to be recorded. Mr. Wolseley took the acknowledgment of the deeds, and he and Henry B. Freeman acted as witnesses. At the time the deeds were executed, the parties resided in the city of Chicago, where Mr. Newkirk has lived ever since. During the first few years of their married life, they lived, at least a part of the time, in the city of Chicago, and then boarded at boarding houses

on, were spent by Mrs. Newkirk with her daughters in California.

The bill in this case was filed on October 12, 1908, more than 16 years after the deeds in question were executed. The bill alleges the following: "That prior to the making of the deed heretofore mentioned by your oratrix to said Jule F. Brower, your oratrix was sick and in a very feeble condition, and had so been for a long period of time, to wit, six months; that at the same time your oratrix was with child and the time of childbirth was very near, and that from the sickness and expected birth of a child her life was despaired of, and she, your oratrix, was in such a feeble, sick, and nervous condition as to be mentally incompetent to transact business or care for her property rights in a proper manner; that while in this condition, and so sick, feeble, and mentally incompetent, the said defendant Hawley A. Newkirk began working upon the fears of your oratrix, and falsely represented to your oratrix that if she should die in childbirth no provision would be made for their then unborn child, and urged upon her in her then condition to make some temporary arrangement whereby he might properly care for the child, and urged and continually argued with your oratrix to deed her property in the manner above mentioned, so that the property would be jointly owned by your oratrix and the said Hawley A. Newkirk as husband and wife, claiming and representing that by so doing the interest of their then unborn child would be better secured; that he, in consideration thereof, promised and agreed that this arrangement would be but temporary, and that if your oratrix survived the birth of their child he would immediately reconvey all of the aforesaid property to your oratrix, and that she would then own the property the same as before; that the said Hawley A. Newkirk agreed to so prepare the papers and conveyance that she, your oratrix, in the event of her surviving the birth of their child, could, if necessary, compel the reconveyance to her of said property as he, the said Hawley A. Newkirk, had promised and agreed; that by reason of the continued arguments, importunities, promises, and representations thus made by the said Hawley A. Newkirk, your oratrix was overpersuaded and unduly influenced in her then weak mental and physical condition, to consent to the transfer of said property and land, as requested by the said Hawley A. Newkirk; that said Hawley A. Newkirk is and was the husband of your oratrix, and that your oratrix relied upon his representation so made, and statements and promises as aforesaid, and believed that the said Hawley A. Newkirk would take such steps and prepare such papers as were necessary to protect the rights and interests of your oratrix; that your

oratrix took no part in the preparation of said legal papers, but left the same entirely to her husband, the said Hawley A. Newkirk; and that on the 3d day of February, A. D. 1892, aforesaid, your oratrix was in so weak a condition, both mentally and physically, as to be wholly unable to transact business or understand the business that was transacted, and had no knowledge of the contents of the papers which she signed, except in a vague and wholly insufficient way; that while in such condition, and under the circumstances aforesaid, and relying upon the representation and statements aforesaid, she executed and delivered the deed aforesaid to said Jule F. Brower, and which said deed was obtained by undue influence and at a time when the will and judgment of your oratrix was so impaired by ill health as to, in fact, render the same not the act of your oratrix; that on or about the 6th day of November, A. D. 1892, a daughter was born to your oratrix and the said defendant, Hawley A. Newkirk, and that your oratrix continued sick for a long period of time thereafter, to wit, 11 years; that your oratrix subsequently partially recovered her health, but that for a number of years thereafter her daughter, Abbie Newkirk, was in poor health, and your oratrix was obliged to make long trips with their said daughter to California for her health; that during all of this time and up to the time of the filing of this bill of complaint, your oratrix has had the possession of the said land and has received the rents and profits therefrom, and the said Hawley A. Newkirk has never attempted at any time to secure possession of the same nor has he had possession thereof, either legally or constructively; that after partially regaining her health your oratrix from time to time requested the said defendant Hawley A. Newkirk to reconvey said property to her, as he had before promised, but that the said Hawley A. Newkirk put her off from time to time with excuses and neglected to deed the same to her as promised."

No effort was made to serve either the defendant Newkirk or Brower with process, but an attempt was made to bring them in by publication. Proof of publication was filed, and an order entered taking the bill of complaint as confessed by both defendants. On March 2, 1909, the deposition of Mrs. Newkirk was taken in California ex parte and without any notice to Mr. Newkirk. A decree was made eight days later in accordance with the prayer of the bill. The description of the property in this decree was erroneous, and an amended decree was made April 20, 1909. Mrs. Newkirk died on May 31, 1909, and Mr. Newkirk learned of the decree a few days before her death. He thereupon filed a petition asking permission to appear and defend, and the decree was vacated, in accordance with section 496 of the Compiled Laws of 1897, and an order made permitting

defendants to appear and defend. Both appeared and filed answers.

The answer of the defendant Newkirk denies all the material allegations of the bill of complaint. It denies that he made to her any of the representations charged in the bill and that he asked her to give him any interest in the property. It states that their child was not born until November 6, 1892, and that the deeds were made in February, 1892, and that at the time the deeds were made Mrs. Newkirk was "in her normal condition and made the deeds because she thought it was advisable that the property covered by the said deeds should be vested in herself and husband jointly." The defendant Brower filed a separate answer, which showed that he acted simply as an intermediary in placing the title in Mr. and Mrs. Newkirk jointly, and denies, so far as he is concerned, all the charges of fraud and misrepresentation made in the bill of complaint. The defendant Abigail N. Hillerman, being a minor, refused to join as a party complainant, and Harry F. Johnson was appointed her guardian ad litem and filed the usual infant's answer, submitting Mrs. Hillerman's rights to the protection of the court.

Upon the trial, the complainants offered the ex parte deposition of Mrs. Newkirk, taken before the defendants appeared in the case. The defendants objected to the admission of the deposition, and moved that it be suppressed, and the court made an order to that effect, and a motion has been made in this court to strike this deposition from the record. The complainants attempted to make out their case by the testimony of Mrs. Billingham and Mary E. Davies, formerly a servant of Mrs. Newkirk. The principal evidence of the defendants consisted of the depositions of Mr. Brower, Mr. Wolseley, Judge Freeman, Dr. Bailey, the family physician and documentary evidence. After hearing all the testimony the circuit judge dismissed the bill, and the complainants have appealed to this court.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

Thomas P. Bradfield, of Grand Rapids (Kleinhaus & Knappen and Chas. A. Watt, all of Grand Rapids, of counsel), for appellants. Wilson, Wilson & Rice, of Grand Rapids (Albert G. Welch, of Chicago, Ill., of counsel), for appellees.

KUHN, J. (after stating the facts as above). It is contended by appellants (1) that the deposition of the original complainant should not have been suppressed by the circuit judge at the rehearing of the case; (2) that the testimony of Dr. Bailey as to matters which he learned in his professional relations was incompetent; (3) that the testimony of Mr. Wolseley, the attorney who drew the deeds, was incompetent, as involving nego-

as privileged communications between client and attorney; (5) that the conveyance should have been set aside because of the fiduciary relations sustained by the parties as husband and wife, and on the grounds of undue influence, fraud, misrepresentation, and over-persuasion, and that, in addition, there was an assent by silence on the part of the defendant Newkirk in all conversations with his wife regarding this transaction, and that equity will not permit him to claim any different or other agreement or state of facts than was understood and claimed by the complainant during her lifetime in his presence.

[1] Counsel for the complainants urge strongly that a promise to reconvey was made by defendant Newkirk and that it was never carried out. It seems to us that upon this phase of the case a careful examination of the conduct of Mrs. Newkirk during the period elapsing from the time she executed the deeds up to the time she filed her bill is very material. The testimony discloses that, notwithstanding the claimed promise to reconvey and Mr. Newkirk's failure to carry it out, on April 15, 1893, she executed a very broad power of attorney to her husband, intrusting him with the uncontrolled direction of her affairs, and it is not claimed that the power was executed by Mrs. Newkirk under duress, but was apparently her free and voluntary act. From March 9, 1897, to March 19, 1904, letters were offered in evidence, written by her to her husband, in which she expresses confidence in him. On May 27, 1899, 7 years after the execution of the conveyance in question, Mrs. Newkirk's confidence in her husband was further shown by appointing him executor of her estate. On March 19, 1904, 12 years after the execution of the deeds, her confidence is further displayed by a letter in which she consults him in relation to a proposed transaction in regard to this property, and in which she says: "What do you think? If it's all right, and you think best, you better sign also, and send it to them. Otherwise destroy the option." There is also a postal card in the record, dated May 28, 1907, containing a photograph of Mrs. Newkirk. Considerable discussion has been had with reference to the date when this card was sent, it being claimed it was sent in 1901, and the card has been submitted to us for examination. The year is stamped on the postage stamp, and while the "7" is not very plain, a close inspection satisfies us that it is a "7." Moreover, the stamp is a special stamp printed by the government in commemoration of the Jamestown Exposition, and has on it, "Commemoration Series, 1907." There is nothing in the message on the card which would indicate any estrangement between herself and her husband. She concludes: "God bless and keep you many years. Yours, Anna."

to the time that she filed her bill of complaint is entirely inconsistent with the theory of complainants that the defendant Newkirk had made a promise to reconvey and had failed to carry it out. As counsel in their brief contend: "Evidence derives its probative value from its inherent probability of truth. The spontaneous word or action, which is part of the *res gestæ* of a transaction, has greater probative force than a subsequent interested, perhaps studied, self-serving declaration. For that reason Mrs. Newkirk's correspondence and the circumstances which are the *res gestæ* of the execution of these deeds are more persuasive than her declarations." The evidence introduced to substantiate the allegations of the bill was the testimony of Mary E. Davies and the complainant Mrs. Billinghamurst. It appears that when her mother married Mr. Newkirk Mrs. Billinghamurst was 8 years old, and 9 years old when her sister, Mrs. Hillerman, was born. She attempts to testify as to conversations which she claims to have overheard at the time when she was between the ages of 9 and 15 years. The witness Mary E. Davies did not enter the employ of Mrs. Newkirk until 1896, which was 4 years, at least, after the birth of Mrs. Hillerman. The trial judge saw and heard both these witnesses, and had an opportunity of judging of the reliability of the testimony.

[2] The testimony of Dr. Bailey was confined to the state of Mrs. Newkirk's general health and mental condition. He was not examined as to any information gained from Mrs. Newkirk, or as to any communication with her. It does not appear that what he stated on the stand was information which "was necessary to enable him to prescribe for her." This is necessary, in order to bring it within the prohibition of section 10,181, Compiled Laws 1897, which provides: "No person duly authorized to practice physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient, in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." We think the testimony was properly admitted. 4 Wigmore on Evidence, § 2383; *Campau v. North*, 39 Mich. 606, 33 Am. Rep. 433; *Dittrich v. Detroit*, 98 Mich. 245, 57 N. W. 125; *Lincoln v. Detroit*, 101 Mich. 245, 59 N. W. 617.

[3] The testimony of Mr. Wolsley was also admissible. While the rule is that confidential communications between attorney and client cannot be disclosed by the attorney without the consent of the client, or, after his death, of the personal representative of the client, Mr. Wolsley's testimony did not come within this rule, because he was not

asked and did not state any communication between himself and Mrs. Newkirk.

[4] The letters written to Mr. Blair were objected to, because it was claimed that they were privileged communications between client and attorney. Mr. Blair was acting as trustee under the will of her father, Geo. B. Morton, and she was beneficiary under the will. An examination of the letters does not disclose that the relation of attorney and client existed, nor is there any evidence in the record to show that relationship.

[5] Without passing upon the questions of whether or not the circuit judge should have considered the deposition of Anna L. Newkirk, whether the motion to suppress should be granted in this court, or whether the testimony of Hawley Newkirk was improperly admitted, for the purpose of this case, giving the deposition all the probative force it is entitled to, it would not, in our opinion, change the determination of the issues here involved.

After carefully going over the record in this case, considering the exhaustive briefs of the solicitors for complainants, but being of the opinion that the arrangement made between Mrs. Newkirk and her husband does not do violence to justice and equity, we decline to disturb the determination of the lower court.

The decree is affirmed, with costs.

BERRY v. HARBOR SPRINGS RY. CO.

(Supreme Court of Michigan. Dec. 17, 1912.)

1. RAILROADS (§ 391*)—INJURIES TO TRAVELERS—"GROSS NEGLIGENCE."

Plaintiff while walking by the side of a railroad track in a street where there was plenty of room to have avoided a moving engine was struck by the tender of an engine approaching her from the rear. The engine was moving very slowly, and stopped within 10 feet after plaintiff was discovered to be in a place of danger. The engineer saw plaintiff as he approached, and was watching her until the time of the accident with nothing to obstruct his view. One of his hands was on the air brake lever, the other was ringing the bell continuously, and he testified that the air pump was making a noise that could be heard 35 or 40 rods, but that plaintiff proceeded along the path for 100 feet without looking to the rear, and that just before the injury she suddenly stepped between the rails, when the engine was not more than 10 feet from her. *Held*, that the engineer was not guilty of gross negligence, such term being defined to mean an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, a thoughtless disregard of consequences without the exercise of any effort to avoid them.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1317, 1326-1330; Dec. Dig. § 391.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3168-3173; vol. 8, p. 7675.]

2. RAILROADS (§ 383*)—INJURIES TO TRAVELERS—CONTRIBUTORY NEGLIGENCE.

Plaintiff in walking along the track for such distance without looking to the rear, and

so close to the track that she might be struck by an approaching train when there was ample space for her to walk with perfect safety, was guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1305-1310; Dec. Dig. § 383.*]

Error to Circuit Court, Emmet County; Frank Shepherd, Judge.

Action by Helen Berry against the Harbor Springs Railway Company. Judgment for plaintiff, and defendant brings error. Reversed without new trial.

Argued before MOORE, C. J., and STEERE, MCALVAY, BROOKE, STONE, OSTRANDER, and KUHN, JJ.

Halstead & Halstead, of Petoskey, for appellant. Geo. E. & M. A. Nichols, of Ionia, and W. S. Mesick, of Petoskey, for appellee.

MCALVAY, J. This is an action on the case brought by plaintiff against defendant to recover damages for personal injuries to plaintiff, claimed to have been caused by the negligence of defendant's servants. A verdict was rendered in the case in favor of plaintiff. From a judgment entered upon such verdict defendant has brought the case before this court upon a writ of error, asking a reversal on account of errors, which are assigned. As far as may be necessary in the consideration of this case to state any facts, the court will accept the statement as made in the brief of the appellant, for the reason that the appellee has ignored rule No. 40 (68 N. W. viii) of this court, and not pointed out in a single instance wherein it is claimed the appellant's statement is incorrect, and has made a new statement of great length.

The injury to the plaintiff occurred in the village of Harbor Springs, Emmet county, where defendant owns and operates a narrow-gauge logging road, which crosses the tracks of the Grand Rapids & Indiana and Bay street at right angles. On defendant's main track two switches are placed to connect with side tracks, one north of the Grand Rapids & Indiana tracks and one south of those tracks. These switches are operated from a small target house. The north switch is about 120 feet north of this operating station.

On the day of the injury plaintiff approached defendant's main tracks from the east, and saw an engine pushing a car of coal ahead of it approaching from the south, the engine heading north. Plaintiff stepped on the east side of defendant's track, and waited for this engine and car to pass going north. While waiting she saw a man, supposed by her to be in the employ of defendant, in this target house. She knew what the target house was used for, and understood he was there for the purpose of turning the switch on defendant's track. She knew that the north switch could be operat-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to the north that could be so operated. She was familiar with the location of the main line and the switch tracks of defendant's road, having often walked on both. After the engine and car of coal had passed plaintiff, she continued on west in the path and on the north side of what is known as Bay street. Defendant's switch track, from the north switch stand, above mentioned, curves in a southwesterly direction, and as it approaches Bay street curving to the westward it straightens out and runs parallel with such street. This curve, which starts at defendant's north switch stand, ends where this switch track meets the path at Bay street, and is about 175 feet in length. This engine and car continued on its course up the track far enough to permit the switch to be thrown by the man in the operating station, and let them in on this curved track. This he did, and then went across to the switch track to meet the engine and car, upon which he acted as a brakeman, to cut the car off for the lower switch. When the switch was thrown, the engine backed in on the switch track, pulling the car of coal. This was a small, light engine of low gear, and adapted to climbing grades. The track was slightly downgrade, and, as soon as it got onto the switch track with the car of coal, the steam was cut off, and it coasted slowly down the hill, with the tender first, at a speed estimated as 2½ to 4 miles per hour. It was intended to place the car of coal further down by cutting it off, and making what is known as a "flying switch." The grade on the switch track as it descends from the north switch stand is 2.3 per cent. for a short distance, then 2 per cent., then on a level at the point where this track comes in north of Bay street, and continues along parallel with it to the place where the injury occurred. Plaintiff, continuing on the path as described, came to and passed the point where this switch track approaches Bay street, and proceeded along said path to the place where she was injured, which she designates as exactly opposite the south switch. As she was coming towards the point where the switch track parallels Bay street, some piles of railroad ties obstructed her view of this switch track higher up. She could see some distance up the track where it straightens out, and says that at that point she looked and saw nothing approaching. She continued along her way to the place where the path comes to the side of the switch track on Bay street, and proceeded along such path without any further observation. The engineer on the approaching engine saw plaintiff when she came into view at the end of the pile of railroad ties. The brakeman on the engine also saw her at the same time. The engineer was standing up in his cab watching her from that time until the accident, with nothing to obstruct his view, with one hand on the air brake lever,

other hand; the air pump making a noise which could be heard 35 or 40 rods. She walked the whole distance with her back to the engine approaching her from behind along or near the path on the side of the track toward Bay street, which is open and level for the whole distance it is paralleled by the track, without turning or looking back. The record shows that she did not walk in the path all of the time, but zigzagged as she went along toward the street and toward the railroad track. The engineer had the engine under control, and at one time applied the brakes because he thought plaintiff was getting too near the track. She proceeded in this manner for a distance of about 100 feet from the place, where, as stated, she looked up the track as she approached it, when, as is claimed by the men on the engine, she suddenly stepped between the rails, the engine being then ten feet from her, and, although the engineer applied his air brakes, reversed his engine and pulled the throttle wide open, and the engine was stopped within that distance, she was struck, and her ankle was injured. No part of her person went under the tender, nor was crushed by it. Her testimony is that she was walking in the path, and did not step over the rail onto the track. She gives as her reason why she did not walk farther away from the track that the street was dusty. Plaintiff claimed that her attention was distracted by a train which passed, going west, on the Grand Rapids & Indiana tracks, about 30 feet away from defendant's road, before she was struck. All the other witnesses testify that no such train passed until five minutes or more after she was hurt. The plaintiff testified that she was familiar with all these surroundings, and knew that trains were operated on these tracks; that she did not look behind her for the whole distance after she made the first observation until she was injured. The record shows that this was for a distance of about 100 feet, the greater part of which was traversed by her parallel with the railroad track. It appears without dispute from the record and the exhibits in the case that this path parallel with the railroad track was a well-defined and beaten path, at a sufficient distance from the tracks to be without danger of injury from a passing engine, and also that on this side south from the track the way for the entire distance was smooth and unobstructed for a width sufficient for teams to pass each other.

The material errors assigned and relied upon by defendant are that the court erred in refusing to direct a verdict for the defendant, in allowing the amendments of the declaration whereby the charge against defendant was changed from one of "ordinary negligence" to "gross negligence," upon the charge of the court upon the question of negligence and the measure of damages, the

refusal to charge upon these questions as requested by defendant, and the refusal of the court to grant a new trial. The amendments referred to were allowed after all the evidence in the case had been introduced, changing the averments in the declaration from "ordinary negligence" to "gross negligence," notwithstanding the objection of defendant that such amendments introduced a new and distinct cause of action. It may be said that the offer and allowance of these amendments was vital and important, and at this stage of the trial was to say the least unusual and of the most serious import to the defendant. Upon this record, however, we do not need to determine the proposition urged by defendant, that by the amendments an entirely new cause of action was presented, and therefore under our practice they were improperly allowed.

[1] The undisputed facts in the case show that the engineer was operating this small geared engine with great care from the time the plaintiff approached the railroad down to the time when the injury occurred; that the engine was practically moved no faster than plaintiff walked; that she was a normal person, in possession of all her senses, traveling over a road which she was well acquainted with and walking in this path, which ran far enough from the rails for perfect safety; that the bell on the engine was ringing continuously, the brakes were always under control, and the air pump working with a great noise. The engineer was justified in acting upon the assumption that plaintiff would not put herself in a place of danger, and had no reason to believe that plaintiff would walk so near to the rails as to be injured, much less step over the rail. The fact that the engine was stopped within 10 feet after she was discovered to be in a place of danger is evidence of itself that it was under control. Both of the engineer's hands were engaged in doing those things which were necessary to warn plaintiff of the approach of the engine and at the same time keep absolute control of the machine. Complaint is made that he did not blow the whistle. Not being provided with more than the ordinary number of hands, which were occupied as we have already stated, the blowing of the whistle was impossible.

The record shows that after it was discovered that plaintiff had got into a place of danger the engineer did everything that could have been done to prevent her injury, and was not guilty of reckless, wanton, and willful conduct. This court has recently defined what is "gross negligence," under somewhat similar circumstances to those of this case. Mr. Justice Ostrander, speaking for the court, said: "The term 'gross negligence' has been used in cases decided by this court, and has a definite meaning when referred to as authorizing a recovery for

negligent injury, notwithstanding the contributory negligence of plaintiff. It means an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another. It also implies a thoughtless disregard of consequences without the exercise of any effort to avoid them. *Schindler v. Railway Co.*, 87 Mich. 400, 411 [49 N. W. 670]; *Denman v. Johnston*, 85 Mich. 387, 396 [48 N. W. 565]. In *Labarge v. Railroad Co.*, 134 Mich. 139 [95 N. W. 1073], the cases are reviewed and the doctrine of 'gross negligence,' as stated and defined in *Richter v. Harper*, 95 Mich. 221, 225 [54 N. W. 768], is approved." *Knickerbocker v. Detroit, etc., R. Co.*, 167 Mich. 596, 602, 133 N. W. 504, 507. A careful examination of all the testimony in the record satisfies us that it does not disclose any evidence of "gross negligence" upon the part of defendant, and the court was therefore in error in its charge to the jury that there was evidence in the case, which, if believed by them, would warrant a verdict against defendant upon the ground of "gross negligence."

[2] The defendant insisted upon the trial that the evidence disclosed contributory negligence on the part of the plaintiff, and requested the court to instruct a verdict in its behalf for that reason, which request was refused. It will not be necessary to repeat what already appears from the statement of facts we have given the conduct of this plaintiff as she went along this path. The presence of the railroad track was of itself a warning of danger, and required the exercise on the part of plaintiff of all her senses necessary to discover whatever danger might be imminent from an approaching train. The testimony of all the eye-witnesses and plaintiff's testimony is in accord, and shows that she proceeded all this distance without looking behind her. It is also undisputed, as shown by the record, including her testimony, that there was ample space along the track for her to walk with perfect safety. Of her own accord, without any regard to her safety, it appears that she put herself either over the rail or so close to the rail that she was struck by the end of the tender coming from behind. If, in fact, a train on the Grand Rapids & Indiana track passed shortly before the injury, upon which there is a dispute in the testimony, this would be no excuse for the utter disregard of her own safety. Our conclusion is that from the evidence in the case the plaintiff was guilty of contributory negligence as a matter of law, and on that ground, as requested by defendant, the court should have so charged the jury.

Other errors assigned, in view of our conclusion, do not require discussion.

The judgment of the circuit court is reversed, and, it being admitted in the brief for plaintiff that the testimony offered at

now be otherwise or different, no new trial is granted.

BLAIR, J., on account of sickness, took no part in this decision.

GRIPMAN v. KITCHEL.

(Supreme Court of Michigan. Dec. 17, 1912.)

1. LIBEL AND SLANDER (§ 111*)—EVIDENCE—OPINION.

In an action for libel in publishing an article charging plaintiff, a city marshal, with having a double graft system with reference to a bill submitted by him to the board of supervisors for services, some of which had been performed in the arrest of offenders for violating ordinances of the city, defendant was entitled to show the information on which his reporter wrote and published the statement, but could not prove mere expressions of opinions by supervisors interviewed by the reporter in mitigation.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 315-324; Dec. Dig. § 111.*]

2. LIBEL AND SLANDER (§ 123*)—LIBELOUS ARTICLE—RETRACTION—COMPLETENESS—QUESTION FOR COURT.

Comp. Laws 1897, § 10,425, provides that no punitive damages shall be recovered in an action for libel unless plaintiff, before suit, give notice to defendant to publish a retraction, and that proof thereof shall be admissible on the question of defendant's good faith and in mitigation of damages. *Held* that, where a retraction had been published, its completeness was a question of law for the court.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. § 123.*]

3. EVIDENCE (§ 471*)—OPINION—CONCLUSION OF WITNESS.

Where defendant, in accordance with plaintiff's demand, published a retraction of a libel, a question asked plaintiff as to whether the retraction was not full and complete was objectionable, as calling for a conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

Error to Circuit Court, Branch County; Frederick W. Knowlen, Judge.

Action by L. J. Gripman against Horace Kitchel. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

H. H. & B. E. Barlow and Palmer & Palmer, all of Coldwater, for appellant. L. F. Humphrey, of Coldwater, and F. A. Lyon, of Hillsdale, for appellee.

KUHN, J. The plaintiff was marshal of the city of Coldwater, in this state, on October 31, 1908, and for some time prior thereto. The defendant was the proprietor and publisher of a newspaper printed and published in the city of Coldwater, and circulated generally throughout said city and Branch county, and, to some extent, in ad-

the state. On or about October 12, 1908, plaintiff filed a claim with the board of supervisors of the county for services rendered in making arrests, serving warrants, and other services pertaining to the apprehension, arrest, detention, etc., of persons charged with or convicted of crime. The consideration of the bill was postponed by the board, and the plaintiff brought mandamus proceedings against the said board to compel the allowance of the bill. The bill, which was sworn to, contained two items in which he claimed fees which upon the face of the bill showed that the work was done for violation of city ordinances. The defendant, learning of the mandamus proceedings, sent his reporter, a Mr. Dean, to the courthouse to examine into the matter and write an article. The reporter examined the sworn bill by the plaintiff, talked with the clerk of the board of supervisors and with several of the supervisors, the name of one of whom was, he states, Mr. Bidelman, and thereupon wrote the article which gave rise to this controversy.

The article which was published in the newspaper accuses the plaintiff of having a double graft system, and further says: "The marshal had submitted a bill to the county for the arrest of common drunks, the bill itself stating that they were taken for violation of a city ordinance, which would itself explain that the expense incurred should be met by the city." After the publication of the article, Mr. Gripman served upon the defendant a notice to retract, whereupon the defendant published what is claimed to be a full and complete retraction of the article. Suit was instituted by the plaintiff against the defendant, which resulted in a verdict by the jury of \$1,200 rendered in favor of plaintiff, \$400 of which was specified as damages to plaintiff's feelings, and \$800 damages to his reputation. Defendant now seeks to review the judgment by writ of error in this court.

[1] On the trial of the cause, for the purpose of showing the source of defendant's information, his good faith in publishing the article, and to rebut the presumption of malice on the part of defendant in mitigation of damages, Mr. P. J. Rathburn, one of the supervisors of the county, was produced as a witness on behalf of the defendant. He was asked whether there was anything said at the time that the matter was brought before the board of supervisors as to how the members of the committee looked at the action of Mr. Gripman in filing the bill. He was not allowed to answer this question by the trial court, and at the close of the testimony and before the defendant had rested his case counsel also offered the testimony of a number of the supervisors of the county, at which time the following colloquy oc-

current between counsel and the court: "Mr. Barlow: May it please the court, yesterday, I offered the testimony upon the question of rumor. This morning we desire to offer the same testimony, or the same class of testimony, and also in justification of the alleged slanderous article. It is offered in connection with what is stated in the plaintiff's declaration on page 8. The Court: What testimony do you offer? Mr. Barlow: The testimony of the supervisors bearing upon the reason why the bill was tabled, as showing how the bill appealed to the supervisors, as published in the article in the Reporter. The Court: Is there objection to the offer? Mr. Lyon: There most certainly is. It cuts no figure what their reason was. The Court: It is offered for a twofold purpose, first in mitigation? Mr. Barlow: Yes, sir. The Court: Gentlemen, I may be in error, but I don't think the testimony is admissible for either purpose. To which ruling of the court the defendant by its counsel in open court then and there duly excepted." The failure of the court to admit this testimony is made the basis of assignments of error.

While it was competent for the defendant or his reporter to show particularly the information upon which they wrote and published the statement, it does not seem to us to be competent, in order to justify libelous charges, to show the expressions of opinion of the supervisors. They could not be said to be in mitigation of damages, because the mitigating circumstances would only be what actually inspired the publication of the article and this could only be proven by showing what actually came to the mind of Mr. Kitchel and his reporter before the article was published. In the case of *Brewer v. Chase*, 121 Mich. at page 539, 80 N. W. at page 579, 46 L. R. A. 397, 80 Am. St. Rep. 527, Mr. Justice Hooker, speaking for the court, said: "Much testimony was admitted tending to show that the plaintiff had been charged with the offenses described in the alleged libel. It was competent to show in mitigation of damages that the defendant had heard that such charges had been made, but it was unimportant whether other persons had heard them or not. It was insisted that it was competent to show that the statements contained in the libel were literally true, whether the charges which they reflected were true or not. We have already shown that it was necessary to prove the truth of the latter to make out a justification. Nothing else would do. It was incompetent to prove the former." *Schattler v. Daily Herald Co.*, 162 Mich. 115, 127 N. W. 42; *Atkinson v. Detroit Free Press Co.*, 46 Mich. 347, 9 N. W. 501.

[2] Upon the cross-examination of plaintiff by defendant's counsel, he was questioned regarding the retraction which had been published, and the following questions were asked: "Q. Did you read it at the time it

was published? A. Oh, yes; I was quite a student of the paper about that time. Q. It was a pretty full and complete retraction in your judgment, wasn't it? Mr. Humphrey: Now, just a moment, that should be left to the jury. Mr. Palmer: I have a right to find out how it affected him. Mr. Humphrey: Not whether or not it was a complete retraction. (Question read.) Mr. Humphrey: I object to that because the retraction should be left to the jury as to whether it was full and complete. The Court: It seems to me that is a good objection, is it not? Mr. Palmer: The question possibly may be objectionable. There isn't any sort of question but what it is for the jury, but he is suing for damages to his feelings, and I have a right to show from the witness himself whether the retraction did not repair his feelings. Mr. Lyon: That wasn't quite your question was it, Judge? Mr. Palmer: That was the object of the question, Mr. Lyon? The Court: You did not mean complete in the sense of a legal retraction under the statute? Mr. Palmer: Well, I don't care for his conclusion on that because we will read it to the jury. The Court: I understand your question is, was it satisfactory to him? That is what you mean by it? Mr. Palmer: Substantially, yes. Q. Didn't you think it a fair retraction of the article you complained of? The Court: You still object? Mr. Humphrey: I do. The Court: I will have to sustain the objection, Judge. To which ruling of the court the defendant by his counsel in open court then and there duly excepted." Error is assigned because of the ruling of the court excluding the questions asked. Section 10,425, Compiled Laws 1897, provides as follows: "No exemplary or punitive damages shall be recovered unless the plaintiff shall before bringing suit give notice by mail or otherwise to the defendant to publish a retraction of the libel, and allow the defendant a reasonable time in which to publish such retraction, and to make amends as are reasonable and possible under the circumstances of the case; and proof of the publication or correction shall be admissible in evidence under the general issue on the question of the good faith of the defendant, and in mitigation and reduction of exemplary or punitive damages: Provided, that the retraction shall be published in the same type and in the same editions of the paper as the original libel, and so far as practicable in the same position." A retraction having been published, no claim was made in this case for punitive or exemplary damages. The retraction being in writing, the question whether it was full or complete was a question of law for the court, and not a question of fact for the jury, if that question had been in issue.

[3] The questions asked of the witness on cross-examination and ruled out by the court

the legal construction to be placed upon this retraction. We think it would have been competent for counsel to have asked the witness what effect the retraction had on his feelings, and an examination of the excerpt from the record set forth above discloses that a clear intimation was given counsel by the court that such a question would have been permitted. The circuit judge did not err in excluding the questions asked.

Judgment is affirmed.

HOLCOMB v. SAYERS et al.

(Supreme Court of Michigan. Dec. 17, 1912.)

1. **BILLS AND NOTES (§ 352*)—CHECKS—BONA FIDE PURCHASER.**

Where plaintiff took a check sued on for collection as the banker of the payee, plaintiff was not a bona fide purchaser for value without notice.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 898-908; Dec. Dig. § 352.*]

2. **APPEAL AND ERROR (§ 1010*)—FINDINGS—REVIEW.**

In an action at law, a finding by the trial court on the facts cannot be overturned on appeal, unless there is a total want of evidence to support it, or it is contrary to the undisputed evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

Error to the Superior Court of Grand Rapids; William J. Stuart, Judge.

Action by Martin H. Holcomb against Frank P. Sayers and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

Colin P. Campbell, of Grand Rapids, for appellant. William B. Brown, of Grand Rapids, for appellees.

KUHN, J. This case was tried before the judge of the superior court of the city of Grand Rapids, who made the following findings of fact and of law:

"(1) That on May 11, 1910, the defendant Edwin F. Sayers, of Grand Rapids, went to the residence of one John B. Bagley, who lived about two miles from the village of Pierson, in Montcalm county, for the purpose of buying a horse.

"(2) That on being shown the horse said Sayers was pleased with its appearance, and, after driving it about a little to try its wind, he stated to Mr. Bagley, in substance, that, if the horse was all right in every way, he would take it at the price demanded, namely, \$125, and, on being assured by said Bagley that the horse was 'in every way right,' he purchased the horse then and there, and gave him the check of defendants for \$125 in payment to said Bagley.

then and there relied upon the statement of said John B. Bagley that said horse was 'in every way right' in making the purchase of said horse.

"(4) That said horse was brought to Grand Rapids on May 12th, and on the morning of May 13th defendant noticed that the horse could not eat hay, and thereupon they had an examination made of said horse, and found that the horse had decayed molar teeth, which were decayed down to the gum so that the horse could not masticate hay or such foods, and that the horse was not 'in every way right.'

"(5) I find that, by reason of said defect in his teeth, the said horse was not fit for the use for which he was purchased, and would require special feed and care in order to be of any service, and that he was practically valueless to defendants.

"(6) I find that said horse was on May 16th returned to plaintiff's barn on his premises near Pierson, and a written statement was left with Mr. Bagley's wife that the horse was of no value to defendants, as he could not eat hay, and said horse was put into the barn by permission of plaintiff's wife, and left there, and has been retained by plaintiff ever since, or at least, has never been returned to defendants.

"(7) I find: That said Bagley after receiving said check on May 12th indorsed his name on the back of it and took it to the plaintiff, his near neighbor at Pierson, and handed it to him for collection. Plaintiff often acted as banker for his neighbors in the village and attended to such matters, as there was no regular bank in that village, and the plaintiff had loaned money to said Bagley, and had dealings with him prior to this time, and at this particular time held a loan against Bagley for about \$140 secured by a chattel mortgage upon this horse in question and some other property.

"(8) That on the following day said Bagley, learning that plaintiff was about to leave the village for an absence of some time, went to plaintiff, claiming that he wished to buy another horse perhaps before he returned and obtained \$50 from him for such purpose, although he had no other horse at that time in view for purchase, and told plaintiff that he could apply the balance of the check, amounting to \$75, on the note and chattel mortgage above mentioned, but no papers passed between them as to this transaction.

"(9) Bagley did not inform defendants that there was a chattel mortgage on the horse, and said horse was not released from said chattel mortgage and plaintiff has renewed the chattel mortgage, including said horse, since the date of said transaction between Bagley and defendants.

"(10) Said Bagley knew before he sold the horse to defendants that he was unable to masticate hay, but did not mention this fact

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

at the time of the sale of the horse, and his representations that the horse was 'in every way right' were false and fraudulent.

"(11) The plaintiff did not purchase the check at the time it came into his possession or give any consideration for it, but simply took it to act as banker for said Bagley in collecting it.

"(12) That said Bagley is irresponsible pecuniarily and has lost nothing by the transaction, having had the horse restored to him promptly in as good condition as it was taken from him, and the plaintiff will not suffer loss by the transaction, as he is secured for his loan to said Bagley.

"Under all these circumstances I find as a matter of law that the plaintiff is not entitled to recover, and that a judgment be entered for the defendants of no cause of action with costs."

In paragraph 6 of the findings, instead of the word "plaintiff," in each instance, there should appear "Bagley."

The questions involved in this appeal are stated by counsel as follows:

"First. The court should have excluded the testimony of Edwin F. Sayers regarding his transaction with Bagley until notice or its equivalent had been shown to have been brought to plaintiff, and until it had been shown that plaintiff did not part with value.

"Second. That the findings do not support the judgment.

"Third. Was there any infirmity or defect in Bagley's title?

"Fourth. Plaintiff was a bona fide purchaser for value without notice."

[1] The court found that the plaintiff was not a bona fide purchaser for value without notice, and that he simply acted as a banker for Bagley in collecting the check. In this case, we cannot weigh evidence, determine facts, or review the findings of the court below upon questions of fact.

[2] This finding can only be overturned in case there should be a total want of evidence to support it, or in case it is contrary to the undisputed evidence. *Cragin v. Gardner*, 64 Mich. 399, 31 N. W. 206; *Lamoreaux v. Crevelling*, 103 Mich. 501, 61 N. W. 783; *Hindman v. Friedrich*, 163 Mich. 655, 128 N. W. 1086. In the instant case we are unable to say that the findings of the judge are not supported by evidence, and we are of the opinion that the facts found support the judgment rendered by him.

Judgment is affirmed.

PEOPLE v. DUDLEY.

(Supreme Court of Michigan. Dec. 17, 1912.)

1. CRIMINAL LAW (§ 982*) — PROBATION — REVOCATION—IMPRISONMENT.

Pub. Acts 1903, No. 91, as amended by Pub. Acts 1909, No. 124, authorizing the placing of persons convicted of crime on probation, authorizes the court to place one convicted of

crime in charge of a probation officer, and to require the officer to take accused into custody for a violation of the conditions of the probation, and the mere fact that accused was taken into custody for violating the conditions and kept in jail for a few days, and again released on probation, does not deprive the court of the power to thereafter imprison him on his subsequent violation of the conditions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

2. CRIMINAL LAW (§ 641*)—RIGHTS OF ACCUSED—REPRESENTATION BY COUNSEL.

One brought before the court for sentence after violating the conditions of his probation authorized by Pub. Acts 1903, No. 91, as amended by Pub. Acts 1909, No. 124, is not entitled to the benefit of counsel as a matter of right, and the act is not unconstitutional because denying the benefit of counsel as a matter of right.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1496-1506; Dec. Dig. § 641.*]

3. CRIMINAL LAW (§ 662*) — WITNESSES — RIGHT OF ACCUSED TO BE CONFRONTED BY WITNESSES.

One brought before the court for sentence after violating the conditions of his probation authorized by Pub. Acts 1903, No. 91, as amended by Pub. Acts 1909, No. 124, is not entitled as a matter of right to be confronted with witnesses to establish the violation of the conditions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1538-1548; Dec. Dig. § 662.*]

4. JURY (§ 21*)—RIGHT TO TRIAL BY JURY.

One brought before the court for sentence after his violation of the conditions of his probation, authorized by Pub. Acts 1903, No. 91, as amended by Pub. Acts 1909, No. 124, is not entitled as a matter of right to a jury trial to determine the question of violation of the conditions.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 134-142; Dec. Dig. § 21.*]

5. CONSTITUTIONAL LAW (§ 272*)—DUE PROCESS OF LAW.

Pub. Acts 1903, No. 91, as amended by Pub. Acts 1909, No. 124, providing for the release of persons convicted of crime on probation subject to the terms required by the court, and authorizing the court to revoke the probation and pronounce judgment, is not invalid as depriving one convicted of crime and released on probation on specified conditions of his liberty without due process of law, when, after violating the conditions, he is brought before the court and sentenced.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 761; Dec. Dig. § 272.*]

6. CRIMINAL LAW (§ 162*)—FORMER JEOPARDY.

The statutes (Pub. Acts 1903, No. 91, as amended by Pub. Acts 1909, No. 124), are not invalid as permitting one to be placed in jeopardy more than once for the same offense as applied to one convicted of crime, released on probation, placed in custody for a violation of the conditions of the probation, and then released, and subsequently sentenced on a subsequent violation of the conditions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 285; Dec. Dig. § 162.*]

Exceptions from Superior Court of Grand Rapids; William J. Stuart, Judge.

George Dudley was convicted of crime, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

there was a judgment of commitment, and he brings exceptions. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ.

Roger I. Wykes, Atty. Gen. (Samuel D. Pepper, Asst. Atty. Gen., and Earl F. Phelps, Pros. Atty., and Louis T. Herman, Asst. Pros. Atty., both of Grand Rapids, of counsel), for the People. Lombard, Hext & Washburn, of Grand Rapids, for defendant.

STONE, J. The respondent having been duly arrested upon a warrant charging him with having fraudulently obtained \$50 by false pretenses in the city of Grand Rapids, and having waived an examination upon said charge, and having been duly bound over to the superior court of Grand Rapids, and having on March 8, 1910, been duly arraigned in the superior court upon an information charging him with said offense, and having pleaded guilty thereto on March 19, 1910, he was brought before the court, when an order was duly entered by the court in said cause that "sentence be deferred from day to day, and from term to term, as the court may see fit," and the respondent was permitted to enter into his personal recognizance conditioned to appear before the court at the then next term thereof, and from day to day, and term to term, and to do and receive what should by the court and by the probation officer be then and there enjoined upon him, he was placed in the custody of the probation officer, which officer was then and there instructed by the court to take said respondent into custody at any time thereafter that the said respondent violated the conditions of his probation, and the said officer was instructed to report to the court the fact of the respondent's commitment, and the said officer then and there informed the respondent of the conditions accompanying, and incident to, his freedom, among which he was instructed to report every Monday evening to said probation officer at his office in the courthouse, and was given a card containing certain written and printed instructions as to the conditions of his parole, among which conditions was one requiring him to refrain from the use of intoxicating liquors, or from entering any place where intoxicating liquors were sold. Respondent secured employment, and for a time reported satisfactorily to said probation officer, but after a while that officer learned that respondent had been visiting saloons, and drinking intoxicating liquors, and was guilty of other improper and unlawful conduct; and thereupon said officer, feeling that respondent had violated his parole, took him into custody, and placed him in jail on or about the 13th day of April, 1911, without any further order or direction whatever from the court. The probation officer reported the matter to the court very soon thereafter, and also reported that respondent and his family felt

very sorry for what he had done, and said officer also reported that in his opinion, if respondent was kept in jail a few days, and then given another chance, he would perhaps be able to keep the conditions of his parole in the future, and the officer was informed by the court that he might take such course, and it was taken. The probation officer a few months later found that the respondent was again drinking heavily, that he was visiting saloons, and was guilty of other improper and unlawful conduct; whereupon on or about August 12, 1911, the officer again took respondent into custody for the reason that the latter had violated the conditions of his parole, and imprisoned him in the Kent county jail, where he remained until September 2, 1911, when he was brought into said superior court, and by the judge thereof was sentenced to the Michigan Reformatory at Ionia, where he is now confined. Before sentence, the respondent demanded an examination in open court of the charge of having violated his probation. This demand was refused, and respondent's counsel excepted.

The respondent has brought the case here for review, and the following are the assignments of error:

(1) That the court erred in directing and causing the rearrest of the said respondent on the 12th day of August, 1911, for the reason that upon the release of said respondent from custody on the 26th day of April, 1911, said court lost all further jurisdiction over him in the cause.

(2) That the court erred in passing sentence upon the said respondent on the 2d day of September, 1911, for the reason that the release of said respondent on the said 26th day of April, 1911, was in law and in effect a full and complete discharge of said respondent, and said court had no further jurisdiction over him, to either order his arrest, or to sentence him.

(3) That the court erred in passing sentence upon the respondent on the 2d day of September, 1911, for the reason that the statute (Act No. 91, Public Acts of 1903, as amended by Act No. 124, Public Acts of 1909) is unconstitutional and void, as it denies the respondent the benefit of counsel as a matter of right, as there is no provision in said acts for his defense on the violation of his probation, as provided for in section 19, art. 2, of the Constitution of this state.

(4) That said act and its amendments are unconstitutional, as they deny to the respondent the right to be confronted with witnesses who allege the violation of the terms of his probation, and are therefore in conflict with said section and article.

(5) That said act as amended is unconstitutional for the further reason that it deprives the respondent of the right to a trial by jury, as to those facts relating to the violation of the terms of his probation.

(6) That said act as amended is unconsti-

tutional for the further reason that it deprives the respondent of his liberty without due process of law, as provided in section 16 of article 2 of said state Constitution.

(7) That said act as amended is unconstitutional for the further reason that by its terms said respondent is more than once placed in jeopardy for the same offense.

Act No. 124, Public Acts of 1909, amends section 1 of the original act to read as follows: "Section 1. Provided the defendant has never before been convicted in this state or elsewhere of a felony other than simple larceny, after a plea or verdict of guilty in any case where the commission of a crime or misdemeanor is charged and where discretion is conferred on the court as to the extent of the punishment, the several circuit courts of this state and all other courts having like jurisdiction in criminal cases, where it may appear to the satisfaction of the court that the circumstances are such that the defendant is not likely to again engage in a criminal course of conduct, and that the public good will be as well subserved as to pass and enforce sentence, shall have power to place the defendant on probation under the charge and supervision of a probation officer in the following manner: First, before passing sentence, the court before whom he stands convicted may place the defendant in the custody and under the supervision of the probation officer, or some other suitable person, and under such terms and conditions as it may require, and may require a recognizance with one or more sufficient sureties and in such penalty as the court may deem reasonable, conditioned for the appearance of the respondent at such times as the court may order; second, at any time during the probationary term of a person convicted and released on probation as aforesaid, the court before which the person so convicted, when presided over by its judge at the time of the conviction, or his successor in office, may in its discretion revoke and terminate such probation. Upon such revocation and termination the court may immediately pronounce judgment, imposing fine or imprisonment, or both, at any time thereafter within the longest period for which the defendant might have been sentenced. The court whenever satisfied that the respondent has sufficiently reformed, that it is reasonably certain that he will not thereafter pursue a life of crime, may terminate said probation and discharge the respondent from custody." Section 4 of the original act of 1903 has not been changed, and it provides that probation officers shall have, as to persons committed to their care, the powers of a sheriff. Section 7 makes it the duty of the probation officer to report to the court any violation or breach of the terms and conditions imposed by said court upon the persons placed in his care.

[1] 1. The first and second assignments of error may well be considered together. As

we understand counsel for the respondent, they claim that the court, because of what occurred on or about April 13, 1911, revoked and terminated the probationary term of respondent, and that, under the statute, it only remained for the court to proceed to sentence, and that, because it permitted the probation officer to hold the respondent in jail a few days, it thereby exhausted its authority to pronounce sentence. It might be well to ascertain what power the court has, under this statute, and what authority was actually given to the officer by the court in this instance. The statute provides that, before passing sentence, the court may place the respondent in the custody and under the supervision of the probation officer, "under such terms and conditions as it may require." The record discloses that, when respondent was placed in charge of the probation officer, such officer was then and there instructed by the court to take respondent into custody at any time thereafter that the respondent violated the conditions of his probation and such officer was further instructed to report to the court the fact of respondent's commitment. The record shows that the respondent violated the conditions of his probation, and was taken into custody by the officer in exact accord with the instructions of the court. The officer also, as he was required to do, reported the fact of respondent's commitment to the court. It also appears that it was the opinion of the probation officer that if respondent "was kept in jail a few days, and then given another chance, that he would perhaps be able to keep the conditions of his parole in the future, and he [the officer] was informed by the court that he might take such course." We find nothing here to indicate that the court revoked and terminated the probation. Certainly the probation officer could not terminate it. Under the scheme or plan of this statute, the respondent was all of the time in charge and custody of the probation officer; and, unless we are to hold that such officer has the power to revoke and terminate such probation, it cannot be held that anything which the officer did amounted to such revocation. We do not think that the officer had such plenary power, nor do we think that he attempted to exercise it. He was simply obeying the order of the court made in the first instance. Nor do we think that there was any action of the court in April that indicated that it revoked and terminated the probation. We are not prepared to hold that, under the humane provisions of this statute, the court dealing with such a case may not continue, modify, and even extend the period of probation in the hope that the respondent may sufficiently reform, so that in the end he may be discharged from "custody." Until final sentence on September 2, 1911, the respondent was all of the time in the charge and custody of the probation officer. On

that day he was in jail in the custody of the probation officer, who possessed all of the powers of a sheriff, in the matter, and on that day respondent's probation was properly revoked and terminated by the court and sentence was pronounced. We are of opinion that there was no error in these proceedings. *Conlon's Case*, 148 Mass. 168, 19 N. E. 164; *Ex parte Sizelove*, 158 Cal. 493, 111 Pac. 527; *People v. Flynn*, 55 Misc. Rep. 689, 106 N. Y. Supp. 925. The placing of persons convicted of crime in the custody and care of probation officers under the statute is a part of our penal system, and must to a large extent be directed and controlled by the sound discretion of the officers representing the state, subject at all times to the supervision and direction of the court in which the case is pending for sentence. *Commonwealth v. McGovern*, 183 Mass. 238, 66 N. E. 805; *Renado v. Lummus*, 205 Mass. 155, 91 N. E. 144.

[2-4] 2. The third, fourth, and fifth assignments of error will be considered together. It is here claimed that the statute is unconstitutional because in the matter of the termination and revocation of the probation no provision is made for benefit of counsel, for the right to be confronted with witnesses, and the right of trial by jury. These rights are only given by the Constitution in criminal proceedings. The violation of the terms of probation is not a crime necessarily, and is not treated as a crime, but is rather in the nature of a breach of contract. As we have already said, the respondent was all of the time in the care and custody of the probation officer, acting under the direction of the court. When probation was granted, respondent agreed to its terms, and fully understood that, for certain misconduct, his probation would be revoked and terminated. This is of the very essence of the plan. When brought before the court for sentence, he is not charged with a new crime, but merely with the violation of his agreement with the court. In no sense can this be said to be a criminal prosecution. The respondent was granted his probation subject to this liability. A similar feature appears in the law of other states, and has, in so far as we have been able to find, been sustained when questioned. *People v. Warden*, 39 Misc. Rep. 113, 78 N. Y. Supp. 907; *Fuller v. State*, 122 Ala. 32, 26 South. 146, 45 L. R. A. 502, 82 Am. St. Rep. 1; *Conlon's Case*, supra; *State v. Hunter*, 124 Iowa, 569, 100 N. W. 510, 104 Am. St. Rep. 361; *People v. Cook*, 147 Mich. 127, 110 N. W. 514. This respondent had not been set at liberty, under the pardon of the executive. He was not a "free man" within the meaning of the language used in *People v. Moore*, 62 Mich. 496, 29 N. W. 80, but was all of the time in the custody of the probation officer awaiting sentence in a certain contingency. We

think the cases are readily distinguishable. We are of opinion that there is no merit in these assignments.

[5, 6] 3. The same considerations apply to the sixth and seventh assignments of error. Respondent has not been deprived of his liberty without due process of law. When he pleaded guilty to the information filed against him, he might have been sentenced at once. It is only by the mercy of the law that he was given probation. If by the violation of the terms of his probation he is called before the court for sentence for the crime of which he had freely pleaded guilty, it cannot be said that he is deprived of his liberty without due process of law.

We find no error in the record, and the judgment of the superior court is affirmed.

PEOPLE v. DUNSTON.

(Supreme Court of Michigan. Dec. 17, 1912.)

PARENT AND CHILD (§ 17*)—"ABANDONMENT" AND "DESEOTION" OF CHILD—ACTS CONSTITUTING.

Where, after his wife obtained a divorce and they were living apart, accused failed to comply with the provisions of the decree requiring him to pay her a weekly allowance for the children's support, he was not guilty of the crime of desertion and abandonment of his minor children, denounced by Pub. Laws 1907, No. 144, where the decree of divorce absolutely deprived him of all custody or right over his children, and imposed upon the wife the duty of furnishing them support, subject to his contribution; so there could be no "desertion," which is the act of a consort leaving his wife and children with intent to cause a perpetual separation, or "abandonment," which is the act by which a man deserts and abandons his minor children.

[Ed. Note.—For other cases, see *Parent and Child*, Cent. Dig. §§ 176-181; Dec. Dig. § 17.*

For other definitions, see *Words and Phrases*, vol. 1, pp. 4-13; vol. 8, p. 7559; vol. 3, pp. 2020-2024; vol. 8, p. 7635.]

Exceptions from Circuit Court, Oakland County; George W. Smith, Judge.

William E. Dunston was convicted of the offense of desertion and abandonment of his minor children. On exceptions after sentence and before judgment. Exceptions sustained, and conviction set aside.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, BIRD, and KUHN, JJ.

Carl H. Pelton, Pros. Atty., and Clinton McGee, Asst. Pros. Atty., both of Pontiac, for the People. Andrew L. Moore, of Pontiac, for defendant.

STEERE, J. This case involves the question of whether or not respondent is liable to criminal prosecution for desertion and abandonment of his children, as defined in Act No. 144 of the Public Acts of 1907; he having previously been divorced from his wife, to whom the court had granted possession and custody of their minor children,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

decreasing an allowance to be paid to her for said children's support, which allowance respondent has failed to fully pay. Respondent was arrested, prosecuted, and convicted under said Act No. 144 in the circuit court of Oakland county, and has removed the proceedings to this court for review, on exceptions and assignments of error after verdict and before sentence.

The complaint in this case was made by his former wife, Margaret Dunston, to whom he was married on February 8, 1904, and from whom he was divorced January 9, 1909, by a decree in her favor under a bill alleging cruelty, drunkenness, and nonsupport. By the terms of said decree she was given possession and custody of their minor children, Ruth Dunston and William Dunston, aged, respectively, 4 and 2 years; it also being provided in said decree that defendant must pay to his said wife the sum of \$1.50 per week for the support of each child until it should arrive at the age of 14 years. The testimony discloses that until March 1, 1910, defendant was absent from the state and made no payments, but on his return he entered into an agreement with his divorced wife that the back payments would be waived by her, provided he then commenced paying according to the decree and continued to pay from that time on. Following this agreement, he paid to her the sum of \$144 in all; the last payment being made on April 6, 1911.

On July 31, 1911, his former wife made the complaint upon which warrant was issued in this case, as before stated. On preliminary examination he was held to the circuit court for trial, and on December 5, 1911, he was there found guilty of the offense charged, by the verdict of a jury rendered pursuant to a charge of the court concluding as follows: "So I say to you, gentlemen, while I am not directing a verdict, that you must retire to the room and consider the verdict yourselves; but I say to you, you ought to convict the respondent in this case upon these facts, because I believe the facts do render him liable under the statute." The information filed against respondent charged that he, "on or about the 1st day of May, 1911, * * * did desert and abandon his minor children under 15 years of age, to wit, Ruth Dunston, of 6 years of age, William Dunston, of 4 years of age, without providing necessary and proper shelter, food, care, and clothing for them, contrary to the form of the statute," etc. When arraigned in the circuit court, respondent stood mute, and a plea of not guilty was entered in his behalf by order of the court. On the trial, by direction of his counsel, he introduced no testimony. Neither he nor his counsel took any active part in the trial, except that, under the express understanding that no rights should be waived in so doing, his counsel briefly cross-examined the people's wit-

nesses to bring out certain of the facts contained in the statement of this case, and by pertinent objections, exceptions, and motions saved the points desired for review.

It was the testimony of complaining witness, Margaret Dunston, that she had made no demand on defendant other than for the amount decreed on granting her divorce, that the last payment was April 6, 1911, since which he had contributed nothing towards the support of their children, and that she made the complaint because he had failed to make the payments provided for in the decree. It also appeared that the children were not destitute, or liable to become a public charge, or that complainant's people, with whom she lived, were unable or unwilling to assist her. At the conclusion of the people's case, respondent's counsel requested the court to direct a verdict in his favor, for the reason that the testimony introduced only showed a failure on his part to pay all of the money which he was ordered, by the court of chancery in the divorce proceedings, to pay; that the wife had a complete and adequate remedy by contempt proceedings in the chancery court; that the word "desertion," as used in the criminal statute under which respondent was prosecuted, meant the act of the husband leaving his wife and children willfully, with the intention of causing perpetual separation, and inasmuch as his children were taken from him by a decree of the chancery court he could not be held guilty of deserting or abandoning them within the meaning of the statute. This request was denied, as was also a motion for a new trial based on substantially the same grounds.

The offense of desertion and abandonment, as defined in said Act No. 144, is made a felony, punishable by sentence to state prison for from one to three years. That crime is charged in the information in this case to have been committed by respondent on or about May 1, 1911, at the village of Clarkston, Oakland county. He was then living in Detroit, Wayne county. The children were living at Clarkston with their mother, to whom they had been given by the court. Though the date of the offense is charged with a videlicet, which would not bind the prosecution to the exact time stated, no complaint was made of respondent's misconduct prior to his last payment on April 6, 1911, and all the testimony is launched against his default subsequent to the latter date. The complaining witness was not then his wife. He had no right to the custody or company of his children, no control over them, and could not even legally visit them without her permission. By the former decree, dissolving the marriage ties and awarding the children to the mother, the legal entity of the family life and relations, with him as the head of the household, was destroyed, rightfully and through his fault, we must assume, but on the initiative of his

rights of a surviving parent, as fully as though the father had been taken by death. She became solely entitled to the custody, parental pleasure of association and companionship, control, services, and earnings of their minor children, which otherwise belonged to the father separately or the parents jointly. He was divested of all paternal rights. His paternal duties, which survived, were defined by the decree of a court of chancery. They could be enforced in a civil action and by punitive proceedings for contempt in disobeying the order of the chancery court.

In the absence of a provision in the decree requiring contribution by the father, even his civil liability for the support of minor children, unconditionally awarded to the mother, has been a mooted question. In *Keezer on Marriage and Divorce*, § 329, it is said: "The party to whom the custody of children is awarded must support them. But where no award is made as to the custody of children, the liability of the father to support his minor children still continues." This court has held that, where the custody of a child is given to the mother, a third party, supporting the child at her request, cannot recover therefor in an action of *assumpsit* against the father, restricting the rule, however, to the particular facts in that case; the party bringing the action having married the divorced mother of the child. *Johnson v. Onsted*, 74 Mich. 437, 42 N. W. 62. In *Finch v. Finch*, 22 Conn. 411, it was held, by a divided court, that a divorced wife, awarded the custody and control of their minor children, could not, in the absence of a provision in the decree of divorce requiring contribution from him, recover from the father for the support and education of such children. In *Rodgers on Domestic Relations*, § 603, the general rule is stated as follows: "The sundering of the marriage tie between the father and mother does not relieve the parent of his legal duty to support his children, * * * and a wife who has been divorced from her husband by reason of his fault, and who has been awarded the custody of the children, may maintain an action against the divorced husband, in any court having competent jurisdiction, for necessities and support furnished by her. * * * That there are respectable authorities at variance with this contention must be admitted. But it is confidently believed that the better reasoning, as well as the pronounced weight of authority, is to the contrary."

This question is only pertinent here for the light it may throw on the legal status of respondent at the time he is charged with the felony defined in said Act No. 144, and his criminal turpitude in failing to make the payments for support ordered by the chancery

121 N. W. 498, the act was held constitutional; but the case was reversed on the ground that the trial court did not, in charging the jury, give to the words "deserts" and "abandons" the meaning which the statute imports. It was there said: "Desertion of one by the other means more than going away, more than separation. * * * 'Abandonment' is defined as 'the act of a husband or wife who leaves his or her consort willfully and with intention of causing perpetual separation.' 1 Bouvier, Law Dic. p. 2. The same author defines 'desertion' as 'the act by which a man abandons his wife and children, or either of them.' * * * Respondent was entitled to have the jury instructed that 'abandonment' or 'desertion,' under the statute, means to separate from, wrongfully, without intention of again resuming marital relations."

In the case at bar respondent had already been separated from his wife and children by the decree of a court. He was a thing apart from them. He had no right to, and could not if he wished, resume marital or family relations with them. There only existed the obligation to contribute to the wife for support of the children. In the case of *People v. Albright*, 161 Mich. 400, 126 N. W. 432, respondent was charged under this statute with deserting and abandoning his wife on May 20, 1909. The proof showed that the desertion took place February 7, 1905, prior to the enactment of the statute under which he was prosecuted. This court there held that the statute does not make subsequent refusal or neglect to provide necessary shelter, etc., standing alone, a felony; that to constitute the offense desertion, abandonment and refusal or neglect must contemporaneously combine; that, the desertion and abandonment having occurred in 1905, the offense could not be considered as committed in 1909, by reason of the then refusal or neglect to provide necessary shelter, etc.

Applying the construction of the statute in those cases to the facts in this case, and conceding that at the time charged, and to which the testimony was directed, respondent neglected or refused to provide necessary and proper shelter, food, care, and clothing for his children, there is no proof that he at that time separated himself from, deserted, or abandoned them, within the meaning of the statute; but, on the contrary, he was apart from them, and his legal status was such that it was impossible for him to do so. Whatever his culpability and legal liability under other laws may be, we are constrained to hold that the facts proven by the prosecution in this case do not constitute the offense charged under the statute in question.

The conviction must be set aside, and respondent discharged.

PEOPLE v BRANNEN.

(Supreme Court of Michigan. Dec. 17, 1912.)

CRIMINAL LAW (§ 1008*)—MODE OF REVIEW—WRIT OF ERROR—CERTIORARI.

Where, in a criminal proceeding, no judgment had been entered after conviction and the denial of a motion for a new trial, the proceeding was not reviewable by writ of error; certiorari being the only available remedy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2565; Dec. Dig. § 1008.*]

Error to Circuit Court, Oakland County; George W. Smith, Judge.

Hugh J. Brannen was convicted of an offense, and he brings error. Dismissed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ.

Andrew L. Moore, of Pontiac, for appellant. Carl H. Pelton, Pros. Atty., and Clinton McGee, Asst. Pros. Atty., both of Pontiac, for the People.

PER CURIAM. In bastardy proceedings respondent was convicted by a jury. A motion for a new trial was denied. No judgment has been entered. Respondent assigned errors and settled a bill of exceptions, which is brought into this court by writ of error.

A writ of error lies in any case only to review a judgment. Aside from this, the practice in such cases has been misconceived. We are aware that in one, and, perhaps, in more than one, case the proceeding appears to have been reviewed upon writ of error; no notice being taken of the use of the writ. See *Hull v. People*, 41 Mich. 167, 2 N. W. 175. The proceeding is, however, purely statutory, not after the course of the common law, and is summary. No judgment known to the common law follows the verdict, and the judgment rendered is final. Comp. Laws, §§ 5904, 5905. The only remedy available to an aggrieved party is by writ of certiorari. *Cross v. People*, 8 Mich. 113.

The writ must be dismissed.

ERNST v. GRAND RAPIDS ENGRAVING CO.

(Supreme Court of Michigan. Dec. 17, 1912.)

1. MASTER AND SERVANT (§ 54*)—OBLIGATION OF SERVANT—IMPLIED OBLIGATION.

The duty of a servant to obey lawful and reasonable orders of his master, or those representing him, is implied from the contract of employment.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 54.*]

2. MASTER AND SERVANT (§ 30*)—DISCHARGE OF SERVANT—GROUNDS—WILLFUL DISOBEDIENCE."

A "willful" refusal or neglect of a servant to obey the lawful and reasonable orders of his master or those representing him justifies his discharge, but a willful disobedience is an intentional disobedience, and is something more than a conscious failure to obey, and involves a wrongful and perverse disposition,

such as to render his conduct unreasonable and inconsistent with proper subordination.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 30-36; Dec. Dig. § 30.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7473, 7474.]

3. MASTER AND SERVANT (§ 30*)—DISCHARGE OF SERVANT—GROUNDS—WILLFUL DISOBEDIENCE OF ORDERS.

A servant who refuses to take orders from his foreman, and who uses abusive and obscene language toward him, is guilty of misconduct justifying his discharge, provided he knows at the time that the foreman is his superior.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 30-36; Dec. Dig. § 30.*]

Error to Circuit Court, Kent County; John S. McDonald, Judge.

Action by Carl Ernst against the Grand Rapids Engraving Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

Wilson, Wilson & Rice, of Grand Rapids, for appellant. Fred Maichele and Chris Maichele, of Grand Rapids, for appellee.

OSTRANDER, J. Plaintiff had with defendant a contract of employment until September 1, 1911, at a salary of \$40 per week. The contract was made August 12, 1910. Plaintiff was discharged by defendant April 14, 1911, and sued to recover his wages under the contract. He had earned something meantime in other employment, and a verdict in his favor was returned for his agreed salary less the sum which he had so earned. Judgment was entered on the verdict.

Two propositions are raised upon errors assigned by defendant: One, that plaintiff's testimony shows there was sufficient reason for his discharge; the other, that the court erred in instructing the jury as to what would be a sufficient cause for plaintiff's discharge. Both propositions involve the sufficiency of the cause for discharge asserted by defendant. Plaintiff was hired as foreman of its lithographic department. Defendant discontinued this department at or about the end of the year 1910. The reason was that the department did not prove to be a success. About January 1, 1911, plaintiff talked with the defendant's manager, and it was arranged between them that plaintiff should enter the designing branch of the engraving department, but not as foreman. Soon afterwards, John Hegner was made general foreman of the engraving department. Whatever trouble arose was between plaintiff and Hegner.

[1-3] The court instructed the jury upon the subject as follows: "As I said, the defendant claims that he was discharged because of insubordination and disobedience to proper orders. It is the duty of a servant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

is implied from the contract of employment; and a willful refusal or neglect on his part to obey such orders amounts to insubordination, and constitutes a sufficient ground for his dismissal. The acts which the defendant claims constitute insubordination and disobedience to proper orders in this case were using obscene and abusive language to the general overseer of the engraving department, refusing to recognize his authority, and to report to him. You have heard the defendant's evidence on that claim. The plaintiff claims that he did not use obscene and abusive language to the general overseer, that he did not refuse to do any work which he was requested to do, and that he did not report to the overseer because he had not been informed that he should do so and had no reason to believe that to be a part of his duty. It is admitted that the plaintiff was discharged, and, as some of the facts and circumstances surrounding the transaction are in dispute, it is for you to say, under the facts as you find them and the law as I give it to you, whether the discharge was lawful. If the plaintiff was guilty of conduct which would justify his discharge, it must be found in what he said to the overseer just before they went to the president's office. If you find that he then refused to take any orders from the overseer, and that he used the language which it is claimed he used, such conduct would be a legal justification for his dismissal, providing that he knew at the time that Mr. Hegner was his superior officer from whom it was his duty to take orders and instructions and to whom he should report. In other words, his conduct, if it was as the defendant claims, was sufficient to justify his discharge, if it was willful. 'Willful' means intentional and wrongful. A willful disobedience must be an intentional disobedience. It is something more than a conscious failure to obey. It involves a wrongful and perverse disposition, such as to render his conduct unreasonable and inconsistent with proper subordination. If Mr. Ernst knew that Mr. Hegner was his overseer, and that it was his duty to take orders from him and report to him, and, knowing these things, he refused to recognize Hegner's authority and accompanied his refusal with profane and indecent language, such conduct would justify his discharge; and, if you so find, the plaintiff cannot recover in this action. If, on the other hand, the plaintiff's conduct was not willful, he was unlawfully discharged, and he can recover in this action. Every act of disobedience or insubordination will not constitute lawful reason for discharging an employe.

The court gave also defendant's requests to charge 5 and 6, somewhat modified, as follows:

"If you shall find from the evidence that after plaintiff entered defendant's engraving department Mr. Hegner was appointed general foreman of that department, and that plaintiff was subject to his reasonable directions, it was his duty to recognize Mr. Hegner's authority as foreman. Plaintiff's testimony shows that on the day of and just previous to his discharge he refused to recognize Mr. Hegner's authority. If you so find, as before stated, that Mr. Hegner was plaintiff's foreman, a willful refusal on the part of the plaintiff to recognize Mr. Hegner as foreman would constitute such an insubordination as would justify the plaintiff's discharge, and in that case your verdict will be for the defendant."

"If you shall find from the evidence that Mr. Hegner was the foreman of defendant's engraving department in which the plaintiff was working at the time of his discharge, it was his duty to recognize Mr. Hegner's authority as foreman; and if you shall further find that previous to his discharge plaintiff knew that Mr. Hegner was his foreman or overseer, and with such knowledge used the language to Mr. Hegner to which the latter testified, I charge you that this would constitute such an insubordination as would justify plaintiff's discharge. Therefore, if you shall find that Mr. Hegner was plaintiff's foreman, and that the plaintiff knew it, and having such knowledge used to Mr. Hegner the language testified to by him, your verdict must be for the defendant."

The trouble which resulted in plaintiff's discharge appears to have arisen from an exaggerated idea on the part of plaintiff of his position upon the staff of defendant, and the zealous, and not entirely modest, notions of the foreman of the engraving department concerning the dignity of his position as foreman. Plaintiff was not ignorant of his rights. He kept a memorandum of whatever he did. And, when he was asked to go from defendant's office to work for an outsider, he consulted his attorney before he would go. But the finale, the situation which culminated in the discharge of plaintiff, is told by both the plaintiff and the foreman. Sparing the reader the details, it in our opinion results in this: That whether the plaintiff was oversensitive, or whether the defendant's foreman was overdignified, was upon the trial a question for the jury.

We are satisfied with the instructions which were given, and therefore affirm the judgment appealed from.

SOUTHWICK v. HOSMER, Circuit Judge. (Supreme Court of Michigan. Dec. 20, 1912.)
EXCEPTIONS, BILL OF (§ 16*)—FORM—STENOGRAPHER'S NOTES.

A proposed case on appeal, consisting of the entire stenographer's minutes, without effort to reduce the testimony to narrative form, is a violation of chancery rule 37 (124 N. W. v.), requiring that a case shall set forth the substance of the evidence, and hence the court was not required to sign and allow the same.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. § 17; Dec. Dig. § 16.*]

Mandamus, on the relation of William D. Southwick, against George S. Hosmer, as Wayne Circuit Judge, to compel respondent to settle and sign a case on appeal. Denied.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

Sherman D. Callender and Arthur H. Covert, both of Detroit (Claudius B. Grant, of Detroit, of counsel), for relator. Clark, Lockwood, Bryant & Klein and Jasper C. Gates, all of Detroit, for respondent.

KUHN, J. This is a petition for mandamus to compel respondent to settle and sign a case on appeal in two cases which were consolidated and heard as one, wherein relator's wife is complainant and relator defendant. One is a divorce case, in which the decree was entered January 26, 1912, and the other is a suit to set aside a deed from relator's wife to himself, in which the decree was entered February 2, 1912.

Complainant having obtained relief in both cases, relator gave notice of appeal in accordance with the statute, and filed bonds to stay proceedings, which bonds were duly approved by the court. On account of illness of one of the counsel for relator, the time for settling the case for review was extended from time to time until July 25, 1912. On that day a motion was made asking for further extension of time, and on the hearing thereof respondent stated that he would hold the matter in abeyance 10 days, in which counsel should serve on complainant's solicitor a copy of the proposed case on appeal. The proposed case was served on counsel for complainant on August 3, 1912, and consisted of the entire stenographic minutes; no effort having been made to reduce the testimony to a narrative form. The case was noticed for settlement for August 17, 1912, but because of absence of respondent, and also of counsel for relator, the case on appeal was not presented to respondent for his signature until September 28, 1912.

In his answer respondent sets up the following: "This respondent shows that the alleged case, as finally presented to this respondent for his signature, was, in no proper sense, a compliance with the requirements of chancery rule 37, for the following rea-

sons: (a) Said rule provides that 'any party shall be entitled to make and settle a case setting forth the substance of all the evidence taken or read at the hearing.' That said case, on the contrary, is merely the whole of the stenographer's minutes, with copies of depositions annexed thereto constituting 668 typewritten pages, much of which is repetition of the same testimony by the same witnesses, argument between counsel, remarks by the court, two detailed stories of a tour in Europe which the parties to this suit took as their wedding tour, talks between themselves and fellow passengers, and many other immaterial matters, all of which in a case properly prepared would have been condensed to less than one-half its present proportions."

This court has condemned the practice of signing and returning immaterial and irrelevant matters in chancery appeals. *Andrews v. Lavery*, 159 Mich. 26, 123 N. W. 543. The respondent was justified in refusing to certify the record as presented to him. The petition for mandamus is therefore denied, with costs to respondent. However, for the purposes of this case, we shall consider and treat the petition filed as an application for extension of time to perfect an appeal. In order that relator may not be deprived of this right, an order will be entered extending the time to perfect the appeal to February 15, 1913, on condition that a case on appeal complying with the rules of this court be presented to the respondent for settlement on or before that date, and on the further condition that a further adequate bond to stay proceedings be filed by relator, to be approved in amount and sureties by respondent.

PUDAS v. MATTOLA.

(Supreme Court of Michigan. Dec. 17, 1912.)
ACCOUNT STATED (§ 1*)—NATURE OF DEMAND—UNLIQUIDATED DEMAND FOR TORT.

An unliquidated claim for a tort is not provable as an account stated upon the theory that the defendant promised to settle the tort at a stipulated sum, the doctrine of account stated applying solely to mercantile transactions, where, if an account is rendered by one person to another, showing a balance due, the indebtedness thus expressed is acknowledged by the person against whom the balance appears.

[Ed. Note.—For other cases, see *Account Stated*, Cent. Dig. §§ 1-9; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 93-98; vol. 8, p. 7651.]

Error to Circuit Court, Houghton County; Albert T. Streeter, Judge.

Action by Matt Pudas against Andrew Mattola. From a judgment for defendant in the Justice Court, plaintiff appealed to the Circuit Court. Judgment being there given in his behalf, defendant brings error. Reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

Hanchette & Lawton, of Hancock, for appellant. Burritt & Burritt, of Hancock, for appellee.

McALVAY, J. Plaintiff recovered a judgment in the circuit court for Houghton county against defendant in an action of assumpsit upon an account stated, from which defendant has appealed by writ of error.

The following are the facts in the case: The record shows that the plate glass front of plaintiff's place of business had been broken. Plaintiff claimed that defendant was one of the parties who wrongfully committed this damage. Complaint was made before a justice of the peace against defendant (as the justice testifies) for malicious destruction of property. The defendant was arrested and taken to the justice's office, where some negotiations were had, which plaintiff claims resulted in an agreement on the part of defendant to pay to him \$16 as his share of the damages for the breaking of plaintiff's window. There is a dispute as to whether such an agreement ever was made. Plaintiff later brought suit, declaring and relying upon this claimed agreement made in settlement of this wrong charged against defendant as an account stated in assumpsit, and has recovered a judgment in this suit, which is founded entirely upon the theory that an account stated was had between these parties. This suit was instituted in the court of the justice before whom defendant was brought by the officer, as above mentioned. The case was tried in that court before a jury, and a judgment was rendered against plaintiff. Upon appeal to the circuit court the case resulted as above stated.

The trial judge accepted the theory of the plaintiff that the only question to be determined was whether in fact an account had been stated as claimed by plaintiff. Defendant has assigned errors in the case, of which, as we view it, but the one need be considered which charges the court was in error in holding that the facts in this case show that this transaction could be considered in law as a foundation of an action for an account stated in assumpsit. The statement by the appellant of his position is as follows: "The court was in error in holding that an unliquidated claim for tort is provable as an account stated, upon the theory that the defendant had promised to settle the tort at a stipulated sum."

Definitions of an "account stated" have been given by text-writers and authorities of which the following may be accepted as a general statement: "In general terms, where an account is rendered by one person to another, showing a balance due from one to the other, and the indebtedness thus expressed is acknowledged to be due by the

one to the other, this will constitute an account stated." 1 Cyc. 364. This doctrine was founded originally upon the practice among merchants. This definition states the doctrine generally as it was originally accepted. It has been somewhat modified, but the rule has been retained that in order to constitute an account stated there must be some prior transaction, which may include but a single item where there are no mutual dealings, and when the transaction has no relation to trade. 1 Cyc. 365. This suit upon an account stated was brought to recover upon a claimed settlement between the parties of an unliquidated claim for damages arising out of a tort.

The Supreme Court of Oregon, in an excellent opinion written by Mr. Justice Wolverton, in a case where action was brought upon an account stated to recover for an unliquidated claim of damages for breach of a contract, in discussing this question, said: "Suppose the plaintiff had sent to defendants a statement in writing of his claim against them for \$300 for building this fence, and the defendants had retained it an unreasonable or any length of time without objection, would a promise to pay such a sum arise by implication? Undoubtedly not. If such were the rule, it would be an easy matter for any claimant to convert an action for unliquidated damages, whether arising from contract or tort, into an action upon a money demand, wherein it would not be permissible to inquire into the original cause of action. Every person against whom such a claim is made would be compelled to be constantly on the alert, and make due and timely objection in order to prevent an undue advantage being taken of him. The doctrine of an account stated cannot be carried to this extent. A single item, not of a debt due and owing, but of an unliquidated claim of damages for the breach of a parol or simple contract, cannot form the basis for an account stated." Van Bebbler v. Plunkett, 26 Or. 562, 38 Pac. 707, 27 L. R. A. 811, and notes. The only distinction between the Oregon case above cited and the instant case is that the former grew out of a settlement of unliquidated damages arising from the breach of a contract, and the latter from a claimed settlement of unliquidated damages arising from a tort.

The basis of an account stated must always be a balance or amount due upon a subsisting indebtedness. This was the principle upon which the action upon an account stated was founded. Therefore a settlement of an unliquidated claim for damages arising either from the breach of a contract or from a tort cannot become the subject of an account stated.

Our attention is not called to a single au-

thority which holds to the contrary, and in a thorough search we have been unable to find one. It was unanimously held by the Court of Exchequer, in an opinion written by Lord Abinger, C. B., as follows: "Then as to the account stated: I have often observed that there is a good deal of confusion in the books on questions of accounts stated—not the older books, but the modern ones; they lay down this, that, where there is a promise to pay a sum of money as due from A. to B., it is evidence of an account stated, which means this, that the simple promise, if it stand unexplained and uncontradicted, is evidence to go to the jury that the plaintiff claims that sum to be due, and that there are matters of account between the parties; it does not go further than that; and it is only when you come to look at the facts on which the promise was made that you are enabled to see whether it is an account stated or not. Here there was nothing due from the defendant to the plaintiffs at all, the only thing in respect of which they had a claim upon him was upon his promise, and they might have had an action against him for not performing that promise, because no doubt it was made upon a good and sufficient consideration; but it was not in the nature of any debt due from one to the other at all." *Lubbock v. Tribe*, 3 M. & W. 606-613. The same doctrine was announced earlier in *Tucker v. Barrow*, 7 B. & C. 624 (14 E. C. L. R.).

In our opinion, upon this record, it may be stated as a matter of law that the claimed settlement relied upon by plaintiff was not an account stated, and no recovery can be had in this action. This disposes of the case, and the other errors assigned, although apparently meritorious, require no consideration.

The judgment is reversed, and a judgment will be entered in this court in favor of defendant and appellant, with costs of both courts to be taxed.

BLAIR, J., on account of sickness, took no part in this decision.

APSEY et al. v. DE YOUNG et al.

(Supreme Court of Michigan. Dec. 17, 1912.)

APPEAL AND ERROR (§ 870*)—WRIT OF ERROR—REVIEW OF INTERLOCUTORY ORDER.

An interlocutory order granting a right to appeal from an order of the probate court admitting to probate an instrument purporting to be a last will and testament cannot be reviewed on writ of error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3451, 3487-3469, 3491-3512; Dec. Dig. § 870.*]

Error to Circuit Court, Kent County; Willis B. Perkins, Judge.

Petition by Alvin Apsey and another

against Jane A. De Young and others for leave to appeal from an order of the probate court admitting a will to probate. An order was made granting the right to appeal, and respondents bring error. Writ of error dismissed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OS-TRANDER, and BIRD, JJ.

J. T. Preston, of Grand Rapids (Chas. E. Ward, of Grand Rapids, of counsel), for appellants. Grove & Davis, of Grand Rapids, for appellees.

PER CURIAM. Petitioners and appellees applied to the circuit court for leave to appeal from an order of the probate court admitting to probate an instrument purporting to be the last will and testament of John Apsey. An order was made requiring appellants and others to show cause why the prayer of petitioners should not be granted. Many affidavits were filed and were considered by the court, and an order was made granting the right to appeal. Appellants sued out a writ of error to review this order and determination, and have brought here the record made upon the said application for leave to appeal. The briefs do not discuss the practice which has been pursued, all parties appearing to be willing, if not desirous, to have this court in this proceeding approve or disapprove of the action of the trial court. At the hearing in this court it was suggested to the attorney for appellee, who alone appeared here, whether appellants had not mistaken their remedy.

Formerly such orders were reviewed in mandamus proceedings. The frequency with which the writ was applied for, the delays occasioned by such reviews, and the difficulty of formulating governing rules of decision were reasons which led this court to refuse to grant, as it formerly had done, its orders to show cause in cases in which the circuit court had permitted the delayed appeal to be made and was asserting jurisdiction to hear and determine the issues involved in the appealed cause. *Cosgrove v. Wayne Circuit Judge*, 144 Mich. 682, 108 N. W. 361. In the opinion filed in the case just cited, it is pointed out that, if a party is content to stand upon the objections raised to the order permitting the appeal, he may do so, and, after final judgment, may review the ruling on error. If he is not satisfied that his objections are sound, he will probably waive them, proceeding to a trial upon the merits. In any event, final determination of the cause is expedited, and no rights are waived, unless voluntarily. In no case has this court reviewed the interlocutory proceeding on writ of error.

The writ of error will be dismissed. Under the circumstances, we award no costs to either party.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**PEOPLE'S SAVINGS BANK OF SAGINAW
v. MCKAY et al.**

(Supreme Court of Michigan. Dec. 17, 1912.)

EQUITY (§ 228*)—PLEADING—DEMURRER—REQUISITES.

Under Chancery Rule 9, requiring the setting out of the special reasons in matters of substance in a general demurrer, as well as matters of form in a special demurrer, a demurrer to the bill of complaint in a suit against a husband and wife to foreclose a mortgage executed by the wife alone to secure a note given by her alone, interposed by the husband, and giving as special reasons that the action is triable at law and is an attempt to deprive him of constitutional rights, is properly overruled.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 504; Dec. Dig. § 228.*]

Appeal from Circuit Court, Saginaw County, in Chancery; William G. Gage, Judge.

Suit by the People's Savings Bank of Saginaw, Michigan, against Emma McKay and another. From an order overruling a demurrer to the bill of complaint interposed by defendant John A. McKay, he appeals. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

John A. McKay, of Saginaw, in pro. per. Walter J. Lamson, of Saginaw, for appellee.

KUHN, J. In this cause, the bill of complaint was filed to foreclose a mortgage securing a note made by Emma McKay. John A. McKay, her husband, is made a party defendant, although he did not execute either the note or mortgage, upon the theory that the mortgaged premises constitute the homestead of the defendants, in which he may have some interest or which he may have the right to redeem from the operation of the mortgage. He has demurred to the bill in substance and form as follows: "(1) That the bill of complaint herein does not state a case of equitable jurisdiction. (2) That the complainant has not in and by its said bill of complaint made or stated such a case as entitles it in a court of equity to any relief for or against this defendant or either defendant herein touching the matters or any of them contained in said bill. (3) That under the facts alleged and set forth in said bill of complaint the complainant is not entitled to the relief prayed for or to any relief whatever. (4) That the complainant's remedy under the state of facts set forth in its said bill of complaint is at law. (5) That this demurring defendant is entitled to a trial of the facts alleged in the bill of complaint herein by a jury on an issue framed according to the regular practice of the court in a case at law. (6) That the issues raised by the bill of complaint herein are as to this demurring defendant, and as to both defendants, properly triable at law. (7) That the proceedings herein are an attempt on the

part of the complainant to deprive this demurring defendant, and each of said defendants, of his and their property without due process of law, and are contrary and obnoxious to both the Constitution of the state of Michigan and the Constitution of the United States, particularly the fourteenth amendment of the Constitution of the United States."

Chancery Rule 9 requires special reasons in matters of substance in a general demurrer, as well as matters of form in a special demurrer, to be set out. The only special reasons given in the demurrer are that the action is triable at law and is an attempt to deprive defendant of constitutional rights, both of which were properly overruled by the trial court.

The order overruling the demurrer is therefore affirmed, with costs to the appellee.

DALTON v. MERTZ.

(Supreme Court of Michigan. Dec. 17, 1912.)

1. PLEADING (§ 380*)—EVIDENCE—VARIANCE.

A person suing to have an assignment of his interest in a land contract declared a mortgage cannot, within the rules of equity relative to consistency, attack the validity of such assignment for want of consideration.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1237, 1239-1252; Dec. Dig. § 380.*]

2. MORTGAGES (§ 38*)—EVIDENCE AS TO CHARACTER OF INSTRUMENT—WEIGHT AND SUFFICIENCY.

The proof should be clear and convincing before an instrument, purporting to be an absolute conveyance, can be declared to be a mere security.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 108-111; Dec. Dig. § 38.*]

Appeal from Circuit Court, Wayne County, in Chancery; James O. Murfin, Judge.

Action by Robert M. Dalton against William M. Mertz. Judgment for defendant, and complainant appeals. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, BIRD, and KUHN, JJ.

W. G. Fitzpatrick and M. Hubert O'Brien, both of Detroit, for appellant. Frank N. Renaud and Frazer, Griswold & Slyfield, all of Detroit, for appellee.

BIRD, J. The purpose of complainant in bringing this suit was to have an assignment of a land contract declared a mortgage. The trial court refused to grant him relief, and he has appealed to this court for similar relief.

Complainant and defendant are lawyers and reside in the city of Detroit. For several years before this trouble arose they occupied the same office and did business under a firm name, although they were not partners as between themselves. Complainant

gave some of his attention to buying and selling real estate and in the forepart of the year 1907 there was placed with him for sale a tract of 44 acres of land in Grosse Pointe township. The sale price was \$35,000 and his commission was fixed at \$1,000. Both complainant and defendant seemed to be impressed with the future prospects of this land, and complainant suggested that defendant purchase it. Defendant explained to him that his means were too limited to engage in a deal involving such a large amount, and that, if he should so engage and be unable to carry it through, he might lose what little he possessed. It was then proposed and agreed that they should both purchase it and make it a joint venture. Charles W. Restrict, the owner, was seen by complainant, and a deal arranged whereby the premises were sold to complainant on a land contract, dated September 24, 1907, for \$34,000. The terms were \$1,000 payable when the contract was executed, \$9,000 in 60 days, and the balance in sums of not less than \$3,000 each year. The first payment was promptly made. The second payment of \$9,000 was not paid when due because complainant was unable to pay his share of it. After some delay, he arranged with Restrict to accept a payment of \$2,500 with some accrued interest in lieu of the \$9,000 payment. Each gave his check for \$1,262.50 to cover this payment. Complainant's check was postdated. When it became payable it was presented at the bank, and payment was refused by reason of "no funds." The check was renewed but was never paid. About this time complainant's financial matters became very much involved, and he was unable to meet his share of the payments. Defendant hesitated to meet his share of them for fear he would lose all. Matters went along in this way until November 4, 1908, when Restrict forfeited the contract for the nonpayment of upwards of \$10,000 of principal and interest. Three days later, on November 7th, complainant executed and delivered to defendant an assignment of all his interest in the contract; the defendant agreeing therein to assume all the obligations of complainant imposed by the contract. Subsequently defendant secured assistance, and on November 9th he made a new arrangement with Restrict whereby he consented to the assignment and arranged as to future payments. From that time on the defendant made payments, and when this suit was begun in August, 1910, he had paid thereon upwards of \$13,500 besides paying taxes, insurance, and for improvements.

In June, 1910, complainant demanded a reconveyance of a one-half interest in the contract, and later he offered to reimburse defendant for one-half of the payments made thereon; his claim being that he conveyed his one-half interest in the contract to secure defendant for whatever advances he might make on his account. This demand was re-

fused, and later in the summer this suit was commenced to enforce the demand. It was the claim of the complainant that, soon after the execution of the assignment, his business affairs became badly involved, and that in consequence thereof he was unable to meet his share of the payments as they fell due, and that defendant in consideration of the assignment of the contract agreed to carry the deal for him, as he had in the first instance carried it for the defendant, until either a sale was made of the premises or his financial position became easier, at which time defendant was to be reimbursed for all advancements made on his account. The defendant denies these claims and insists that the assignment was unconditional and absolute. He asserts that after the forfeiture the complainant executed and delivered to him the assignment, with the announcement that he was through with the deal; that defendant must take care of himself the best he could; that since that time complainant has given no attention to the property, has paid nothing thereon, and has had no possession thereof; that he made no claim that he had any interest in the property for over two years after the assignment was given; and defendant charges that complainant would have made no claim when he did save for the fact that the property has increased in value very rapidly since the fall of 1909.

[1] The question is raised by complainant that the assignment is void for want of consideration. However much of merit there may be in this contention, the complainant is in no position to raise it, as he has brought the instrument into court and asked for a construction thereon beneficial to himself. To rely on the instrument as a mortgage, and at the same time condemn it as being void, is a position not within the rules of equitable consistency.

The remaining question, an important one, is a question of fact involving the veracity of the parties. The conflict is very sharp on the essential point as to whether the assignment was intended to be absolute or simply to operate as a security.

[2] We think it would be without profit to the profession to discuss the testimony which makes for or against the veracity of these parties. We have given the record and briefs close attention and have considered the case, keeping in mind the friendly relations of the parties, the fact that none of their engagements reduced to writing the financial position of each, the reason given for making the assignment, and the attitude of each toward the property since the assignment was made; and, while we are still in doubt as to which party is right in his contention, we are of the opinion that the complainant has failed to discharge the burden of proof which rested upon him in making out his case. The proof should be clear and convincing before an instrument which on its face purports to

The decree of the trial court will be affirmed. The defendant will recover his costs in this court.

LUSCOMBE et al. v. PETERSON et al.

(Supreme Court of Michigan. Dec. 17, 1912.)

DEEDS (§ 56*)—DELIVERY—ACTS CONSTITUTING.

Where a grantor, intending to execute a deed to a grantee reserving a life estate and conveying to the grantee a life estate with remainder to his son, executed, to correct an error in an unrecorded deed, a new deed to carry out the intention and delivered the deed to the grantee, who immediately delivered it to a third person for delivery to the grantee on the grantor's death, there was a valid delivery of the deed sufficient to pass a present estate to the grantee, which could not be afterwards defeated through any change of mind on the part of the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 117-123, 125; Dec. Dig. § 56.*]

Ostrander, Stone, and Bird, JJ., dissenting.

Appeal from Circuit Court, Montcalm County, in Chancery; Frank D. M. Davis, Judge.

Suit by John B. Luscombe and others against Peter Peterson and another. From a decree for complainants, defendants appeal. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ.

I. L. Hubbell, of Belding, and F. C. Miller, of Ionia, for appellants. R. A. Hawley, of Ionia, for appellees.

BROOKE, J. I am of the opinion that the learned circuit judge reached a proper conclusion in this cause. After Lyman W. Luscombe learned from Wilson, who drew the original papers, that they were no good, he went back to Wilson with the complainant, John B. Luscombe, for the purpose of correcting the error he had been told was made.

He testified: "Q. Before you made the change you told your brother John, and you and John went to Wilson together didn't you? A. Yes; he said it was no good. Q. You fixed it up so it was good? A. I supposed so. Q. So your brother would have it after you passed away while he and his wife lived and then Robert should have it? A. Yes, sir. Q. You fixed it up that way? A. Yes, sir."

Wilson, the scrivener, testified in part as follows: "A. He wanted to deed it to his brother, John, and at his death and his wife's death he wanted his son, Robert, John's son Robert, to have it as long as he lived. Then he wanted Robert's oldest son to have it. I can't say as I remember any

John lived on the place at that time. I told me how long John had lived there, I don't remember. I made out a deed at that time. Q. I wish you would describe what was in the instrument as near as you can remember. A. The deed was filled out as Lyman Luscombe as party of the first part to John B. Luscombe as the party of the second. The consideration, if I remember right, was \$1. Then the description of the land was given, and then, after the description was given, it further stated that at the time of John's death and his wife's he wanted Robert Luscombe to have it, his son, John's son; and at the time of his death, Robert's death, he wanted Robert's oldest son to have it. After I drew the document, I read it to him. It was drawn on a warranty deed headed 'Long Form,' containing the usual covenants. Q. After the deed was drawn and read to him what was done? A. He told me he wanted to leave it with me. Q. Did he sign it? A. Yes, sir; he signed the deed. Q. Will you state as to whether it was witnessed or not? A. Yes; signed, witnessed, and acknowledged. I don't remember who the witnesses were. There were two of them. I was a notary, and took the acknowledgment. Nothing further said or done about it any further than he told me to keep it. He wanted to leave the papers with me. * * * Q. When he came to your office in 1904, as you remember it, in relation to this property, do you know how he happened to come there at that time? A. My attention was called on the street or in the People's Savings Bank over here by Mr. Lamberton to an article in the Northwestern Review, stating that a deed made in that kind of a manner there had to be a transfer made. Q. Delivery you mean? A. Yes, sir; delivery of the deed. I had left my papers there at the bank, and Mr. Lamberton knew they were there, and I brought up that matter about him. I said there was no delivery made there. We talked the matter over. So I called Lyman's attention to it. Q. In what way? A. I have forgot whether—I think I spoke to him. I told him I was informed there had to be a delivery made of the deed, and I think I wrote to John, his brother. I think I wrote to him, and says I, 'If that is the case, we had better fix things up.' So he and John came into the store together, to the best of my remembrance, and I told him that this deed that he drew up formerly looked to me as though it was entailing the property. I told him, if I was in his place, I would change it, and have only one name mentioned in it besides John's. He told me I might draw up another one. So I drew up another deed of the same property, and with just Robert's name mentioned besides John's. Q. How was that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 138 N.W.—67

deed worded as near as you can remember it? A. It was worded like the first one, copied from the first one, with the exception of Robert's oldest son. Q. That was left out? A. Yes, sir. Q. Now was that deed read over to Lyman Luscombe? A. To the best of my remembrance it was. Q. When he came there on each occasion as I understand you, or on the first occasion when he came there, he told you he wanted a deed made of his property? A. Yes, sir. Q. To John? And he stated he wanted it fixed so it would not have to be probated? A. Yes, sir. Q. Did he say anything about being opposed to the probating of estates? A. Well, he grumbled about the expense that was attached to it, and he said as a rule the lawyers got a good share of it. He wanted his fixed so there wouldn't be any expense. Q. When he came there the second time, and this last deed was made, the deed you have just referred to was made, did he say anything at that time about fixing it so it wouldn't have to be probated? A. I don't remember of it now. It was read over to him, signed, witnessed, and acknowledged. I think Alvin Lloyd and Henry Friedley witnessed it. I took the acknowledgment as a notary public at that time. That acknowledgment was certified on the instrument itself in the usual form in vogue in this state. It was a long form warranty deed. Q. Was John Luscombe present on that occasion the second time? A. To the best of my remembrance he was sitting down by the stove. I couldn't say positive. I think he was. The first time he wasn't there. Q. The second time he was? A. Yes, sir; as I remember it. Q. After the deed was drawn and fully executed except delivery, what was done with it? A. The three of us went over to the People's Savings Bank and I gave Lyman the deed. He passed it to John, and John handed it to me and I took care of it. Q. Lyman Luscombe delivered it to John Luscombe? A. Yes, sir. Q. And John handed it to you? A. Yes, sir. Q. What were your instructions in relation to what was finally to be done with that deed? A. The instructions were the same as the other, that I was to keep the deed and in case of his death I was to pass it to John. Q. That is hand it to John? A. Yes, sir. Q. Now at the time of the delivery, or the execution of this deed, or either of them, was there anything said in regard to recording the deeds by Lyman Luscombe? A. He stated he didn't want it recorded. The first deed I inserted the words: "This deed not to be recorded until after my death." Q. Was there anything said about it at the time of the second deed? A. He didn't want that recorded, said the same. Q. What was the language you inserted? A. This deed is not to be recorded until after the death of Lyman Luscombe. Lyman Luscombe came to me again in the winter of 1911. * * * Q. At the time of making the second deed was there anything said by Lyman in respect to

his wanting to retain control of the deed or property during his lifetime? A. No, sir."

I think it is quite clear from the foregoing testimony that Lyman W. Luscombe made and intended to make delivery of the deed in question, and that by such delivery a present estate passed to the grantees named in the instrument which could not afterwards be defeated through any change of mind on the part of the grantor. *Dyer v. Skadan*, 128 Mich. 348, 87 N. W. 277, 92 Am. St. Rep. 461; *Willbur v. Grover*, 140 Mich. 187, 103 N. W. 583; *Blackford v. Olmstead*, 140 Mich. 583, 104 N. W. 47; *Wipfler v. Wipfler*, 153 Mich. 18, 116 N. W. 544, 16 L. R. A. (N. S.) 941, and cases there cited and reviewed.

The judgment should be affirmed.

MOORE, C. J., and McALVAY and STEERE, JJ., concurred with BROOKE, J.

OSTRANDER, J. (dissenting). The subject of this controversy is 80 acres of land in the county of Montcalm in this state which was at one time owned by Lyman Luscombe; the parties complainant and the parties defendant each claiming title to the land through the said Lyman Luscombe. When the bill was filed, Lyman Luscombe was living and was made a party defendant. He has since died, but not until after his deposition had been taken, which appears in the record. The case involves some disputed facts, which the circuit judge determined favorably to the complainants, and held that a deed made by the said Lyman Luscombe, conveying the premises to the defendants, should be delivered up to be canceled, that the defendants should convey to the complainants, and that a certain instrument made by the said Lyman Luscombe in his lifetime, conveying the said premises to the complainants, should be restored, "and that the said agreement between said Lyman Luscombe and John B. Luscombe be specifically performed." The case made by the bill is that Lyman Luscombe, an unmarried man, residing at some distance from the land in question, proposed to his brother, the complainant John B. Luscombe, in March, 1878, that he remove his family and belongings to the land in question, saying that, if he would do so and would work and operate the farm, improve it, and pay the taxes, he might have the entire proceeds and profits of the land; that pursuant to this request the said John B. Luscombe consented to and did remove to the premises, occupied and tilled the land, and remained in possession until the spring of 1894. At that time the dwelling house had become dilapidated, and the complainant John B. Luscombe consulted with Lyman, suggesting that it was advisable to erect a new dwelling house upon the premises, receiving the reply that he should go on and erect a dwelling house and continue to live in it and upon the

after his death, and that he would fix the title in such a way that said John B. should have the same after his death, without exactly stating the terms of the arrangement, whatever it was. Said John B. assented, erected a large and more commodious dwelling, paid the entire expense thereof, and built other buildings and structures, and during all the time down to the filing of the bill of complaint, which was in March, 1911, continued to occupy, crop, and improve the premises. Said John B. Luscombe received word, so he charges, in March, 1905, or thereabouts, that a deed theretofore made by Lyman Luscombe, conveying the land to himself, was invalid and void because it had never been delivered. He informed Lyman Luscombe what he had heard, and thereafter, and on the next day, the complainant John B. and the said Lyman went to the city of Belding, and were informed that the former deed was invalid for the reason stated; that then it was agreed between John B. and Lyman that a deed of the premises should be executed and delivered, conveying to John B. and his wife, Elizabeth, the said premises for the period of their natural lives with the remainder to complainant Robert Luscombe, a son of said John B. and Elizabeth; that such a deed was executed and then and there delivered to John B. Luscombe, who handed the same to the scrivener, "to be by him safely kept during the life of said defendant Lyman Luscombe, and then to be by him placed on record in the office of the register of deeds of said county by Montcalm." Later, and in February, 1911, complainant John B. was told by Peter Peterson, one of the defendants, to remove from the premises and surrender possession of the same to him, he claiming to be the owner thereof as grantee of Lyman Luscombe. Inquiry made by complainant John B. discovered the fact that the scrivener had delivered up the deed made in March, 1905, to the said Lyman Luscombe. An injunction is asked for, restraining Peter Peterson from entering upon the premises and disturbing complainants restraining all defendants from concealing, disposing of, or destroying the deed of conveyance made in March, 1905, and a decree restoring said deed in case it had been lost or destroyed, and "that the said defendant be decreed specifically to perform said agreement so made by said Lyman Luscombe to and with your orator, John B. Luscombe, in the spring of A. D. 1895, as hereinbefore set forth, and to convey said premises to your orators and your oratrix in due form of law as agreed by and between said John B. Luscombe and said defendant Lyman Luscombe at the time last above stated, your oratrix and orators

other act or thing that may seem to said court to be equitable in the premises." Lyman Luscombe answered the bill, and denied the material allegations thereof, averring that John B. Luscombe came to him in March, 1878, or at about that time, wanting to know what kind of an arrangement he could make to work the land in question, and that he told him that if he would work the farm in a good and proper manner, improve it, keep it fenced, pay the taxes, do the road work, he could have what he made thereon for his labor; that thereupon John B. moved upon the land, raised large and valuable crops, and made a good deal of money, enough to keep his family, and in addition, to purchase an adjoining farm; that he cut down and sold many hundred dollars worth of valuable timber, taking the entire proceeds, had been able to travel extensively, but for several years had not kept up the fences, and had allowed the same to become dilapidated. Further answering, he says that John B. came to him "a few years ago" and requested permission to build the house now standing on the premises, that he gave him permission to build the house, but denies that it cost the amount stated in the bill, and says it did not cost to exceed \$1,000, and in this connection avers that the receipts of the farm at a fair rental value prior to the time when the house was erected would exceed the value of all improvements placed thereon before or after that time. Concerning the execution of the conveyance, he denies that he ever executed any at a time when complainant John B. was present, and avers that John B. was not informed by himself, and did not know of his intention to make any conveyance or conveyances of the land in question; that because he was becoming old, being 79 years and more of age, he desired to make a testamentary disposition of his property and considered the matter for a time, when he went to a justice of the peace (the same one referred to in the bill of complaint), and consulted him with respect to making a will or disposition of his property to take effect only after his death; that the scrivener prepared a paper, but whether it was a will or contract or deed he does not know, except that he never understood that he was making a deed and never understood that the paper he executed was a deed and had no knowledge at the time of filing his answer, except as he has since been advised, that the paper was a deed; says that, if it was a deed which conveyed any title whatever, it was contrary to the understanding and expectation and wish of himself; that whatever paper was made he left with the scrivener with the

understanding that he could change the same or destroy it if he should choose to do so at any time thereafter; that whatever paper he executed provided that upon his death the premises should go to John B. Luscombe and at his death to his son Robert, but that he had always insisted upon retaining full control of the property during his lifetime, with the right to make other or different disposition of it. In this connection he avers that he was growing feeble, and considered that he might require the property for his own living and support. He further avers that the scrivener did state to him later on that the paper which he had previously made was void, and told him of the decision of some court to that effect; that some time thereafter he met complainant John B. in Belding, and together they went to the place of business of the justice of the peace, who again informed him that it would be necessary to make other or different papers, and in a talk with said justice was told by him that he had fixed it up, but defendant did not know, and did not know at the time of filing his answer, whether he made a new paper or fixed over the old one. He avers that, whatever the justice of the peace did, he, Lyman, never understood he was making, and never intended to make, any paper which would be other than a testamentary disposition of his property and operate as a will. He says he was requested by the said justice of the peace and by complainant Robert Luscombe to make a deed of the premises, which he refused to do. He admits the occupancy of the premises by complainant, but says that they are there as his tenants, subject to be removed at any time. He admits that he went to the justice of the peace and demanded of him the papers made by him, and says that the justice immediately acceded to his request, and advised him that he had a perfect right to destroy them, and, in fact, did advise him to destroy them, and he avers that he at once tore the papers up and destroyed them. He, further answering, avers that he is old and infirm, unable to hear without the aid of an ear trumpet, with poor eyesight, no longer able to care for himself; that he has been living for some years with one Lester Carpenter, who married a niece, and had become indebted to the said Carpenter for medicine and board and care, and had to have money to discharge his obligation; and that in February, 1911, after destroying the papers originally made by him, he sold the property to the defendants Peter and Lulu Peterson, Lulu being his niece and wife of Peter, they paying him \$1,000, which with his love and affection for his said niece was the consideration for the conveyance. The \$1,000 he turned over to the Carpenters at whose home he was living at the time of drawing his answer, and who were providing for him.

Defendants Peter and Lulu in their answer assert that they are good-faith purchasers of the premises, for which they paid \$1,000, and that they had no notice or knowledge of any rights on the part of John B. and Elizabeth Luscombe other than that they were tenants of Lyman Luscombe, subject to removal at any time when he, the said Lyman, desired. They ask for affirmative relief.

An analysis of the testimony has led to conclusions which may be stated without setting out the testimony at large. There was never any agreement between John B. and Lyman Luscombe by the terms of which Lyman agreed to convey the land, or any interest in it, to John B. Nothing was ever done by John B. with respect to the land in reliance upon, or in consideration of any promise or undertaking of Lyman to convey the land to him or to any one else. Entry was made and possession retained by John B. by permission of Lyman, and with the understanding that John B. should have the use of the land. But no term was agreed upon and no interest in the land created by any agreement of the parties. John B. Luscombe entered upon the land in 1878. In 1890 or 1892, according to his testimony, he inquired of Lyman what he would take for the place. He says that Lyman replied: "I intend it to be yours any way. I am going to fix it that way so it will never have to be probated." In this there is no indication that John B. claimed any interest in the land, or that Lyman intended any present gift to him. In 1894 the house erected by John B. upon the land was in such condition that he desired to build a new one. He consulted with Lyman, who said, according to the testimony of John B., "Go on and build it," and said he had fixed it or would fix it so the land "would be mine." John B. was asked by his counsel, "Would you have gone on and built the house unless he had given you that assurance?" and was answered, "I don't think I should." The house was built, but we find no evidence of an agreement to convey the land which the court could enforce. The house was built to accommodate John B. and his family. No obligation to build it was asserted or was implied. Looking again to the testimony of John B. Luscombe, we find that in 1898 Lyman told him that he had fixed the papers so it would be all right and would not have to be probated. "He had fixed the paper out for me, it wouldn't have to be probated." It was not until 1904 or 1905 that John B. was informed how Lyman had "fixed it." Even then he gained his information, not from Lyman, but from the officious justice of the peace and scrivener who had prepared the instrument. John B. never saw the instrument, and knew and knows nothing of its terms, except from hearsay. Clearly there was no oral agreement to convey the land to him, and no gift was talked about except

testimony and that of the scrivener. The papers were destroyed. Lyman testified that he went to a justice of the peace, who had made out his pension vouchers, and told him what sort of instrument he desired drawn. This was in 1894. His instructions were to prepare an instrument which would give the place to John B. after he, Lyman, was done with it, for the life of John B. and his wife, remainder to Robert, son of John B. The scrivener testified that the old gentleman wanted the instrument drawn in such manner that it would convey a life estate to John B. and his wife, a life estate to Robert, son of John B., and remainder to Robert's eldest son. He testifies that he so prepared the instrument. He further testifies that Lyman wished to retain the property, so that, if necessary, he could use it for his own support; that he put nothing into the instrument to carry out this wish, but did write therein that it was not to be recorded until after the death of Lyman. The instrument was left with the scrivener. No one pretends that it was ever delivered to John B. The scrivener testifies that he did not believe it was a valid instrument, but, so long as it seemed to satisfy Lyman, he said nothing about it, understanding himself that he was bound to deliver it to Lyman upon his request. The scrivener had the custody of this instrument until late in 1904 or early in 1905. Meantime he continued to make out the quarterly pension vouchers for Lyman. Neither referred to the instrument. In 1904 or 1905 he informed Lyman that he thought the instrument was not valid. He took it upon himself also to inform John B. something about the instrument and the necessity for a new one. It is somewhat difficult to gather from the testimony of the scrivener the reason for this counsel. Probably it was because he had read something from which he conceived that manual delivery of the instrument was necessary to give it validity, although he testifies that he thought the deed was invalid because creating a perpetuity. Whatever the reason, Lyman and John B. appeared in the scrivener's store and office, and a new instrument was prepared which purported to create a life estate in the land for John B. and his wife, with remainder to Robert, son of John B. The instrument having been executed, the parties went through the form, according to Lyman, of having Lyman pass it to John B., who passed it back to Lyman, who delivered it to the scrivener, telling him to keep it or them "until I was done with them." The scrivener testified that Lyman passed the paper to John B., who handed it to the scrivener. There is much in the testimony of the scrivener tending to prove that Lyman intended, and that the scrivener knew he in-

to avoid the expense and uncertainty of probating his estate. Clear it is that Lyman did not and could not dictate or formulate the method to be pursued or the language to be employed to accomplish his purpose, in which respects he relied upon the scrivener. It appears, too, that at the request of John B. and Robert the scrivener afterwards asked Lyman to make a deed, stating that Robert had consulted an attorney who told him that, in case Lyman died, the persons with whom he was living could present claims against his estate which would have to be paid out of this property if his personal estate was insufficient for that purpose. Lyman declined to make any other papers. Later, in 1911, the scrivener, at Lyman's request, made a deed of the property to defendants Peterson, and delivered to Lyman the two instruments formerly executed, and those instruments were destroyed. The scrivener testified that he understood that Lyman had the right to demand, receive, and destroy those instruments at any time. The Petersons gave Lyman a valuable consideration for the land and deed.

Upon the whole record—direct reference has been made to but a small portion of the testimony—we feel compelled to disagree with the learned trial judge, and to find that complainants have not made out by a preponderance of evidence that Lyman Luscombe ever intended to part with his title to the land, or that in passing the deed to John B. he understood or believed that by so doing he was making effective a present transfer and conveyance of property. My Brother BROOKE has set out considerable of the testimony and reached the conclusion that Lyman Luscombe, when the last deed to complainants was made and the performance of a delivery gone through with, intended to make a delivery of the deed, and that by the delivery a present estate passed to the grantees. No opinion should be formed—I do not say that his has been so formed—from reading portions of the record. It must all of it be read. When it is read, it will be seen that the old gentleman had not changed his original purpose to keep and control the land so long as he lived. Otherwise, he would have executed and delivered his deed. What he did do was by direction of his scrivener, to whom he had once fully stated his purpose. Everything tends to prove that his original purpose had not changed. His original purpose was understood by the scrivener. But he had been advised by the scrivener that the deed first made was ineffectual to accomplish his purpose, which was to retain the title to and control over the land so long as he lived. He was seeking, by making the second conveyance, to make effectual a

distinct purpose, namely, to retain control of his property and title thereto while he lived, and to secure a particular devolution of his estate after his death, without expense. To accomplish this, he did what the scrivener told him it was necessary to do. The understanding of the scrivener of the legal effect of the instruments he prepared is not of importance, except as it explains the conduct, declarations, and intentions of Lyman Luscombe. It negatives the idea that Lyman Luscombe made a delivery of the deed for the purpose of immediately passing title. It clearly indicates, as does the later refusal of Lyman to execute another conveyance, that Lyman Luscombe did not intend to deliver the deed.

It is not a case in which, after delivery of a deed, the grantor, having changed his mind, seeks to defeat an estate he has created. Nor do the facts as stated herein bring the case within the rule of *Dawson v. Hall*, 2 Mich. 390; *Dyer v. Skadan*, 128 Mich. 348, 87 N. W. 277, 92 Am. St. Rep. 461; and *Wipfler v. Wipfler*, 153 Mich. 18, 116 N. W. 544, 16 L. R. A. (N. S.) 941. There are cases, and those just cited are such, where the act of making delivery of a deed by the grantor to the grantee is held to conclusively establish the fact of intentional, unconditional, delivery. And the rule of these cases ought to be applied whenever it appears that a grantor intended to deliver and a grantee intended to accept the instrument as a conveyance, without further act on the part of the grantor. But, as has been pointed out, in the case at bar all of the parties witnessing the delivery understood that no such unequivocal acts of delivery and acceptance were taking place. Precisely the contrary. Suppose that one ignorant of the law was instructed by one supposed by him to have proper knowledge that to carry out his clearly expressed and understood purpose he must do an act which in law, if intentionally done, completely frustrated such purpose; would it be held that a court of equity could not give relief from the apparent effects of the fraud thus committed? The case at bar is the case supposed, although the scrivener was innocent of any intention to defraud. Unmistakably, the testimony points to a desire and intention on the part of Lyman to retain title and to provide by some means other than a last testimonial for the devolution of the estate after his death. Unmistakably the act of delivering the deed was done under the belief that it was necessary to the accomplishment of his purpose, and did not negative and frustrate that purpose, and all parties so understood it.

Holding this view, we determine that the decree of the court below shall be reversed, and a decree entered in this court dismissing the bill of complaint, with costs of both courts to appellants. Appellants may have a

decree for possession of the premises, and for an accounting as prayed for in the cross-bill.

STONE and BIRD, JJ., concurred with OSTRANDER, J.

SQUIRES v. MICHIGAN BONDING & SURETY CO.

(Supreme Court of Michigan. Dec. 17, 1912.)

1. INTOXICATING LIQUORS (§ 87*)—SALOON KEEPER'S BONDS—EXTENT OF SURETY'S LIABILITY.

A surety on a saloon keeper's bond, which was given pursuant to Comp. Laws 1897, § 5398, specifying the liability of such sureties, and was conditioned that the principal would pay all fines imposed and all damages adjudged to any one, and satisfy all judgments for actual or exemplary judgments against him in violation of the statute under which the bond was given, was liable to a minor child of a parent killed from an accident due to intoxication from liquor procured from the principal, until it had personally paid out the full amount called for by the bond, though payments made by it on other judgments in favor of the widow and other children, taken together with the amount paid by the principal, equaled the amount of the bond; the surety's liability not being lessened by payments made by the principal.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 90; Dec. Dig. § 87.*]

2. INTOXICATING LIQUORS (§ 88*)—ACTION ON SALOON KEEPER'S BOND.

In a suit for damages resulting from a liquor dealer's violation of law, the principal and surety on the liquor dealer's bond may be proceeded against jointly or severally in a statutory action of trespass on the case; the bond being mere security for the payment of any judgment obtained, and not being the foundation of the action.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 91–95; Dec. Dig. § 88.*]

3. INTOXICATING LIQUORS (§ 82*)—LIQUOR DEALER'S BOND—CONSTRUCTION.

A saloon keeper's statutory bond, being for the benefit of the public and not strictly contractual in nature, is to be construed according to the purpose, intent, and meaning of the statute pursuant to which it is given, and not according to the strict rules applicable to private contracts of suretyship.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 85; Dec. Dig. § 82.*]

Error to Circuit Court, Ingham County; Howard Wiest, Judge.

Action by Leroy E. Squires, an infant, by Hattie M. Squires, his next friend, against the Michigan Bonding & Surety Company. From a judgment for defendant, plaintiff brings error. Reversed and remanded, with directions.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, BIRD, and KUHN, JJ.

William M. Smith, of St. Johns, for appellant. A. F. Bunting, of Detroit, for appellee.

STEERE, J. This case involves the scope of a saloon keeper's bond, given under sec-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cess of the killing of William A. Squires, deceased, against Louis Miller, a saloon keeper engaged in the sale of intoxicating liquors in the city of Lansing, Mich., and his surety, the Michigan Bonding & Surety Company, to recover, under the appropriate statute, damages resulting from the death of said Squires on March 5, 1909, while intoxicated by liquor obtained at said Miller's place of business.

Deceased was a man in the habit of getting intoxicated, and while in that condition went upon the track of the Belt Line Railway in said city and was killed by a passing train. In three previous suits, arising out of the same state of facts, his wife and two of his minor children recovered and collected judgments from Miller and his surety aggregating \$3,000.

Under said section 5386 the common council of the city of Lansing had determined and fixed the bonds of persons engaged in the sale of intoxicating liquors in said municipality, covering the year 1909, at the sum of \$3,000. Miller had filed his bond, with the defendant bonding company as surety, in that sum. It followed the form set out in the statute, and had been duly approved.

Plaintiff, Leroy E. Squires, a minor son of said William A. Squires, now brings this suit by his mother, Hattie M. Squires, acting as his next friend, under section 5398, Comp. Laws of 1897, which provides, among other things: "Every wife, child, parent, guardian, husband or other person, who shall be injured in person or property, or means of support or otherwise, by any intoxicated person or by reason of the intoxication of any person, or by reason of the selling, giving or furnishing any spirituous, intoxicating, fermented or malt liquors, to any person, shall have a right of action in his or her own name, against any person or persons who shall, by selling or giving any intoxicating or malt liquor, have caused or contributed to the intoxication of such person or persons, or who have caused or contributed to such injury, and the principal and sureties to the bond hereinbefore mentioned shall be liable severally and jointly with the person or persons so selling, giving or furnishing," etc.

Under this provision it has been held that, where the injuries arising from an illegal sale of intoxicating liquors are several, there may be separate actions for damages, and recovery in one will not bar a recovery in another; but the wife and minor children of a husband and father may each maintain an independent action for damages sustained. *Friend v. Dunks*, 37 Mich. 25; *Rosecrants v. Shoemaker*, 60 Mich. 4, 26 N. W. 794.

The declaration in this case is properly

pleaded the general issue, and further gave notice in connection therewith, as a special ground of defense, that it had already paid the full penalty of Miller's bond on which it was surety in satisfaction of previous judgments, amounting to \$3,000, whereby its obligation as surety upon said bond had been exhausted and fulfilled.

The issues of fact involved in this controversy had been thoroughly threshed over in the previous suits, and when this case came on for trial in the circuit court of Ingham county the parties, by their respective attorneys, simplified matters, so far as possible, by filing a stipulation in which all the material facts alleged in plaintiff's declaration were admitted, and defendants' conceded liability to the plaintiff was fixed at the sum of \$500 and costs; the court being authorized to enter a judgment in favor of plaintiff for that amount, unless one or both of defendants was relieved from that liability by reason of payment of the full sum of \$3,000, which had been made to other plaintiffs in other suits before that date, as follows:

On a previous judgment recovered April 7, 1910, by Hattie M. Squires herself for \$1,449 60	
On a previous judgment recovered June 4, 1910, by Hattie M. Squires, as next friend for Mildred E. Squires, a minor, for the sum of.....	1,250 00
On a previous judgment recovered by Hattie M. Squires, as next friend for Arlow A. Squires, a minor, on June 4, 1910, for	300 84
Aggregating	\$3,000 44,

—the first two of said judgments having been rendered upon verdicts by juries, and the third under stipulation that plaintiff was entitled to recover said amount.

The stipulation also specified that of the \$3,000 so before paid by defendants to other plaintiffs defendant Miller, the saloon keeper, had himself furnished \$2,000 paid by him to defendant bonding company and by it to said plaintiffs; it being, however, provided that the stipulation should not be considered as an admission, either on the part of the plaintiff or defendant, as to how much of said judgments was paid by said Miller, the principal, and how much by the Michigan Bonding & Surety Company, defendant, but that as between Miller and the bonding company said bonding company had paid the whole of said amount, having before paying the same received from said Miller property of an agreed value of \$2,000. By a supplemental stipulation it was agreed as follows: "Paragraph 7. It is further stipulated and agreed by and among all the parties hereto that the property heretofore turned over by Louis Miller to the Michigan Bonding & Surety Company before the three judgments aggregating \$3,000 were paid con-

sisted of certain shares of the Lansing Brewing Company's stock, certain shares of the Peerless Motor Company's stock, and certain real estate, which was of the value of \$2,000, so that said Miller in fact paid \$2,000 of the three judgments that were paid and the Michigan Bonding & Surety Company paid the other \$1,000. And the stipulation heretofore signed and filed herein is supplemented by the addition of this paragraph, which shall bind all the parties hereto." On these stipulated facts the case was argued and submitted to the trial court for its judgment.

That court held the bond was joint and several, and if the saloon keeper paid judgments for such damages to the amount of \$3,000, being the penalty of the bond, the condition of said bond was met and the same was satisfied; that it therefore became immaterial who furnished the money to satisfy the bond; that the saloon keeper was responsible for damages found, regardless of the amount of his bond; that under circuit court rule 27 judgment might be entered against him and the other defendant be released; that, the bond having been satisfied, the defendant bonding company was not liable in this action. Judgment was thereupon entered accordingly, in favor of said defendant bonding company, of no cause of action, and in favor of said plaintiff against said principal defendant Miller for \$500, the stipulated amount of damages, from which judgment the action has been removed by plaintiff to this court for review on writ of error.

[1] Plaintiff, by appropriate requests, asked the trial court to hold, as conclusions of law under the stipulated facts, that the payment by Miller of judgments recovered against him and his surety for damages resulting from his sales of intoxicating liquor in violation of law does not satisfy the bond to the amount of such payment, nor in any way release the surety of its obligation, which can only be discharged by it having borne the loss and paid judgments recovered for such damages to the full \$3,000, that being the amount of its obligation as nominated in the bond; that, inasmuch as it is admitted "said Miller in fact paid \$2,000 of the three judgments that were paid, and the Michigan Bonding & Surety Company paid the other \$1,000," the bond for \$3,000 yet remained in full force and effect to the amount of \$2,000, and judgment should also be entered in this case against the surety for the stipulated damages of \$500, with costs.

It is pointed out that under somewhat similar statutes in other states authority is found for the proposition that, inasmuch as a liquor dealer's bond is a public protection comprehending any criminal violation of the liquor law within a certain stated period of time, the surety is holden for all damages arising from violations of said law at any time during the period for which the bond

is given; that successive fines may be imposed and collected in criminal prosecutions, and successive recoveries may be had in distinct actions by different parties, during the time covered—the amount of recovery being limited, however, in each case to the penalty stated in the bond. We do not gather from the language of our own statute that such was the legislative intent, and think the following language, in *Merrinane v. Miller*, 157 Mich. 279, 118 N. W. 11, 25 L. R. A. (N. S.) 585, is of general application, though used in a particular case where plaintiff had obtained a judgment exceeding the amount of the bond: "It is urged in the brief of plaintiff that the penalty of the bond does not limit the liability, but that the sureties on the bond are liable to any amount by virtue of their relation to the principal and that the liability is not limited to the penalty of the bond. We cannot assent to this view. We think that statute fixing the liability of the sureties must be read in connection with the provision requiring a bond and fixing the penalty thereof."

The question which confronts us here is whether the surety's liability is released or reduced in one case through previous payment by the principal of damages in another case. In this case a sum equal to the penalty of the bond had been previously paid for damages resulting from Miller's violation of the law. He had paid two-thirds of that amount himself. Had he paid all of it, the principle involved would have been the same.

Was it the legislative intent that a bond given as hostage for his observance of the law for a period of one year should be satisfied and discharged, without the surety ever being required to pay anything, in case he at any time personally paid damages or fines to the amount of the bond? Under the strict rules of suretyship as applied to commercial paper, or to a bond given to a private party to indemnify him in a private matter, it could well be contended that, the principal having responded to the amount of the bond, the surety goes free.

This is not a bond primarily given to indemnify a private party, though by its terms private parties may avail themselves of its provisions. It is a public bond given to the commonwealth as a condition precedent to engaging in the liquor traffic, a business which, as a matter of public policy, is regulated and restricted under the police power of the state; violations of the restrictions imposed being made criminal offenses.

Under the law a liquor dealer's responsibility and liability are not confined to nor limited by the exact terms and amount of penalty in his bond. Throughout the year, and as often as he repeats them, violations of the statute lay him liable to criminal prosecutions, which involve fine or imprisonment, or both; and, irrespective of the limit laid in his bond, he is answerable for all damages

of the statute. If he is financially able to meet all such liabilities, the bond becomes of no practical importance. As a wise precaution and reasonable protection to the public, the Legislature saw fit to require that an approved bond be filed of from \$3,000 to \$6,000, in the discretion of the proper municipal board. It is not unreasonable to presume that this was intended to be in addition to the dealer's individual financial responsibility, and as a further protection.

Among other things, the principal, by the terms of the bond, promises, covenants, and agrees not to violate the law regulating the business in which he is about to engage; that he will not sell to minors, Indians, or intoxicated persons, nor to any person in the habit of getting intoxicated, nor to certain persons when forbidden in writing by a relative or official; and that he will pay *all* fines imposed and *all* damages adjudged to any one, whoever it may be, injured in person, property, or means of support, or otherwise, as a result of any such unlawful acts. The condition of the bond, in which his surety joins him, is that he "shall well and truly keep and perform all and singular the foregoing covenants and agreements and shall pay any judgment for actual or exemplary damages which may be recovered against him in any court of competent jurisdiction and all fines for violation of" the act in question. It seems clear that the penalty stated in the bond is intended as the limit of the surety's liability, not the principal's, nor for his benefit, except as it otherwise might be more difficult for him to obtain bondsmen. The surety, by the terms of the bond, joins the principal in his promises, and with him covenants that the said principal will faithfully observe the law and conduct his business in compliance with its provisions, in that aspect of the undertaking standing with him and vouching for him, as well as becoming pecuniarily answerable for his delinquencies during the time and to the amount for which the bond is given.

[2] In a suit to recover damages resulting from the liquor dealer's criminal violation of the statute, the principal and surety may be proceeded against jointly or severally in a statutory action of trespass on the case, and not by a strict action in debt on the bond. The bond is not the foundation of the action, nor, standing alone, evidence of liability. It figures as security to enforce payment of any judgment obtained for injuries occasioned by violations of the statute. Those violations give the cause of action and are the basis of recovery, and the surety becomes responsible for *all* of them up to the limit of the penalty stated.

[3] While, under the law of suretyship, a bond is, as a general rule, recognized to be

is to be strictly construed and not extended beyond the scope of the obligation according to its express terms, still a statutory bond to the public given for the observance of a law authorizing a business only permitted under specified conditions and regulated under the police power of the state, is not in the same sense strictly contractual in its nature. Its characteristics are also, and, perhaps, to a greater degree, statutory. It is to be read and construed and enforced in connection with and according to the statute pursuant to which it is given, and should be interpreted according to the purpose, intent, and meaning of the legislative enactment. *Brockway v. Petted*, 79 Mich. 620, 45 N. W. 61, 7 L. R. A. 740; *Merrinane v. Miller*, *supra*.

When, in that connection, we consider the wrongs sought to be remedied, the reason for and policy of the law, and the purpose of the bond, read in the light of that statute under which it is given, it can be deduced with reasonable certainty that it was the legislative intent that the penalty named should measure the surety's individual liability for any breach of the law by the principal during the year the bond covers, which liability continues throughout that period, or until paid by the surety, in case of default on the part of the principal; that payment by the principal in settlement of fines or claims for damages, with or without suit, where the surety has not been called upon to respond and has stood no loss, does not operate to release or reduce the bond; that it stands during the year for successive recoveries, in separate actions, until its full amount has been paid by the surety.

We cannot read into the bond and statute, considered together, any intent that payment in one case by the principal, whose liability is unlimited, shall operate in another case to release the surety, whose liability is limited; but all intendment of the law are to the contrary.

While the law is not concerned with the private relations between principal and surety, or the motives of the latter in assuming the obligation, it can be said in passing that this construction works no unreasonable hardship and involves no deterring uncertainties. The surety knows exactly what his limit of liability is and the risk he assumes. He simply obligates himself for the period of one year to pay all adjudicated fines and damages which the liquor dealer fails to pay, up to the amount of the penalty stated in the bond.

The judgment is reversed and the case remanded to the trial court, with directions to enter judgment in accordance with the foregoing conclusions.

PEOPLE v. MIRE et al.

(Supreme Court of Michigan. Dec. 17, 1912.)

1. CRIMINAL LAW (§ 1213*)—CRUEL AND UNUSUAL PUNISHMENT.

The punishment, imprisonment for not less than 15 years nor more than 30 years, prescribed by Pub. Acts 1907, No. 64, for one who with intent to commit crime breaks and enters a building, and for purpose of committing any crime uses a high explosive, is not cruel and unusual.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3304-3309; Dec. Dig. § 1213.*]

2. STATUTES (§ 118*)—TITLE AND SUBJECT.

The object of Pub. Acts 1907, No. 64, providing that one, who, with intent to commit crime, breaks and enters a building, and for purpose of committing any crime uses or attempts to use any high explosive, shall be deemed guilty of burglary with explosives, and punished by imprisonment for not less than 15 years nor more than 30 years, is expressed in its title, "An act defining the crime of burglary with explosives and providing the punishment thereof."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 158-160; Dec. Dig. § 118.*]

3. CONSTITUTIONAL LAW (§ 250*)—EQUAL PROTECTION.

Pub. Acts 1907, No. 64, defining burglary with explosives, and prescribing the punishment therefor, is not unconstitutional, as placing a greater burden on one than on another, denying equal protection to all, and inflicting on one greater penalty than on another, because of there being several kindred acts, prescribing less severe punishment, which include, to a greater or less extent, elements of the offense created by the act of 1907, so that a violation of the latter act might include a violation of one of the other acts, with the possibility of one offender, in the discretion of the prosecuting attorney, being prosecuted under the later act, and another under one of the other acts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 711-713; Dec. Dig. § 250.*]

4. BURGLARY (§ 2*)—STATUTES—CONSTRUCTION.

Comp. Laws, §§ 11545-11548, defining, grading, and fixing the penalty for various forms of statutory burglary, none of them mentioning the use of explosives, are readily distinguishable from, and therefore not repugnant to, Pub. Acts 1907, No. 64, defining burglary with explosives, and prescribing the punishment therefor.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 1-3; Dec. Dig. § 2.*]

5. STATUTES (§ 225*)—CONSTRUCTION—PARI MATERIA.

When acts are pari materia, though enacted at different times, and not referring to each other, they are to be taken and construed together, as explanatory of and supplemental to each other, and sustained, if possible, to produce a consistent and harmonious system.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 302, 303; Dec. Dig. § 225.*]

6. STATUTES (§ 159*)—REPEAL—INCONSISTENT STATUTES.

If the earlier act (Comp. Laws, § 11506) as to bank, safe, and vault robbery be inconsistent with, and repugnant to, Pub. Acts 1907, No. 64, defining burglary with explosives, and prescribing the punishment therefor, as covering identically the same offense, and pre-

scribing different punishments, the earlier statute in that respect is repealed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. § 159.*]

Error to Circuit Court, Lenawee County: John L. O'Mealey, Judge.

Joe Mire and others were convicted, and bring error. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, BIRD, and KUHN, JJ.

Solon T. Klotz, of Toledo, Ohio, for appellants. Earl C. Michener, Pros. Atty., of Adrian, for the People.

STEERE, J. This case comes before us on a declaration in error launched against the record, without any bill of exceptions.

Respondent was charged and convicted and sentenced in the circuit court of Lenawee county under Act No. 64, Pub. Acts of 1907, which, including the title, is, in full, as follows:

"An act defining the crime of burglary with explosives and providing the punishment therefor.

"The people of the State of Michigan enact,

"Section 1. Any person who, with intent to commit crime, breaks and enters any building and for the purpose of committing any crime, uses or attempts to use nitroglycerine, dynamite, gunpowder, or any other high explosive, shall be deemed guilty of burglary with explosives, and on conviction shall be punished by imprisonment for a term of not less than 15 years nor more than 30 years.

"Approved April 25, 1907."

From the record, which includes the testimony taken on preliminary examination, counsel for the prosecution makes a statement of the case in his brief which counsel for respondent accepts as correct and adopts and ratifies so far as the facts are concerned, not, however, admitting any of the conclusions of law therein stated. The facts contained in such statement helpful to an understanding of the case are, briefly, as follows: On the night of December 22, 1910, in the village of Britton, Lenawee county, Mich., the People's Bank was broken into and entered by four persons, of whom respondent was one, who blew up and practically demolished a large safe in said bank, using therefor five charges of nitroglycerine. These four persons all participated and co-operated in the perpetration of this offense. After an entrance to the building had been made, two of them stood guard on the outside armed with large revolvers, while the other two proceeded to use the explosives on the safe in the building. When officers and citizens of the village, aroused by the explosions, appeared, the two men on the out-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

seeking to apprehend or stop them in their depredations at bay for over half an hour, and then all four of the parties thus criminally engaged withdrew together and fled. They were pursued during the night by officers and others, across the country, over fields, through woods and thickets, and finally were captured a distance of over 19 miles from Britton. During the chase they were persistently and closely followed directly from the scene of the crime to the place of their apprehension. When arrested, respondent was heavily armed and resisted the officers. He was complained against, tried by a jury, and convicted under the statute quoted, and on January 12, 1911, sentenced by the court to the State House of Correction, and branch of the State Prison in the Upper Peninsula at Marquette, Mich., in compliance with the said statute and the indeterminate sentence law, for a term of not less than 15 years, minimum sentence, and not more than 30 years, maximum statutory sentence; 20 years being recommended by the court as in his judgment a proper maximum. The other offenders were also charged with a like offense, tried by jury, convicted, and each sentenced accordingly to the same institution. All four are now serving their sentences.

In behalf of this respondent it is claimed that his conviction and sentence were without jurisdiction and void, and he should be discharged from his imprisonment, without day, because the statute under which he was prosecuted and sentenced violates the Constitutions of the United States and of this state in the particulars that it deprives him of his liberty without due process of law, does not give him equal protection under the laws, abridges his privileges and immunities as a citizen of the United States, imposes cruel and unusual punishment, and the provisions of said statute are not expressed in its title.

Certain fundamental principles, from which the arguments in respondent's behalf are built up, are well stated and elaborated in the brief of his counsel, fortified by abundant authority. They must be conceded as sound in principle and by precedent. Unquestionably if the statute, under which respondent was prosecuted and which defines the offense of which he was found guilty and prescribes the punishment administered, is unconstitutional and void, the court was without jurisdiction to act, and the prisoner should be discharged. If this statute places a greater burden upon one than upon another, and does not give equal protection to all under like circumstances, denying to one rights which are accorded to others and inflicting upon one individual a more severe penalty than is imposed upon another in like

void, and it follows that the accused was deprived of his liberty without due process of law.

[1] The punishment prescribed in the act in question is imprisonment, a most common and usual method of punishment the world over. The claim that it is cruel and unusual must of necessity be directed, not to its nature, but to its limits of time, "not less than 15 years nor more than 30." That class of cruel and now unusual punishments at one time sanctioned and prevalent under the common law of England, such as burning at the stake, drawing and quartering, mutilation, starvation, and lesser forms of physical torture, to which the constitutional prohibitions were primarily directed, is not involved here. Approaching the dividing line, the inquiry as to what does in any particular case constitute cruel and unusual punishment under the constitutional provisions turns, not only upon the facts, circumstances, and kind of punishment itself, but upon the nature of the act which is to be punished.

The most serious part of the crime defined in this statute, and the especial depravity which is to be punished, is manifestly the use of high explosives in a building as an agency to facilitate the perpetration of a felony, a branch of criminal activity regarded with increasing disfavor since the time of Guy Fawkes and steadily becoming more dangerous, more easily resorted to, a greater menace to organized society and more fear-inspiring with the development in kinds, strength, facilities in handling and use of those deadly agencies. The ease with which they can be procured and applied and the common knowledge of methods obtained from their general use in legitimate lines has resulted in an alarming increase of their application to unlawful ends. The results of their criminal use, like the use of fire in arson and the scattering of poisons, are not to be foreseen, and are often far-reaching, beyond the crime intended. As the intentional firing of a hovel may result in the unintentional burning of a city, so the intentional dynamiting of a building for revenge or as a warning to the owner, or the use of explosives to obtain access to the interior of a vault or safe may cause the unintentional destruction of many lives. The viciousness of the crime is not only in the actual or intended result, but in the possible and unknown result. It can legitimately be inferred that the Legislature enacted this new law with reference to the growing activities in that branch of criminal endeavor. "It will be conceded that the Legislature has the constitutional power to fix the minimum as well as the maximum of the punishment. It has also the exclusive jurisdiction of defining crime and prescribing the punishment. It

is supposed to represent the sentiments and wishes of the people." *People v. Morris*, 80 Mich. 641, 45 N. W. 591, 8 L. R. A. 685. "The Legislature is ordinarily the judge of the expediency of creating new crimes and prescribing penalties, whether light or severe, for prohibited acts." *Commonwealth v. Murphy*, 165 Mass. 68, 42 N. E. 504, 30 L. R. A. 734, 52 Am. St. Rep. 498. We are not prepared to hold that the punishment prescribed in this act does not fit the crime, or that the minimum punishment, which is the test, should be regarded as so unusual and cruel, and so disproportionate to the offense as to shock the moral sense of the public.

A question somewhat analogous to this was raised in *People v. Morris*, supra, which involved a statute prescribing a particularly severe punishment for horse thieves, who were said to have become specially active and obnoxious at the time of the passage of the act. The court there said: "When a statute is challenged as in conflict with the fundamental law, a clear and substantial conflict must be found to exist to justify its condemnation. * * * It is argued that under this law a prisoner must be sentenced from three to fifteen years, while under other statutes, for the larceny of property of the same value, he could only be imprisoned for one year. This is not a fair or legitimate test. Our statutes, and so probably the statutes of all the states, recognize this distinction. Under our statutes, larceny from the person, larceny from a dwelling house, or at a fire, may be punished by imprisonment for five years. The cashier or any officer or servant of a bank, who takes any of the property intrusted to his care, and thereby commits larceny, may be imprisoned for ten years. Any officer, clerk, or person employed in the state treasury may, for larceny therefrom, be imprisoned for fourteen years. So, too, any person who shall, at the same term of court, be convicted of three distinct larcenies, may be imprisoned for fifteen years. In all these cases the property stolen may not exceed the value of a dollar. It has never been contended that any of the punishments imposed by these statutes were cruel or unusual."

[2] We think the objection that the law is unconstitutional because the object of the act is not expressed in its title is not tenable. The title describes the act as "defining the crime of burglary with explosives and providing the punishment therefor." The one short paragraph constituting the body of the act is devoted exclusively to that subject and purpose. That the statutory burglary there defined varies from the definition of common-law burglary and is to some extent a departure from the principles which underlie the ancient law on that subject does not militate against the act. As already observed, it is within the constitutional power of the Legislature to create and define the elements

which constitute new crimes, and to name them as it sees fit.

[3] The claim that this act is unconstitutional because it places a greater burden on one than upon another, does not give equal protection to all, and inflicts on one greater penalty than on another is based upon the fact that there are several kindred acts in this state, prescribing a less severe punishment, which include, to a greater or less extent, elements of the offense created by the act under which respondent was convicted. As a consequence, it is said the Legislature has so arranged these laws that the prosecuting attorney may at will choose the one under which he will proceed, and thus decide the penalty to be inflicted upon the accused, usurping in effect the power of the court to exercise its discretion in pronouncing sentence. The prosecuting attorney has been declared by this court to be a quasi judicial officer, and is vested with certain discretionary powers in the administration of the criminal law. As was pointed out in *People v. Morris*, supra, the laws of this state, as well as of other states, present numerous cases of similar statutes covering allied offenses and degrees of offense, like the different forms of assault and of larceny, in which the nature of the case might render it possible for the prosecutor to bring any one of several different charges against the accused. So long as these laws are not repugnant, they are not invalid because the accused could have violated more than one of them at the same time in a certain transaction.

[4] It is claimed, however, that said Act 64, under which respondent was convicted, is repugnant to sections 11545-11548, and particularly section 11506 of the Comp. Laws of Michigan; the latter section covering the identical offense of which respondent was convicted, and which prescribes a much lighter minimum punishment than the one under which he was charged. Sections 11545-11548 of said Comp. Laws define, grade, and fix the penalty for various forms of statutory burglary, covering breaking and entering, entering without breaking, in the nighttime and in the daytime, armed and unarmed, with and without making an assault, a dwelling house or other described buildings, occupied and unoccupied, committing or attempting to commit, under the various conditions enumerated, different stated crimes. In none of these sections is any mention made of the use of explosives. They are readily distinguishable from, and not repugnant to, the statute in question.

[5, 6] Section 11506, entitled "An act relating to the punishment of bank, safe and vault robbery," is as follows: "Section 1. The people of the state of Michigan enact, that whoever, with the intent to commit the crime of larceny, or any felony, shall confine, maim, injure or wound, or shall put in fear any person for the purpose of stealing from any building, bank, safe, or other depository

surrender the means of opening any building, bank, safe, vault, or other depository of money, bonds, or other valuables, or shall attempt to break, burn, blow up, or otherwise injure or destroy any safe, vault, or other depository of money, bonds, or other valuables in any building or place, shall, whether he succeeds or fails in the perpetration of such larceny or felony, be punished by imprisonment in the state prison for life or any term of years." This statute was enacted in 1877, 30 years before said Act 64. If yet in force in all its provisions, it would seem clearly applicable to the facts in this case, and the prosecuting attorney could properly have charged the respondent with a violation of the older statute, under which his minimum sentence might be but two years. The act, however, does not in the portion relating to the use of explosives specifically make the breaking and entering of a building with intent to commit crime an ingredient of the offense, nor name the various high explosives, the use of which shall constitute the crime of "burglary with explosives," as does said Act 64. Under the older law, respondent could be convicted without proof that he broke and entered a building with intent to commit crime, if it were shown he at any time or anywhere attempted to break, burn, blow up, etc., for the criminal purposes charged, while under the latter law he could not.

When acts are *pari materia*, though enacted at different times and not referring to each other, they are to be taken and construed together, as explanatory of and supplemental to each other, and sustained, if possible, in order to effectually carry out the legislative intent and produce a consistent and harmonious system. In the disposition of this case, it is not necessary to determine whether or not such a result can be reached here, and both statutes sustained. Conceding that said section 11506, passed in 1877, is inconsistent with, and repugnant to, said Act 64, passed in 1907, and applying the rule of construction which obtains in such cases, the later law prevails, and the earlier falls. "It is a principle of universal application in the construction of statutes that, if two legislative provisions are found to be inconsistent, the court in construing them will give effect to the later expression of legislative will. Therefore, if two statutes make inconsistent provisions for the punishment of the same act, the later repeals the earlier. * * * In the absence of an express repealing clause, a subsequent statute repeals a former one only so far as the two are inconsistent." McLean on Criminal Law, §§ 91, 92. This is an old and long established doctrine. In the early case of *Rex v. Cator*, 4 Burr. p. 2026, it appeared

punishment not exceeding 100 and imprisonment of 8 months for the first offense, and for a second offense a fine in the discretion of the court, and imprisonment for 12 months. The later statute, defining the same offense, imposed a forfeiture of £500 and imprisonment for 12 months for the first offense, and for the second a forfeiture of £1,000 and imprisonment for 2 years. It was held that the second statute repealed the first, the court saying: "By the latter act, there is no discretion left in the court. The punishment directed in it is peremptory." It has also been held where two acts of different dates, covering the same offense, are found upon the statute books, that when the Legislature imposed in the second act a different punishment for the offense, whether it be smaller or larger than the former one, the former is repealed by implication. *Nichols v. Squire*, 5 Pick. (Mass.) 168. This subject has been reviewed and numerous authorities cited in *Commonwealth v. Davis*, 77 Mass. (11 Gray) 48, wherein a former statute defining and providing the punishment for maintenance of a disorderly house was held to have been repealed by a subsequent statute upon the same subject prescribing more severe penalties.

In the case at bar if, as claimed by respondent, the two statutes under consideration cover identically the same offense, providing a different and greater punishment in the later, the earlier is repealed, and therefore said Act 64 of the session laws of 1907, under which respondent was convicted and sentenced, stands alone, as the only law in this state under which he could be prosecuted for such offense.

For these reasons, we are constrained to hold that said act is constitutional and valid, that the court pronouncing sentence was not without jurisdiction, and the judgment must stand affirmed.

MOLBY v. MURRAY.

(Supreme Court of Michigan. Dec. 17, 1912.)

1. WITNESSES (§ 166*)—COMPETENCY—TRANSACTIONS WITH DECEASED PERSONS.

Under Comp. Laws 1897, § 10212, as amended by Pub. Acts 1903, No. 30, providing that, when a suit is prosecuted by the heirs, assigns, devisees, legatees, or personal representatives of a decedent, the opposite party may not testify to matters which must have been equally within the knowledge of decedent, the maker of a note, when sued by a transferee of an assignee of the administrator of the deceased payee, may not testify to matters equally within the knowledge of the deceased payee.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 702; Dec. Dig. § 166.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. **BILLS AND NOTES (§ 508*)—OWNERSHIP—EVIDENCE—SUFFICIENCY.**

Evidence held to support a finding that one suing on a note as transferee thereof was the owner thereof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1728-1732; Dec. Dig. § 508.*]

Appeal from Circuit Court, Hillsdale County; Guy M. Chester, Judge.

Action by George S. Molby against Abner Murray. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, and OSTRANDER, JJ.

O. A. Shepard and B. E. Sheldon, both of Hillsdale, for appellant. Powell & Chase, of Hillsdale (F. A. Lyon, of Hillsdale, of counsel), for appellee.

KUHN, J. The defendant is sued in assumption as the maker of the following note: "Reading, Michigan, Oct. 2, 1900. \$100.00. Sixty days after date, for value received, I promise to pay to the order of Byron Berry, one hundred dollars, at the State Bank of Reading, with interest at the rate of six per cent. per annum, interest payable annually from date, until paid. Abner Murray." Indorsements are as follows: "Oct. 2-01 interest paid in full, \$6. Nov. 12th-04 by team, \$2.50. Pay to the order of Phebe E. Berry, Elvin P. Starr, Admr. Estate of Byron Berry, without recourse. Pay to Geo. S. Molby or order. Phebe E. Berry."

[1] 1. The main question involved in this appeal is whether the trial court erred in refusing to permit the defendant Murray to testify to matters equally within the knowledge of Byron Berry, deceased, the payee of the note. The testimony was excluded by authority of section 10212 of the Compiled Laws of 1897, as amended by Act No. 30 of the Public Acts of 1903, which provides, in part, as follows: "When a suit is prosecuted or defended by the heirs, assigns, devisees, legatees or personal representatives of the deceased person, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person." Counsel for defendant urge that the word "assigns," as used in this statute, can include only a person to whom the property or right is transferred by a deceased person in his lifetime, and cite in support of this proposition the case of Ripley v. Seligman, 88 Mich. 177, 50 N. W. 143. This question was not involved in this case because the assignment was made by the deceased in his lifetime, and the court held that such an assignee would come within the meaning of the statute. The following language is also used: "The statute is broad

enough to cover successive transfers, or where the controversy depends on the acts or dealings with the property of the deceased in his lifetime; and any one who is called upon to prosecute or defend such interest which is affected by the act or agreement of the deceased party through whom he claims may invoke the protection of the statute to shield his interest from the testimony of the opposite party to matters which, if true, were equally within the knowledge of the deceased person through whom he claims." In the case of Olin v. Henderson, 120 Mich. 154, 79 N. W. 180, Chief Justice Grant said: "Defendant was asked to testify to a conversation between him and Mr. Campau, deceased, in 1878, in regard to the building of this fence. This was excluded, under 3 How. Stat. § 7545, as amended by Act No. 121, Pub. Acts 1895. Counsel sought to defend the admission of this testimony upon the ground that the plaintiffs are not the assignees of Mr. Campau, but are grantees of his heirs several times removed, and that the statute only applies to a case where the property or right was transferred by the deceased in his lifetime. We think the statute is broad enough to include this case within the beneficial prohibition. This statute was held in Lloyd v. Hollenback, 98 Mich. 203 [57 N. W. 110], to include the heir. If it includes the heir, for the same reason it should include the grantee or assignee of the heir. It was also held in Ripley v. Seligman, 88 Mich. 189 [50 N. W. 143], that the assigns of a deceased person include the grantee of the grantee of the deceased person. The testimony was properly excluded." See, also, Letts v. Letts, 91 Mich. 596, 52 N. W. 54. We believe this to be controlling, and the court did not err in excluding the testimony.

[2] 2. It is also urged that there was no proof of ownership of this note on the part of the plaintiff. An examination of the record discloses that there was evidence of ownership in the plaintiff, who testified: "I know Byron Berry and Phebe Berry. She is my grandmother. I know Elvin P. Starr. I remember purchasing a note of my grandmother. It was in the fall, about 1904, that I received this note from my grandmother. Q. And did you pay her the consideration for the note? A. Why, in services I did." The administrator, Elvin P. Starr, testified: "Q. Now this note came in the administration and distribution of the estate. This note came to Mrs. Phebe Berry? A. Yes, sir. Q. Well, what did you do with the note? A. I turned it over to Mrs. Berry." The question of ownership was properly submitted to the jury, and they were justified in finding ownership in the plaintiff upon this testimony.

3. We are of the opinion that the question

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

jury.

We find no reversible error in the record, and the judgment is affirmed.

Because of the death of BLAIR, J., this case was reassigned on the 11th day of September, A. D. 1912.

HOLDEN v. BUTLER.

(Supreme Court of Michigan. Dec. 17, 1912.)

1. ACCOUNT (§ 1*)—LIENS (§ 7*)—CONTRACT SUBJECT TO ACCOUNTING.

A contract wherein a son, in consideration of a deed from his mother of her dower interest in certain land, agreed to give her one-third of the income from same, was one on which equity might decree an accounting and a lien for the income not paid over, though it was personal in nature and did not in terms provide for a lien and was not recorded until a demand for payment of the income was made and refused.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 1-8; Dec. Dig. § 1; * Liens, Cent. Dig. §§ 26-28; Dec. Dig. § 7.*]

2. VENDOR AND PURCHASER (§ 232*)—BONA FIDE PURCHASERS—NOTICE.

Where a mother conveyed her dower interest to a son for one-third of the income from the land and continued to reside on the premises with her son and his wife, it put the wife on notice and prevented her successfully claiming the rights of a bona fide purchaser of the property without notice of the mother's rights, especially where the agreement was executed under such circumstances that she could not well have been ignorant of it.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

3. VENDOR AND PURCHASER (§ 223*)—BONA FIDE PURCHASER—POSSESSION UNDER DECREE OF DIVORCE.

A wife took title to premises granted her by decree of divorce subject to the outstanding equities against it; the fact that the conveyance was a voluntary one for which she paid nothing precluding her from being a bona fide purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 467, 468; Dec. Dig. § 223.*]

Appeal from Circuit Court, Eaton County, in Chancery; Clement Smith, Judge.

Action by Mary E. Holden against Eva B. Butler. From judgment for defendant, complainant appeals. Reversed.

Argued before McALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ.

George Huggett, of Charlotte, for appellant. Frank A. Dean, of Charlotte, for appellee.

BIRD, J. In the year 1873, complainant's husband died intestate, leaving three sons, Daniel, James, and George, him surviving. The homestead, consisting of 40 acres of land in Eaton county and a small amount of personal property, constituted his estate. Complainant and the boys continued to live on

he undertook to manage the farm alone. About this time the dwelling was divided into two apartments; complainant and her sons James and George living in one, and Daniel and his wife in the other. In the year 1885, Daniel made an agreement with his brother James to buy his interest in the estate for the sum of \$250. In order to do this, he had to mortgage the premises. The prospective mortgagee would not accept the mortgage subject to complainant's right of dower. Daniel therefore made an arrangement with complainant, his mother, whereby she quitclaimed to him her interest in the estate, and in consideration thereof received from him the following written agreement, which was neither witnessed nor recorded until the year 1908: "This agreement made this 7th day of December, A. D. 1885, and between Daniel O. Holden, of Bellevue, Michigan, of the first part, and Mary E. Holden, of the same place, of the second part, witnesseth: That the party of the first part for and in consideration that the said party of the second part has sold and conveyed to said party of the first part by quitclaim deed all her dower and homestead interest in and to the lands of which her late husband, James Holden, died seised, hereby agrees to let the said party of the second part have and occupy that portion of the house which she now occupies, upon said homestead land, for and during her natural life, and also that he will during each year during the lifetime of the said party of the second part, give and deliver to the said party of the second part one-third part of all crops and produce raised by him on said homestead land of forty acres so conveyed to said party of the first part as aforesaid; and also to let the said party of the second part get her firewood sufficient for her use from said homestead land as long as there is any timber remaining thereon. In witness whereof the party of the first part has hereunto set his hand the day and year above written. Daniel O. Holden."

When this agreement was given, Daniel agreed with his mother that he would buy the interest of George as soon as he became of age. In 1903, instead of purchasing the interest of George, George purchased his interest, and Daniel and his family left the place for something like two years, after which they returned and Daniel repurchased the entire premises from George. Matters went along in this way, complainant living in her apartment and defendant and her husband, Daniel, living in the other, until some time in 1896, when complainant went to remain for a time with her brother on account of sickness in his family. Subsequently the brother died and she remained with her nephew and niece until 1908, during which

*For other cases see same topic, and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

time her mother had claimed in her apartment and she had kept the possession thereof but had not demanded one-third of the crops reserved to her in the agreement. During the years that complainant was away, trouble had come to Daniel and the defendant and had separated them. Before leaving defendant, Daniel conveyed the premises to her by quitclaim deed. Subsequently, for the purpose of promoting a reconciliation between them, defendant caused the premises to be conveyed to herself and Daniel as an entirety. The peace pact was soon broken by dissension, and Daniel again left defendant. She then sought a decree of divorce, which was granted, and with it the title to the entire premises. A few days after the divorce was granted, she changed her name by marriage to Bailey. After the divorce was granted, defendant, aided by her son, paid the balance due upon the mortgage, amounting to \$585, the major portion of which came from the avails of the farm. In August, 1908, complainant had reached the age of 72 years, and, feeling that she could no longer work as she had done, she demanded of the defendant that from then on she must have the income which was reserved to her by the agreement. The defendant professed not to have any knowledge that any such agreement was ever made and refused to comply with complainant's demand, whereupon this bill was filed to enforce her rights under the agreement. After a hearing in the cause was had, the trial court denied her the relief prayed, and held that: "Upon a consideration of the entire case as it appears to me from the proof, I am of the opinion that complainant has no legal rights in the land in question and that it would be inequitable and unjust to burden the land with such a lien as complainant claims. The contract under which she asserts her claims is a personal one as against her son Daniel O., and cannot be enforced against the land, or against the defendant. There is no proof showing knowledge on the part of the defendant of the existence of the contract under which complainant claims and I am satisfied she had no knowledge of it. It is very probable that, had she known it, she would not have paid the Allen mortgage and had it discharged. It seems to me it would be inequitable, after the long silence of the complainant as to her claims and rights, permitting the payment and discharge of the mortgage, in ignorance of her claim, to further burden the land with the claimed accumulated yearly lien upon the land for all these years, and with the further burden of an annual incumbrance on the same equal to one-third of all crops and proceeds raised on the same. I not only feel that this would be inequitable and unjust, but further than that I do not think she has a legal claim under her contract with her son as against this land, or the defendant."

[1] While the agreement which Daniel gave to his mother was a personal one and did not in terms provide for a lien, it was one in which a court of equity might have very properly ordered an accounting and made the amount found due thereon a lien on the premises while they were owned by Daniel or any subsequent purchaser who had notice of the agreement. *Baker v. Baker*, 157 Mich. 76, 121 N. W. 287.

[2] Complainant does not ask for an accounting for the time that she was away, but only from the time of her demand in August, 1908. We think she is entitled to this relief. Complainant surrendered her interest in the estate to enable Daniel to raise money to purchase the interest of his brother George, and we think the mortgage and agreement were executed under such circumstances that defendant could not have been ignorant of the agreement. Such readjustments of property rights in families are usually preceded by much discussion, and the testimony of James would indicate that this case was no exception. He testified that the agreement was discussed by members of the family in defendant's presence. Defendant claims that she thought the \$50 paid to complainant for her share in the personal property was in payment of her interest in the estate. If she was sincere in this claim, she must have been very curious afterward to know by what right complainant continued to occupy and keep possession of her apartment in the dwelling. Complainant never surrendered the possession of her apartment in the dwelling. This was notice to defendant that complainant had some rights there, and it was then her duty to learn what they were.

[3] But aside from this question, defendant was not a bona fide purchaser. The conveyance was a voluntary one. And as she paid nothing for it, she would take the premises subject to the outstanding equities against it. *Peters v. Cartier*, 80 Mich. 124, 45 N. W. 73, 20 Am. St. Rep. 508; *Otis v. Kennedy*, 107 Mich. 312, 65 N. W. 219; *Hoffman v. Simpson*, 121 Mich. 501, 80 N. W. 1133; *Ziegler v. Valley Coal Co.*, 150 Mich. 82, 113 N. W. 775, 13 Ann. Cas. 90.

We conclude that defendant has no equities which ought to be preferred to those of complainant. Complainant is entitled to have her rights under the agreement enforced. If the parties are unable to agree as to the value of one-third of the crops raised since complainant's demand in 1908, an accounting thereof will be taken under the direction of the trial court, and, when determined by the court or by an agreement, the amount will be made a lien on the premises until paid.

The decree of the lower court will be reversed, with costs to complainant of both courts.

Supreme Court of Michigan. Dec. 11, 1912.
1. **WATERS AND WATER COURSES (§ 179*)—MEASUREMENT OF WATER—PRESUMPTIONS.**
In the absence of a showing as to what method was used in measuring an eight-foot head of water in a stream, as between two dam owners, it will be assumed the usual method was adopted; that is, by measuring the vertical distance from the water in the flume or place from which it is drawn to the tailwater.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. § 179.*]

2. **WATERS AND WATER COURSES (§ 185*)—FLOWAGE RIGHTS.**

Grant by an upper dam owner to a lower owner of right to maintain an eight-foot head of water requires the grantor to bear all the consequences, without regard to how far back the water is set.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 213; Dec. Dig. § 165.*]

3. **WATERS AND WATER COURSES (§ 164*)—FLOWAGE RIGHTS.**

That a dam owner entitled under a grant to maintain an eight-foot head of water maintained only seven feet for 20 years would not preclude him from afterwards maintaining the greater head as against the grantor.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 210-212; Dec. Dig. § 164.*]

4. **WATERS AND WATER COURSES (§ 165*)—FLOWAGE RIGHTS—"EIGHT-FOOT HEAD OF WATER."**

Grant of right to maintain a "dam to a height as to have at no time a head of water at said dam of more than eight feet," etc., does not permit maintenance of a dam eight feet high, if the water flows over the crest at a depth of two or more inches.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 213; Dec. Dig. § 165.*]

Appeal from Circuit Court, Ionia County, in Chancery; Frederick W. Mayne, Judge.

Bill by Mary Tebbel against the Spencer Electric Light & Power Company and another. Decree for defendants, and complainant appeals. Affirmed.

Argued before MOORE, C. J., and OSTRANDER, BIRD, BROOKE, and STONE, JJ.

George E. Nichols and Locke & Sheldon, all of Ionia, for appellant. I. L. Hubbell, of Belding, and R. A. Hawley, of Ionia, for appellees.

BIRD, J. This contest is between two dam owners. The dams are about one-half a mile apart. The complainant, who is the upper proprietor, claims that the first-named defendant, who is the downstream proprietor, is maintaining a head of water in excess of what it is entitled to, with the result that it backs the water into his tailrace and diminishes his power. The defendant takes the position that it can and has established its right to maintain an eight-foot head, and that, if the water standing at that level

sides were ably represented, the trial court denied complainant the relief which he sought and dismissed his bill, and under defendant's prayer for affirmative relief fixed the height the water could be raised at defendant's dam and directed the point to be ascertained and marked by a suitable monument.

The complainant's mill and dam are located on Seeley creek, near the village of Smyrna, in the county of Ionia. Seeley creek discharges its waters into Flat river. A short distance downstream from the junction of the two, the defendant's mill and dam are located. Complainant's mill and dam were built in the early 50's, and the defendant's about 10 years later. The natural fall between the two dams is about six feet. From the time defendant's dam was built until the year 1874, approximately a six-foot head was maintained. During these years complainant claims that his grantors had a head of nearly 20 feet. In the year 1873 the respective owners of these dams fell into a disagreement over the attempt of defendant's predecessor to reconstruct a portion of his dam, which had been washed out by a flood, higher than it had been theretofore maintained. The controversy found its way into court, but was adjusted by the parties themselves in March, 1874, before it came to a hearing. The terms of the compromise were a conveyance to defendant by complainant of the right to flow the lands above his dam to the extent that an eight-foot head would necessitate, and complainant received therefor, as a consideration, the sum of \$1,150. This change in their respective rights lessened complainant's head two feet and increased defendant's to eight feet. Matters went along without much friction until 1904, when complainant complained to defendant that it was maintaining a head in excess of eight feet. More or less controversy between them thereafter ensued until this suit was begun in 1906.

Complainant purchased the Seeley creek property in 1880, and he claims that at that time he measured the head and found it to be 17½ feet. He charges that this 17½-foot head has gradually lessened until now he has only a 16-foot head, and he further charges that defendant is responsible for this diminution of his power by increasing from time to time the height of its dam and thereby increasing its head. Complainant also charges that the defendant the Belding Land & Improvement Company owns and maintains a dam on Dickson creek, which empties into Flat river some distance upstream, and that it impounds the water for a considerable period and then releases it in such large quantities that the water is driven up into his tailrace, thereby prevent-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 188 N.W.—68

ing his tailwater from getting away as quickly as it otherwise would. This he claims is done for the benefit and with an understanding with the defendant electric company.

The defendant electric company relies on its grant from complainant's predecessor in title by which it acquired the right to maintain an eight-foot head, and insists that it has not in the past nor is it now maintaining a head of water in excess of eight feet. It is admitted by the defendant electric company that, since it purchased the property in 1893, it has steadily held the water somewhat higher than it was previously held, and that it was justified in so doing because the old dam was incapable of carrying an eight-foot head; that since its purchase the dam has been repaired and a portion of it rebuilt; that it was at the time of the purchase a leaky dam, but since it has been improved it is tight and will hold the water much higher than before; that since it was improved the water has been carried higher by means of flashboards, but not to the extent that would exceed an eight-foot head.

On the hearing of the case in the trial court, much testimony was offered by complainant tending to show that his dam originally had a 20-foot head, and that defendant had added materially to the height of its dam. The defendant denied both of these propositions and offered proofs tending to disprove them. We shall make no attempt to determine how much head the respective dams carried prior to March, 1874. The settlement which the owners made at that time renders it in a measure unnecessary. By their own agreement the heads of both dams were materially changed, and we think it is by this agreement that the rights of the parties must now be determined. The material portion of the grant from complainant's predecessor in title to defendant's predecessor in title is as follows: "To so erect, enjoy and maintain said dam to a height as to have at no time a head of water at said dam of more than eight feet, with the right and privilege in perpetuity of flowing the land and premises of the said Spencer bordering upon said river and hereinbefore described."

[1] By this grant defendant was given the right to flow complainant's lands to the extent that an eight-foot head would necessitate. We are of the opinion that the defendant still has that right, and this conclusion at once brings us to the question as to how it should be determined. It is conceded by counsel that it should be determined as nearly as possible in accordance with the conditions as they existed at the time the grant was made. It appears that after the settlement surveyors were employed by the owners to take levels and fix the mark of the eight-foot head at both plants, but these marks seem to have long since disappeared.

We think it is safe to assume that the usual method was adopted of ascertaining the head by measuring the vertical distance from the water in the flume or place from which it is drawn, to the tailwater. *Shearer v. Middleton*, 88 Mich. 311, 50 N. W. 737. The trial court found as a fact, and we think he was justified in so finding, that the water in the tailrace, at the time the grant was made, was on a level with the floor in the old wheelhouse at defendant's plant, in which was installed a 74-inch La Fell wheel in 1875. The testimony tended to show that this floor was yet intact and unmoved from its position in 1875. Taking this floor as a basis of measurement, the trial court held that the defendant electric company was entitled to raise the water eight feet above it.

[2] Complainant takes issue with the trial court on this method of determining defendant's head, and says that it should not be made at defendant's dam without regard to the extent of flowage that an eight-foot head would necessitate. The defendant was not given the right to set back the water a certain distance nor up to a certain point, nor was the right granted one to flow a certain number of acres, but was a right to flow such lands as an eight-foot head would necessitate. When complainant's grantor conferred this right upon his grantee, we must presume that he did so intending to accept all the consequences that an eight-foot head would produce. 2 *Farnham on Waters*, p. 1790; *Sanford v. Nyman*, 23 Mich. 328.

[3] It is also contended by complainant that the testimony shows that from 1874 to 1894 there was no change in the height of the head maintained at defendant's dam, and that, if defendant did not raise the water during that time to the full height to which he was entitled, he is now estopped from raising it higher than it stood during that period. There is testimony in the record which shows that the water several times a year, from 1874 to 1894, was raised as high as defendant has ever raised it since 1894; but, were we to concede that counsel is right on the fact, we think he is wrong on the law. If it be conceded that defendant's grantors used only seven feet of head from 1874 to 1894 when they were entitled to eight feet, the nonuse of the one foot for that time would not deprive defendant of the right to claim and use it now. 2 *Farnham*, p. 2294; *Day et al. v. Walden*, 46 Mich. 575, 10 N. W. 26. In the last case cited, Mr. Justice Cooley, in considering a similar claim, said: "The right to the easement was not lost by the mere neglect to assert, use, and enjoy it for the period of 20 years. There is no doubt of this upon the authorities. The easement was created by grant as an appurtenance to the mill, and there were no conditions or limitations attached which rendered its use necessary to its continuance. The grant was perpetual, and without conditions;

cepted grant cannot be waived or abandoned; and the neglect of the grantee to enjoy the easement would be no more significant in its bearing upon his rights than the neglect to enjoy the freehold to which the easement was appurtenant"—citing *Arnold v. Stevens*, 24 Pick. (Mass.) 106, 35 Am. Dec. 305; *Bannon v. Angier*, 2 Allen (Mass.) 128; *Hayford v. Spokesfield*, 100 Mass. 491; *Owen v. Field*, 102 Mass. 114; *Barnes v. Lloyd*, 112 Mass. 224; *Taylor v. Hampton*, 4 McCord (S. C.) 96, 17 Am. Dec. 710; *Elliot v. Rhett*, 5 Rich. (S. C.) 405, 57 Am. Dec. 750; *Corning v. Gould*, 16 Wend. (N. Y.) 531; *Wiggins v. McCleary*, 49 N. Y. 346; *Hall v. McCaughey*, 51 Pa. 43; *Ward v. Ward*, 7 Exch. 838; *Carr v. Foster*, 3 Q. B. 581; *Crossley v. Lightowler*, L. R. 3 Eq. Cas. 279; s. c. on appeal 2 Ch. App. 479; *Cook v. Mayor*, L. R. 6 Eq. Cas. 177.

We are not impressed that complainant and his grantors dealt with their property to any considerable extent in reliance upon the head as maintained at defendant's dam from 1874 to 1894, and therefore there is little or no foundation upon which to base a claim of estoppel.

[4] There seems to be some misunderstanding between counsel as to whether the decree provides for an eight-foot standing head or an eight-foot running head. Complainant insists that the decree provides for an eight-foot running head, and he argues that this is wrong; that, while the terms of the grant are silent as to which was intended, the construction subsequently placed upon it by the parties shows that an eight-foot standing head was contemplated. Our understanding of the decree is that it gives an eight-foot standing head, and counsel for defendants concedes that such is the fact. If there is any question concerning it, we think it should be construed to be a standing head. This, of course, would not necessarily mean that an eight-foot permanent dam could be erected without a violation of the terms of the grant. The language of the grant, that defendant might "erect, enjoy, and maintain said dam to a height as to have at no time a head of water at said dam of more than eight feet, etc.," precludes the right to maintain more than an eight-foot head. Should a dam eight feet high be erected and the water flow over the crest at a depth of two, four, or six inches, a head in excess of an eight-foot standing head would thereby be maintained. Provision must be made to regulate the head so that it will not exceed eight feet.

We are of the opinion that the trial court reached the right conclusion, and its decree will be affirmed. Defendants will recover their costs in this court.

1. BILLS AND NOTES (§ 493*)—NEGOTIABLE INSTRUMENTS—PLEADINGS—CONSIDERATION.

A note negotiable in form imports a consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1652-1662; Dec. Dig. § 493.*]

2. BILLS AND NOTES (§ 90*)—NEGOTIABLE INSTRUMENTS—ACTION BETWEEN PARTIES—DEFENSES.

In an action on negotiable notes between the original parties, the defendant may show want of consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 163, 164; Dec. Dig. § 90.*]

3. BILLS AND NOTES (§ 493*)—BURDEN OF PROOF—CONSIDERATION.

Where, in an action on negotiable notes between the original parties, defendant introduces evidence of want of consideration, the burden of proving consideration rests on plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1652-1662; Dec. Dig. § 493.*]

4. BILLS AND NOTES (§ 94*)—SUFFICIENCY OF CONSIDERATION.

The acceptance of notes in payment of accrued interest on a debt owed by the maker's deceased husband and the indorsement of the amount of such interest was a sufficient consideration for the notes.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166, 212; Dec. Dig. § 94.*]

Error to Circuit Court, Calhoun County; Walter H. North, Judge.

Action by Ellis Cawthorpe, executrix, against Caroline H. Clark. From judgment for plaintiff, defendant brings error. Affirmed.

The declaration was the common counts on three notes, to which the defendant pleaded the general issue, with notice that it would be shown that two of the notes were without consideration, being given by defendant in payment of interest on notes given by her deceased husband, for which she was not liable.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

Edward R. Loud, of Albion, for appellant. Charles R. Wilkes, of Allegan, for appellee.

OSTRANDER, J. Being requested so to do, the trial court on April 24, 1912, made findings of fact and law. The defendant on June 4, 1912, filed exceptions in the following form: "This court having made and filed his findings of fact and law in this case, now comes the said defendant, Caroline Clark, by Edward R. Loud, her attorney, and excepts thereto, as follows: (1) The said defendant excepts to the decision of the court in allowing the said plaintiff to recover on the two disputed notes in question,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and, (2) the said defendant excepts to the findings and conclusions of law of this court in this cause." We find no errors otherwise assigned, although the certificate of the trial judge recites that "the annexed assignments of error" were before the court when the bill of exceptions was presented and signed. No proceedings appear to have been taken by appellant pursuant to circuit court rule 26, except to allege exceptions, as above set forth. This rule provides that the findings of facts shall be treated as special verdicts, "and error may be alleged that the same does not support the judgment, as on a special verdict; but no ruling of law embodied in such finding can be reviewed except on exceptions, or on a case made as provided by statute." Assuming the exceptions to be sufficient, the question presented is whether the facts found support the judgment.

[1] The notes sued upon, being negotiable in form, import consideration, and, in the absence of other evidence, copies of them having been set out in the declaration, plaintiff would be entitled to a judgment.

[2, 3] The action being between the original parties to the notes, and the notes never having been negotiated, it was competent for defendant to introduce testimony to prove want of consideration; the burden being upon plaintiff upon the whole case to prove consideration. *Manistee National Bank v. Seymour*, 64 Mich. 59, 31 N. W. 140; *Taylor v. Taylor's Estate*, 138 Mich. 658, 101 N. W. 832.

[4] The facts supposed to show want of consideration are not disputed. Plaintiff's decedent held the promissory notes of defendant's husband. After the death of her husband, intestate, defendant gave the notes in suit to pay accrued interest upon her husband's said notes. Plaintiff's decedent accepted the notes in suit in payment of such accrued interest and indorsed the amount thereof upon said notes. The estate of defendant's deceased husband has never been administered. Whether defendant's husband had an estate of value and defendant a valuable interest therein, whether forbearance was sought by defendant and was secured, are facts not made to appear.

There is no evidence of reciprocal promises, and in the facts stated there is none of any benefit or advantage moving from plaintiff's decedent to defendant. There is the presumption, already referred to, and the fact that the notes in suit were tendered and received in payment of the debt of a third person, which debt was, to the amount of the notes in suit, discharged. We regard the fact that the third party debtor was deceased when defendant's notes were given as immaterial. There was an act of plaintiff's decedent, the altering of an existing right, presumptively the release or relin-

quishment of a remedy based upon defendant's promises. This is a sufficient consideration for the promises.

The judgment is affirmed.

CARSON v. CARSON.

(Supreme Court of Michigan. Dec. 17, 1912.)

DIVORCE (§ 31*)—GROUNDS—"WANTONLY AND CRUELLY" NEGLECTING TO SUPPORT.

A husband, whose income had been insufficient to support his wife and child, but who was not extravagant or unkind, and who, on reduction of his salary, went West, contributing practically nothing to the wife's support for five years, during which time she supported herself by keeping boarders, and who at the end of that time was earning a salary and hoping to have his wife and child with him, was not guilty of "wantonly and cruelly" neglecting to support his family, within the meaning of the statute.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 95, 96; Dec. Dig. § 31.*

For other definitions, see *Words and Phrases*, vol. 8, pp. 7385, 7386.]

Appeal from Circuit Court, Muskegon County, in Chancery; James E. Sullivan, Judge.

Action for divorce by Mabel C. Carson against Byron L. Carson. Decree for complainant, and defendant appeals. Reversed, and bill dismissed.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, BIRD, and KUHN, JJ.

William Carpenter, of Muskegon, for appellant. Cross, Vanderwerp, Foote & Ross, of Muskegon, for appellee.

BROOKE, J. This is a divorce case. By her bill complainant charged that defendant "has continuously, since July, 1907, neglected and refused to support and maintain your oratrix and her said child; he, the said defendant, being a well and able-bodied man, sufficiently able to furnish and provide support for your oratrix and their said daughter."

Upon the hearing complainant was permitted to amend by inserting the words "wantonly and cruelly" before the words "neglected and refused." From a decree in favor of complainant, defendant appeals.

It appears that the parties were married in 1896; defendant at that time being the manager of the local telephone exchange in Muskegon, at a salary of \$65 per month. After about two years the parties moved to Saginaw, and then to Bay City; defendant still being engaged in the telephone business, and receiving a salary of \$90 per month. This continued until early in 1907. In January of that year complainant, with her daughter, then seven years old, returned to her home in Muskegon to take care of her mother, who was then ailing, and who died shortly thereafter. In the spring of 1907, defend-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ant resigned his position in Bay City, because his salary was reduced from \$90 to \$75 per month. Believing he could do better in the West, he went to Washington in July of that year. The panic of 1907 is said to have been responsible for the fact that he was unable to get any employment for some time. In the meantime complainant kept boarders in her father's home in Muskegon, thus supporting herself and child. The father died in 1908, and she and her brother inherited the property, valued at from \$5,000 to \$6,000.

During the five years, 1907-1911, while complainant was thus supporting herself and child, defendant contributed practically nothing to the support of the child, and nothing to the support of complainant. An operation upon the child's throat becoming necessary, complainant wrote defendant for money, and he sent \$100 for that purpose. He claims to have sent \$150. The expense of the operation was \$160, the balance of which was borne by complainant.

On May 22, 1911, complainant, being tired and worn out, wrote defendant that she intended to give up her boarders and go West to him. In this letter she asks him to tell her exactly how he is situated. Defendant's answer to this letter shows that at that time he had a position at \$75 per month, but hoped soon to do better. His net capital at the time he wrote was but \$77.50. While he expressed an earnest desire to have complainant and their child join him, his letter was, upon the whole, very discouraging, and indicated plainly that at that time he was unable to support complainant and her daughter. Complainant does not appear to have answered this letter, but three months later (August, 1911) filed her bill of complaint.

The earnings of the husband during the first 10 years of his married life seem to have been insufficient for the support of his family. The record does not show any particular extravagance upon the part of either of the parties, yet they were always in debt. They never seemed to be quite able to make ends meet. This condition of their finances is claimed by complainant (and doubtless truthfully) to have caused her much worry and anxiety. During his absence in the West, she repeatedly wrote to him that she would not go to him until he had *something* to which to go. That time seems never to have come; for never has defendant been able to send to her money sufficient to take her and the child to him. There seems to us no doubt, however, that defendant, during all these five years, has been earnestly, though, perhaps, inefficiently, striving to gain a foothold—to better his condition and ultimately to bring his wife and child back to him. His letters, we believe, indicate an honest, genuine affection for his family. While he deplores his past failures, he is al-

ways optimistic and hopeful for the future. Complainant herself credits his good intentions. She testified: "Q. Well, now, then, will say that you haven't any doubt that if you should go out there to live with him that he would support you to the extent that his earnings would enable him to do? A. No I think he would do that, I suppose." Defendant was always kind to his family. Complainant says: "He was one of the quiet sort. He was never ugly."

At the time of the hearing defendant was local manager of a telephone and telegraph office at Centralia, Wash., at a salary of \$85 per month, with (he says) good prospects of early advancement. He then expressed himself as anxious and willing to support his wife and child, if they would go to him.

Can defendant's failure to support complainant for five years, which is admitted, be construed, under the circumstances of this case, to have been wanton and cruel, within the meaning of the statute? We are constrained to hold that it cannot be so construed. *Stewart v. Stewart*, 155 Mich. 421, 119 N. W. 444. Neither misfortune nor incompetence resulting in a failure to support affords the wife any ground for relief under the law. The possibility of such a result was one of the hazards complainant undertook when she assumed the burdens incident to the contract.

The decree must be reversed and the bill dismissed, but without costs.

McBRIDE v. JERRY MADDEN SHINGLE CO.

(Supreme Court of Michigan. Dec. 17, 1912.)

1. MASTER AND SERVANT (§ 88*)—INDEPENDENT CONTRACTOR—WHO IS.

A contractor to cut and deliver timber at fixed prices at places designated is an independent contractor, where the contract does not reserve to the employer the right to control the details of the work or to interfere with the manner of doing the work so long as the contractor is able to do it, and the employees of the contractor are his employees and not the employees of the employer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 144-152; Dec. Dig. § 88.*]

2. MASTER AND SERVANT (§ 88*)—EXISTENCE OF RELATION.

The relation of master and servant exists where the employer retains the right to direct the manner in which the business shall be done as well as the result to be accomplished, but does not exist where the person employed is in the exercise of a distinct independent employment and not under the immediate control or supervision of the employer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 144-152; Dec. Dig. § 88.*]

3. MASTER AND SERVANT (§ 88*)—INDEPENDENT CONTRACTOR—INJURY TO EMPLOYEES.

A teamster employed by an independent contractor hauled logs to pole a lake to make weak spots in the ice safe for hauling over it.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Ke., -No. Series & Rep'r Indexes

He and the contractor had examined the ice and ascertained weak places. While the teamster was hauling logs, the overseer of the employer appeared at the lake and assisted the teamster and showed him where to unload poles. The teamster procured additional loads and unloaded them under the direction of the contractor, and, while attempting to place a load at the place directed by the contractor, the team broke through the ice. *Held*, that the overseer of the employer did not assume such direction of the work as to create the relation of master and servant between the teamster and the employer, and the employer was not liable for the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 144-152; Dec. Dig. § 88.*]

Error to Circuit Court, Chippewa County; Horace M. Oren, Judge.

Action by John McBride against the Jerry Madden Shingle Company. There was a judgment for plaintiff, and defendant brings error. Reversed without granting new trial.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ.

F. T. McDonald, of Sault Ste. Marie, for appellant. M. M. Larmonth, of Sault Ste. Marie, for appellee.

KUHN, J. The plaintiff, being the owner of a team of horses, in the fall of 1909, sent them with a driver, Samuel Hewitt, to Trout Lake, in Chippewa county in this state, to work for Julius Brandt, who had a contract with the defendant company to cut and deliver certain timber at fixed prices on bank or on cars, as designated, near Trout Lake. The contract was in writing and provided that the timber should be cut clean, manufactured in a workmanlike manner, and delivered before April 15, 1909. The time for completing the contract was extended by the defendant, and all the work done by Brandt from 1908 until the spring of 1911 was done under this contract. Some changes were made, by mutual consent, as to the place of delivery; but in 1909-10 the route for hauling the logs was to Trout Lake, and, in order to get the logs to the banking grounds at this place, Brandt made a road and attempted to cross a small lake, approximately 40 rods wide which was frozen and covered with ice at the time. On January 10, 1910, the driver, Hewitt, with plaintiff's horses, was working under Brandt's orders and directions in plowing the road down to the lake. In the forenoon of that day, Brandt and Hewitt walked out on the ice so as to ascertain if it was strong enough to haul logs across. Holes were cut with an ax every 15 or 20 rods, and some weak places were found in the center of the lake. In the afternoon, Brandt told Hewitt to haul some logs, so as to pole the lake, by which means it was intended to make the weak spots on the ice safe, by allowing the poles to freeze in solid. While this work was going on, Timothy P. Cullnan, who was the overseer of the woods operations of the

defendant company, appeared at the lake, and Hewitt claims that he assisted him in loading poles on his dray and went on the ice, cut several holes, and assured him that the ice was safe at those places and showed him where to unload the poles. It is also claimed by Hewitt that Brandt said he would not cross the ice without instructions from Cullnan. Hewitt thereupon left to get a second load of poles and met Cullnan on the edge of the lake as he was coming back. He placed the second load at the point where he had left the first, and, it is claimed, as directed by Cullnan. Cullnan did not return, and Hewitt, after delivering the second load, went after a third, which he placed about 15 feet farther out in the lake, under direction of Brandt, and then went after a fourth load, which he attempted to place still farther out, also under direction of Brandt, whereupon the team broke through the ice and were drowned. Suit was brought against the defendant company for the value of the horses. It was the claim of the plaintiff on the trial of the case below, and it is urged here, that the defendant company's walking boss assumed and exercised such authority over the driver and team of the plaintiff and gave the driver such assurances as to the condition of the ice as to create the relationship of master and servant between the defendant company and the driver. This brings us to a discussion of what is the all-important question in this case.

[1] It is an undisputed fact that in the ordinary relationship Brandt was an independent contractor. There was no provision in the contract reserving to the defendant company the right to control the details of the work. The company had no right to interfere with the manner of doing the work, or to assume direction of it as long as Brandt was able to do it; the only provision in the contract with reference thereto being: "It is further agreed and distinctly understood that should the said Julius Brandt, through sickness, disability, death or any other cause be unable to properly look after and manage the said work, then the parties of the first part shall have the right to take charge of said work and carry out the terms of this agreement at the cost and expense of the said Julius Brandt." No claim is made of any such right to interfere on the part of the defendant company, and Cullnan stated: "Brandt, himself, had the sole direction of cutting the timbers under his contract, and the hauling of it and placing it on the banking ground. Q. Did you have any work to do, or instructions from the company, with respect to that work? A. Why, no more than to go and look around and see how they were getting along." The general rule has been repeatedly stated by the authorities that the relation of master and servant does not exist where the person employed is in the exercise of a distinct, independent employment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and not under the immediate control, direction, or supervision of the employer. De Forrest v. Wright, 2 Mich. 368. This case has been repeatedly cited and the Supreme Court of Massachusetts in Linton v. Smith, 8 Gray, 147, declared it to be a well-considered case.

[2] The relation of master and servant exists wherever the employer retains the right to direct the manner in which the business shall be done as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done. 26 Cyc. 966.

[3] Can it be said that at the time of the accident Hewitt was under the immediate direction and control of the defendant's representative?

The record discloses that Cullnan was not at the scene at that time and that Brandt was actually supervising the work. Hewitt testified: "I was working for Mr. Brandt. Mr. Brandt fixed my wages. Mr. Brandt hired me and also hired this team that was lost. He told me what he would pay me. Q. And you took orders from Brandt as to what you were to do? A. Yes, up to that time. Q. And you knew that he was your boss, and no one else? A. Yes, he gave me orders. Q. You were not working for the Jerry Madden Shingle Company? A. No, sir. Q. And you received no instructions from the Jerry Madden Shingle Company with respect to your work, when you went to work there for Brandt? A. No, sir; only to get my pay. Q. And you got your pay from the Jerry Madden Shingle Company on orders issued by Brandt? A. He gave us our time; yes, sir. Q. And you would go to the Jerry Madden Shingle Company to get paid? A. Yes, sir. Q. You knew you were hired by Brandt, and that you were subject to his instructions? A. Yes, sir. Q. And you knew that he was the man to let you go, and tell you when your work was done? A. Yes, sir. Q. And to let you know if the work was done satisfactorily? A. Yes, sir. * * * Q. Had you left the employment of Brandt and become employed by the Jerry Madden Shingle Company that morning? A. No, sir. The walking boss gave the orders that morning. Q. Did you change your employment that morning? A. I didn't know. The walking boss is the man that gave the orders, anyway. I had not quit working for Brandt. * * * I put the first and second loads at the same point, and the third 15 feet further out as directed by Mr. Brandt. I had to drive the horses 15 feet farther out. The ice was just as good there as where I was. The men were working alongside where the poles were left, making a road. They were poling the ice at the right-hand side of where I put the poles. After unloading these poles, I went back and got another one. Q. Now, you came out with the fourth load, and where did you put that load? A. Brandt

told me to put it a little piece further ahead. Q. And how far did you go with it? A. Went ahead about 20 or 25 feet. Q. Farther on than the third load of poles? A. Yes, sir. Q. And you started to unload them? A. No, sir; the team went through the ice."

Defendant did not hire the driver and he has no power to discharge him. It stood in sort of contractual relation with him. In the case of Riedel v. Moran, Fitzsimons C. 103 Mich. 262, 61 N. W. 509, the doctrine laid down in De Forrest v. Wright, supra, is affirmed. See, also, Reier v. Detroit Stevedores, 109 Mich. 244, 67 N. W. 120; Burr v. Mich. Paint Co., 152 Mich. 613, 116 N. W. 182, 16 L. R. A. (N. S.) 816; Larsen v. Hon. Telephone Co., 164 Mich. 295, 129 N. W. 89. In our opinion, Cullnan, by the acts testified to by plaintiff's driver, Hewitt, did not assume such immediate control and direction of the work of building the road across the lake as to create the relationship of master and servant between the driver and the defendant company at the time of the accident.

The trial judge should have directed a verdict for the defendant at the close of the proofs, as requested by defendant's counsel. It is unnecessary to consider the other assignments of error.

The judgment is reversed, and no new trial granted.

GORMAN et al. v. PATRICK HIRSCH CO et al.

(Supreme Court of Michigan. Dec. 17, 1912.)

1. APPEAL AND ERROR (§ 150*)—PARTY ENTITLED TO APPEAL—PARTY IN INTEREST.

Receivers of a railroad company petitioned for the distribution of the proceeds of the sale of railroad property ordered in a suit, and creditors of the company filed intervening petitions praying for the distribution of the funds among them. The court entered a decree of distribution among the creditors. The attorney for the receiver, who had also appeared for the railroad company, indorsed on the decree his consent to the entry thereof. The railroad company at the time of the decree of distribution was and continued to be in the hands of the receiver. Held, that the railroad company had no interest in the proceeds and could not appeal from the decree of distribution under the rule that an appeal can only be taken by parties affected by the decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 934-946; Dec. Dig. § 150.*]

2. APPEAL AND ERROR (§ 984*)—ALLOWANCE OF FEES—CONCLUSIVENESS.

The allowance by the trial court of solicitor's and receiver's fees in proceedings for the distribution of proceeds of a sale of property in the hands of the receiver will not be disturbed in the absence of anything to indicate that the trial court abused its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3881-3888; Dec. Dig. § 984.*]

3. APPEAL AND ERROR (§ 190*)—ALLOWANCE OF CLAIMS—OBJECTIONS IN TRIAL COURT.

Where, in proceedings by a receiver for the distribution of funds in court, the attention

of the court was called to claims and proofs were taken in open court in relation thereto, though the claims had not been filed with the register, but no objection on that ground was made in the trial court, a decree of distribution of the proceeds would not be disturbed because it allowed such claims.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1216-1220; Dec. Dig. § 190.*]

Ostrander and McAlvay, JJ., dissenting.

Cross-appeal from Circuit Court, Monroe County, in Chancery; Harry A. Lockwood, Judge.

Suit by Frank Gorman and others against the Patrick Hirsch Company and others, in which the Trust Company of America filed a cross-bill. There was a decree directing a sale of the Toledo, Ann Arbor & Detroit Railroad Company, and its receivers filed a petition for the distribution of the proceeds of the sale paid into court, and Frank Gorman and others intervened. From a decree of distribution, the Ann Arbor & Detroit Railroad Company appeals, and Frank Gorman and others cross-appeal. Affirmed.

Argued before MOORE, C. J., and OSTRANDER, STEERE, McALVAY, BROOKE, KUHN, and STONE, JJ.

Ralph S. Holbrook and Claude R. Banker, both of Toledo, Ohio, and Smith Baldwin & Alexander, of Adrian, for complainants. E. R. Gilday, of Monroe, for defendants.

MOORE, C. J. The record in this case covers 400 printed pages. The case is elaborately briefed. We think the following statement of facts, taken chiefly from the brief of the solicitors for the complainants, is justified by the record. We quote:

"This statement is largely taken from the opinion of Judge Lockwood. Prior to April 16, 1904, the Toledo & Northwestern Railway Company had been incorporated under the laws of the state of Ohio to construct and operate a railroad from the city of Toledo to the state line between the states of Ohio and Michigan, and the Michigan Traction Company had been organized under the laws of the state of Michigan to construct and operate a railroad from the state line between the states of Ohio and Michigan to the city of Ann Arbor. Some work had been done in preliminary surveys and in acquiring rights of way between these two cities. On the 16th day of April, 1904, a contract was entered into between the Toledo & Northwestern Railway Company and Patrick Hirsch wherein it was provided that the two railway companies above mentioned should be consolidated in a corporation to be known as the Toledo, Ann Arbor & Detroit Railway Company, which consolidated company should have a capital stock of \$1,500,000 secured by a first mortgage on its property; that this contract should be assumed by the consolidated company, and Patrick Hirsch agreed in said contract to construct and complete a

railroad from the city of Toledo in the state of Ohio to the city of Ann Arbor in the state of Michigan for said consolidated company, to equip the railroad with all necessary power houses, electrical machinery, substations, passenger and freight depots, and to do everything to make a complete railroad, for the sum of \$2,765,000, to be paid with the stock of the consolidated company to the extent of \$1,490,000 par value and \$1,500,000 of its first mortgage bonds at 85 per cent., the same being the entire stock and bond issue of the consolidated company except 10 shares of the capital stock. This contract provided that, immediately upon the execution of the mortgage by the consolidated company, the trustee therein should deliver to Patrick Hirsch \$240,000 face value of the bonds and contemporaneously \$690,000 par value of the capital stock of the company, which were to be received by the contractor as part payment of the contract price, and the balance of the bonds and stocks, it was provided, should immediately be delivered to John H. Clauss, as trustee. It was further provided that, upon the commencement of the work by the contractor, Clauss, as trustee, should deliver to him \$210,000 of the bonds and \$133,000 par value of the said stock, and that each 30 days thereafter the trustee should, upon the receipt of a certificate of an engineer of the consolidated company, deliver \$85,000 face value of the bonds and \$50,000 par value of the stock, and upon the completion of the work should deliver the balance of the stocks and bonds to the contractor. And it was further provided that said Clauss was fully empowered, in his discretion, to hypothecate all of the bonds and stock held by him in escrow, as he might deem it wise, as collateral security for the notes of the contractor or for the payment of loans evidenced by such notes. It provided that the contractor should pay for all incidental expenses, legal counsel, engineering, and every other expense connected with the building and completing and equipping of said railroad. This contract was, on the 26th day of May, 1904, assigned by Patrick Hirsch to Patrick Hirsch Company, a corporation, in consideration of the issuing to him of all its common stock. The consolidated company, known as the Toledo, Ann Arbor & Detroit Railroad Company, was organized as provided in the contract, and Patrick Hirsch Company, a corporation under the laws of the state of Delaware, was also organized.

"The persons who were promoting this railroad, and who became stockholders of the consolidated company, were also stockholders and officers of the Patrick Hirsch Company. Mr. Clauss, who by this contract is made trustee of the bonds and stocks of the consolidated company, became president of the Toledo, Ann Arbor & Detroit Railroad Company and treasurer of the Patrick Hirsch Company. Many of the directors of the rail-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

road company were directors of the Patrick Hirsch Company; in fact, there were no shares of stock in the railroad company except 10 that were originally subscribed for except the subscription was made through the intermediary, Patrick Hirsch Company. In this original contract for the construction of the road, mention is frequently made of Lawrence Barnum & Co. The trustee in the mortgage is to be satisfactory to Lawrence Barnum & Co.; the form and terms of the stock and bonds is also to be satisfactory to Lawrence Barnum & Co.; the first of \$240,000 of the bonds and \$690,000 of the stock are to be delivered upon the order of the consolidated company in such form as shall be approved by counsel for Lawrence Barnum & Co. Pursuant to this contract, the Toledo, Ann Arbor & Detroit Railroad Company on July 1, 1904, made and executed 1,500 bonds of the denomination of \$1,000 each, and a mortgage upon all its property and all the property to be acquired thereafter by it to secure the payment of said bonds, said mortgage running to the Trust Company of America, as trustee, and all of these bonds and all but 10 shares of the stock of the railroad company were placed in the hands of J. H. Clauss.

"As a further preliminary, Patrick Hirsch Company entered into two contracts with Lawrence Barnum & Co. These contracts were simultaneously made and are dated June 1, 1904. One of these contracts, marked Exhibit No. 2, is an agreement on the part of Lawrence Barnum & Co. to purchase 1,113 of the bonds of the Toledo, Ann Arbor & Detroit Railroad Company at 85 cents on a dollar at any time within 90 days after the completion of the railroad in accordance with the plans and specifications, and also providing that the road shall be fully completed within two years from the date of the contract. The other of these contracts, marked Exhibit No. 3, in addition to the discount of 15 per cent. on the face of the bonds provides for the payment of \$13,912.50 in cash to Lawrence Barnum & Co. each 90 days from the date of the contract to the completion of the road, and also payment of \$40,000 in cash and \$147,000 of the bonds and \$100,000 of the stock of the railroad company; in other words, Lawrence Barnum & Co. was to receive, in addition to \$100,000 of the stock, compensation and discount upon the bonds amounting to \$443,200 on the basis that the construction would continue two years. The first of these contracts was shown to the various persons desiring to make subcontracts, but the second was not disclosed. The amount of money actually paid to Lawrence Barnum & Co. on account of this underwriting agreement was \$90,426.62. As a further preliminary step, a so-called unit agreement, Exhibit 10, was made, wherein the organization of these railroad companies was recited, and the proposed consolidation and the issuance of the bonds and

making of the mortgage was also recited, and it was further recited that John H. Clauss is in a position to acquire \$240,000 of the first mortgage bonds to be issued by the said consolidated company when and as soon as the same are issued for the sum of \$204,000 in cash. It was agreed between the subscribers to said agreement that the said bonds and stocks should be divided into 20 blocks or units, each to consist of \$12,000 of said bonds and \$34,500 of said capital stock, and that the subscription price of each of said blocks or units of bonds and stocks should be the sum of \$10,200 in cash to be paid to said Clauss when called for under the terms of the agreement. The subscribers to this agreement subscribed for most all of said units, and it appears from the testimony in this case that these subscribers, each of them, paid \$10,200 for each unit, and received the bonds and stocks as above provided. These bonds and stocks were to be turned over to Patrick Hirsch immediately upon the execution of said mortgage by the terms of his contract with the railroad company. The money received upon this unit agreement went into the hands of Patrick Hirsch Company.

"Patrick Hirsch Company then sublet the construction of this railroad to various parties and made contracts with other parties for material to be used in the construction, among which contracts was a contract with Gorman Bros., the original complainants in this cause, for the construction of the power house at the village of Petersburg; and another with the Lamb Wire Fence Company for constructing fences along the right of way of the railroad; and another with J. L. Hosler & Co. for ties and materials to be used in said railroad. In all these contracts it was provided that Patrick Hirsch Company should pay 50 per cent. or thereabouts in cash and give notes, secured by the first mortgage bonds of the consolidated company, for the other 50 per cent. The right of way was acquired by Mr. Burgoon, employed by the Hirsch Company, and title taken to the Toledo, Ann Arbor & Detroit Railroad Company. Nearly all of it was acquired between the city of Toledo and the city of Ann Arbor. The grading was largely done between these two points. Ties and rails were laid from Petersburg south a distance of about 18 miles and extending about 2½ miles into the state of Ohio. The various subcontractors and materialmen had accumulated large quantities of material along the line of the road, more especially at the village of Petersburg, for the construction of the railroad. Most of the actual work of construction was done between the 1st of June and the 1st of December, 1906. At this latter date, all work and furnishing of materials ceased because of the failure of Patrick Hirsch Company to make payments according to its contracts with the various parties. Later receivers were appointed in this

case for the Toledo, Ann Arbor & Detroit Railroad Company in the state of Michigan, and the same persons were appointed, by the court in Ohio, receivers of the railroad company in the state of Ohio, and a receiver was appointed, by the court in Ohio, for Patrick Hirsch Company.

"After the suspension of work, a number of suits were brought by the subcontractors and materialmen against Patrick Hirsch Company; several of them in replevin for material on the ground and some of it in the track, others in attachment, until finally the bill by Gorman Bros. was filed and all parties, including the railroad company, claiming any right to or liens upon the railroad property, or the materials that had been used in the making of the track so far as it was constructed, were before the court in this case. On August 24, 1906, the original bill of complaint in this cause was filed by Frank Gorman, James Gorman, and Thomas Gorman, comprising the copartnership of Gorman Bros., against Patrick Hirsch Company, the Toledo, Ann Arbor & Detroit Railroad Company, and the Trust Company of America. The purpose of the original bill was for the appointment of a receiver for the railroad company and to enforce a mechanic's lien against certain property in the village of Petersburg upon which the complainants had built and partially completed a power house under their contract with the Patrick Hirsch Company, which latter company had a contract with the Toledo, Ann Arbor & Detroit Railroad Company to construct the railroad from Toledo to Ann Arbor.

"The Trust Company of America filed its answer and a cross-bill in said cause, in which cross-bill the said Trust Company asked to have foreclosed the mortgage given by the Toledo, Ann Arbor & Detroit Railroad Company to it as trustee, covering all of the property of said railroad company to secure the bonds of said railroad company to the amount of \$1,500,000. And in said cross-bill there were made defendants, in addition to the persons already made parties, the Lamb Wire Fence Company, the Fidelity Construction Company, and others. On March 19, 1907, the answer of the Toledo, Ann Arbor & Detroit Railroad Company and of Willis Baldwin and I. H. Burgoon, who had theretofore been appointed receivers of said railroad company, to the original bill of complaint was filed. The default of Patrick Hirsch Company for want of appearance was entered by the complainants. On December 7, 1907, James L. Hosler & Co. filed its answer to the cross-bill of the Trust Company, in the nature of a cross-bill, asking that it be given a lien upon the railroad materials furnished by it under a contract with Patrick Hirsch Company and used in the construction of the railroad. On December 14, 1907, the Lamb Wire Fence Company filed its answer in the nature of a cross-bill

to the cross-bill of the Trust Company, and asked that it be given a lien on certain property which it had attached in a suit against Patrick Hirsch Company prior to the lien of the mortgage of the Trust Company of America. To the answers and cross-bills of the Toledo, Ann Arbor & Detroit Railroad Company and its receivers and of the Lamb Wire Fence Company and of James L. Hosler & Co., the Trust Company of America filed separate answers. The default of Patrick Hirsch Company, for want of appearance and answer to the cross-bill of the Trust Company, was entered by the Trust Company of America.

"On these several issues a hearing was had before Judge Lockwood, and on July 1, 1908, a final decree was entered finding that complainants, Gorman Bros., and the defendants, the Lamb Wire Fence Company and James L. Hosler and Robert C. Bowlius, had no lien against the property in question; that the mortgage given by the railroad company to the Trust Company of America was a good and valid mortgage and a first lien on all the property of the railroad company, and ordered a sale of the railroad and a distribution of the fund realized to the several bondholders as found in the decree, with the following provisions as to the unit holders. The court further finds that 145 of the remaining bonds secured by the said mortgage aforesaid are valid obligations of said railroad company, and were, at the time of the hearing of this cause, held by the parties set forth in the following schedule to the amounts and of the number set forth opposite their respective names, to wit:

Schedule B.

Name.	Nos. of Bonds	Total
J. B. Foraker.....	1 to 12 inclusive	12
J. M. Griffith.....	13	1
Mary S. Bacon.....	14 to 24	11
J. W. Pero & Co.....	25 to 36	12
Chas. Thompson ...	37 to 48	12
M. I. Wilcox Est....	49 to 68	20
W. A. Jones.....	69 to 80	12
W. M. Holliday...	81 to 83	3
O. S. Wilcox.....	84 to 89	6
H. E. Rouse.....	90 to 95	6
M. I. Wilcox Est....	96 to 99	4
H. C. Stahl.....	100 to 111	12
J. H. Clauss.....	377 to 387	11
J. H. Clauss.....	148 to 159	12
J. H. Clauss.....	186	1
M. C. Briggs Est....	137 to 146	10
Total		145

"With reference to all these bonds enumerated in Schedule B and secured by said parties under the so-called unit agreement, the court finds they are outstanding obligations of the Toledo, Ann Arbor & Detroit Railroad Company to the amount of their face, together with the accumulated interest. The court further finds that it is claimed by several of the parties of this cause that all of the 145 bonds enumerated in Schedule B were issued to the parties by which the same are held as hereinbefore set forth un-

der the agreement by which said parties or some of them became the owners of a large amount of the capital stock of the said railroad company, for which said parties paid no value, and that the parties so receiving the said bonds are liable to said company and its creditors for the unpaid value of said stock. The court does not at this time determine the question as to the liability of the holders of said last-named bonds as for unpaid stock subscription, but it orders that the amount to which the holders of said 145 bonds would be entitled to receive out of the proceeds of sale of said property to be paid to the register of the court to abide the further order of the court herein on application of either of the holders of said bonds or of the receivers of said railroad company.

"The railroad having been sold, there was paid to the register of the court November 1, 1909, the sum of \$5,060.64, being the amount due to the aforesaid unit holders. The court then made an order July 12, 1909, upon the petition of the receivers, directing a notice to be published requiring all creditors of the railroad company to exhibit their claims and become parties to this suit on or before February 1, 1910. In accordance with said order, the Lamb Wire Fence Company, Gorman Bros., and J. L. Hosler filed their intervening petitions, setting up claims amounting to \$7,838.88 and \$18,628.25 and \$——, respectively, growing out of their contracts made with the Patrick Hirsch Company as subcontractors in the building of the Toledo, Ann Arbor & Detroit Railroad. The following also filed claims with the register, but not intervening petitions, claiming to be direct creditors of the railroad company: Jno. O. Zabel, \$3,311.32; John White, \$241.62; C. H. Masters, \$500.00.

"The petitions are too lengthy to quote here. They set forth the facts showing the manner of the organization of the railroad company and the Patrick Hirsch Company, the way the road was attempted to be built, and the method pursued in the issuing of the stocks and bonds of the railroad company; alleging among other things the following: The whole purpose and design of the promoters of the railroad company, being the persons above mentioned and their associates, if any, in all the incorporations, contracts, resolutions and acts aforesaid, or done in connection therewith, was and is: (a) To enable said railroad company to issue to said promoters above named the bonds and stocks of the said railroad company at less than their par value, and that the aggregate of said bonds and stocks should be more than twice the actual value of the railroad for which they were ostensibly issued. (b) That by the fiction of a contract for the construction of said railroad with another company it might be made to appear that said bonds and stocks were issued for actual

value, and thus enable the promoters to receive said bonds and stocks and place them on the market for sale to innocent purchasers at a discount, who could not buy directly from the railroad company at less than par. (c) To enable the construction company to make subcontracts with labor and materialmen for the actual construction of said railroad, such as Gorman Bros., but whose claims and demands for payment would be against the construction company and not against the railroad, which latter would have the railroad protected by the lien of the trust deed securing the bonds, and said bonds being payable to bearer, either held by said individuals interested or some one of them, or sold on the market and the proceeds thus received and held for their individual benefits.

"The prayer is as follows: (a) That upon the hearing of this petition the said court may make an order declaring the contract made by your petitioners with the said Patrick Hirsch Company for the construction of the said power house as aforesaid to be a contract made with both corporations, and with the officers and directors of said corporations. (b) That upon the hearing of said petition, the said court may make an order that said contract was made with the Toledo, Ann Arbor & Detroit Railroad Company, as well as with the Patrick Hirsch Company. (c) That the court may, upon the hearing thereof, declare that in equity the said fund should be subject and applied upon the claim of your petitioners.

"On April 5, 1910, the receivers of the railroad company filed a petition to determine the distribution of the money, amounting to \$5,060.64, in the hands of the register, alleging among other things: Your petitioners further represent that they are informed and believe that the holders of said 145 bonds, excepting the said Mary S. Bacon, are indebted to the said railroad company largely in excess of said sum now in the hands of said register (and each of them are so indebted), and certain creditors of the said defendant the Toledo, Ann Arbor & Detroit Railroad Company claimed that all of the holders of said 145 bonds, on account of fraudulent acts of said holders in their connection with the organization and management of the said railroad company and the Patrick Hirsch Construction Company, and because of their purchase of the stock of said railroad company, which they severally have not paid for, and which they are severally owing the said railroad company therefor, are liable to the said railroad company and its creditors as and for unpaid stock subscriptions; and your petitioners aver, upon information and belief, upon the grounds above stated, that all of the said above-named bondholders, except the said Mary S. Bacon, are owing to the said railroad company for unpaid stock as afore-

said for the par value of \$33,500 of stock for each 12 bonds held by each of the above-named parties, and that each one of said above-named persons, excepting the said Mary S. Bacon, is owing to the said railroad company the sum of \$2,791.66 for each bond so held by him respectively.

"The prayer of the petition was as follows: (1) That the court declare all of said funds in the hands of the register of this court, excepting that proportionable to said Mary S. Bacon, be declared a payment on the indebtedness of the aforesaid parties to the said railroad company, and that the same be paid to the receivers of said company. (2) That, in so far as the holder of said bonds appear in this court, this court determine the amount due to the said railroad company from the said holders of bonds respectively, and order such amounts so found to be due to be paid to the receivers of said railroad company.

"Notice to the unit holders, most of them being nonresident, was given by publication, and, none of them appearing, a default was taken against all of them except Mary S. Bacon, who filed an answer admitting that she was the owner of 11 bonds, but denying that she was a unit holder. To the intervening petitions of the fence company and Gorman Bros., an answer in the way of a general denial was filed by the railroad company and its receivers. The case having been heard before Judge Golden on December 16, 1910, a decree was entered finding in favor of the intervening creditors and Mary S. Bacon, and ordering the receivers to distribute the fund and pay the same out as follows: (1) To Mary S. Bacon her pro rata share on 11 bonds. (2) That he pay the costs and expenses of the receivers and their attorneys as follows: John O. Zabel, \$500; Willis Baldwin, \$500; I. H. Burgoon, receiver, \$60; Edward J. Ready, register, \$——. (3) What shall remain in the hands of the court shall be distributed as follows: Pro rata between the said Gorman Bros., Lamb Wire Fence Company, Willis Baldwin, John O. Zabel, J. S. Clark, Fred Froehlich, I. H. Burgoon, John White, and Chas. Masters.

"From this decree the railroad company has appealed, and the Lamb Wire Fence Company and Gorman Bros. made a cross-appeal from so much of the decree as provided for distribution to others than themselves."

[1] The first important question to be determined is whether the railroad company has a right to appeal this case. We quote from the brief of counsel for the railroad company: "Whether or not the railroad company had any right to the so-called fund is neither here nor there; the point is that the appellees, as a foundation for reaching the fund, had to have a decree establishing their claims (which on their face were against another person) as claims against the rail-

road company. This they have obtained, and they have obtained it by a decree; and, if the railroad company has enough life to obtain a decree against it, then it has enough life to defend itself by an appeal. A corporation is not dead simply because a receiver has been appointed over its property. *State v. Merchant*, 37 Ohio St. 251." This sounds well, but it is not conclusive. At this point it becomes important to know the status of the case when the decree was entered. The answers to the intervening petitions after the formal part commenced as follows: "The answer of the defendant the Toledo, Ann Arbor & Detroit Railroad Company, and Willis Baldwin and Isadore H. Burgoon, receivers of said defendant, heretofore appointed in said cause by this court, to the intervening petition of James H. Hosler and Robert A. Bollus, filed herein. These defendants and respondents hereby reserving to themselves all right of exception to the said intervening petition for answer thereto say: * * * It ended as follows: "And deny that petitioners are entitled to the relief prayed for or any part thereof, and ask to be dismissed with their reasonable costs in this behalf expended. The Toledo, Ann Arbor & Detroit Railroad Company, by John O. Zabel, Secretary. Willis Baldwin and Isadore H. Burgoon, Receivers and Respondents, by John O. Zabel, Their Attorney. [Seal.] John O. Zabel, Solicitor for Defendants and Respondents."

It will be observed that these signatures are all made by Mr. Zabel. It has already appeared that as early as July, 1908, it was decreed that the amount —, the "proceeds of the sale of the property, should be paid to the register of the court to abide the further order of the court on application of either of the holders of said bond or of the receivers of said railroad company." It has also appeared that in April, 1910, the receivers petitioned for a distribution of the fund. In that petition a reference was made to the creditors and the amount of their claims, and the following appears: "Your petitioners further show that there are no funds to pay the claims of the said company excepting the sum of \$5,060.64 and such sum as may be realized from such unpaid stock subscriptions"—showing clearly that the railroad company was insolvent. It also appears that after a hearing, and in December, 1910, a decree was entered which, after the formal part, reads in part as follows: "This cause came on to be heard upon a petition of Willis Baldwin and Isadore H. Burgoon, receivers of the Toledo, Ann Arbor & Detroit Railroad Company, heretofore appointed herein by this court, the answer of Mary S. Bacon thereto, and upon the intervening petitions of Frank Gorman and Thomas Gorman, survivors of the copartnership theretofore doing business under the firm name and style of Gorman Bros., the intervening petition of

the Lamb Wire Fence Company, a corporation, and the intervening petition of J. L. Hosler & Co., a copartnership, the answer thereto, the replication of said intervening petitioner to such answers, and the proofs taken in open court in said cause, and having been argued by counsel for the respective parties, and the court having duly considered the same, the court finds as follows." Then follows the findings of the court, including costs and expenses to the receivers and their attorney. Indorsed on this decree is the following: "I consent to the entry of the above decree. John O. Zabel, Attorney for Receivers."

It will be remembered that Mr. Zabel had appeared for all the defendants, and that they had no other solicitor of record. It is clear he had knowledge of the proposed decree, and that the railroad company, as a company, had no interest in the fund, and that it was hopelessly bankrupt. It does not appear that any objection was made to the entry of this decree by Mr. Zabel or by anybody else. Later Mr. Zabel ceased to be the solicitor for the railroad company, and another was substituted in his place by his consent, and this appeal was taken. The fact should not be overlooked that, though notice was given of the petition by publication, none of the unit holders appeared. It should also be remembered that, when this decree was made, the railroad company was in the hands of a receiver, and, so far as the record discloses, is still in the hands of a receiver. The court was not requested to direct the receiver to appeal from the decree. No request was made of the court, or granted, giving the railroad company permission to appeal the case.

The following proposition of law has been stated as to chancery appeals: "An appeal can only be taken by parties affected by the decree appealed from; there must be some substantial rights of the parties to which the appeal would be prejudicial. An appeal will not be allowed in a mere fictitious case, and the court will not entertain mere speculation of parties or feigned issues, and so a merely fictitious case to test the rights of parties who do any particular thing will not be entertained by the appellate courts." Van Zile Equity Pleading & Practice, § 360, p. 494. See *Chapin v. Perrin*, 48 Mich. 130, 8 N. W. 721; *Owen v. Yale*, 75 Mich. 256, 42 N. W. 817; *Weber v. Costigan*, 139 Mich. 146, 102 N. W. 666.

In this case, under all the facts surrounding it, with the railroad company having no interest in the fund, to say that as to the re-

ceivers the decree was a consent decree from which they could not appeal, but as to the railroad company it was not a consent decree from which it could appeal, would be a refinement of words which does not appeal to our sense of justice. We think it must be held that as to the railroad company the appeal should be dismissed. This brings us to the cross-appeal. Objection is made to the allowance to Mary S. Bacon. We think the answer of Mrs. Bacon, the testimony of her husband, and the consent of the receiver justified this part of the decree.

[2] Objection is made to the allowance for solicitor's and receiver's fees. The trial judge was familiar with the litigation which was very considerable, and there is nothing to indicate that he abused his discretion in making these allowances.

[3] Objection is made to the allowance of certain claims, which it is said were not filed with the register. The record shows the attention of the court was called to these claims and proofs were taken in open court in relation thereto. We think the decree as to them should not be disturbed.

We again quote from the brief: "If, however, the court should be of the opinion that they should participate, then we think the court should allow the solicitors of Gorman Bros. and the Lamb Wire Fence Company reasonable compensation for their services in prosecuting this case, to be charged against the fund. Otherwise Gorman Bros. and the Lamb Wire Fence Company, who were diligent and complied with the order of the court, must pay their solicitors in both the lower court and Supreme Court, and to that extent, be worse off than the other creditors, who were tardy and failed to comply with the court's order." Our attention has not been called to any place in the record where the solicitors made this claim in the court below. No reference is made to this subject in the cross-appeal.

We find no reversible error, and the decree is affirmed. As both parties have appealed, no costs will be allowed.

STEERE, BROOKE, KUHN, and STONE, JJ., concurred with MOORE, C. J.

OSTRANDER, J. I think that no reason is given in this opinion for denying to the defendant railroad company the right to appeal. As a majority of the Justices are of a different opinion, it is not necessary for me to examine other questions.

McALVAY, J., concurred with OSTRANDER, J.

**O'BRIEN v. EQUITABLE LIFE ASSUR.
SOCIETY OF THE UNITED
STATES.**

(Supreme Court of Michigan. Dec. 17, 1912.)
**INSURANCE (§ 522*)—TONTINE POLICY—SUR-
PLUS—GUARANTY.**

An illustration blank, attached to a tontine policy, executed by the soliciting agent, from the society's tables furnished to agents for that purpose during the year the policy was issued, expressly stated that the surplus was a varying quantity depending on future experience; that, while a surplus was guaranteed, its amount could not be determined in advance, but that calculations based on past experience showed approximately the surplus and profits which would be payable with such a policy, if issued by the society 10, 15, or 20 years previously, and its tontine period had ended when the illustration was made; that, while future results must necessarily depend on future experience, figures based on past experience furnished the best obtainable data on which to judge of the management of the society and the value of the policies offered. *Held*, that such illustration blank was not a guaranty that the society would pay the surplus estimated therein at the end of the tontine period, or any particular amount of surplus; and hence insured, at the end of the tontine period, could not recover the surplus so estimated, but could only recover the surplus earned during his tontine period and apportioned to the policy by the society.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1306; Dec. Dig. § 522.*]

Error to Circuit Court, Hillsdale County; Guy M. Chester, Judge.

Action by Joseph W. O'Brien against the Equitable Life Assurance Society of the United States. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

Argued before MOORE, C. J., and STEERE, McALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ.

Miller, Smith, Paddock & Perry, of Detroit, for appellant. Smith, Baldwin & Alexander, of Adrian, for appellee.

STONE, J. This is an action in assumpsit, brought to recover the sum of \$2,210.05 and interest, claimed to be due the plaintiff as cash surplus on what is termed a free tontine policy issued to him in 1891 by the defendant. Plaintiff was solicited to take this policy by one Halsey, of Grand Rapids, whom he calls a special agent of the defendant. After some conferences with Halsey, the plaintiff, at Grand Haven, on February 28, 1891, applied for the policy in question, and paid the first premium thereon, and took a receipt therefor, signed by said Halsey as special agent. On March 17, 1891, the policy was issued in New York, and presumably sent to Halsey, because thereafter it was delivered to the plaintiff by Halsey. The policy is Exhibit I, and is hereinafter set forth. When so delivered, according to the claim and testimony of the plaintiff, there was pinned to the policy the illustration blank, or "green slip," Exhibit II.

The policy was in words and figures following:

Exhibit I.

[Body of Policy.]

120 Broadway, New York.

Equitable Life Assurance Society of the United States.

Premium, \$155.50. Amount, \$5,000. Age 30. No. 530-424.

William Alexander, Secretary. Thomas J. Jordan, Assistant Secretary. S. D. Ripley, Cashier. James B. Loring, Registrar. President, Henry B. Hyde. George W. Phelps, Actuary. J. G. Van Cise, Assistant Actuary. James W. Alexander, Vice President. Samuel Borrowe, Second Vice President. Edward W. Scott, Third Vice President. John A. McCall, Comptroller.

In consideration of the written and printed application for this policy, which is hereby made a part of this contract, and of the payment in advance of one hundred and fifty-five dollars and fifty cents, and of the annual payment of \$155.50 to be made thereafter at the office of the Society in the city of New York on or before the 10th day of March in every year (provided that when premium for twenty full years shall have been duly paid to said Society, no further premiums will be required).

Does promise to pay to Mary E. O'Brien, if living, if not then to her husband, Joseph W. O'Brien, his executors, administrators or assigns, at the office of the Society in the city of New York, FIVE THOUSAND DOLLARS, upon satisfactory proofs of the death of said Joseph W. O'Brien, of Grand Haven, in the county of Ottawa, state of Michigan.

New York, the 17th day of March, A. D. 1891.

J. B. Loring, Registrar.

H. B. Hyde, President.

New Free Tontine. No. 89. Second Edition.

Examined by.....

NOTICE.—No person except one of the executive officers named above is authorized to make, alter, or discharge contracts or waive forfeitures.

[On the back of policy, in red.]

List of privileges, the details of which will be found in the application.

This policy becomes incontestable two years from its date of issue. It provides for a paid-up policy after three years for as many twentieths of the original policy as complete annual premiums have been paid. It grants freedom of residence, travel, and occupation after one year. It gives to Joseph W. O'Brien a choice of six methods of settlement upon the completion of the tontine period, on the 10th day of March, 1911 (March 10, 1911) namely:

1. The surrender of the policy for its full value consisting of the entire reserve, amounting to \$2,335.00, twenty-three hundred and thirty-five dollars, together with the surplus then apportioned by the Society, either in (1) cash; (2) paid-up assurance; (3) a life annuity, or

2. The continuance of the policy and the withdrawal of the accumulated surplus, either in (1) cash; (2) paid-up assurance; (3) an annuity.

W. Alexander, Secretary.

H. B. Hyde, President.

[On the front of the policy, in red.]

No. 520,424

The Equitable Life Assurance Society of the United States.

120 Broadway, New York.

Free Tontine Policy.

Assurance on the Life of J. W. O'Brien.

No dividend will be declared on this policy until the 10th day of March, 1911.

Amount \$5,000.

Term, life, 20 A. P.

First payment, \$155.50.

Premium due 10th March, \$155.50.

Register date of policy, 10th March, 1891.

American Bank Note Company, New York.

"William Halsey," at the bottom, written on the bottom of the policy, and the indorsement, indorsed at the bottom, "William Halsey."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Exhibit II.

[Front.]

For Use in 1891.

Free Tontine Illustration Blank.

For 10, 15 or 20 Payment Life Policies, with Corresponding Tontine Periods.

Premiums payable for } 20

Policy \$5000.00.	Tontine Period	} yrs.	
Age 30.	Annual Premium		\$ 155.50
Total premiums paid in 20 years.....			\$3,110.00

Results at the end of the Tontine Period, on the basis explained on the other side of this sheet:

1. *Cash Value*, Consisting of

Reserve	\$2,334.95	
and Surplus	2,210.05	\$4,545.00
2. *Paid-Up Value* (see note on other side) \$9,700.00
3. *Cash Surplus* \$3,210.00

Under this settlement, the policy holder withdraws the surplus in cash, and retains the original policy, which is now fully paid up for \$5,000, or the surplus may be used to buy an *Annuity* to continue with the paid-up assurance during the life time of the policy holder, about \$180.00 per year.

Wm. Halsey, Agent.

Dated at Grand Rapids, 3-4-1891.

N. B.—The foregoing blank must be filled up from the Book of *Tobies* issued during the current year by the Equitable Life Assurance Society of the United States, and based on the Society's actual experience up to 1891.

[Back of Exhibit II.]

The Advantages of a Free Tontine Policy Shown by an Illustration Based on Actual Experience.

The fund belonging to the policy holder at the end of the tontine period, consists of two parts: (1) The *Reserve*, which is a fixed quantity, may be stated in advance, and, if desired, may be written in the policy. (2) The *Surplus* (popularly known as "profits" or "dividends"), which is a varying quantity, depending on future experience. One of the chief recommendations of the Free Tontine Policy is that the Society guarantees the payment of the *Entire Reserve* at the end of the tontine period. The *Surplus* is guaranteed also, but its *amount* cannot be determined in advance. Calculations, however, based on the experience of the past, show approximately the surplus profits which would be payable with such a policy, if it had been issued by the Society 10, 15, or 20 years ago, and ended its tontine period to-day. While the results of the future must necessarily depend on the experience of the future, figures based on past experience furnish the best attainable data upon which to judge of the management of the Society, and the value of the policies now offered.

The Free Tontine Policy grants many benefits denied under all older forms. It gives *absolute freedom* as to *travel, residence and occupation* after *one year*, and becomes incontestable after *two years*.

NOTE.—Where the paid-up value of the policy, at the end of the tontine period, exceeds the face value of the original policy, the assured has the privilege of taking a paid-up policy for the full amount of the original policy, drawing the *excess* on the cash basis; or the paid-up policy may be issued to include this excess subject to a satisfactory medical certificate of good health.

J. G. Van Cise, Asst. Actuary.

120 Broadway, N. Y., Jan. 1, 1891.

Plaintiff did not know whether or not the green slip—Exhibit II—was attached to the policy when issued by the defendant. The written portion of the slip was in the handwriting of Halsey. Plaintiff testified that Exhibit II contained the figures and representations upon which he made the applica-

tion for the policy; that when he received the policy, and the green slip, he read the policy all over, and that he read the front of the green slip sufficiently to verify the fact that the figures given in the green slip were the same that Halsey had previously given him. On cross-examination the plaintiff testified as follows: "When I got this policy I presume I read all of it over, the face of it and the back of it. I presume I took the policy and the green slip together, and understood from them both that I was to be paid \$2,210.05. I knew nothing of this policy that they were going to pay me the surplus until it was handed to me. I never saw these figures on the back of it, until after it was handed to me. I presume I examined the policy, and it was stated on the back of the policy that the surplus was to be, the amount apportioned by the Society in 1911; but that was a condition afterwards, after the policy was paid for, and after the other contract had been entered into. I think I read the green slip while it was attached to the policy. I do not think I read the back of the green slip at that time. We had talked over what was on the front of the green slip before he had filled it in, and I knew what he was going to put in there. I read over the front of the green slip at that time, to verify what he had said to me during his conversations. I noticed at that time that there was a statement on the front of the green slip that it was an 'illustration blank'; but I did not notice at that time the statement on the front that the results given were given on the basis explained on the other side of the sheet. I presume that is stated very plainly on the front of Exhibit II. I have read over the back of the green slip. I presume I read it over about the time it matured. Because the figures had been talked over with Mr. Halsey and myself for several meetings when he solicited my insurance, and when I saw the figures verified that he willingly put in there, I took it for granted that that was all there was to it. I don't suppose I paid very much attention to it."

It is conceded by counsel for the defendant that the figures in the green slip were undoubtedly correctly inserted by Mr. Halsey; that they were correctly computed from the Agents' Book of the Equitable, and were inserted in the green slip under exactly the conditions which they were given in the Agents' Book, and were authorized to be used. The application signed by the plaintiff provided, among other things, as follows:

"VI. Tontine Profits.

"At the end of the Tontine Period, if the person proposed for assurance be then living, and the policy in force, the policy shall participate in the accumulated surplus derived from the policies on the Free Tontine Plan, both existing and discontinued, as may then be apportioned by the Society.

"VII. Choice of Privileges at the End of the Tontine Period.

"The policy may then be surrendered for its full value, consisting of the entire *reserve* and the *surplus* then apportioned by the Society."

Certain Free Tontine Tables contained in the Agents' Book in use by defendant's agents in 1891 were offered in evidence by plaintiff and received, from which the following are extracts:

"Tables for 1891 to illustrate the advantages of Tontine policies and bonds based on the results of Tontine policies maturing in 1891."

"Important.—The Society issues official illustration blanks. The figures in this book are to be used in filling up these blanks. They are to be used in no other way. In no case are they to be given in letters, or on slips of paper, or on any but the Society's official blanks. See that in each case the appropriate figures are correctly given on the proper blank. This book is to be used only during the year 1891, in filling up blanks dated 1891."

"Note.—The amount of profits which will be distributed among the holders of the Free Tontine (and Semi-Tontine) policies and bonds of the Equitable Life Assurance Society of the United States cannot be stated in advance, but calculations based on the experience of the past under Tontine policies which have matured show approximately the surplus profits which would be payable with such policies and bonds if they had been issued in the past and matured to-day. While the results of the future must necessarily depend on the experience of the future, figures based on past experience furnish the best attainable data upon which to judge of the management of the Society, and the value of its policies. These tables are prepared annually to enable agents to give illustrations based on the actual result of policies maturing during the year in which the illustrations are given. This book is to be used only during the year 1891 in filling up the Society's official blanks issued for 1891. Dated January 1, 1891."

Counsel for the defendant concede that the agent, Halsey, was authorized to fill in the blanks in the green slip from the book in the manner which he did, but claim that he had no authority to attach such paper to the policy. The plaintiff paid his premiums for the full period of 20 years, and then elected to take the cash surplus of \$2,210.05, the amount given in the green slip. The defendant offered him \$907.90, which it claimed was the surplus dividend apportioned to his policy at the completion of the Tontine period, in accordance with the agreement in the policy and the application. The plaintiff refused to accept this sum, and this suit was commenced.

The trial court directed a verdict for the

plaintiff for \$2,210.05 and interest, and a judgment for the plaintiff was entered. The defendant has brought the case here upon writ of error, and under appropriate assignments of error it urges two grounds for reversal:

First. That the trial court erred in admitting in evidence the Illustration Blank or Green Slip (Exhibit II), as forming any part of the contract of insurance in the case, or as operating in any way to alter, modify, vary, or explain the terms of the contract between the parties as expressed in the policy and the application, which, taken together, constitute by their terms the entire contract between the parties.

Second. Assuming the Illustration Blank (Exhibit II) to have been properly received in evidence, and to have been properly considered a part of the contract of insurance, its construction was for the court; and the trial court's construction of the exhibit was erroneous as a matter of law.

1. Upon the first ground it is urged by plaintiff that it clearly appears that Mr. Halsey was duly authorized to solicit this insurance, that it is conceded that he had authority to fill in the green slip with the figures taken from the book furnished by the defendant to its agents, that this green slip was furnished by the defendant over the signature of its assistant actuary, J. G. Van Cise, and that the application, the policy, and the green slip made up and constituted the contract of insurance. There is added force in this position from the fact that this paper is expressive of promises and agreements: For example, note the language contained on the back of Exhibit II. Is it clear that the words "this policy" restrict the contract to Exhibit I? Upon this subject see the language of the Supreme Court of Wisconsin in *Timlin v. Equitable Life Assurance Society*, 141 Wis. 276, 124 N. W. 253. We do not find it necessary to pass upon this question; for, if we were to hold that Exhibit II constituted a part of the contract, that holding would not be decisive of the case, for the reason that it did not constitute an agreement on the part of the defendant to pay a definite or agreed amount of surplus upon this policy.

2. If it were conceded that Exhibit II was properly received in evidence, we are of opinion that the trial court, in determining that it constituted an agreement on the part of the defendant to pay a definite or guaranteed amount of surplus upon this policy, incorrectly construed its language. We have here set out in full both Exhibits I and II, that they may the more readily be construed together. A careful consideration of these instruments leads us to the conclusion that a reasonable construction of them shows that the amount of surplus is not fixed or definite, and could not be determined until the end of the tontine period, at which

time it would be apportioned by the defendant, and that, if the experience of the defendant during the said tontine period should prove to be the same as its experience had been in the preceding 20 years, the surplus would amount to the estimate given, but otherwise not, and that the future alone could decide what the amount of the surplus would be, but that there would be some surplus was guaranteed.

Speaking of Exhibits I and II in its charge to the jury, the trial court said: "I think these papers must be construed together, and it must be determined that under these papers, constituting the contract, the surplus was fixed at not less than \$2,210.05. With that view of the testimony and the papers, I think the court would be in duty bound to direct a verdict here for that amount, plus the interest." We cannot agree with the trial court in this construction. That the plaintiff was bound to know the contents of Exhibit II is very clear. *Cleaver v. Insurance Co.*, 65 Mich. 527, 32 N. W. 660, 8 Am. St. Rep. 908; *Cook v. Insurance Co.*, 84 Mich. 12, 47 N. W. 568; *Avery v. Equitable*, 117 N. Y. 451, 23 N. W. 3. The construction of Exhibit II by the trial judge overrides the following express statements:

"The surplus (popularly known as 'profits' or 'dividends'), which is a varying quantity, depending on future experience."

"The surplus is guaranteed also, but its amount cannot be determined in advance. Calculations, however, based on the experience of the past, show approximately the surplus profits which would be payable with such a policy, if it had been issued by the Society 10, 15, or 20 years ago, and ended its tontine period to-day. While the results of the future must necessarily depend on the experience of the future, figures based on past experience furnish the best attainable data upon which to judge of the management of the Society, and the value of the policies now offered."

We think that the clear weight of authority is against the construction of the trial judge. We have examined the following cases cited by counsel for defendant, and they support the position claimed for them: *Avery v. Equitable*, supra; *Grieb v. Equitable* (C. C.) 189 Fed. 498, affirmed in 194 Fed. 1021, 114 C. C. A. 658; *Langdon v. Northwestern*, 199 N. Y. 188, 92 N. E. 440; *Untermeyer v. Mutual Life Ins. Co.*, 128 App. Div. 615, 113 N. Y. Supp. 221. We have not the space to quote from these authorities, as we might do with profit.

The plaintiff relies upon and cites the cases of *Timlin v. Equitable*, supra, and *Equitable Society v. Meuth*, 145 Ky. 160, 140 S. W. 157. In *Timlin v. Equitable*, supra, a life policy in the usual form contained a printed provision that, on the completion of the tontine dividend period, insured might continue the policy for the original amount and apply the tontine dividend to

the purchase of a new action to enforce had been stipulated the annuity, beginning annually that he was entitled to \$750. It is clear from the option that the plaintiff contained a provision beginning with \$1 annually. That case the instant case particulars: There to Exhibit II here.

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surplus apportioned by the Society, \$544, either: (1) Cash, \$1,000; (2) paid-up assurance, \$2,000; (3) life annuity; or (II) the continuance of the policy and the withdrawal of the accumulated surplus, either in (1) cash, \$544; (2) paid-up assurance, \$1,000; or (3) an annuity." The cash surplus of \$544 was sued for. In the list of privileges indorsed on the back of the policy the figures "\$544," "\$2,000," "\$544," and "\$1,000," were written in pencil. Meuth testified that when he received the policy by mail it contained those figures. The defendant did not plead any attempted spoliation of the policy. It did not deny the issuance of the policy, and the court held that its answer put nothing in issue, except the effect of the contract, and the plaintiff recovered, and the judgment was affirmed. We think that the case is readily distinguished from the instant case.

For the error pointed out, the judgment of the circuit court is reversed, and a new trial granted.

CUTHBERTSON et al. v. FIRST NAT. BANK OF CARROLL et al.

(Supreme Court of Iowa. Dec. 14, 1912.)

1. MORTGAGES (§ 38*)—PROTECTING SECURITY—EVIDENCE.

In an action by a mortgagor to declare a deed to be in fact a mortgage, evidence held to warrant a finding that the mortgagee had advanced money to protect his security which had not been repaid.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 108-111; Dec. Dig. § 38.*]

2. CONTRACTS (§ 54*)—CONSIDERATION.

Where notes are given for a debt then incurred, an agreement that they shall cover a prior indebtedness also is invalid because without consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 233-239, 242, 245, 250, 291-315; Dec. Dig. § 54.*]

3. INTEREST (§ 22*)—MORTGAGES—JUDGMENTS.

A mortgagee having taken assignments of judgments which were a lien on the mortgaged land, releasing them on the record to enable the mortgagor to procure a loan, is entitled to the interest provided for in the judgments.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 43-53; Dec. Dig. § 22.*]

4. APPEAL AND ERROR (§ 169*)—PLEADING—REVIEW.

Where an issue is not raised in the pleadings, it cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034; Dec. Dig. § 169.*]

Appeal from District Court, Carroll County; F. M. Powers, Judge.

The facts are stated in the opinion. Affirmed.

B. I. Salinger and L. H. Salinger, both of Carroll, for appellants. Lee & Robb, of Carroll, for appellees.

SHERWIN, J. This action was brought in equity to have a deed declared a mortgage securing a certain amount and no more. The

plaintiffs allege that they are the owners of certain lands, the title to which stands in the name of the defendant bank. The plaintiff E. G. Cuthbertson is the wife of D. W. Cuthbertson, and the petition further alleged: "That for many years immediately preceding the 4th day of January, 1908, there was a long course of dealing between said bank and the plaintiff and her husband. Said dealings included deposits made by plaintiff and her husband in said bank and loans made by the bank to them. In the course of such dealings, the bank purchased for this plaintiff and her husband certain judgments rendered against them in this court, which judgments were liens upon the land in controversy here; the purchase of such judgments being, with the exception hereafter to be stated, done by taking an assignment of such judgments to said bank or to its said president for it; that the price paid for purchasing such judgments was at times paid by the said deposits of plaintiff and her husband, and at other times by loans made to plaintiff and her husband by said bank; that, the method of purchase to the contrary notwithstanding, the said judgments, with the exception hereafter to be stated, were in truth and in fact bought as a method of satisfying the same; and that the purchase price paid for such judgments was either paid for by said deposits or became the debt of plaintiff and her husband to said bank, and that the lien of said respective judgments, with the exceptions stated, was thus extinguished." It was further alleged that among the judgments rendered against said plaintiff and her husband was one in favor of the Rochester Loan & Banking Company. That a sale of the land in controversy was had thereunder, and that the land was bid in by one Graham for the sum of \$2,882.69 under an agreement between the defendant bank, the plaintiff and her husband, and Graham that the bank should furnish the money for such purchase as an advancement to the plaintiff and her husband, and that Graham should bid in the land, take a sheriff's deed thereto, and thereafter deed the same to the bank, which agreement was carried out.

Plaintiffs further alleged in their petition as follows: "The said sheriff's deed was given and taken and said deed from Graham to said bank was given and taken under an oral agreement between plaintiff and her husband and said bank and Graham that said deeds and each of them should operate only as security for what plaintiff and her husband were then or thereafter to be indebted to said bank, and neither of said deeds was given or taken with intent to divest plaintiff of title in said realty; and, with reference to the making of each deed referred to in this substituted petition, it was orally agreed by and between plaintiff and her husband, said bank, and whosoever was grantor or grantee in any of said deeds, that each and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

all of said deeds should in no wise operate to divest the title of this plaintiff in said realty, and that said deeds and each of them should operate only to secure to said bank whatever was or might be owing it by plaintiff and her husband. That on or about December 27, 1907, the said bank claimed that plaintiff and her husband were indebted to it in some \$15,000 as a general balance due above deposits made by plaintiff and her husband; said sum including all advances theretofore made by said bank for plaintiff and her husband, including what had been paid to obtain the said assignments of said judgments, and the sum furnished to Graham wherewith to pay for his said bid, and including the interest due for carrying such advances. At this time there was outstanding upon said land a mortgage to one G. W. Wattles, amounting to some \$15,000, which said mortgage it became necessary to pay. Whereupon said bank, through said Culbertson, stated to plaintiff and her husband that the bank desired to avoid the appearance of being a borrower, and wished the said mortgage to be paid by a new loan, made in the name of some one other than said bank. At the same time the said Culbertson asked of plaintiff and her husband to increase said loan by approximately \$5,000, which excess should be used by the bank to meet pressing obligations, and which excess should be credited on whatsoever was owing the bank on account of the said advances. The said Culbertson also stated to plaintiff and her husband that, if plaintiff retook title for the purpose of making said renewal loan, it might jeopardize the security given the bank by the conveyance to it from Graham. Thereupon, at the solicitation of said Culbertson, plaintiff permitted one William Cuthbertson, her son, to take the deed from said bank and to place a mortgage upon said land while apparent title was in him in an amount sufficient to pay the Wattles mortgage, and approximately \$5,000. On the day the transfer so consented to was made to William Cuthbertson, to wit, December 27, 1907, the said William Cuthbertson and wife made two mortgages aggregating \$20,000 to said Wattles. And on the same day still the said William Cuthbertson and his wife deeded back to said bank the land in controversy herein, and said excess or addition to the said \$15,000 mortgages was delivered to said bank to be a credit on said account of plaintiff and her husband. That on the 4th day of January, 1908, there was a complete oral settlement of all matters then outstanding between the defendant bank and plaintiff and her husband, in pursuance of which settlement the plaintiff and her husband delivered to said bank their certain promissory notes for \$15,000, more particularly described in the prayer herein, in full satisfaction of all matters between them, which said notes were accepted by said bank in full satisfaction and payment of any and all debts then claimed to be due said bank from plaintiff or her hus-

band. That, as a part of said settlement, it was orally agreed that the deed from William Cuthbertson and wife aforesaid should stand as security for the payment of said agreed balance due of \$15,000, and that plaintiff avers that the said notes represented, and do represent, all due from plaintiff or her husband, or either of them, to said bank."

The plaintiffs prayed that the deed in question be declared a mortgage to secure the \$15,000 represented by the notes of January 1, 1908, and that the bank be compelled to satisfy of record all judgments held by it which are liens upon the premises. In its answer and cross-petition the defendant admitted that E. G. Cuthbertson and her husband, D. W. Cuthbertson, were the owners of the land in controversy prior to March 16, 1903, and that it was conveyed by Graham to the bank as security to said bank for whatever sum the plaintiff E. G. Cuthbertson and her husband were then, or might thereafter become, indebted to said bank. It was alleged that the sale of the land to Graham, under the judgment in favor of the Rochester Loan & Banking Company, was subject to other existing prior liens on said land, and that, after the bank acquired the title thereto, it was compelled, in order to protect its security, to purchase the judgments which were prior liens on the land. The defendant further alleged that the land was to be held as security for the sums so paid in addition to the sum of \$15,000 represented by the notes of January 1, 1908. The bank further alleged that to protect its security it was compelled to pay interest on a prior mortgage on the land, and also taxes thereon. The alleged settlement was denied. On the issues thus joined, the case was tried to a referee, who reported his findings of fact and conclusion of law to the district court, where they were approved; the court finding that the Cuthbertsons were indebted to the bank in the sum of \$43,049.99, including interest to January 1, 1909. This amount included all sums due the bank. The plaintiffs appeal. There is no question as to the amount due the bank on the five \$3,000 notes executed to the bank on January 1, 1908, nor as to the amount due it for the advancement of \$2,882.69, to enable Graham to buy in the land at the sale under the Rochester Loan & Banking Company judgment. No serious question is made as to the sum due the bank for interest paid on the Wattles mortgage of \$20,000, which was prior to the mortgage deed held by the bank, nor as to the amount of taxes paid by the bank to protect its security.

[1] The real controversy in this case centers around two fact questions: First, did the bank furnish the money to procure assignments of the judgments in question? and, second, if it did, was there a satisfaction of the bank's claim therefor on the 1st of January, 1908, when the five \$3,000 notes were given to the bank? The last of these two propositions is the most serious one of

the two. The dates of these several transactions are material, and, at the risk of repetition, we set them out together. The judgments involved in this controversy, with two exceptions, were rendered in 1898, and assignments thereof were made to the bank or to W. L. Culbertson on dates ranging from April 22, 1899, to January 31, 1903. Of the other judgments, one was rendered in June, 1899, and the other in December, 1907, and one was assigned to the bank in 1902, and the other one was first assigned to W. L. Culbertson and later to the bank by his executrix. The title to the land was taken by Graham and by the bank from him in 1903. As we understand the record, the original Wattles mortgage was a lien prior to the lien of any of these judgments, and, when it became due, it was necessary to make provision for its payment, and this was done in December, 1907, under agreement as follows: The bank conveyed to William Cuthbertson, a son of the plaintiff E. G. Cuthbertson, and he executed two new mortgages to Wattles in the aggregate sum of \$20,000, and on the same day deeded the land back to the bank. It was January 1, 1908, that the five \$3,000 notes were given to the bank. The judgments that were rendered against the Cuthbertsons October 3, 1898, aggregating nearly \$14,000, were satisfied of record December 27, 1907, by the bank through W. L. Culbertson, its president, and by W. L. Culbertson individually. This was on the same day that the two mortgages on the land were given to Wattles, and the record shows that satisfaction of the judgments was then entered for the purpose of enabling the Cuthbertsons to make this new loan. We have given the evidence in this case very careful consideration, and we are fully satisfied that all of the judgments in question were taken up by the bank with its own money, under an agreement with the Cuthbertsons, husband and wife, that the bank should do so and hold the land as security therefor. Appellants make many technical objections to a great deal of the evidence offered by appellees, but we think the appellants' admissions in pleading and as witnesses, together with other evidence of appellees which is clearly competent and entitled to weight, establish, without serious question, the liability of the Cuthbertsons, in the first instance, for the sums so advanced by the bank. The assignment of these judgments to the bank, and the satisfaction of the October, 1898, judgments on the very day that the new mortgages to Wattles were executed by William Cuthbertson for the benefit of his parents, is in itself a circumstance of great weight, and, together with the other facts either admitted or proven, is very nearly conclusive on this branch of the case.

As we have before indicated, the one difficult question in this case is whether there

was a settlement on the 1st of January, 1908, which included the money paid on these judgments by the bank. It is undisputed that at this time the bank held notes of the Cuthbertsons for the full amount represented by the five \$3,000 notes, and that said five notes represented renewals simply of previous notes. And it is practically undisputed that renewals of notes and actual loans had been made from time to time from 1897. The Cuthbertsons did not attempt to show that any of the money paid by the bank on these judgments had been included in any particular one of the prior notes that had been renewed from time to time, and the evidence of the defendant is practically conclusive that no part of such money could have been included therein. The judgments paid by the bank aggregated over \$20,000, and it was conceded by appellants that there was other large indebtedness to the bank during the years covered by their transactions. The contention of the plaintiff E. G. Cuthbertson and her husband is that, when the five \$3,000 notes were given to W. L. Culbertson for the bank, he was asked whether they included judgments and everything else, and that he answered "Yes." So far as the plaintiffs' evidence goes, that was all there was to the settlement of the amount due on account of the judgments. It is not satisfactory in itself. It is improbable that a claim of over \$20,000 would be so lightly disposed of, or so little discussed, and we are united in the conclusion that there was never a settlement of the judgments.

[2] Moreover, if such an agreement as appellants claim had been made, it would be invalid because without consideration. *Marshall v. Bullard*, 114 Iowa, 462, 87 N. W. 427, 54 L. R. A. 862.

[3] The bank having taken assignments of these judgments and having released them on the record for the purpose only of enabling the appellants to make the Wattles loan, it is manifest that it is entitled to the interest provided for in the judgments, and this was allowed, as we understand the matter.

[4] No issue is raised in the pleadings as to the validity of the receivers' appointment, and hence no such question is before us. An amendment to the abstract shows that an affidavit for attorney's fees was filed by appellees, and hence such fee was properly allowed.

The judgment is affirmed.
Affirmed.

LEWIS v. OMAHA & C. B. S. RY. CO.

(Supreme Court of Iowa. Dec. 14, 1912.)

1. EMINENT DOMAIN (§ 112*)—RAILROAD RIGHT OF WAY—ELEMENTS OF DAMAGES—MOTIVE POWER TO BE USED.

A corporation organized under the appellation of "Suburban Railway Company," to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

operate a street railway between certain cities and other points, with an express reservation of power to employ "horse power and electricity, or such other power or motor as may now or hereafter prove practicable or desirable." is not precluded thereby from the use of steam power, and in its condemnation of a right of way through farm property the possibility of the use of such power may be considered in determining the damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 299, 300; Dec. Dig. § 112.*]

2. EMINENT DOMAIN (§ 321*)—RIGHT OF WAY—DURATION.

Where a corporation organized under Code, § 1607, authorizing any number of persons to form a corporation for carrying on any lawful business, with authority to construct and operate a railway, acquires a right of way under Code, § 1995, granting powers of eminent domain, such right of way is perpetual while used for railroad purposes.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 853; Dec. Dig. § 321.*]

3. EMINENT DOMAIN (§ 102*)—COMPENSATION.

In proceedings to condemn a railroad right of way, it is proper to consider the effect which the use of the land taken may have upon the enjoyment and value of the entire tract.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 271, 272; Dec. Dig. § 102.*]

4. RAILROADS (§ 18*)—POWERS—SCOPE.

The purpose declared in its articles of incorporation, and not the name assumed by it, determines the extent of a railroad corporation's powers.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 39-44; Dec. Dig. § 18.*]

5. STREET RAILROADS (§ 2*)—DEFINED.

Properly speaking, "street railways," under the statute, are only such as are authorized to occupy and use the streets of a city or town under franchise from the municipality.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 2-4; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6693-6696.]

6. EMINENT DOMAIN (§ 318*)—RAILROAD RIGHT OF WAY—"SUBURBAN ROAD."

A notice to the sheriff to call a jury for the appraisal of damages in proceedings to condemn a railroad right of way, which stated that the right of way was for a "suburban and interurban" line, did not prevent the operation of steam propelled cars or trains upon the right of way without a new condemnation; a "suburban road" not necessarily being one operated by power other than steam.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 841-846; Dec. Dig. § 318.*]

Appeal from District Court, Pottawattamie County; O. D. Wheeler, Judge.

Condemnation proceeding instituted to obtain right of way for defendant's railroad over the land of plaintiff. From the assessment of damages, defendant appeals. Affirmed.

Tinely & Mitchell, of Council Bluffs, for appellant. J. J. Stewart, of Council Bluffs, for appellee.

WEAVER, J. The plaintiff owns a farm of 300 acres outside of the city of Council Bluffs, Iowa. The body of the farm is upon the low lying land which borders the Mis-

souri river, but one corner or portion thereof rises to a higher level, and at this point it has a frontage of 180 feet upon the public highway. Owing to the topography of these lands, the more elevated portion of which we have just spoken constitutes the most favorable and desirable site for plaintiff's buildings and improvements. At this place he has constructed a large and valuable house, and made many other improvements in harmony therewith. The house stands at a distance of about 100 feet from the highway. Defendant has located and condemned for its right of way a strip of land along this highway, and between it and the plaintiff's buildings, thus appropriating some 30 feet of his dooryard, and making it impossible for him to reach the public road except by crossing the railway track. The jury assessed his damages at \$2,983.50. Defendant does not deny its liability for the damages thus occasioned, but contends that the amount is excessive. This result it is argued was made possible by error in the court's charge to the jury.

[1] Many assignments of error are stated in appellant's brief, but as, generally speaking, each and all are ultimately made to depend upon the soundness or unsoundness of the proposition laid down by the trial court in the thirteenth paragraph of its charge to the jury, we proceed at once to a consideration of that question. The instruction reads as follows: "The defendant has condemned the strip in question for use for suburban and interurban railway purposes, but, under the law as applied to the facts in this case, the defendant would have the right to use other power than electric power in the operation of said line of railway and would have the right to use steam as a motive power, or, in other words, a locomotive, over said line; and in determining such damage you may consider that at the time of such condemnation the defendant had the right to use steam as a motive power to propel its cars over said line, and might, if it desired, use steam in the operation of said line." It is the contention of the appellant that, under the statute as well as by the limitations contained in its articles of incorporation, the company in this case cannot lawfully operate its railway by steam power, and that the instruction to the contrary in the quoted paragraph constituted error for which a reversal and new trial should be ordered.

By articles of incorporation the defendant company declares its nature and the purposes of its organization to be among other things to purchase, acquire, lease, construct, maintain, and operate a street railway throughout, over, along, and upon the streets, avenues, and alleys of the city of Council Bluffs, Iowa; also from the city of Council Bluffs to Lake Manawa, a lake lying south of said city, and to and from such points within and in the vicinity of and suburban

to said city of Council Bluffs as may be determined upon, whether the same shall be upon streets, avenues, alleys, or highways, or upon right of way acquired by purchase or in the exercise of the right of eminent domain or otherwise; also to purchase, acquire, lease, construct, maintain, and operate a street railway throughout, over, along, and upon the streets, avenues, and alleys of the city of Omaha, Neb., the suburban districts known as East Omaha, Iowa; also between any of the cities and districts herein named, and to and from such points within and in the vicinity of and suburban to said cities and districts, and in the operation of all such street railways to use and employ therein horse power and electricity or such other power or motor as may now or hereafter prove practicable or desirable, and, for the purpose of owning, leasing, constructing, maintaining, and operating such street railway, may purchase, lease, or acquire any and all necessary or desirable real and personal property privileges, franchise, grants, leases, and rights of way, and make, execute, and enjoy and contract or lease for right of way over the line or lines of any other street railway company; also in the operation of its street railway and all lines thereof to use and employ the same for the carrying of passengers, freight, express, and United States mail for hire. Other paragraphs avow the further purpose to be the acquirement of various kinds of property and the carrying on of various enterprises and lines of business, the particulars of which are not important in this connection. The notice given by the company to the sheriff for the appointment of a jury to assess plaintiff's damages in this proceeding describes the corporation as being empowered to construct and operate street railways, interurban railways, and suburban railways, and states that it has located its suburban and interurban line of railway across the land of the plaintiff.

[2] Under our statutes, any number of persons may unite to form a corporation for carrying on any lawful business (Code, § 1607). When organized with authority to construct or operate a railway, it may exercise the powers of eminent domain for the purpose of acquiring its necessary right of way (Code, § 1995). A right of way thus acquired is assumed to be perpetual so long at least as it is occupied and used for railroad purposes. *Hollingsworth v. Railway Co.*, 63 Iowa, 443, 19 N. W. 325; *Heskett v. Railway Co.*, 61 Iowa, 467, 16 N. W. 525.

[3] In assessing damages in favor of the landowner, the jury may take into consideration any and all uses which the company may rightfully make of the land which it condemns, or of the tracks laid thereon, and the injury, annoyance, danger, and inconvenience, if any, necessarily resulting to the use, enjoyment, and value of the entire tract from which such right of way has been taken. *Henry v. Railroad Co.*, 2 Iowa, 288; *Small v. Railroad Co.*, 50 Iowa, 338; *Clay-*

ton v. Railroad Co., 67 Iowa, 238, 25 N. W. 150. The construction of street railways—that is, of railways laid upon and along the streets and highways of a city for purposes of local traffic and travel—is subject to the authorization and control of the municipalities in which they operate. Code, § 767. An interurban railway is defined by statute as a railway operated by other power than steam, and extending beyond the corporate limits of a city or town to another city or town. Code Supp. § 2033a. An interurban railway company may lay its track along and upon any public road of 100 feet or more in width, and under certain restrictions may occupy other roads of not less than 60 feet in width. Code Supp. § 2026. Now, the distinction or peculiar privilege given to an interurban railway is this right under certain conditions to occupy and use the public roads as a right of way, and it is doubtless due to this fact that such railway is required to use some motive power other than steam.

If, therefore, in its organization the appellant herein had seen fit to incorporate with articles limiting its activities to the acquirement, construction, and operation of an interurban railway under the statute—that is, a railway operated by power other than steam—its assignment of error upon the thirteenth instruction to the jury would have to be sustained, and a new trial ordered. But its authority is not thus limited. Under the statutes governing the creation of corporation, it was entirely competent for the promoters of this enterprise to make the declared purpose of their organization broad enough to enable it to own and operate both interurban and other railways, and this we think is what they did. The nature of the corporation and the extent of its authority is neither defined nor limited by the name which it assumes, but by the power and authority with which it is clothed and the business which it proposes to transact. So far as name is concerned, appellant does not profess to be a mere interurban railway company. It assumes the appellation of a "suburban railway company," which is by no means necessarily the same thing. We have no suburban railways as a matter of statutory classification or definition.

[4] In the body of its articles, the company speaks of its purpose to acquire or construct and operate street railways, but here again the name is not controlling.

[5] Properly speaking, street railways under our statute are only such as are authorized to occupy and use the streets of a city or town under franchise from the municipality. If, however, a corporation organized primarily to own and operate a street railway assumes in its articles the further power to own and operate other railways, and reserves to itself the right to designate the power by which they shall be operated, we can see no good reason why in its management of such enterprises it is not a railway

corporation in the broad sense of the term, and may not exercise the discretion which such corporations generally possess in choosing the motive power to be used in operating its cars. Turning to the appellant's articles of incorporation, we find that it does not limit the scope of its railway business to the city of Council Bluffs, which alone could give it the right to occupy the city streets, but makes it to include the construction, maintenance, and operation of lines "from the city to Lake Manawa as well as to and from such points within and in the vicinity of and suburban to said city as may be determined upon whether the same shall be upon streets, avenues, alleys or highways, or upon rights of way acquired by purchase or in the exercise of the right of eminent domain or otherwise." It further provides for lines to Omaha and East Omaha, Neb., and between these cities or districts and other points within and in the vicinity of and suburban thereto. Power is also expressly preserved in the operation of the railways so provided for to use and employ "horse power and electricity or such other power or motor as may now or hereafter prove practicable or desirable." Now, while appellant could not lawfully use steam power in operating its street railways in the city of Council Bluffs, and could not lawfully assume to operate by steam power an interurban railway along the public roads outside of the city, there is still, as we view it, ample reserve power provided for in the articles of incorporation in the exercise of which it may by condemnation or purchase acquire a right of way between Council Bluffs and other cities and towns in that vicinity or suburban thereto, and on such right of way build an ordinary railroad, and operate the same in the ordinary manner. There is no statute which requires all railroads between cities and towns situated in the same general vicinity to be built or operated as interurban lines. Such roads may be of the interurban variety or of the ordinary type. If a corporation be organized with charter or articles sufficiently broad and general in terms, it may build lines of either character, and, having once constructed a road on one plan, there is nothing to prevent its abandonment for the other plan. True, if not operated as an interurban line, it could not lawfully occupy the highways, but, if such objection should arise, the corporation still has resource to its right of eminent domain, by which it could acquire a right of way outside of the highways, as it has done in the case at bar. The farm property in question and the railway line at this point lie wholly outside of the city and for the purpose of this case the railway is not in any proper sense of the word a street railway, and, as we have already seen, its articles of incorporation do not restrict the authority or

power of the corporation to make use of this road either as an interurban or ordinary railway. There was therefore no error in instructing the jury that the right of way condemned across the plaintiff's land was subject to use for the operation of a railway operated by steam power.

[6] If we understand counsel, it is further argued that, although the corporation may have had the legal right to condemn the right of way for the use of an ordinary railway, yet defendant in notifying the sheriff to call out a jury for the appraisal of damages limited its demand to a right of way for an interurban road, and could not lawfully thereafter operate steam propelled cars or trains thereon without a new condemnation. Assuming, without deciding, that the corporation would be bound by such limitation if clearly expressed in the notice, we have to say that this notice would not call for an application of the alleged rule. The statement there is that defendant desires the right of way for its "suburban and interurban" line. We have already said that a suburban road need not necessarily mean one that is operated by power other than steam. Indeed, it is a matter of common observation by all who visit the great cities of the land that suburban roads and suburban trains are very often, if not very generally, operated by steam power. Under the proceedings herein, we are disposed to hold that defendant by said condemnation acquired the right to use the track for any and all purposes authorized by the statute, or by its articles of incorporation.

There is no reversible error in the record, and the judgment below is affirmed.

COLLINS v. BOARD OF SUP'RS OF POT-TAWATTAMIE COUNTY et al.

(Supreme Court of Iowa. Dec. 12, 1912.)

1. NAMES (§ 3*)—MIDDLE "NAME"—SUFFICIENCY OF NOTICE.

The middle name is no part of the name, and under Acts 33d Gen. Assem. c. 118, relating to notice to owners of land in a drainage district, a notice to "Emma Forsythe Jones," whose maiden name was "Forsythe," was a sufficient notice to "Emma Jones."

[Ed. Note.—For other cases, see Names, Cent. Dig. § 2; Dec. Dig. § 3.*

For other definitions, see Words and Phrases, vol. 5, pp. 4657-4660.]

2. DRAINS (§ 57*)—PROCEEDINGS ON CLAIM FOR DAMAGES—DISMISSAL.

Where plaintiff had sufficient notice of the establishment of a drainage district, and did not file his claim for damages within the time required by Code Supp. § 1989a4, as amended by Acts 34th Gen. Assem. c. 88, both the board of supervisors and the district court were justified in denying it; the statute plainly providing the penalty for such failure without exceptions, and not justifying this court in considering any equitable excuses.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 67, 69; Dec. Dig. § 57.*]

3. APPEAL AND ERROR (§ 380*)—BONDS—COMPETENCY OF SURETIES—PARTY'S ATTORNEY.

Where a party's appeal bond has no other surety than one of his attorneys, his appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2023-2028; Dec. Dig. § 380.*]

4. DRAINS (§ 82*)—ASSESSMENT—APPEAL—VOLUNTARY PAYMENT—AFFIRMANCE.

Where a landowner, after appealing from an assessment for benefits from the establishment of a drain, voluntarily pays the amount of his assessment, his protest upon payment is not sufficient to relieve him from the consequences of payment, so that the order confirming the assessment will be affirmed.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 84-87; Dec. Dig. § 82.*]

5. DRAINS (§ 82*)—APPEAL FROM ASSESSMENT—PRESUMPTION AND BURDEN OF PROOF.

An assessment for benefits is presumed to be correct and equitable, and the burden is on the party appealing therefrom to show that it is incorrect or inequitable; and it is not enough for him to show that it was in excess of the actual benefits to his land, but other assessments on land of like character must be shown.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 84-87; Dec. Dig. § 82.*]

6. MANDAMUS (§ 95*)—RELIEF—PUBLIC OFFICERS—MATTERS OF DISCRETION.

Where the board of supervisors acted upon an owner's claim for damages from the establishment of a drain and justifiably rejected it, the owner cannot have the correctness of such decision reviewed by mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 201, 204; Dec. Dig. § 95.*]

7. DRAINS (§ 57*)—REVIEW OF PROCEEDINGS FOR ASSESSMENT OF DAMAGES—EQUITABLE JURISDICTION.

Where a landowner fails to file his claim for damages arising from the construction of a drain with the board of supervisors as required by statute, such owner cannot maintain a suit in equity to determine the amount of his damages.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 67, 69; Dec. Dig. § 57.*]

Appeal from District Court, Pottawatamie County; O. D. Wheeler, Judge.

Plaintiff's lands were included in a drainage district established by defendant county, and he filed a claim for damages which was disallowed. Subsequently his lands were assessed for benefits to the extent of \$800 or \$900, and he appealed to the district court from such assessment. Thereafter he filed a petition in mandamus to compel the board to pass upon his claim for damages, for an injunction, etc. These different proceedings were all consolidated, and tried in the district court, resulting in an order and judgment sustaining the board of supervisors in disallowing the claim for damages, confirming the assessment of his lands, and dismissing the petition for mandamus. Plaintiff appeals. Affirmed.

Flickinger Bros., of Council Bluffs, for appellant. W. H. Killpack, of Council Bluffs, for appellees.

DEEMER, J. In the year 1909 a proceeding to establish a drainage district known as the Pigeon creek extension ditch was pending before the defendant board of supervisors. The proposed district embraced the 80 acres of land in controversy, which was then owned by Emma Jones, whose maiden name was Emma Forsythe, and her husband was one of the petitioners for the district. During the pendency of the proceedings, which were regular in every respect, Emma Jones and her husband contracted to sell the land to one Rhodes. This contract was not recorded. By the terms thereof possession was to be given March 1, 1910. Plaintiff purchased the land by taking an assignment from Rhodes, but did not go into possession of the land until March 1, 1910. He obtained his deed, however, on February 7th, and recorded it February 9th. Before getting the deed, and on January 22, 1910, he filed with the board of supervisors his claim for damages to the land by reason of the establishment of the district. This claim was disallowed by the board, and plaintiff appealed to the district court. The lands were then assessed for benefits, and plaintiff appealed to the district court, but did not file his petition in that court within the time required by statute. An excuse is offered for not filing it in time, which will be referred to later. The appeal bonds in the two cases mentioned were signed by appellant's counsel as sureties. It appears that, when the case assessing lands for damages reached the district court, a demurrer was filed to the petition on the ground that the plaintiff was not entitled to file a claim for damages, and that in any event the claim was filed too late. This demurrer was sustained, and plaintiff thereupon amended by pleading that his claim was filed five days before the day set by the board for the hearing. The defendants also moved to dismiss both appeals because the appeal bonds were signed by appellant's counsel as sureties, and for the reason that plaintiff's petition in the appeal from the assessment was not filed in time. Defendant also denied that the claim for damages was filed in time for a hearing before the board, and also denied that plaintiff was entitled to file any claim for damages for the reason that he was not the owner of the land. The petition for mandamus and injunction concluded with this prayer: "Wherefore, by reason of the premises, your petitioner prays the order and direction of this court enjoining the defendant C. H. Sternberg & Sons from entering upon or trespassing upon plaintiff's lands. That the proceedings establishing said ditch across his land be declared null and void and without force and effect, and that said board of supervisors be enjoined from further proceeding with the construction of said ditch or its establishment across your petitioner's

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

titled by reason of the location of said ditch across his said premises, and your petitioner prays for such other and further relief as may be just and equitable in the premises." The answer to that petition was that plaintiff had not filed his claim for damages in time, that contracts for the construction of the ditch had been let to Sternberg & Sons, and that in any event plaintiff's remedy was at law by appeal. Some of these motions were not ruled upon at any time except as may be inferred from the final order of the court. The statute with reference to the filing of claims for damages provides that they must be filed in the office of the county auditor at least five days prior to the day set for hearing and also provides: "Failure to file such claim at the time specified shall be held to have waived his rights thereto." Code Supp. § 1989a4, as amended by 84 G. A. c. 88.

The notice given in this case pursuant to Acts 33d G. A. c. 118, was directed to a long list of owners, including the name Emma Forsythe Jones, and the time for hearing was fixed as January 24, 1910. Plaintiff did not file his claim until January 22d of that year, and, of course, it was not in time.

[1] But it is contended for him that notice was insufficient because addressed to "Emma Forsythe Jones," instead of "Emma Jones." The law with reference to this matter is as follows: "When the plan, if any, shall have been finally adopted by the board of supervisors, they shall order the auditor immediately thereafter to cause notice to be given to the owner of each tract of land or lot within the proposed levee or drainage district, as shown by the transfer books of the auditor's office, including railway companies having rights of way in the proposed district, and to each lienholder or encumbrancer of any land through which or abutting upon which the proposed improvement extends as shown by the county records, and also to all other persons whom it may concern, including actual occupants of the land in the proposed district (without naming individuals), of the pendency and prayer of said petition, the favorable report thereon by the engineer and that such report may be amended before final action, the day set for hearing on said petition and report before the board of supervisors, and that all claims for damages must be filed in the auditor's office not less than five days before the day set for hearing upon the petition, which notice shall be served by publication thereof once each week for two consecutive weeks in some newspaper of general circulation published in the county, the last of which publications shall be not less than twenty days prior to the day set for hearing upon the petition, proof of such service to be made by affidavit of the

usual form, giving notice to a long list of owners' names, among others 'Emma Forsythe Jones.' * * * Notice published in Council Bluffs Daily Nonparell December 23rd and 30th, 1909." The transfer books are reproduced, and they show that "Emma Jones" or "Emma Forsythe," who it is conceded is the same person as Emma Jones, was the owner of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 13, part of the land in controversy, and of an undivided interest in the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of the same section. If there be any other party interested in this last described forty as shown by the transfer books, it is Susan Forsythe. However, plaintiff's claim in this respect is that a notice addressed to "Emma Forsythe Jones" is not a notice to "Emma Jones." It is horn-book law that the middle member of one's name is no part of the same, and the notice, in so far as complaint is made of it, is sufficient. *Hendershott v. Thompson*, Morris, 186; *Loser v. Plainfield Savings Bank*, 149 Iowa, 672, 128 N. W. 1101, 31 L. R. A. (N. S.) 1112; *Grimes v. Martin*, 10 Iowa, 347. As plaintiff derived his title and rights through Emma Jones, he cannot complain that notice was not given Susan Forsythe, even if he had made that point.

[2] The notice was sufficient in so far as plaintiff is concerned, and, as he did not file his claim with the board in time, both the board of supervisors and the district court were justified in denying it. *Johnson v. Board*, 148 Iowa, 539, 126 N. W. 153. The statute plainly provides the penalty for such failure and contains no exceptions. We are not justified, therefore, in considering any equitable excuses, even if they had been shown.

[3] Moreover, the bonds for appeal had no other surety than one of appellant's attorneys. Under previous holdings this was ground for dismissing the case in the district court. *Minton v. Ozlas*, 115 Iowa, 148, 88 N. W. 330; *Hudson v. Smith*, 111 Iowa, 411, 82 N. W. 943; *Bank v. Garretson*, 104 Iowa, 655, 74 N. W. 11.

[4] 2. As to the appeal from the assessment of benefits, there are several reasons why the order should be affirmed. The first is that since the appeal plaintiff has voluntarily paid the amount of his assessment. True, he did this as he says under protest, but this is not sufficient to relieve him from the consequences of his payment. *Dittoe v. Davenport*, 74 Iowa, 66, 36 N. W. 895. Moreover, the appeal bond given on this appeal was signed by one of plaintiff's counsel as surety, and under previous holdings this was insufficient. We shall treat the excuse for delay in filing the petition on this appeal as sufficient, as doubtless did the district court, and, conceding *arguendo* that plaintiff is en-

titled to a hearing on the merits of this appeal, we find no reason for disturbing the order of the district court affirming and confirming the assessment.

[5] The assessment is presumed to be correct and equitable, and the burden is on the plaintiff of showing that it was made on an incorrect basis, or is inequitable. It is not enough for him to show or try to show it was in excess of the actual benefits to his land. Other assessments on lands of like character in the district must be considered and irregularities or inequalities therein shown. This was not done here, and no reason appears for interfering with the assessment made against plaintiff's land.

[6] 3. The independent suit in equity cannot be maintained. The board of supervisors did act on plaintiff's claim, and rejected it. Plaintiff cannot have the correctness of that decision reversed by mandamus.

[7] Nor can he by action in equity have his damages assessed. A court of equity will not relieve him from the consequences of delay in filing his claim with the board and undertake itself to act as an assessing tribunal. The statute, as we think, forbids any such proceeding. Even if it were permissible, no such showing was here made as to justify equitable interference. There is some testimony to the effect that failure to file the claim was due to the negligence of plaintiff or his attorneys. But, however this may be, it would be unwise to establish a rule which would permit parties in drainage proceedings to go into a court of equity for relief based upon equitable circumstances. If such proceedings were tolerated, drainage proceedings would be unduly delayed, and the board of supervisors could not act with any assurance as to the final cost of the improvement. Surely a court of equity should not be made an independent assessing tribunal. For reasons already indicated, the board of supervisors was justified in disallowing plaintiff's claim for damages; and, this being true, plaintiff has no cause of action in equity upon any theory. Even if equitable circumstances might be considered, they should be heard in the proceedings before the board and not introduced into the case by an independent action in equity.

No reason appears for disturbing the orders and judgments appealed from, and they are each and all affirmed.

WILE, WEILL & CO. v. DENISON CLOTHING CO. et al.

(Supreme Court of Iowa. Dec. 14, 1912.)

1. PARTNERSHIP (§ 218*)—UNAUTHORIZED ACTS OF PARTNER—RATIFICATION BY CO-PARTNERS.

Whether a partner ratified his copartner's act in appropriating firm funds for the payment of his individual debts is a question of fact.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 426-428; Dec. Dig. § 218.*]

2. PARTNERSHIP (§ 217*)—UNAUTHORIZED ACTS OF PARTNER—RATIFICATION BY CO-PARTNER.

Evidence held to show that a partner did not ratify his copartner's act in appropriating firm funds for the payment of his individual debts.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 419-425; Dec. Dig. § 217.*]

3. PARTNERSHIP (§ 144*)—UNAUTHORIZED ACTS OF PARTNER—RIGHTS OF CO-PARTNER.

Where a partner paid nothing to his copartner at or after the dissolution of the firm, though he obtained the entire assets of the firm, but the copartner, giving credit for everything he was entitled to, was indebted to the partner by virtue of firm transactions, the partner was damaged by the copartner's misappropriation of firm funds to the payment of his individual debts; and the partner was entitled to relief against the creditor.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 234-239; Dec. Dig. § 144.*]

4. PARTNERSHIP (§ 144*)—RIGHTS OF PARTNERS—FIRM ASSETS.

A partner cannot pledge the firm credit or use firm property to pay his individual debts without the consent of the copartner; and where he does so use the firm property the creditor receiving it is liable to the firm, unless he is a bona fide holder for value.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 234-239; Dec. Dig. § 144.*]

Appeal from District Court, Crawford County; F. M. Powers, Judge.

Action for balance on account for goods and merchandise sold and delivered. Defendants Denison Clothing Company and Julius Sonksen filed separate answers, denying any indebtedness to plaintiff and pleading payment and settlement. They also filed equitable answers and counterclaims, which will be referred to in the body of the opinion. Upon the issues joined, the trial court found that plaintiff's account had been settled and paid, and rendered judgment for defendant Sonksen against the plaintiff in the sum of \$219.30. Plaintiff appeals. Affirmed.

Mayne & Hazelton, of Council Bluffs, and Harding & Kahler, of Denison, for appellant. Shaw, Sims & Kuehnle, of Denison, for appellees.

DEEMER, J. Plaintiffs are wholesale clothing merchants doing business in the city of Buffalo, N. Y., and their action is for goods and merchandise sold and delivered to the Denison Clothing Company when one C. C. Kemming was doing business in that name, and for goods sold and delivered said company when the firm of Kemming & Sonksen were doing business in that name. Defendants clothing company and Sonksen deny liability for any goods sold Kemming while he was doing business in the name of the company, and admitted only the last two items of plaintiff's account, amounting to \$301.50. They also averred that Kemming & Sonksen were in business as a partnership for a time under the name of the Denison Clothing Company, and alleged that during

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the continuance of this partnership Kemming, without the knowledge or consent of Sonksen, took from the partnership funds the sum of \$2,500 and used the same to pay his individual indebtedness to plaintiff. They also averred that Kemming issued partnership checks to plaintiff in payment of his individual accounts, without the knowledge or consent of his partner Sonksen, amounting to the sum of \$1,000, and by way of counterclaim asked judgment against plaintiff for the amount of such payments, after deducting therefrom the amount due plaintiff from the firm of Kemming & Sonksen. For reasons not material to be mentioned, defendant Sonksen was obliged to forego any claim to the funds received by plaintiff on the checks referred to; and by reason of being unable to show any knowledge on plaintiff's part of the partnership relations existing between him and Kemming until some time in April, 1908, his counsel now concedes that he is not entitled to have considered any payments made prior to that date. The amount claimed by him in the district court was reduced to a sufficient amount to pay the firm debt, to wit, \$301.50, and the further sum of \$219.50; the two sums being, as he claims, the amount paid plaintiffs by Kemming after they had knowledge of the partnership arrangement between him and Sonksen.

There is not much dispute in the facts, and the record discloses the following: For a number of years prior to 1907, C. O. Kemming was engaged in the retail clothing business at the town of Denison, Iowa, under the name of the Denison Clothing Company, and also at the town of Charter Oak, under the name of the Charter Oak Clothing Company. While so engaged, he purchased most of the goods for the price of which this action was brought. On the 4th day of September of the year 1907, he sold to defendant Sonksen a one-half interest in the stock of the two clothing companies. This partnership continued doing business in the name of the two companies until May 15th of the year 1908, when the firm was dissolved; Sonksen taking over the business and property at both places. Sonksen paid Kemming, at the time the partnership was formed, the sum of \$9,000, but assumed none of Kemming's debts. Upon being admitted into the firm, Sonksen went into the store at Denison, and being without business experience he permitted Kemming to keep the books and the bank account, and to purchase and pay for all goods bought. Kemming was at that time largely indebted for goods purchased before the partnership was formed, and after its formation he paid these debts with money belonging to the partnership. The contract of partnership contained these express provisions: "That the said first party shall pay all indebtedness now owing by the said Denison Clothing Company, and the Charter Oak Clothing Company, and shall be entitled

to all sums collected on and from accounts now due the said Denison Clothing Company and Charter Oak Clothing Company. * * * That neither of said partners shall permit said joint stock or his share or interest to be in any way charged, incumbered, attached or taken in execution for his own private and particular debts."

And the agreement of dissolution provided, among other things, that: "The business done by the said Denison Clothing Company and the said Charter Oak Clothing Company since the partnership was formed between C. C. Kemming and Julius Sonksen, the parties hereto, up to the time of the execution of this contract is partnership business, and is to be treated, considered and disposed of as such to the party of the second part as part of this contract and without any other or additional consideration therefor; the profits and losses of said business during said period of said partnership are to be shared equally by the parties hereto, and the debts of said partnership are to be borne, share and share alike, by the parties hereto. * * * It is further agreed that all accounts due and owing to the said firm arising by virtue of the partnership heretofore existing between the parties since September 5, 1907, to this date shall be collected by Julius Sonksen, the surviving partner of said firm, without charge; he to make a monthly accounting of same to the said C. O. Kemming. At the end of sixty days from this date the accounts then uncollected shall be placed in the hands of a special collector to be mutually agreed upon, at a commission of not to exceed 5%, unless mutually otherwise agreed. Reports of collections and settlement are to be made monthly to the said Julius Sonksen and C. C. Kemming, share and share alike. All of the accounts belonging to said firm remaining uncollected four months after date hereof shall be sold within thirty days thereafter to Julius Sonksen or to C. C. Kemming, depending upon which shall pay the highest price therefor, and the price thus paid shall be divided between the parties hereto, share and share alike, and the accounts thus bought shall be the absolute property of the person buying and paying therefor."

After the dissolution of the firm, Sonksen paid all the firm debts; but, learning then for the first time, as he claims, that Kemming had paid his prior individual debts from the proceeds of firm property, he refused to pay any balance due to Kemming individually, and insisted that he was entitled to the money paid by Kemming from partnership assets upon his (Kemming's) individual debts from every creditor of Kemming who knew he was using firm property or assets to pay his individual accounts. Plaintiff's entire account against Kemming individually and the firm of Kemming & Sonksen was \$4,559.52, all but \$301.50 of

which was Kemming's individual indebtedness. During the existence of the partnership, Kemming sent plaintiff five \$500 checks, signed "Denison Clothing Co., per C. C. Kemming," and these were credited upon the account. At that time Kemming's indebtedness to plaintiff was evidenced by notes signed by "C. C. Kemming" alone. The testimony shows beyond all controversy that some time early in the month of April, and before the last of the five \$500 checks was sent to plaintiff, it had knowledge, through one of the members of the partnership, that defendant Sonksen had become a partner with Kemming; and the plaintiff firm also had knowledge from the checks themselves that these checks were drawn against partnership funds to apply on the individual debt of Kemming. It is true Sonksen knew, during the life of the partnership, that Kemming was signing checks drawn against the funds of the partnership; but, as the firm was buying goods all the time, he testified that he did not know until after the dissolution of the firm that Kemming was paying his individual debts with such checks. He was, he admits, about the store actively engaged in selling of the goods; but he testifies, and no one disputes him, that he knew nothing of the state of the accounts; that he trusted Kemming with the keeping of the books, the handling of the bank book, and the payment of bills, and did not know of any misappropriation of partnership funds by Kemming. Kemming himself said that he did not deposit any part of the money received from Sonksen for an interest in the business, or any part of the amount received from his individual accounts in the name of the clothing company; and it sufficiently appears that after charging back to Kemming the amount of his misappropriations, and paying the firm indebtedness, instead of his owing Kemming anything, he (Kemming) was indebted to Sonksen.

[1] Plaintiff's chief contention is that Sonksen ratified the misappropriations of Kemming, and thus estopped himself from claiming anything from plaintiff, and that the trial court was in error in not allowing a recovery, at least to the extent of \$301.50, being the amount of the firm's indebtedness. Whether or not there was such a ratification is a question of fact to be determined from all the evidence.

[2] The only testimony relied upon to show ratification is the following, given by Sonksen himself: "I bought him out in May, 1908, and am now the sole owner of the business. In the settlement, when I became owner of the last half of the business, I did not pay over to him personally any money. There was no occasion for doing so, as he had overdrawn already. Q. What is the fact as to his having misappropriated funds of the partnership during the time of the

partnership? A. That was it; it was because of that. Q. Was it a fact that there was no cash to be paid by you to him, owing to the fact that he had overdrawn the account of the firm and had appropriated funds without your knowledge or consent? A. That is the reason. I never paid Kemming, himself, a dollar for the last half of his stock. I did not have any knowledge or information as to any misappropriation of the partnership funds by Mr. Kemming until about the time of the dissolution. I am not owing Mr. Kemming anything under the articles of dissolution. I have paid him all that I owe him. I did not pay him personally any money. It was taken up in overdrafts he had made and moneys appropriated without my knowledge or consent."

But this witness also testified that: "I did not have any knowledge or information as to any misappropriation of the partnership funds by Mr. Kemming until about the time of the dissolution. I am not owing Mr. Kemming anything under the articles of dissolution. He is owing me. I have paid him all that I owe him. He is owing me by reason of the settlement. I did not pay him personally any money; it was taken up in overdrafts that he had made and moneys appropriated without my knowledge or consent."

[3] There is nothing here, as we view it, which shows any ratification of the misappropriation, and the record is wanting in any confirmation of the claim of ratification when the checks were sent by Kemming to the plaintiff. The most that could be claimed here is that defendant has not shown any loss to himself by reason of the misappropriation. He testified, it is true, that he paid nothing to Kemming at the time of or after the dissolution of the partnership; and it also is true that he obtained the entire stock of goods theretofore owned by the firm, but he distinctly testified that, giving credit for everything, Kemming was still his debtor; and the records show that he (Kemming) was adjudged a bankrupt in the federal court of the Southern district of Iowa, and afterwards regularly discharged. His trustee in bankruptcy filed an answer and counterclaim in this case, which concluded with this prayer: "Wherefore this defendant prays that he may be decreed, as such trustee, an owner of an undivided one-half interest of whatever judgment may be rendered herein in favor of his codefendant, and for such other and further relief as equity may demand."

From the decree entered in this case, the trustee did not appeal, so that it appears affirmatively that Kemming was still owing Sonksen something, after taking into account all of Kemming's misappropriations; and the trustee in bankruptcy is satisfied with the decree entered in Sonksen's favor, for he did not appeal. There is no merit,

then, in the claim that Sonksen ratified the misappropriations at the time they were made or afterward; and the testimony clearly shows that, taking into account all the misappropriations made by Kemming, Sonksen is still a sufferer, although he has all the assets of the firm, and did not pay Kemming anything for his interest in the business. The law applicable to the undisputed facts is well settled.

[4] A partner cannot pledge the firm credit, or use the firm property to secure or pay his individual debts. *Brewster v. Reel*, 74 Iowa, 508, 38 N. W. 381. One partner cannot, without the knowledge and consent of the other partner, use the partnership property or assets to discharge his own personal obligations. If he does so use the property or assets of the copartnership, the party receiving such property, whether money or other property, in the payment of an individual obligation of one of the copartners, upon receiving the same, is liable to the copartnership. *Janney v. Springer*, 78 Iowa, 619, 43 N. W. 461, 16 Am. St. Rep. 460; *Blake v. Bank*, 219 Mo. 644, 118 S. W. 643.

In *Shumaker on Partnership* the rule is stated as follows: "It is a necessary consequence of the existence of the partner's lien that no partner has a right to apply the partnership property to his own individual uses or debts, and, unless the transferee is a bona fide holder for value, the property so transferred may be recovered for the benefit of the firm." *Shumaker on Partnership*, p. 178.

This rule is so well established that it is needless to cite other authorities. The only payment made by Kemming to plaintiff, after notice to plaintiff that the checks were drawn against partnership funds, was the last \$500 check, issued the latter part of April in the year 1908, and the trial court deducted from the amount of this check the amount of the firm debt, to wit, \$301.50, and rendered judgment in favor of Sonksen for the balance, to wit, \$198.50, and allowed interest thereon from April 26, 1908, at the rate of 6 per cent. In this there was no error.

The judgment is therefore affirmed.

FIRSCH-WICKWIRE CO. v. DENISON CLOTHING CO. et al.

(Supreme Court of Iowa. Dec. 14, 1912.)

1. PARTNERSHIP (§ 302*)—ACCOUNTING—MARSHALING ASSETS AND CREDITS.

Where a creditor of an individual and of a firm of which the individual is a partner has received funds of the firm and of the individual, the copartner, in an equitable action for accounting, may insist that payments from firm funds shall be applied to the firm debt, especially those payments made after knowl-

edge by the creditor that it was getting firm funds, and that nothing shall be credited on the individual debts of the partner save payments made by him from his individual funds.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 699; Dec. Dig. § 302.*]

2. PARTNERSHIP (§ 176*)—RIGHTS OF FIRM CREDITORS.

In equity, the property of a firm is a fund for firm creditors, and the separate property of each partner is a fund for the creditors of each partner; and the firm creditors cannot reach the separate property of the partners until the individual creditors are paid, and the creditors of the partners cannot look to the firm funds until firm debts are paid.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 308, 309; Dec. Dig. § 176.*]

Appeal from District Court, Crawford County; F. M. Powers, Judge.

Action upon account for goods and merchandise sold and delivered. Defendant Sonksen filed an answer and counterclaim, and upon the issues joined the trial court dismissed plaintiff's petition and rendered judgment for the defendant. Plaintiff appeals. Affirmed.

Mayne & Hazleton, of Council Bluffs, and Harding & Kahler, of Denison, for appellant. Shaw, Sims & Keuhnle, of Denison, for appellees.

DEEMER, J. [1] This case is ruled by *Wile, Weill & Co. v. Denison Clothing Co. et al.*, 138 N. W. 1098, decided at the present term. In addition to the authorities there cited, we may properly call attention to the fact that this is an equitable action for an accounting, and involves the doctrine of the proper application of funds. Plaintiffs here are creditors of C. C. Kemming, and also of the firm of Kemming & Sonksen, doing business under the name of the Denison Clothing Company. It has received funds or property of the partnership and some funds belonging to Kemming individually. In this action, brought against all the parties, defendant Sonksen asks a marshaling of the debits and credits, and insists that payments made by the partnership, or out of partnership funds, shall be applied to the firm debts, especially those payments made after notice or knowledge by plaintiff that it was receiving partnership funds, and that nothing should be credited upon the individual debts of Kemming, save payments made by him from his individual funds. That this is the rule everywhere recognized is certain from an examination of the authorities. Vide *Hoaglin v. Henderson*, 119 Iowa, 720, 94 N. W. 247, 61 L. R. A. 753, 97 Am. St. Rep. 335; *Farwell v. St. Paul Co.*, 45 Minn. 495, 48 N. W. 326, 22 Am. St. Rep. 747; *National Bank v. Brubaker*, 128 Iowa, 592, 105 N. W. 116, 2 L. R. A. (N. S.) 256, 111 Am. St. Rep. 209; *Reyburn v. Mitchell*, 106 Mo.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[2] In Parsons on Partnership (4th Ed.) §§ 382 and 402, it is said:

"This is still more the case with questions of bankruptcy, which go into equity almost exclusively. We might expect that questions which connect partnership with bankruptcy should be, more than most others, determined on equitable principles. Hence the rule is distinctly established in equity that in bankruptcy of a partnership the joint property forms a fund appropriated to the joint creditors, and the several property of each creditor a several fund appropriated to the several creditors of each partner. And the joint creditors cannot go to the several property until the several creditors are paid in full, and there is a surplus over, by which the joint creditors may benefit. On the other hand, the several creditors cannot look to the joint fund until all the joint debts are paid, and there is a surplus; and then the several creditors of a partner may resort to that partner's interest in that surplus. It has, however, been held that if one partner pays more than his share of the partnership debts he has, in equity, a claim on the partnership property superior to the claims of the separate creditors of the copartners."

"402. While solvent partners cannot prove against the joint fund to the prejudice of joint creditors, because they are liable to those creditors, they may prove against the joint fund, in competition with the several creditors, to whom they are not liable. Indeed, their rights are prior to those of the several creditors; for those creditors can have the right of their debtor to the point fund only after all claims upon it are satisfied, and, among these, the claims of the other partners. On this point, it must be the general rule, applicable to all partnerships, whether they be general or confined to a particular business or a particular transaction, and, indeed, to all joint adventures and enterprises of every kind, that they must be first settled, and the mutual claims and balances of the copartners or coadventurers be adjudged, before the divisible surplus is ascertained; and then the right of each one is only to his share of this surplus, and the creditors of each one can reach and acquire only his right. It follows, therefore, that the several creditors of each one will be postponed, so far as the joint assets go, not only to the joint creditors, but to the claims of the coadventurers for balances due from their companions, arising out of the adventure."

Applying these rules, it follows that the decree of the district court must be, and it is, affirmed.

(Supreme Court of Iowa. Dec. 13, 1912.)

1. FRAUDULENT CONVEYANCES (§ 115*) — TRANSFER BY INSOLVENT.

An insolvent debtor may dispose of his property in good faith for the payment of one of his creditors, though others may thereby be defeated in the enforcement of their claims.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 370, 375-377; Dec. Dig. § 115.*]

2. FRAUDULENT CONVEYANCES (§ 99*)—INSOLVENT—SALE OF PROPERTY—INADEQUACY OF CONSIDERATION.

Inadequacy of consideration in a sale of property by an insolvent is a badge of fraud; and, though it may not be sufficient in itself to invalidate the transaction for fraud, the conveyance will be regarded as fraudulent to the extent of the difference between the consideration and the value of the property.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 323, 325-328; Dec. Dig. § 99.*]

3. FRAUDULENT CONVEYANCES (§ 271*)—INADEQUATE CONSIDERATION — BURDEN OF PROOF.

Where an insolvent transferred certain of his property for an inadequate consideration, the burden of proof to repel the presumption of fraud arising therefrom, when the transaction is attacked by the insolvent's creditors, is on the grantee.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 796-798, 821; Dec. Dig. § 271.*]

4. ATTORNEY AND CLIENT (§ 22*)—WITNESSES (§ 67*)—ATTORNEY FOR PARTY—EMPLOYMENT OF AN ATTORNEY WHO IS TO TESTIFY.

While the relation of attorney and client does not render the attorney incompetent to testify for the client, it is improper for an attorney to accept a retainer as additional counsel in a case for a party who will probably call him as a witness.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 30; Dec. Dig. § 22.* Witnesses, Cent. Dig. §§ 121-123; Dec. Dig. § 67.*]

5. FRAUDULENT CONVEYANCES (§ 158*)—NOTICE OF GRANTOR'S FRAUDULENT INTENT—CONSTRUCTIVE NOTICE — INADEQUACY OF PRICE.

Where an insolvent conveyed certain real property to a garnishee while in financial difficulties for a grossly inadequate consideration, the inadequacy of the consideration charged the grantee with constructive notice of the grantor's purpose to defraud his creditors, though there was no sufficient direct evidence of actual notice of such intent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 500-503; Dec. Dig. § 158.*]

Appeal from District Court, Pottawattamie County; O. D. Wheeler, Judge.

This case, as tried in the lower court and submitted on this appeal, is a consolidation of a garnishment proceeding in which plaintiff Flood, having recovered judgment against the defendant, Bollmeier, sought to hold Henry Anderson on garnishment as the debtor of Bollmeier, and another gar-

nishment proceeding of the same character, in which the Treynor Savings Bank, having procured a judgment against Bollmeier, sought also to hold said Anderson as garnishee, and a third action, in which Flood and the Savings Bank sued jointly as creditors of Bollmeier, to set aside as fraudulent a conveyance of land from Bollmeier to Anderson, in which action plaintiffs asked also an accounting for any indebtedness of Anderson to Bollmeier and for general equitable relief. The court entered a general decree, finding the equities to be with the plaintiffs, and rendering judgment in favor of each against Anderson as garnishee for the amount of their respective judgments. From this decree, Anderson appeals. Affirmed.

John J. Hess and Reed & Robertson, all of Council Bluffs, for appellant. Flickinger Bros., of Council Bluffs, for appellees.

MCLAIN, C. J. The controversy in the cases which have been consolidated, and which we shall consider together under the title of the creditors' bill in equity, relates to the sale by the defendant, Bollmeier, to Anderson, to us in effect also a defendant as well as garnishee, of a one-third interest in a section of land (640 acres) in the Texas Panhandle, which sale was evidenced by deed executed and recorded in November, 1907, soon after certain notes of Bollmeier to plaintiff Flood and his coplaintiff, the Savings Bank, became due. In general, the contentions for plaintiffs are, first, that the consideration for the sale was inadequate, and with the intention on the part of Bollmeier to defraud his creditors, of which fraud Anderson was charged with knowledge, with the result that Anderson is liable to plaintiffs for the difference between the consideration paid and the value of his interest in the land conveyed, to the extent of the claims of plaintiffs; and, second, that there was a secret understanding between Anderson and Bollmeier, at the time the conveyance was made, that Anderson should account to Bollmeier for one-half the proceeds of his interest in the land conveyed in excess of the consideration paid, and that Anderson has received for the interest conveyed more than the consideration paid, with the result that, to the extent of one-half of such excess, Anderson should be held liable as garnishee on the judgments in plaintiffs' favor against Bollmeier. It does not appear on which of these two grounds the decree against Anderson, fixing his liability to plaintiff Flood at \$1,801.91 and to the plaintiff Treynor Savings Bank at \$476.71, was rendered; but as it appears without controversy that Anderson has disposed of the interest in the land which he acquired from Bollmeier, it will not be necessary, as we understand the case, to determine on which

theory of liability the judgments were predicated. If it appears, under the issues raised in the equitable action, that the consideration paid by Anderson to Bollmeier for his interest in the land was inadequate, and the sale was fraudulent as to creditors, it follows that Anderson is liable to plaintiffs, as creditors of Bollmeier, for the satisfaction of their judgments to the extent to which the value of his interest in the land exceeded the amount actually paid, and the only contention between the parties is as to whether the conveyance was fraudulent and the consideration inadequate, and as to whether Anderson is chargeable with notice of fraud on the part of Bollmeier.

In the spring of 1906, Anderson, who was the agent for an Omaha Land Company and resided in the village of Bentley, in Pottawattamie county, of this state, organized a land seekers' excursion to Texas, in order to induce prospective purchasers to look at the lands of this company in that state for sale. As the result of this excursion, Bollmeier, one Hamen, and one Meyer entered into a contract to purchase a section of land, each to have a one-third interest therein. It was understood, of course, that the purchase was for the purpose of realizing a profit on a resale of the land. The price agreed to be paid was \$12.50 per acre and in addition, the purchasers assumed the payment of a school tax in favor of the state of \$2 per acre, so that the total cost price of the land to them was \$14.50 per acre. Anderson got a commission of 50 cents per acre for effecting the sale. In the fall of 1907, Meyer secured a contract of sale of the tract to a Nebraska man at the price of \$20 per acre; but this contract was not carried out by the purchaser, and nothing was realized from it, save the forfeiture of a small cash payment, which was divided among the owners. But in order to prepare for carrying out this contract the owners undertook to pay off a purchase-money lien of \$3,500. To raise his share of this money, Bollmeier gave his note to the plaintiff bank, with plaintiff Flood as surety; and Flood, having been compelled to take up the note, became the creditor of Bollmeier. Meyer procured Anderson, who is his brother-in-law, to become surety on a note to the plaintiff bank for his share of the lien, and Anderson, having paid this note and another note of Meyer's to the bank for \$1,900, on which he was not surety, agreed to take a conveyance from Meyer of his undivided interest in consideration of this indebtedness, which conveyance was executed in October, 1908, although in pursuance of a contract made about November 3, 1907. On October 8, 1908, Hamen also executed a deed to Anderson for his one-third interest for a consideration of \$600 in excess of what that interest cost him. In the meantime Anderson had purchased Bollmeier's interest,

paying \$300 in cash and the balance in notes, which Bollmeier disposed of. The total amount of the consideration to Bollmeier was at the rate of \$8 per acre, assuming the school tax of \$2 per acre, so that the consideration actually paid Bollmeier in cash and notes was at the rate of \$6 per acre. This purchase of Bollmeier's interest was in November, 1906, and it is this transaction which is complained of as having been on an inadequate consideration and fraudulent as against Bollmeier's creditors. Subsequently, Anderson having now acquired the interests of all the purchasers in the section of land, sold one-half of it to a company in Council Bluffs at an estimated cash value of \$45 per acre, receiving \$3,000 in cash and a stock of goods which was turned in on the trade by the purchaser as of the value of \$10,000; the purchaser assuming the payment of the school tax of \$2 per acre. Still later he disposed of the stock of goods in exchange for a farm, turning in the stock at the estimated value of \$10,000. With this general statement of the nature of the transaction between Anderson and Bollmeier, which is attacked by plaintiffs, we pass to a brief statement of the propositions of law applicable in determining whether such a transaction is fraudulent.

[1-3] An insolvent debtor may dispose of his property in good faith for the payment of one of his creditors, although others may thereby be defeated in the enforcement of their claims. *Atkinson v. McNider*, 130 Iowa, 281, 105 N. W. 504. But inadequacy of consideration in a sale of his property by an insolvent is a badge of fraud, though perhaps not sufficient in itself to show the transaction to be fraudulent. *Urdangen & Greenberg Bros. v. Doner*, 122 Iowa, 533, 98 N. W. 317. Even where a partial consideration is paid, if the difference between the price paid and the actual value of the property is apparent, the conveyance will be regarded as fraudulent to the extent of that difference. *Lyon v. Haddock*, 59 Iowa, 682, 13 N. W. 737. And in such cases the burden of proof is upon the grantee to establish facts which will repel the presumption of fraud and show the deed to have been for an adequate consideration. *Long v. Garey Investment Co.*, 135 Iowa, 398, 112 N. W. 550. We must proceed to determine, therefore, under the evidence, whether there was such inadequacy of consideration for the sale of his interest in the land by Bollmeier to Anderson as, with the other circumstances in the case, will establish an attempt to defraud his creditors, and whether, if there was such inadequacy apparent, Anderson has shown that the transaction was under the circumstances in good faith and without any intention to participate in a fraudulent purpose on the part of Bollmeier. It was well understood between Bollmeier and Anderson, when the former solicited the latter to buy his interest in the land, that

Bollmeier was in urgent need of money to meet his obligations. It also appears that the papers in an attachment suit by Flood against Bollmeier were already prepared before the transaction between Bollmeier and Anderson took place, and that they were forwarded to Texas for the purpose of having a levy made upon Bollmeier's interest in the land, when it was discovered that the deed from Bollmeier to Anderson was already on record there. But we think plaintiffs have failed to show that Anderson was affected in any way with notice of the proposed attachment proceeding, or of any purpose on the part of Bollmeier to defeat the creditors, unless such notice is made out by the testimony of the witnesses Lindt and Emil Schurz, who prepared the deed and notes which were delivered by Bollmeier to Anderson.

[4] Counsel for appellant urge us to disregard the testimony of these witnesses, because Lindt was, with knowledge that his testimony would be very material, called in to assist as counsel in the trial of the case for plaintiff, and was paid a considerable fee for such services, although he took a very inconspicuous part in the proceedings, having previously been the attorney for Bollmeier, who seems not to have felt concerned in the result of the litigation. It also appears that Emil Schurz was acting in the transaction only as the assistant or clerk for Lindt. It ought to be said, also, that the testimony of Lindt and Emil Schurz, so far as it imputes to Anderson knowledge of an intent on the part of Bollmeier to defraud his creditors, was quite emphatically contradicted by Anderson and another witness, who claims to have been present at the transaction. If, with knowledge that the testimony of Lindt would be very material, if it could be procured, he was retained to assist in the trial of the case of plaintiffs, such proceeding was open to the gravest objection. It is sometimes necessary and proper for an attorney to give testimony in behalf of his client, and his relation as attorney does not render his testimony incompetent. *Ross v. Ross*, 140 Iowa, 51, 117 N. W. 1105. But it is not in accordance with any fairly sound code of professional ethics to retain as an additional counsel in a case one who is already recognized as likely to be an important witness; and it is equally against sound principles of professional ethics for one who knows that he is to be called as an important witness in a case to accept a retainer as lawyer in that case. So far as possible, the functions of lawyer and witness in a case should be dissociated. *Alger v. Merritt*, 16 Iowa, 121.

[5] But, without regard to the testimony of Lindt and Emil Schurz, we think it fairly and fully established that Anderson, with knowledge of Bollmeier's being heavily indebted and desiring to realize on his property, entered into the transaction for the purchase of Bollmeier's interest for a grossly

inadequate consideration, with the intent to assist in putting the property beyond the reach of his creditors; that is, with intent to enable him to use the proceeds of the property without regard to the claims of his creditors. Only a few days before purchasing Bollmeier's interest, Anderson had, without any other occasion for doing so than that he thought it would be to his financial advantage, purchased Meyer's interest, equal to that of Bollmeier's for more than \$3,000, and less than a year later, he purchased Hamen's equal interest for about the same price. He must have known, therefore, that he was getting Bollmeier's interest at less than half its value, as he understood it to be. The other testimony as to the real value of the land is conflicting, but the weight of the evidence was clearly such as to indicate that the price paid was grossly inadequate. The notes given to Bollmeier were for small sums, and with the apparent intention of enabling him to do what he actually did; that is, dispose of them to different purchasers without satisfying the claims of his creditors. It must be conceded that the case on the facts is a close one; but it is often difficult to introduce direct evidence of a fraudulent purpose, and, in view of the inadequacy of the consideration, it was for Anderson to prove that he acted in good faith. His own testimony is not, in that respect, satisfactory or reassuring.

We reach the conclusion that the decree of the trial court was right, and it is therefore affirmed.

SCHLADER et al. v. STREVER.

(Supreme Court of Iowa. Dec. 13, 1912.)

1. WATERS AND WATER COURSES (§ 158½*)—DRAINAGE—EASEMENT—CONTRACT.

Evidence held to warrant a finding that defendant's grantor had agreed with plaintiffs' ancestor for the construction of a tile drain from the latter's land through that of defendant's grantor, and that plaintiffs' ancestor should be entitled to drain his land through the same.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 189; Dec. Dig. § 158½.*]

2. WATERS AND WATER COURSES (§ 158*)—EASEMENT OF DRAINAGE—ESTOPPEL TO OBSTRUCT.

Where plaintiffs' ancestor constructed a drain through the land of defendant's grantor pursuant to an agreement for the same, relying on such agreement as affording him an outlet for his surface water, and incurring expense in constructing the drain and making connections therewith, defendant was estopped to obstruct the same or deprive plaintiffs of the beneficial use thereof.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 184, 186-188; Dec. Dig. § 158.*]

3. WATERS AND WATER COURSES (§ 119*)—NATURAL WATERWAY—DRAIN—OBSTRUCTION.

Where plaintiffs' ancestor constructed a drain along a natural waterway, defendant

could not rightfully obstruct the flow, and set the water back onto plaintiffs' land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 131-134; Dec. Dig. § 119.*]

4. WATERS AND WATER COURSES (§ 158*)—DRAINAGE—EASEMENT—INCREASED FLOW.

Where plaintiffs' ancestor, by an agreement with defendant's grantor, procured the right to construct a tile drain from his own land over that of defendant, the amount of drainage was not strictly limited to the system originally established, but plaintiffs were entitled to extend their tile lines to drain wet places on their land in accordance with the usages of good husbandry.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 184, 186-188; Dec. Dig. § 158.*]

5. WATERS AND WATER COURSES (§ 158*)—DRAINS—LANDS OF ADJOINING OWNER—DAMAGES.

Under Code Supp. 1907, § 1989a53, providing that landowners may drain by the construction of drains discharging into any natural water course or into any natural depression whereby the water will be carried into some natural water course, and, when such drainage is wholly on the owner's land, he shall not be liable in damages to any person, where the drainage is not wholly on the owner's land, but is carried into or discharged on the land of an adjoining owner in accordance with an agreement with the latter, a like immunity from liability for damages also exists.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 184, 186-188; Dec. Dig. § 158.*]

Appeal from District Court, Wright County; Chas. E. Albrook, Judge.

The opinion states the nature of the case and the material facts. Affirmed.

D. C. Chase and W. J. Covil, both of Webster City, for appellant. Sylvester Flynn, of Eagle Grove, for appellees.

WEAVER, J. The plaintiffs are the heirs of George Schlader, deceased, from whom they derived title to the N. W. ¼ of section 16, township 90, range 25 in Wright county, Iowa. The deceased obtained his title in the year 1890. A swale or natural course of drainage crosses this land from the northwest to the southeast, and extends for a considerable distance upon the east half of said section, and discharges into what is known as the White Fox creek. At the time in question the land was owned by one Walter Good, through whom title thereto is traced to the defendant in this action. Prior to 1894 an open ditch had been constructed along the course of the swale across both tracts of land affording both some degree of drainage. In 1894 or 1895 Schlader laid a 12-inch tile drain along the course of the open ditch across his land, and under an agreement with Good, to which a reference will later be made, he extended the same a distance of 60 rods along the same open ditch in the direction of the creek. Having laid the tile, he filled the excavation upon his own land, but left that part on the land

of Good unfilled. A year or two later Good took up that portion of the uncovered tile which had become broken, replaced them with new tile, cleaned out those which had become more or less obstructed, and refilled the ditch. He also extended said tile drain from the point where it was left by Schlader to the creek, or at least entirely across his own land. Both Schlader and Good and his grantees constructed laterals on their respective premises discharging into the main tile. The system thus provided afforded sufficient drainage, so that both tracts of land have to a considerable extent been cultivated and used for ordinary farming purposes in and along the course of the swale, though it is claimed by the defendant that the 12-inch tile is insufficient to carry off all the water in wet seasons, and that his crops are thereby at times injured or destroyed. The drainage system constructed, as stated, seems to have been used by both parties without controversy or objection on either side until after defendant herein purchased the east half of the section in the year 1909. He made the purchase, knowing the existence of the drain, and required his grantor to covenant or contract against the legal right in any other person to any easement or interest of that nature. In the year 1910 defendant closed or obstructed the main tile near the point of its entrance from the plaintiff's land, and, when such obstruction was removed, he renewed it. Thereupon this action was begun to enjoin further interference with or obstruction of said drainage, and for the recovery of damages. It is the claim of plaintiffs that they have a legal right under the statutes and laws of this state to the unobstructed flow of drainage from their land along the said ditch as a natural water way. They also claim that said tile drain was constructed under an oral agreement with Good, the defendant's grantor, whereby a perpetual license or easement was created for the construction and maintenance of said drain for the benefit of the land now owned by them. The defendants deny the existence of any such right, and deny that any agreement was ever made between Good and Schlader, whereby the latter obtained anything more than a mere temporary license to maintain such drain. They also allege that plaintiff has brought to such drain surface waters from outside the natural watershed, thereby unduly increasing the burden upon the servient estate. The trial court found for the plaintiff, and granted the relief prayed. The defendant appeals.

[1] Concerning the agreement under which Schlader extended his tile 60 rods down the swale upon the land of Good, there is some conflict of evidence, but, upon careful examination, it is apparent that the dispute relates to incidental matters, and not to the real essence of the contract. It

is not denied that, when Schlader undertook the drainage of his land, he sought his adjoining owner Good, or rather Good's brother and agent in possession of the land, and that the latter reported the same to the owner. The negotiations according to defendant's own showing resulted in an agreement that Schlader should be allowed to extend the drain along the open ditch for a distance of sixty rods upon Good's land, and that Good should pay for such improvement or contribute thereto to the extent of \$100, the tile, so laid upon the premises of the latter, to thereafter belong to him. Plaintiff's evidence tends to show a similar agreement except as to where the ownership of the tile in the drain on Good's land should rest. Defendant's evidence further tends to show that while Schlader dug the ditch, and laid the tile on the land of Good for the distance contemplated, he did not cover or fill the excavation. Good complained of this omission, and objected to making the payment of \$100, and the parties compromised upon the sum of \$25, which was thereupon paid to Schlader. Good then or later took up and cleaned a part of the tile, renewed the broken ones, and filled the excavation, leaving the drainage from Schlader's land through such tile unobstructed. It is true Good as a witness now swears that he never agreed to give Schlader any right to an outlet for drainage upon his land, and that the sum and substance was that he employed and paid Schlader to construct this 60 rods of drain for the benefit of his (Good's) land. This statement evidently lacks candor, or the witness is confused as to the very manifest meaning of his own words. There is no pretense or shadow of evidence in the record that Schlader sought the job of making this drain as a mere employé or contractor without respect to its effect upon his own land. On the contrary, it is perfectly clear that in these negotiations he was seeking to secure or improve an outlet for his drain. Good himself on cross-examination says: "The first I knew of Schlader constructing a drain through the N. W. $\frac{1}{4}$ of section 16 was when my brother wrote me about it 11 or 12 years ago. In his letter he told me that Schlader was either tiling or had tiled his land, and wanted to come over and get an outlet upon my land. * * * I never knew of anything that my brother said to me that Schlader wanted to do anything further for me than to place the tile on my land and get an outlet for himself." It was unquestionably for this purpose and for this purpose alone that Schlader sought the arrangement permitting him to construct this drain, and it is incredible that the parties thereto did not both know and understand that he was thereby to acquire the right to use said drain as an outlet. If he, in fact, did not complete the work in the manner contemplated, that failure on his

part was condoned, and the damage resulting therefrom was paid in the settlement by which Good was relieved from his payment of a part of his promised contribution to the expense. That such was the understanding of the parties was shown by the fact that, after Good had repaired such drain, he restored the connection with plaintiff's tile, and it continued to do service as an outlet for plaintiff's drainage for 12 years or more without any objection or complaint from Good or his grantees. The fact, if it be a fact, that it was understood that the tile laid upon Good's land should become his property, is in no manner inconsistent with plaintiff's claim that Schlader had Good's agreement to afford him an outlet for his drain.

[2] That agreement having been acted upon, and Schlader having adjusted his drainage system in reliance upon such outlet and incurred the expense of constructing the same and making connection therewith, defendant cannot rightfully obstruct such outlet, or deprive the plaintiffs of the beneficial use thereof. *Vannest v. Fleming*, 79 Iowa, 638, 44 N. W. 906, 8 L. R. A. 277, 18 Am. St. Rep. 387; *Neuhring v. Schmidt*, 130 Iowa, 401, 106 N. W. 630; *Brown v. Honeyfield*, 139 Iowa, 414, 116 N. W. 731; *Hansen v. Creamery Co.*, 106 Iowa, 167, 76 N. W. 652.

[3] Moreover, the drainage in question is along a natural waterway, and defendant cannot rightfully obstruct the flow and set the water back upon the land of the plaintiffs. The open ditch in which the tile was laid had existed from some more remote date, and afforded an outlet or means of escape for the drainage of both farms. Defendant has both filled this ditch and stopped the tile, thereby wholly preventing the flow from the dominant estate, except as the obstructed waters may arise and overspread the surface. There is no sound theory of law on which such action can be justified.

[4] It is claimed, however, that by means of their lateral ditches plaintiffs have diverted to the main tile waters not naturally flowing in that direction to an amount which lessens the effectiveness of defendant's drainage of his premises. There is some testimony of this character, but we think it fails to show any material or wrongful increase of the burden upon defendant's lands. It may be true that within the watershed served by the drain in controversy there were some low spots of restricted area in which surface waters would stand at times, and only the overflow and seepage be discharged into the swale, and that by extending the lines of tile through these wet places they were drained to the bottom, and converted into arable land, but we think this is not only in accordance with the usages of good husbandry, but is well within the right of the dominant owner. That any material amount of surface water naturally tributary to some other line or course of drainage has

been diverted to the outlet here in dispute is not in our judgment shown by the record. Whether the statute hereinafter cited has any effect to abrogate or modify the unwritten law in this respect we shall not here attempt to decide. None of the cases cited by appellant require any other conclusion than we have already indicated. Both statute and case law on the subject of drainage of rural lands in this state are to a considerable extent the product of a comparatively recent evolution the completion or perfection of which is probably not yet in sight. The distinct tendency on the part of both Legislature and courts has been and still is toward an enactment and interpretation of law, which, while depriving no person of essential or valuable rights, shall not allow any reasonable effort for the reclamation, improvement, and development of agricultural lands to be thwarted because of objections which are at best technical and unsubstantial.

[5] Among the evidence of this tendency prominence is to be given the recent statute, Code Supp. § 1989a53, which provides that owners of land may drain the same by the construction of open or covered drains discharging the same into any natural water course or into any natural depression whereby the water will be carried into some natural water course, and, when such drainage is wholly upon the owner's land, he shall not be liable in damages to any person. It follows, of course, that where such drainage is not wholly upon the owner's land, but is carried into or discharged upon the land of an adjoining owner with the agreement of the latter, a like immunity from liability for damages must also exist. The statute has served to relieve the situation from the hampering effect of a too literal reading and application of certain abstract statements of law contained in the discussion of precedents and principles found in *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563, and some other cases in which that decision has been followed and approved. The statutory right of the plaintiffs to collect the surface waters upon their premises into a single ditch discharging into a natural water course or depression leading into such a water course is thereby assured and this being supplemented by the acquired right to extend the outlet along such course into the land of the defendant the court will protect him in its use and prohibit its obstruction by the defendant. The decree of the district court is right, and it must be approved.

A motion has been filed by appellant to tax appellees with the cost of printing the amended abstract in this case. The amendment contains 52 pages of printed matter, and exceeds in volume the original abstract. We think it much more voluminous than necessary to a proper presentation of the record and the cost of such printing in excess of

15 pages will be taxed to the appellees. All other costs will be taxed to the appellant.
Affirmed.

BARTHELL et al. v. HERMANSON, Treasurer, et al.

(Supreme Court of Iowa. Dec. 13, 1912.)

1. TAXATION (§ 552½*)—SETTLEMENT OF TAXES.

Tax ferrets, though without authority to deal with taxes regularly assessed and not subject to controversy, may settle with a taxpayer for the amount he should pay on property omitted from taxation, and, if in so doing they take into account the taxes already assessed, the county may not repudiate the settlement.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1067; Dec. Dig. § 552½.*]

2. TAXATION (§ 552½*)—SETTLEMENT OF TAXES.

A county may not repudiate a settlement between tax ferrets and taxpayers for taxes on property omitted from taxation, taking into account the amount of taxes already assessed, unless it tenders back to the taxpayers the amount received from them under the settlement.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1067; Dec. Dig. § 552½.*]

3. EVIDENCE (§ 408*)—PAROL EVIDENCE—VARYING RECEIPTS.

A county treasurer's receipt of the payment of taxes is a mere receipt and capable of explanation by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1829-1842; Dec. Dig. § 408.*]

4. JUDGMENT (§ 956*)—PAROL EVIDENCE—EXPLAINING AMBIGUITY.

An ambiguous decree is subject to explanation by parol.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1822-1825; Dec. Dig. § 956.*]

5. TAXATION (§ 552½*)—SETTLEMENT OF TAXES—EVIDENCE.

Evidence held to support a finding that a settlement of taxes on omitted property included as a part of the settlement taxes already assessed as evidenced by a decree entered pursuant to a stipulation of the parties.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1067; Dec. Dig. § 552½.*]

6. TAXATION (§ 552½*)—SETTLEMENT OF TAXES—MUTUAL MISTAKE.

Where a mutual mistake was made in a settlement for taxes, entered into between tax ferrets and taxpayers who paid the taxes called for by the settlement, the county retaining the money paid was bound by the settlement as interpreted by the taxpayers.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1067; Dec. Dig. § 552½.*]

Appeal from District Court, Allamakee County; A. N. Hobson, Judge.

Action to enjoin the sale of certain lands for the taxes of the year 1908, and to cancel the assessment against it for that year. The trial court dismissed the petition and plaintiffs appeal. Reversed and remanded.

William S. Hart, D. J. Murphy, and Stilwell & Stilwell, all of Waukon, for appellants. H. E. Taylor, of Waukon, and Frank Sayre, of Decorah, for appellees.

DEEMER, J. The decision here turns upon the effect of a decree of the district court of Allamakee county on the 31st day of August, 1908, entered pursuant to a stipulation of the parties in certain cases then pending in said court. The stipulation which is the foundation of the decree reads as follows: "August Term, 1908—Stipulation. In the District Court of Iowa in and for Allamakee County. In the appeal of Martha M. Barthell, M. J. Barthell, B. F. Barthell, and Myrtle L. Barthell, Appellants, from the assessment made by J. M. Leppert, Treasurer of Allamakee County, and Chas. H. Barthell, Geo. P. Barthell, J. W. Barthell, Sarah J. Faegre, J. S. Barthell, Minnie Meier, Anna Steinbach, other parties thereto. It is hereby stipulated by and between the board of supervisors, the county of Allamakee, Iowa, and the treasurer thereof, on the one part, and Martha M. Barthell, Sarah J. Faegre, J. W. Barthell, Chas. H. Barthell, George P. Barthell, Anna Steinbach, Minnie Meier, M. J. Barthell, J. S. Barthell, B. F. Barthell, and M. L. Barthell, on the other part: That whereas, the treasurer, his assistants and others, have listed for taxation, or assessed and taxed, a large amount of moneys, bonds, stocks, loans and credits for the years 1903, 1904, 1905, 1906, 1907 and 1908 against the above-named parties of the second part: Now therefore, in order to avoid a vast amount of litigation and adjust all tax matters for said years of 1903, 1904, 1905, 1906, 1907 and 1908, that may have been made or shall be made for such years of 1903, 1904, 1905, 1906, 1907 and 1908 against any, each and all of said parties, including any such tax or assessment that might have been assessed against the estate of J. M. Barthell, deceased, now settled, it is hereby stipulated: That an order shall be made by the district court of Iowa, in and for Allamakee county, at the August term, 1908, thereof that the suits of the above-named appellants shall be consolidated and all of the other heirs of the said J. M. Barthell, deceased, be made parties to said suit, and that said court at said term shall make the following order herein: The listing for assessment and the assessments made by the treasurer or others against any of the above-named parties be and the same are hereby canceled and rebated and that instead of said assessments there be assessed a gross sum against all of said parties aggregating the sum of \$1,800, which shall be in full of all taxes assessed or to be assessed against them or either of them for the years, 1903, 1904, 1905, 1906, 1907 and 1908. Pelsen Welch Co., by J. W. Pelsen. D. J. Murphy, Stilwell & Stilwell, Attorneys for Appellants."

And the decree entered therein is in these words: "And now, to wit, on the 31st day of August, the same being the 1st day of the regular August term, 1908, the court, after

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

being duly advised in the above matter, ordered, adjudged, and decreed that the causes Nos. 7,800 7,801, 7,802, and 7,803 be and the same are hereby consolidated as per above stipulation, and on the payment of the sum of \$1,800, and all costs, to be in full settlement of said causes against all parties as stipulated above, and that all taxes and assessments as per said stipulation be and the same are hereby canceled and receipted in full. Said sum and all costs have been paid in full and said amount of \$1,800 paid by the clerk of this court to J. M. Leppert, treasurer, and all costs paid, and taxes canceled as per stipulation."

On the same day the money was paid to the clerk, and he issued the following receipt:

"Duplicate.

Waukon, Iowa, Aug. 31st, 1908.

"Office of Clerk of District Court of Iowa, in and for Allamakee County. Received of Martha M. Barthell, M. J. Barthell, B. F. Barthell, Myrtle L. Barthell, Chas. H. Barthell, Geo. P. Barthell, J. W. Barthell, J. S. Barthell, Sarah J. Faegre, Minnie Meier, Anna Steinbach, in the case of said parties v. J. M. Leppert, Treasurer of Allamakee, case No. 7,800, the sum of eighteen hundred dollars (\$1,800) in full payment of all taxes and assessments made or that may be made against each or any of said parties for the years 1903, 1904, 1905, 1906, 1907 and 1908, inclusive, as per order of court this day made in said case. James Collins, Clerk of the District Court of Iowa, in and for Allamakee County."

And on the same day the county treasurer receipted for the amount by the following receipt:

"Received above amount in full payment of taxes as above stated, this 31st day of August, 1908.

"J. M. Leppert, Co. Treasurer.

"Receipt No. 173."

It is claimed on the one hand, and denied on the other, that the following appeared on the receipt given by the clerk:

"Waukon, Iowa, August 31, 1908.

"M. J. Barthell. Allamakee County Taxes on Omitted Property. Taxing District, Waukon.

Year.	Amount Taxable	Rate.	Tax.	Int.	Total.
	Omitted.	Value.			
1903					
1904	To cover years 1903 to 1908, inclusive, as against all parties				
1906	named in stipulation.....				
1907					\$1,800.00
1908	Grand Total				
					\$1,800.00

"No. 173."

Upon this record plaintiffs claim that all their taxes for the year 1908, which were levied against them, have been fully paid and satisfied and should be canceled, and

that the county treasurer should be enjoined from collecting the same by sale of plaintiffs' real estate. So far there is no dispute in the record save over the nature of the receipt given by the county clerk; but appellees contend that the documents, receipts, decree, etc., above referred to had reference only to property omitted by the plaintiffs from taxation, and that the only taxes for the year 1908 which were referred to or were in controversy were those which were or might be claimed to have been omitted from the assessment made against the plaintiffs, and they introduced testimony to show the nature of the previous controversies, and the intent of the parties in making the settlement and in consenting to the decree. In response to this, plaintiffs say the record is a verity, and that it cannot be contradicted or explained by parol testimony, and further that, conceding the admissibility of such testimony, plaintiffs have shown that the stipulation and decree were intended to cover all their taxes for the year 1908.

[1] Defendants also claim that, even if the settlement did cover all the taxes assessed against plaintiffs for the year 1908, it should not be considered nor the decree given force for the reason that the tax ferrets who made the stipulation and consented to the decree had no authority either in law or fact to do so. We may as well dispose of this proposition of law here before going to the other matters in dispute. Assuming that the tax ferrets had no authority to deal with taxes regularly assessed and which were not the subject of controversy, they undoubtedly had authority to settle with plaintiffs for the amount they should pay on property omitted from taxation, and, if in so doing they took into account in making the settlement the amount of taxes already assessed, there is no reason why the county should be permitted to repudiate the settlement.

[2] Moreover, if, as plaintiffs claim, they made the settlement on the basis of the inclusion of all of their taxes for the year 1908, neither the county nor any of its representatives can repudiate that settlement, even if made without authority, unless it tenders back to plaintiffs the amount received from them in virtue of the settlement. Neither the county nor its officials can have the benefits of the agreement without assuming its burdens, and by retaining the money it becomes bound to perform the agreement, whatever it may have been. These propositions are very fundamental in actions between private persons, and a county and its officials are not exempt from such wholesome rules.

[3] Appellants' main insistence is that as the decree and stipulation covers all taxes assessed, or to be assessed, against the parties named for the years 1903, 1904, 1905, 1906, 1907, and 1908, this is the end of the controversy. They also rely upon the terms

of the receipt given by the clerk; but, as that is a mere receipt and capable of explanation, it is not conclusive, but may be considered as an evidentiary fact in construing the decree itself.

[4] Defendants say that the decree is not conclusive, but is subject to explanation, and that it has no reference whatever except to omitted property for any of the years named. That it had reference to no other taxes except omitted ones for all years prior to 1907 is very clear, for they were not in dispute, and, as the decree in virtue of this fact is ambiguous, we think parol testimony was admissible to explain just what taxes for the years in question were intended to be covered by the decree. Manifestly it was omitted taxes for the years 1903, 1904, 1905, 1906, and 1907.

[5] Was it the same kind of taxes assessed or to be assessed for the year 1908? This, as it seems to us, is the pivotal question in the case. Upon this proposition, because of the denials, amendments to and counter denials of abstracts, we have been compelled to resort to the transcript; and from a reading thereof we extract the following: The Pelsen Welch Company was employed some time in the year 1907 by Allamakee county for the purpose of collecting taxes on omitted property. Early in March of the year 1908 they reported to the treasurer assessments for the years 1903 to 1907 including a large amount of moneys and credits which had been omitted from taxation by M. J. Barthell, B. F. Barthell, Martha M. Barthell, and Myrtle L. Barthell, and the treasurer gave each of these parties notice that it was proposed to assess them on such omitted property. Each of them appeared and filed objection, and on April 1st M. J. Barthell was assessed with a total tax on such property amounting to \$9,651.51, B. F. Barthell to the amount of \$1,062.24, Martha M. Barthell to the amount of \$2,205.13, and Myrtle L. Barthell to the amount of \$708.18. Each appealed to the district court, and pending the appeal negotiations for a settlement were entered into between the appellants and all the other heirs of J. M. Barthell, deceased, and the "tax ferrets," culminating in the written agreement of settlement herein before set out. This contract was entered into on August 31, 1908, and the regular taxes for that year, while already assessed, were not due. Some of the regular 1907 taxes levied against the property of some of the parties to the settlement had not been paid; that is to say, some of them had not paid the second installment of the 1907 taxes. The taxes in controversy are the remainder of the taxes for the year 1907 and the whole of those for the year 1908, being, as we understand it, \$55.62, against Martha M. Barthell, against O. H. Barthell \$88.76, against G. P. Barthell \$52.45, against Anna Steinbach \$52.45, against

M. J. Barthell \$75.63, and against the estate of J. M. Barthell, deceased, the sum of \$217.82; these taxes being upon real and personal property, including in some cases a small amount on moneys and credits.

It will be noticed from the contract that for some reason seven persons in addition to those who were parties to the appeal were brought into the settlement, and that taxes assessed or to be assessed for the year 1908, which were not included in the original appeals, were also expressly covered. Defendants contend that the additional parties were introduced because they were heirs of J. M. Barthell, deceased, from whom they inherited the moneys and credits which it is claimed had been omitted with the thought of closing up the entire matter of omitted taxes for the years in question, and they also say that the year 1908 was referred to in order to cover any future assessment on omitted property for that year. While, on the other hand, plaintiffs say that the negotiations for settlement at all times had reference not only to taxes on omitted property, but covered all taxes assessed or to be assessed against any or all of the parties named, for the years named in the agreement of settlement, and that, in all negotiations for the settlement, all taxes then due, or assessed, or to be assessed, were specifically mentioned, and the fact that some of the taxes were not then due was considered and taken into account. It is unfortunate that the agreement of settlement was so carelessly draughted as to be subject to two constructions. Standing alone and without reference to any of the circumstances surrounding its making, it clearly covers all taxes for the years 1903, 1904, 1905, 1906, 1907, and 1908, and but for the fact that the original controversy was over omitted property and made by tax ferrets whose only employment was to collect such taxes, there would be no doubt in our opinion that it supports plaintiffs' contention. One of the tax ferrets testifies, however, that the agreement was made to cover omitted taxes for the years 1903 to 1907, inclusive, and any claim for taxes on such property which it might be claimed should be assessed for the year 1908. But this is expressly denied by at least three witnesses who testified that in all the negotiations all taxes for the years mentioned, including taxes on real estate, were expressly mentioned and taken into account. It is manifest that in this settlement new parties were brought in for some purpose, and taxes included which down to that time had not been the subject of controversy. At that time no claim was being made against some of these new parties, but taxes had been assessed against them on other property, and it is also shown that nothing but regular taxes had ever been assessed or claimed against them. The preponderance of the testimony shows that mention was made of the fact that some

of the taxes covered by the agreement were not yet due, and the record shows that Chas. Barthell stated to Mr. Pelsen, who made the settlement, that he had no moneys and credits, that there was a regular tax against him on real and personal property at that time, that he would not settle unless these regular taxes were included, and that upon the settlement he paid \$100 of the \$1,800 agreed upon. A reading of the testimony satisfies us that the preponderance is with the plaintiffs, and that those of them having to do with the settlement—three in number—fully understood and believed that all their taxes for the years 1907 and 1908 were included in the settlement. As we view it, the wording of the agreement itself lends support to this contention.

[6] At any rate, if they were mistaken in their belief, as defendants contend, they (defendants) as representatives of the county cannot hold the money paid in because of the mistake and collect the taxes too. The most that can be claimed from the record is that a mutual mistake was made, not only in the negotiations, but in drawing the stipulation as well; but that in our opinion is not sufficient to defeat the plaintiffs.

From this conclusion it follows that the decree must be, and it is, reversed, and the cause remanded for one in harmony with the opinion.

Reversed and remanded.

RICE et al. v. RICE et al.

(Supreme Court of Iowa. Dec. 14, 1912.)

1. EVIDENCE (§ 601*)—VALUE—CONTIGUOUS LAND.

Evidence in partition that land contiguous to that in question subsequently sold at a price higher than the land in question was appraised at did not conclusively show that such appraisal was too low.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2425, 2456-2459; Dec. Dig. § 601.*]

2. PARTITION (§ 77*)—PLEADINGS—SALE.

Where plaintiff only asked for partition in kind, he was not entitled to an order that the land be sold, especially where his purpose was merely to have it offered for sale in order to fix the price.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 211-223; Dec. Dig. § 77.*]

3. PARTITION (§ 86*)—STIPULATION—RENTS.

Where a stipulation between the parties pending an appeal in a partition proceeding that the parties on each side should have possession, rent free, of the land decreed to them, and possession was taken pursuant thereto, plaintiff was not entitled to recover rent for the land decreed to defendants, though the stipulation did not in specific terms refer to such lands.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 247-252; Dec. Dig. § 86.*]

4. APPEAL AND ERROR (§ 877*)—HARMLESS ERROR—COSTS.

Where the plaintiff in partition secured a more favorable taxation of costs than he was entitled to, he could not complain thereof, though defendants did not appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560-3572; Dec. Dig. § 877.*]

5. CONSTITUTIONAL LAW (§ 278*)—DUE PROCESS OF LAW—PARTITION—ERRONEOUS DECISION.

An erroneous decree in partition depriving a party of his interest in land is not necessarily a taking of property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 763, 765-770, 772-806, 808-810, 816-824, 907-924, 942; Dec. Dig. § 278.*]

Appeal from District Court, Mahaska County; B. W. Preston, K. E. Wilcockson, W. G. Clements, and John F. Talbott, Judges.

Suit in equity for the partition of lands. The case was before us upon a former appeal. *Rice v. Rice*, 147 Iowa, 1, 125 N. W. 826, 34 L. R. A. (N. S.) 917. Upon that appeal the case was remanded for further proceedings. Such further proceedings being had in the district court and a final decree entered, the plaintiff again appeals therefrom. Affirmed.

John F. & Wm. R. Lacey, of Oskaloosa, for appellants. W. H. Keating, of Oskaloosa, for appellees Wm. I. Rice and Minnie A. Rice. Bolton & Shangle, of Oskaloosa, for appellees O. C. Cochran and Ella J. Cochran.

EVANS, J. We quote from our former opinion the following statement of the salient facts of the case: "This is an action for the partition of real estate formerly belonging to W. H. H. Rice. It was brought by his widow, Emily M. Rice, and her son, A. L. Rice; but she has died since the case was decided in the district court, and her son and administrator, A. L. Rice, has been substituted as plaintiff. In 1889 Wm. H. H. Rice made a will, by the terms of which he devised to his wife, Emily M. Rice, one-third of all the real estate of which he might die seised in lieu of her statutory share therein. In the seventh clause of said will he bequeathed to his daughter, Mrs. Ella J. Cochran, 80 acres of land 'free from any lien or indebtedness whatever,' and by the eighth clause of said will he bequeathed to his son Wm. I. Rice another 80 acres of land 'free from any lien or incumbrance whatever.' Both of these tracts of land were specifically described, and together they constituted the tract spoken of in the record as the 159 acres lying south of the east and west road. At the time the will was made, and at the time of the testator's death, he also owned what was known as the 'homestead farm,' consisting of 244 acres just north of the road in question, and separated

not heretofore bequeathed to my said children, Mrs. Ella J. Cochran, Wm. I. Rice, and Abraham L. Rice, in equal shares, hereby intending to vest in my last named children share and share alike, all the rest and residue of my estate in fee simple absolutely not heretofore conveyed to my legatee.' Ella J. Cochran and Wm. I. Rice were children by a former wife, while Abraham L. Rice was his son by his then wife, Emily M. Rice. In the twelfth clause of the will this was said: 'My beloved son Abraham L. Rice being the only son of my wife Emily M. Rice and the heir to the estate by me hereby bequeathed to her is the reason why I make no further provision for him than I have in this my last will and testament.' No change was ever made in this will, but on the 19th of March, 1900, the testator executed and delivered to Ella J. Cochran and Wm. I. Rice separate warranty deeds, conveying to each of them the specific land that was bequeathed to them by the seventh and eighth clauses of his will. On the same day that these two conveyances were made, Ella H. Cochran and her husband conveyed by warranty deed to Wm. I. Rice the 80 that had just been conveyed by warranty to her by her father. In December, 1892, Wm. H. H. Rice executed and delivered to Wm. I. Rice a writing wherein he referred to his will of 1889 and the bequest of the 80 acres therein described to Wm. I. Rice, and agreed that, in case the purpose of his will was not so carried out as to give Wm. I. Rice the 80 devised to him, the value of the improvements placed thereon by said son was to be a claim against his estate, and it was further said therein: 'But if said W. I. Rice receive said land by bequest as contemplated and intended and provided in my said will then this agreement shall become void and of no effect within law or equity.' The wife, Emily M. Rice, did not join in the deeds from her husband to Ella J. Cochran and Wm. I. Rice, and it is conceded that she retained her statutory interest in the land at the time suit was brought; she having declined to take under the will. The widow's share in the two tracts named was set apart from the 244-acre tract and included the buildings; and by taking her interest in the 159-acre tract, the residue of which was given to A. L. and W. I. Rice and Mrs. Cochran by the will, A. L. Rice was compelled to contribute to the satisfaction of the widow's interest in the 159-acre tract. The appellants claim that the widow had the right to take her statutory interest in the 159-acre tract from set apart to her without reference to her interest in the land north of the road; but, if this is not done, that her share of the

order requiring the widow to take her full distributive share out of the 244-acre tract, including therein the homestead buildings. The quantity of land so set apart for her by the referee was 92 acres, including the homestead. The remainder of such tract was allotted in kind equally between the three children of the deceased, W. I. Rice, Ella Cochran, and A. L. Rice. The district court also found that W. I. Rice and Ella Cochran were entitled to hold the 159-acre tract, and that the widow was not entitled to take therefrom in kind; it being made to appear that her entire distributive share could be allotted without prejudice to her in the larger tract. On the appeal we affirmed the action of the district court in all respects save one. We held that it was error to require the widow against her preference to take her distributive share, inclusive of the homestead buildings. Upon that ground the case was reversed and remanded for further proceedings. In pursuance of such remand, and by proceedings in accord with the statute, the district court ordered a partition sale of the 244-acre tract. It also ordered an appraisal by due proceedings of the 159-acre tract. The appraised value of the 159-acre tract was finally fixed at \$15,105. The 244-acre tract brought at referee's sale the sum of \$28,670. It was ordered that one-third of this sum be applied to the distributive share of the widow, and likewise that the further sum of \$5,035 be applied thereto as being one-third of the appraised value of the 159-acre tract. This made a sum total of \$14,591.67 as the full distributive share of the widow in both tracts. The balance of the sale price of the 244-acre tract was divided equally among the three residuary legatees, W. I. Rice, Ella Cochran, and A. L. Rice. From the final orders and decree of the district court, the plaintiff has again appealed. The widow having died prior to the former appeal, the case has been prosecuted by A. L. Rice, her only child, as the sole beneficiary of her estate and as her administrator. The appellant has argued to some extent the merits of the case as presented on the former appeal. Such questions must be deemed concluded.

The plaintiff himself became the purchaser of the 244-acre tract at the referee's sale. He does not in any manner challenge the regularity of such sale. In his notice of appeal he expressly states that he does not appeal "from so much of said decree as orders the sale of said 244-acre tract."

1. The plaintiff complains of the appraisal of the 159-acre tract, and contends that it should have been appraised at a higher valuation. The report of the appraisers fixed

its value at \$90 per acre. The plaintiff excepted to such report and asked that evidence be heard thereto, and this was accordingly done. Evidence was introduced upon the question of value by both sides, and the district court found and fixed the value of the same at \$95 per acre. There was great variation in the testimony. The farm is highly improved. These improvements were put thereon by the present occupant, W. I. Rice. A part of the improvements consisted of expensive tiling which rendered tillable lands theretofore unfit for cultivation. The court was required to find the value of such tract without the improvements. There was a wide variance in the testimony. The district judge was in a better position to weigh such testimony than we can possibly be. We think the valuation fixed was eminently fair in the light of all the evidence.

[1] It is urged, however, that the subsequent sale of the 244-acre tract and the price realized therefor was conclusive evidence that the trial court had appraised the 159-acre tract too low. The 244-acre tract brought at public sale \$117.50 per acre. This, however, included improvements worth several thousands of dollars. The two tracts were contiguous except as they were divided by a highway. The general quality of the land without improvements was similar. The absolute and exact value of real estate is not ordinarily ascertainable, either by appraisal or by actual sale. Within certain limits, the actual value is a question of judgment, and such judgment is necessarily more or less variable. Whatever the appraisal, an actual sale may realize something more or something less. While the selling price of a farm would throw light upon the value of contiguous lands, it could be by no means conclusive thereof. The district court was required to fix the appraisal upon the evidence before it at the time. Its action in so doing could not become erroneous in the light of the subsequent sale.

[2] It is urged, however, that the trial court ought to have ordered an actual sale of the 159-acre tract. It is sufficient to say that no such request was made of the district court. In the original petition filed for a partition, it was specially alleged that the plaintiff only asked for a partition in kind as to this tract. We find no ruling in the record which can furnish a basis for the plaintiff's present complaint in this regard. Furthermore the proceeding of the district court was in strict accord with our holding on the former appeal. It being found that the widow's distributive share could be assigned in one tract without prejudice to her, it became necessary to ascertain and to fix the value of the 159-acre tract. The statutory method was followed. The plaintiff was not entitled to have the land offered for sale simply for the purpose of fixing the price. The statutory method of appraisal operates as fairly upon one party as upon the other. If

the price fixed may be a little too low, it may also be too high. Upon the record before us here, the plaintiff has no legal ground of complaint at this point.

[3] 2. After remand of the case, the plaintiff filed a supplemental petition asking for allowance of rent as against the defendants for the 159-acre tract for the year 1908 and the subsequent years. This demand was refused by the trial court. Complaint is made of such refusal.

The decree from which the former appeal was taken was entered in 1907. The provisions of such decree have already been referred to. After such decree the parties in March, 1908, entered into the following stipulation concerning rents: "That whereas an action in partition has been brought in the district court of Mahaska county, Iowa, which suit is not yet wholly disposed of, and whereas the parties thereto have the right of appeal to the Supreme Court, and whereas they or some of them may take such appeal, whereas the referees appointed by the court have reported in favor of setting apart specific lands to the widow and each of said parties, and whereas such report having been confirmed by the court, whereas said cause might be differently decided on appeal, and whereas it is desirable that said land should be rented or occupied pending such appeal or further court proceedings, it is therefore agreed between said parties that without prejudice to the right of appeal and without waiving any rights to apply for change or modifications of the partition in any way that each of the parties shall occupy, rent free, the particular tracts set apart to them in the said report of the referee, approved by the court; that none of the parties shall be required to account for the rents pending such appeal or further proceedings, on the tracts separately thus occupied by them during said period. This contract to stand in any event for the rental year of 1908. [Signed] A. L. Rice. Emily M. Rice. Ella J. Cochran. Wm. I. Rice." Under this agreement the plaintiff continued in the possession of the full distributive share of 92 acres, including buildings set apart to the widow. The residuary devisees continued also in possession of the portions set apart to them. Wm. I. Rice continued in possession of the 159-acre tract. The trial court held that the question of rents was adjusted by the foregoing stipulation. In this view we concur. It is urged, however, that the stipulation does not in terms refer to the 159-acre tract. But the decree appealed from had awarded the 159-acre tract to Wm. I. Rice and to Ella Cochran, and such provision of the decree was affirmed here. Furthermore an enlarged portion of the 244-acre tract was awarded to the widow. She continued in possession of such enlarged portion until her death, and after her death the plaintiff succeeded to such possession. Upon the hear-

the widow for one-third of the rent. This demand ignores the fact that, under the contract referred to, the widow was put in possession, rent free, of one-third in value of all the real estate owned by her husband, including the 159-acre tract. We think the trial court ruled properly at this point.

[4] 3. Complaint is also made of the apportionment of costs made by the district court. It appears that the trial court taxed against W. I. Rice and Ella Cochran all of the costs of appraisal of the 159 acres. Of the remaining costs, $\frac{10}{28}$ were taxed to plaintiff A. L. Rice, and $\frac{9}{28}$ to the other two devisees. The costs so apportioned included an attorney fee of over \$400 allowed to plaintiff's attorneys. The contention of plaintiff is that the widow's share should have been charged with three-ninths of the costs, and that each of the devisees, including himself, should have been charged with two-ninths thereof. We are impressed with the propriety of this contention. Just why the trial court should have adopted this method of apportionment is not apparent from the record. The result of the apportionment as a whole, however, was to the disadvantage of the appellees. They were not chargeable with attorneys' fees for plaintiff's attorneys. *Hawk v. Day*, 148 Iowa, 47, 126 N. W. 955; *Hanson v. Hanson*, 149 Iowa, 82, 127 N. W. 1032. In apportioning $\frac{9}{28}$ of the costs to the appellees, the sum so apportioned was made to include \$402 of such attorney fee. As a result, the amount taxed to the appellees was considerably more than two-ninths of the costs properly chargeable against them. It is true the defendants have not appealed. But we cannot consider the complaint of the appellant at this point without taking into account the entire apportionment and the result thereof. We cannot, of course, award any relief to appellees from such final result. Inasmuch, however, as we do find that the appellant obtained a more favorable taxation of costs than he was entitled to, he cannot complain of the method by which such result was reached.

4. Some other questions are argued, but they are fully covered by the opinion on the former appeal.

[5] Appellant urges a constitutional question in that he has been deprived of his interest in the 159-acre tract without due process of law. This proposition doubly assumes, first, that our former holding was erroneous, and, second, that an erroneous decision is necessarily unconstitutional. We cannot accede to either assumption.

The order of the trial court is in accord with our opinion on the former appeal, and it is accordingly affirmed.

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 985*)—REVIEW—DISCRETION OF TRIAL COURT—PROCEEDINGS FOR REVIEW.

Trial courts possess a broad discretion in the matter of granting or refusing extensions of time for the purpose of enabling counsel to prepare and cause to be settled a statement of the case, and the exercise of such discretion will seldom be interfered with by this court, and never, except in cases of a manifest abuse of such discretion. It is held, applying the above rule, that respondent's motion to strike the statement of the case from the record, based upon the alleged insufficiency of the showings made for the various extensions of time in which to have such statement settled, should be denied; it not appearing that in granting such extensions there was a clear abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3889-3891; Dec. Dig. § 985.*]

2. APPEAL AND ERROR (§ 873*)—PRESENTING QUESTIONS IN TRIAL COURT—MOTION FOR NEW TRIAL—NECESSITY.

Where a motion for a new trial based upon alleged insufficiency of the evidence is made and denied after judgment, and no appeal from the order is taken, this court, following the rule in *Hedderich v. Hedderich*, 18 N. D. 488, 123 N. W. 276, will not, on an appeal from the judgment, consider assignments based solely upon alleged insufficiency of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3460, 3461, 3522-3525; Dec. Dig. § 873.*]

3. RULINGS ON EVIDENCE—NO ERROR.

Certain rulings in the admission and exclusion of testimony examined, and held proper, or at least nonprejudicial.

On Petition for Rehearing.

4. APPEAL AND ERROR (§ 873*)—PRESENTING QUESTION IN TRIAL COURT—MOTION FOR NEW TRIAL—NECESSITY.

On an appeal from a judgment alone, the question of the sufficiency of the evidence is not properly before the court for decision, although attempted to be raised by an assignment of error, where the sufficiency of such evidence was in no manner challenged at the trial, but only by a motion for a new trial made long after the entry of such judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3460, 3461, 3522-3525; Dec. Dig. § 873.*]

5. APPEAL AND ERROR (§ 843*)—PRESENTING QUESTIONS IN TRIAL COURT—CONSTITUTIONAL PROVISION.

Section 101 of the North Dakota Constitution, which provides that "every point fairly arising upon the record of the case shall be considered and decided, and the reasons therefor concisely stated," etc., construed, and held not to require a literal compliance therewith. A point fairly arising upon the record, within the meaning of said section, must be one, the decision of which is necessary to the final determination of the cause, and which is properly presented with a fullness and distinctness, rendering it possible for the court to comprehend it in all its bearings. Such is the well-recog-

see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

with our
order
is accordingly affirmed

nized and settled construction of like constitutional provisions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3342; Dec. Dig. § 843.*]

(Additional Syllabus by Editorial Staff.)

6. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of testimony is without prejudice, where the same witness had already covered the matter without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

7. EVIDENCE (§ 427*)—PAROL EVIDENCE AFFECTING WRITINGS—CHattel MORTGAGES.

Testimony by a mortgagee of a crop that he told the assignee of the mortgage that it was subject to a rental contract between the mortgagor and mortgagee relative to a lien on the crops for advancements did not tend to vary the terms of the written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1861; Dec. Dig. § 427.*]

Appeal from District Court, Stutsman County; E. T. Burke, Judge.

Action by A. W. Heald and another against J. E. Strong. From a judgment for defendant, plaintiffs appeal. Affirmed.

T. F. McCue, of Carrington, for appellants. Knauf & Knauf, of Jamestown, for respondent.

FISK, J. Defendant had judgment in the court below, and plaintiffs have appealed, both from such judgment and from an order denying their motion for a new trial. On motion of respondent, the appeal from the order was dismissed upon the ground that the same was not taken within 60 days after the making and service of such order. Such order was made April 7, 1911, and a copy thereof served upon appellants' attorney on April 8th, and the appeal from such order is dated June 13th, and was served on June 15, 1911. The statute (section 7204, R. C. 1905) limits the time for taking an appeal from an order to 60 days from the time written notice of such order shall have been given to the party appealing. The appeal from such order was therefore ineffectual.

[1] At the outset we are confronted with a practice question. At the date on which this cause was set for argument, respondent's counsel, on due notice theretofore given, made a motion in this court for an order striking the settled statement of the case from the record on the following ground:

"(1) That the same was not settled within the time allowed by law.

"(2) That no just cause of action or reason existed for the extensions of time within which to prepare or settle the statement of the case.

"(3) That the appellants willfully neglected to prepare the proposed statement of the case, or to settle the statement of the case within the time allowed by law.

"(4) That the extensions of time within

which to prepare or settle the statement of the case were improperly allowed, and that the extensions so granted were erroneous because from the record it appears affirmatively that the failure to prepare or serve the statement of the case or have the same settled earlier was due to the willful neglect of the said appellants."

The record discloses that the case was tried and judgment rendered in the month of June, 1910. The statement of the case was not settled until March 6, 1911. On August 31, 1910, appellants' counsel applied for and received from the trial judge an extension of 60 days from and after such date in which to settle a statement of the case. The showing offered as a basis for such order seems to have been sufficient, and its sufficiency is not challenged. Again, on October 25th, upon a similar showing, appellants' counsel applied for and received a further extension of such time of 60 days from and after such date. Again, on December 5th, plaintiff presented an affidavit to the trial judge stating that he had just received an official transcript of the testimony from the court reporter, and also stating that the same is a large one, and contains many exhibits, and that it will require a great length of time in which to prepare a proper statement of the case, whereupon an order was made extending the time for the period of 90 days from and after December 25th. Such order was filed on January 10, 1911, in the clerk's office. Again, on the 24th day of February, 1911, another similar application was made for an extension of such time up to and including March 8, 1911, which was granted by Hon. E. T. Burke, the trial judge, but who in the month of January preceding ceased to be the presiding judge in said judicial district, and qualified as judge of this court. As a basis for such order appellants' attorney presented an affidavit, stating, in substance, that immediately upon ascertaining the result of the verdict in said cause he ordered a transcript of the evidence for the purpose of settling a statement of the case and of moving for a new trial; that on or about the 1st day of January, 1911, he received such transcript which was the earliest date according to his best information and belief at which he could procure the same; that immediately thereafter he commenced the preparation of such statement, but that during a portion of such time his stenographer was called away on account of sickness; and that during a considerable portion of the time after the commencement of such work his family were seriously ill, which rendered it impossible for him to give his attention to such work, but that he had proceeded with due dispatch and as rapidly as possible, completing the proposed statement on February 5, 1911, on which date he served the same upon respondent's counsel, the latter accepting service thereof on Feb-

examine and compare the original transcript therewith. He also stated that ten days' additional time was requisite in which to serve notice of an application to have such proposed statement settled. Thereupon an order was made by the said trial judge extending the time to March 8, 1911, in which to have such statement of the case settled. Again, on March 8th, two days after such statement was settled, an application was made to Hon. Charles F. Templeton, judge of the First judicial district, for an extension of such time to and including March 25th thereafter, which application was granted upon a showing substantially the same as that made to Hon. E. T. Burke at the time the last extension was granted, and also setting forth the fact that at the time Judge Burke settled such statement on March 6th objection was made upon the ground that no jurisdiction was vested in Judge Burke to grant such extension of time, for the reason that he had at that time ceased to be the judge of the Fifth judicial district, wherein such cause was tried, and a proper showing was also made that his successor, Judge Coffey, as judge of the Fifth judicial district, was absent from the state. At the time of the application for the settlement of the statement of the case, the following objection was made and overruled, and an exception allowed, which objection was as follows: "The defendant objects to the settlement of the statement of the case in the above-entitled action (1) because no proper extension of time has been granted by the judge of said court extending the time to or beyond March 6, 1911, within which to prepare or settle such statement of the case; (2) no good cause in the interest or furtherance of justice has been shown under or by virtue of which the plaintiffs are entitled to the settlement of the statement of the case at this time and no cause exists therefor; (3) that said statement of the case could readily have been settled long prior to the first of January, 1911, by the use of reasonable diligence. These objections are based on the records and files and the annexed affidavits. Wherefore the defendant prays that the motion of plaintiffs to settle the statement of the case be herein dismissed. Dated March 6, 1911."

In support of such objections the following affidavits were presented by respondent's counsel:

"John C. Lowe, being first duly sworn, deposes and says: That he was during all the year 1910 the official stenographer of the Fifth judicial district, and as such stenographer caused the taking of the testimony of the witnesses in the above-entitled matter by Miss Gertrude McConnell, affiant's assistant. That Hon. T. F. McCue was one of plaintiff's

same would cost. That affiant caused said McCue to be immediately notified of the cost thereof. Some weeks later affiant met said McCue, and he (McCue) informed affiant that he had forgotten the amount, and that, if affiant would again notify him thereof, he would send a check therefor. That affiant immediately notified him again of the amount, but did not hear from said McCue again relative thereto. That said McCue was informed by affiant, and well knew, that affiant required payment for transcripts to be made in advance as provided by statute. That said McCue did not furnish the payment, but on November 5th we received a letter from A. W. Heald, in which he stated that he had received a letter from Mr. McCue asking that \$150 be sent to him to pay for this transcript, and Mr. Heald also said at that time (November 5, 1910) 'I wish you to draw on us for the amount of this and we will pay the draft.' On receipt of the letter or soon thereafter, Miss McConnell commenced the transcript for the first time. On November 29, 1910, we received another communication from Heald saying that McCue was no longer retained by them. We did not feel at liberty to write this transcript without having our fees in advance. That the only reason why said transcript was not prepared and sent plaintiffs or their attorney sooner was the failure of the plaintiffs to forward the money therefor in accordance with my rules and section 484, R. C. 1905. On November 5th, 1910, we wrote the plaintiffs the following letter: 'Replying to your letter of November 5th, will state that we require in all cases a deposit of the estimated cost before starting to write a transcript. Therefore, I have not started on the case of Heald & Kleinman v. Strong, but I think I can furnish you the transcript about the second week in December. As per your request I am drawing on you today for the estimated cost of \$150. John C. Lowe.' Subscribed and sworn to before me this 22nd day of Feby., 1911. Omon B. Herigstad, Notary Public. [Seal.]"

"A. L. Knauf, being first duly sworn, deposes, and says: That a copy of the transcript of the evidence in the above-entitled action was furnished affiant by the then court stenographer of said district on December 12, 1910, and that the same could have been furnished affiant long prior to that date had the original thereof been ordered under the rules of said stenographer, and the law of North Dakota relative to stenographers of the district court. That said action was tried and verdict rendered at the June, 1910, term of the district court of Stutsman county, N. D. That notice of entry of judgment was served on Hon. T. F. McCue, attorney for plaintiffs, on or about the 23d day of

June, 1910. That at the same term of court several days subsequent thereto affiant tried a court case, *McCurdy v. Williams et al.*, the same stenographer taking the testimony in said court case as took the testimony in the above-entitled action. That no decision was rendered in the said court case until the last day of November, 1910. That affiant immediately ordered and secured a transcript of the testimony prior to December 12, 1910, in such court case, and that such transcript contained at least 70 pages more of typewritten matter than that contained in the *Heald and Kleinman v. Strong* action. That, had the transcript been ordered and fees paid promptly by the said plaintiffs, plaintiffs could have procured such transcript of testimony long prior to the first day of November, 1911. A. L. Knauf. Subscribed and sworn to before me this 4th day of March, 1911. John Knauf."

No counter showing was made by appellants' counsel. On the foregoing facts we are called upon to decide the motion to strike such statement of the case from the record on this appeal.

While it appears from such showing that appellants' counsel did not proceed in the settlement of such statement with that degree of diligence which he could and perhaps should have proceeded with, still we are not prepared to say that the trial judge, as well as Judge Templeton, clearly abused the discretion vested in them in granting the various extensions of time. Trial judges rightfully possess a broad discretion in these matters, and the exercise thereof will seldom be interfered with by this court, and never, except in cases of manifest abuse of such discretion. It does not appear that the delay was occasioned through bad faith or with any intent to gain an advantage over or to injure the respondent in any way, and in the light of the prior holdings of this court in such cases we have concluded that the motion should be denied.

[2] This brings us to the merits. Appellant has assigned 31 alleged errors, but in view of the rule announced in *Hedderich v. Hedderich*, 18 N. D. 488, 123 N. W. 276, and cases therein cited, those assignments based upon alleged insufficiency of the evidence cannot be considered on this appeal, as those same matters were urged and passed upon on the motion for a new trial made after the entry of the judgment, and the order denying such motion not having been appealed from is, as to such objections, *res adjudicata*. Assignments numbered 1 to 7, inclusive, and also all others not predicated upon alleged errors of law occurring at the trial, must be disregarded.

Before noticing the alleged errors of law complained of, a brief statement of the facts is deemed advisable. It is alleged in the complaint that on March 3, 1909, plaintiffs purchased certain land of defendant, and the latter took a stock of goods in exchange

therefor, and that as part payment for the stock of goods defendant sold and delivered to plaintiffs a promissory note for \$1,422, executed by one Christianson and secured by a chattel mortgage covering an undivided one-half of the crops to be raised during 1909 on certain described land. Plaintiffs' first cause of action is predicated upon an alleged false and fraudulent representation by defendant that such chattel mortgage constituted the first and only lien upon such crops, whereas defendant, in fact, held a prior lien thereon by virtue of a lease or cropping contract between himself and Christianson, and that such prior lien rendered plaintiffs' security under such mortgage wholly worthless. They allege the insolvency of C., and that the note is and was of no value, but that it would have been worth its full face value had it been secured as represented by defendant. The answer puts in issue such alleged representations, and it is therein alleged that plaintiffs were fully informed of the existence of such prior lien held by him.

For a second cause of action, plaintiffs allege that as to one quarter of the land sold by defendant to them there were 13 acres less than had been represented, and that at the agreed price paid for such land of \$30 per acre, plaintiffs paid to defendant and he received from them the sum of \$390 more than he was entitled to receive. This is also put in issue by the answer.

By way of counterclaim defendant alleged that the stock of goods transferred to him by plaintiffs for such lands, note, and other consideration were by plaintiffs represented and warranted to be in a strictly first-class and salable condition, and that such goods were all of like kind and quality as certain boxes of new goods then in Minneapolis, and which were exhibited to him by plaintiffs; that, fully relying on such representations and warranty, he was induced to enter into such deal. Then follow allegations of a breach of such representations and warranty, and of plaintiffs' knowledge thereof and of resulting damages. These allegations were put in issue by a reply to such counterclaim.

Such were the issues submitted to the jury at the trial, and said jury returned a verdict in defendant's favor for the sum of \$1,000. The court's instructions to the jury are not before us, and they are in no way challenged. The only assignments of error to be noticed are therefore those relating to certain rulings admitting and excluding testimony.

We will proceed now to a consideration of such of these assignments as are discussed in appellants' brief.

[6] By the eighth assignment appellants complain of the ruling permitting defendant to testify to the effect that he told the plaintiff Heald at the time the deal was made that the chattel mortgage securing the note

least two answers to such contention may be made. In the first place, the same matters embraced in the questions and answers objected to were immediately, prior to asking such questions, fully covered by defendant without objection. Hence, if error at all, such rulings were nonprejudicial.

[7] Second, we are clear that such rulings were proper, as such testimony did not in any way tend to vary the terms of a written contract as contended for by appellant. Counsel for appellant criticises the holding of this court in *McFadden v. Thorpe Elevator Co.*, 18 N. D. 93, 118 N. W. 242, and also attempts to differentiate the case at bar from that decision. We see no reason, however, to depart from the views there expressed, nor do we concur in the contention that the rule there adopted is not applicable here. Indeed, it would be strange if defendant could be precluded from showing the actual contract which these parties entered into when concededly such contract rested in parol. If, as between the original parties to this mortgage, it was understood and agreed that it should be held subject to the security clause in the cropping contract covering advancements, certainly it was competent for defendant by express agreement with Heald to assign the same on condition that he should hold it in exactly the same way, and such is the purport of the testimony complained of. We find no error in such ruling.

[3] The remaining assignments which are in any manner discussed in the briefs all relate to rulings on the admission or exclusion of testimony introduced to establish defendant's counterclaim, such testimony all relating to the question of the damages sought to be recovered under such counterclaim. To some extent these assignments have a close relation to those involving the sufficiency of the evidence, and they are, as stated by counsel, treated in appellants' brief only in a general way. In view of this, we feel justified in disposing of them in a like manner in this opinion. While the method pursued by defendant's counsel in proving such damages was perhaps not technically correct in every particular, we are satisfied that the testimony as a whole afforded a sufficient legal basis for the jury's assessment of damages, and that to the extent, if any, that such rulings constituted error, such error was nonprejudicial to the substantial rights of appellant, and we are convinced from the entire record that substantial justice was meted out to these parties in the district court.

Entertaining these views, it follows that the judgment must be, and accordingly it is hereby affirmed.

FISK, J. Counsel for appellants has filed a petition for a rehearing in the above cause. It presents nothing new, and it fails to convince us that our former views are incorrect. Ordinarily, under these circumstances, we deem it an unnecessary waste of time in disposing of like petitions to add anything to the opinion as first announced. However, owing to certain statements in the petition, we deem a brief reply to the first two contentions advisable.

Counsel first challenges the correctness of the decision dismissing the appeal from the order denying his motion for a new trial. Among other things, he says: "There was no evidence in the record before this court that the order overruling plaintiffs' motion for a new trial had been filed in the district court 60 days previous to the appeal, * * * and we rise to inquire how this court could conclude that the 60 days in which the right of an appeal from an order is granted had expired when the appeal was made in this case. The dismissal of the appeal from the order overruling the motion for a new trial was evidently inadvertently made, and it was not based upon any of the records in the case, and was unwarranted." Such a bald statement cannot be permitted to go unchallenged in the light of the record before us. Counsel is entirely mistaken as to what the record discloses. The original order denying his motion is before us, and unmistakably shows that it was filed with the clerk of the district court on April 11th. and, the appeal not having been taken until June 15th, it was clearly too late.

[4] Counsel's second contention in substance and effect is that, although the sufficiency of the evidence to support the judgment was in no manner challenged at the trial, nevertheless, on an appeal from the judgment, he may urge such insufficiency as an error of law occurring at the trial. An answer to such contention ought not to be necessary as the practice is so firmly settled to the contrary. It is, of course, true, as held by this court in *Satterlee v. M. B. A.*, 15 N. D. 92, 106 N. W. 561, that, where the sufficiency of the evidence is challenged at the trial by a motion for a directed verdict, such ruling may be reviewed as an error of law in an appeal from the judgment. In that case both parties moved for a directed verdict at the close of the testimony, and prior to the entry of judgment a motion was made for judgment notwithstanding the verdict, and these rulings were very properly held reviewable on an appeal from the judgment, and that a motion for a new trial was not a condition precedent to the right to such review. A very different case is presented, however, in the case at bar. The

sufficiency of the evidence was in no manner challenged at the trial. Counsel concedes in his petition that the decision of matters presented for the first time on a motion for a new trial made after judgment is final in the absence of an appeal from the order denying such motion. In other words, that as to such matters the order denying the new trial is *res adjudicata*. Yet this is all we held on such point in the foregoing opinion, and it is also the holding in the case of *Hedderick v. Hedderick*, 18 N. D. 488, 123 N. W. 276. Counsel seems to be laboring under the idea that, because he has assigned or attempted to assign error predicated upon the alleged insufficiency of the evidence when the sufficiency was in no way challenged or ruled upon at the trial, there is a constitutional duty resting upon us to decide the question thus sought to be raised. It is, of course, entirely clear that such an alleged assignment is no assignment at all, for it in no manner challenges the correctness of any ruling in the court below. The question of the sufficiency of the evidence is therefore not before us on this appeal from the judgment, as manifestly such appeal does not bring before us the question of the correctness of an order denying a motion for a new trial made long after the entry of such judgment. It is, of course, entirely different, as held in *Satterlee v. M. B. A.*, *supra*, regarding rulings made at the trial and duly challenged. These are brought before us on an appeal from the judgment, although the same alleged errors were subsequently urged and passed upon as grounds for a new trial.

[5] This, we believe, fully answers counsel's contention, and we would stop here were it not for the persistent and unwarranted accusations of counsel that this court has violated or evaded section 101 of the Constitution by not passing upon the sufficiency of the evidence. Several pages of the petition are devoted to a discussion of this constitutional mandate, and to the duty of this court to observe it. All through such discussion counsel begs the question by assuming what, as we have seen, is not true, that the question of the sufficiency of the evidence fairly arises on the record. It is not an infrequent occurrence for other members of the bar to make like criticisms in their petitions for rehearings without the least justification therefor, clearly evincing a mistaken idea as to the proper and well-settled construction of this provision of our Constitution. In view of this, and for the information of such members of the bar, we embrace this occasion to express our understanding of said section. In order for a question to fairly arise on the record (in cases not *triable de novo*), it must, of course, not only in fact exist in the record, but it must be properly assigned as error. But this is not all, for it is not by any means true that every question thus assigned fairly

arises on the record. If its decision is not necessary to a final and complete determination of the rights of the litigants, it cannot be properly said to fairly arise on the record, within the meaning of such constitutional mandate. It is absurd to impute to the framers of the Constitution an intent to require of the courts a decision of every point raised, regardless of whether a decision of other and controlling points in legal effect puts an end to the litigation. It would not only force upon the court needless labor, but it would be an unwise and dangerous practice, as it would inevitably result in laying down hastily prepared precedents on points naturally not as carefully considered as those which are necessarily controlling and decisive of the appeal. In view of this, it is well settled that, when necessary and controlling points are decided, the other questions cease to fairly arise on the record.

A like constitutional provision was construed many years ago by the Supreme Court of Indiana, and such construction has been adhered to ever since. See *Willets v. Ridgway*, 9 Ind. 367. We quote therefrom as follows: "It is true that the Constitution, by an unwise provision, requires that this court shall give a written opinion upon every point arising in the record of every case—a provision which, if literally followed, tends to fill our reports with repetitions of decisions upon settled, as well as frivolous, points, and often to introduce into them, in the great press of business, premature and not well considered opinions, upon points only slightly argued; yet it is a provision not to be disregarded, though merely directory, like that requiring the Legislature to use good English. But, though the provision is not to be disregarded, it is to be observed according to some construction, and should receive such a one as to obviate its inconvenience and objectionable character, as far as consistently can be done. It often happens that a point is raised involving an important principle, but of minor consequence in its bearing upon the particular case, while it presents the material question in some other pending cause. Now, to decide it in the case where from its subordinate position it is but carelessly argued by one side or the other, if at all, and hence, perhaps, but hastily considered by the court, is unjust to counsel whose subsequently pending cause is thus prejudged, without their being heard, and upon an argument on which they would be unwilling to rest it. It is this class of decisions which forms the bane of judicial reports. These, and other considerations, have led the court to inquire, When does a question, in the sense of the Constitution, arise in the record? We do not think it does so merely because it is raised by counsel, nor because it is presented in the assignment of errors. Nor, necessarily, because it is raised in a bill of exceptions. It must be

for the court to comprehend it in all its bearings. Hence, it has been the frequent practice of the court, in cases where a single point would put an end to a case, to decide that point and no other. So, where a cause was necessarily reversed for one or more errors, and remanded for a new trial, which might be upon new issues, formed by amended pleadings, and with more or less evidence, points which were made upon the first trial, but might not arise upon the record, or were not so distinctly and satisfactorily presented by the record as they might be after another trial, have been considered as not necessarily and properly arising in the record, and have been passed. See [Ferguson v. Harrison] 7 Ind. 610; [Newell v. Gatling] Id. 147; [Iseley v. Lovejoy] 8 Blackf. [Ind.] 464; [Roberts v. Ward] Id. 335; [Elliot v. Adams] Id. 104; [State Bank v. Bowers] Id. 73; [Conrad v. Dowling] Id. 40; [Fullerton v. Warrick] 3 Blackf. [Ind.] 221 [25 Am. Dec. 99]. For later Indiana authorities on this point, see Trayser v. Ind. Asbury University, 39 Ind. 536, and Lake Shore & M. S. Ry. Co. v. C. W. & M. Ry. Co., 118 Ind. 578, 590, 19 N. E. 440, 446. From the latter opinion we quote the following: "The gravity and importance of the question is such that we have concluded that it should only be decided in a case where it is indispensably necessary to a proper and adequate judgment. We do not, as we have indicated, believe this is such a case, for we think that our decision upon a point which preceded the one mentioned fully and properly disposes of this appeal. We believe our duty is done when we fully meet and decide a question which leads to a reversal without investigating and deciding questions which lie beyond. Where a material question first in point of priority is decided, all the questions that the record legitimately brings to us are disposed of within the meaning of section 5 of article 7 of our Constitution. That provision cannot mean that in cases of reversal every point must be decided, even though some one of them completely disposes of the case; nor does it mean that the court must write upon all questions, but that it must write on such only as are decided. This court has uniformly acted upon the rule that, where there is a judgment of reversal, it will not consider all of the questions urged or presented, except in cases where it is clear that they will arise on a new trial, and even then the questions are not decided because it is the duty of the court to decide them, but because it is best to do so as a matter of expediency. We doubt whether a single volume of our reports can be found from the time our Con-

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The petition for a rehearing is denied.

BURKE, J., being disqualified, did not participate.

CLOW-SCHAAF LUMBER CO. v. KASS et al.
(Supreme Court of South Dakota. Dec. 14, 1912.)

1. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, in an action for the purchase price of building material, the defendants admitted that the balance claimed by plaintiff was correct unless defendants were entitled to a certain credit, the admission of evidence to prove the sale to defendants, the amount thereof, the payments made, and the balance due, if error, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

2. CORPORATIONS (§ 406*)—OFFICERS—AUTHORITY—UNAUTHORIZED CONTRACT.

A corporation was not bound by an unauthorized and unratified agreement of its vice president that a debt owed by him individually to the buyer of building material from the corporation should be credited on the account for the material, though the material was sold by the vice president while he was one of the acting managers of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1611-1614; Dec. Dig. § 406.*]

3. PRINCIPAL AND AGENT (§ 152*)—AUTHORITY OF AGENT—UNAUTHORIZED CONTRACT.

An agent has no authority to apply his principal's property to liquidate his own indebtedness to a third person.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 567-569; Dec. Dig. § 152.*]

For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by the Clow-Schaaf Lumber Company, a corporation, against N. J. Kass and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

C. A. Kelley and James Byrnes, both of Huron, for appellants. Sutherland & Payne, of Pierre, and E. D. Ede, of Huron, for respondent.

WHITING, J. This action was brought by plaintiff corporation to recover of the defendants a balance which, it was claimed, remained due and unpaid upon an account for building material sold defendants by the plaintiff. Trial was had before the court and a jury, and a verdict was directed in favor of plaintiff for the amount claimed. Judgment was entered upon said verdict, and, a motion for a new trial having been denied, the defendants appealed from such judgment and order denying new trial.

[1] Although the record contains several assignments of error, there are really but two matters presented for our consideration. Defendants objected to certain evidence, received upon behalf of plaintiff, and which was offered for the purpose of proving the sale of this material to the two defendants, the amount thereof, the payments that had been made, and the balance due thereon. It is unnecessary for us to determine whether or not there was any error in the rulings of the court in relation to this evidence for the reason that the error, if there was any, was not prejudicial to the defendants. The answer of the defendants admitted as to one defendant that, unless he was entitled to the credit hereinafter referred to, he was owing the balance claimed to be due; the undisputed letters of the other defendant virtually admitted that she was indebted in said amount; and the first defendant, when a witness upon the stand on behalf of the defendants, admitted unequivocally that the balance claimed by plaintiff remained due and unpaid unless defendants were entitled to the said credit above referred to.

[2] The real question in this case, and the one going to the merits of the defense, relates to a credit claimed by defendants. They sought to offer proof to sustain their claim to this credit, and such proof was, in part, rejected by the trial court. For the purposes of this case it will be presumed that defendants could have proven the facts as claimed. If, under such facts, defendants would have been entitled to the credit claimed, this cause should be reversed and a new trial granted; otherwise, it should be affirmed. The evidence received, together with that offered, would have tended to prove the following facts: Plaintiff corporation, at the time of the sale of this building material, was under the actual control and active management of two of its officers, one of whom was Mr.

on behalf of the corporation by said Clow and the defendant N. J. Kass. At the time the making of said contract, the said Clow individually was indebted to the defendant N. J. Kass upon an account for labor performed by said defendant, and, in connection with the sale of the building material, agreed with this defendant that defendant should receive a credit upon said bill for the amount of said account. The corporation never gave this credit. With such credit allowed, there would be no balance due to plaintiff.

[3] The trial court ruled that the agreement to credit such account was not binding upon the corporation. In this the trial court was clearly right. One proposition which lies at the basis of the law of agency is that a person cannot fairly serve two masters whose interests are conflicting, and is therefore an established proposition that an agent—even though he be a general agent—cannot be presumed to have authority to do an act or enter into a contract binding upon his principal when such act or such contract is one in which he has a personal interest known to the party with whom he is dealing. So it is held that, unless an agent has actual authority—or by the act of his principal has been clothed with ostensible authority—to enter into such a contract, he has no authority to contract the use of the property of his principal to liquidate his own indebtedness to a third person, and, if he does so, the principal may recover the property or its value in an action against such third person. 31 Cyc. 1605; 2 Enc. L. & P. 1224. Applying this principle, full recognized in the law of agency, to the case of a corporation which can act only through agents, it follows that, while a managing agent of a corporation will be presumed to have authority to enter into any and all ordinary transactions upon behalf of said corporation which are within the corporate powers of such corporation, yet when an agent in a transaction in which he attempts to act as the agent of such corporation is one in which he is also acting in his own behalf—which fact, as in the case at bar, is known to the party with whom he is dealing—the presumption in favor of the power of such agent or officer ceases. In such a case the other party is bound to know that the agent cannot bind the corporation unless he has special authority from the corporation so to do. It therefore becomes incumbent upon a party, who seeks to hold a corporation to a contract or agreement made by its agent or officer under such circumstances, to ascertain, at his own peril, whether or not the officer or agent had authority to enter into the contract. As is well stated in 10 Cyc. 799, "for the directors or contracting officers of a corporation to divert its property or pledge its credit to the payment or securing of their individual debts is

a fraud and breach of trust toward the corporation and its shareholders, and a fraud as to its creditors."

Appellants have cited but one case in support of their contention, namely, the case of Siemens, etc., Co. v. Horstmann et al. (Pa.) 16 Atl. 490. An examination of this case will show that the propositions therein involved have not the remotest bearing upon the question presented upon this appeal. With the legal propositions announced in said case we fully agree; the same having but recently been announced in the decisions of this court.

Defendants neither introduced nor offered any evidence tending to prove that Clow had actual or ostensible authority to credit said account upon said bill sold, or that his agreement so to do was ever ratified by the corporation.

The judgment and order appealed from are affirmed.

CITY OF DEADWOOD v. HURSH.† (Supreme Court of South Dakota. Dec. 14, 1912.)

1. APPEAL AND ERROR (§ 997*)—REVIEW—DIRECTED VERDICTS.

Where both parties requested a directed verdict, the decision of the trial judge is conclusive on appeal, unless against the clear preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4023, 4024; Dec. Dig. § 997.*]

2. NUISANCE (§ 66*)—ADVERSE POSSESSION.

Under Civ. Code, §§ 2393, 2394, declaring that an obstruction of a public street is a public nuisance, and section 2399, declaring that no lapse of time can legalize a public nuisance, 20 years' maintenance of an obstruction in a public street will not ripen into a right; the same being the rule at common law, which holds that the right to permit a public nuisance cannot be acquired by prescription.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 139; Dec. Dig. § 66.*]

3. ESTOPPEL (§ 54*)—EQUITABLE ESTOPPEL—WHAT CONSTITUTES.

Where abutting property owners maintained an obstruction in a street for more than 20 years, and it appeared from their muniments of title that they could determine the limits of their land, the failure of the city to object to that occupancy will not raise an estoppel; the defendants having notice of the illegality of their occupancy of the street, and that it was merely permissive.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 128-135; Dec. Dig. § 54.*]

Appeal from Circuit Court, Lawrence County; William G. Rice, Judge.

Action by the City of Deadwood against Christopher S. Hursh. From a judgment for plaintiff, defendant appeals. Affirmed.

Hayes & Heffron, of Deadwood, for appellant. Norman T. Mason, of Deadwood, for respondent.

WHITING, J. In the city of Deadwood, S. D., there is a street known as Main street

running north and south, and running from it toward the west is a narrow street known as Gold street. On the south side of Gold street and west side of Main street there is standing a brick building belonging to the defendant, the north and east walls of which conform to the lines of the said streets. On the north side of this building, and adjoining a part of the north wall of same, there is a 3-foot areaway extending from the sidewalk, which runs along the north side of said building, down to and connecting with the basement of such building. Above this areaway there is a stairway connecting said sidewalk with the second story of this building. It will thus be seen that the areaway and stairway are both situated in and upon what would be a part of said Gold street, providing the south boundary line of Gold street is straight. Plaintiff brought this action, claiming that such areaway and stairway occupied a portion of such street, and were, for such reason, a public nuisance; and, in its prayer for relief, it asked for the abatement of such nuisance. The defendant denied that Gold street ever included the space occupied by such areaway and stairway. The cause was tried to the court and jury. At the close of all of the testimony, both parties moved for a direction of verdict, and the trial court directed a verdict in favor of the plaintiff. It is from the judgment entered upon such directed verdict that this appeal is taken.

[1] The only question presented for our determination is whether the decision of the trial judge in directing a verdict was against the clear preponderance of the evidence. If not, it must stand. *Durand v. Preston*, 26 S. D. 222, 128 N. W. 129. No useful purpose could be subserved by the reproduction of the evidence in this opinion. We think such evidence fairly proves the following: As early as the year 1877 there was a public street conforming in location to what is now Gold street. In 1879 a wooden building stood where defendant's building now stands, and the street along the north side thereof was in use. Defendant's title to the land upon which his building stands is derived through a chain of deeds, not one of which describes the land occupied by the areaway and stairway. The first transfer of which evidence was received was one dated February 24, 1879, which conveyed a tract 25 feet by 100 feet in size. The building then upon the premises burned down in 1879, and the present building was erected in 1880, and, in its construction, recognized the existence of Gold street adjoining such building. The areaway was constructed at the time the present building was erected. The stairway was placed over such areaway in 1886. Until about two years prior to the bringing of this action, Gold street extended only to an alley or narrow street which runs north and south at the west end of defendant's lot.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 3, 1913.

At that time the city acquired a right of way for and erected a stairway connecting the west end of Gold street with a street west thereof.

We think the trial court warranted in finding that, prior to the erection of the present building, there was an established street having as its south boundary line the north line of the lot upon which this building stands, which lot comprises no part of the space occupied by the areaway and stairway, and that defendant never received through his chain of title any title whatsoever to this space so occupied by the areaway and stairway. But appellant insists that, even if the street as established included such space now claimed by the street: First, the defendant has acquired the right to use said space through 20 years' occupancy; second, the city is estopped from now claiming same.

[2] The obstruction of a public street is, under the provisions of sections 2393-2394 of the Civil Code, a public nuisance. Section 2399 of such Code provides: "No lapse of time can legalize a public nuisance amounting to an actual obstruction of public right." The areaway and stairway constituted such an obstruction. Regardless of statutory provisions, the rule is well established that a right to commit a public nuisance cannot be acquired by prescription. 29 Cyc. 1207. See, also, notes following case of Ireland v. Bowman in 17 Ann. Cas. at page 789, where this rule and the reasons upon which it is founded are very fully discussed and a vast number of cases cited. See, especially, cases referred to under heading, "Highways, Streets, etc.," on page 791.

[3] It certainly needs no argument to show that the equitable doctrine of estoppel has no application to the facts of this case. As appears from the muniments of title under which defendant and his grantors held title to the lot upon which the building rested, they all had notice that their occupancy of the space taken by the areaway and stairway was not by virtue of any right or title, but was merely permissive. They were not misled. They were not ignorant of the true facts.

The judgment of the trial court is affirmed.

AMERICAN FOOD PRODUCTS CO. v. AMERICAN MILLING CO. et al.

(Supreme Court of Wisconsin. Dec. 10, 1912.)

1. DISCOVERY (§ 55*)—EXAMINATION OF ADVERSE PARTY—GROUNDS—RIGHT OF ACTION.

Under St. 1898, § 4096, which provides for the examination of a foreign corporation which is an adverse party before issue joined, by taking the deposition of its principal officer upon notice accompanied by an affidavit stating the general nature and object of the action, etc.,

an affidavit upon which a discovery was sought, which disclosed that the cause of action was based on a contract of subscription to the capital stock of the party seeking the discovery, shows a tender of performance and failure to perform, and that the minutes, proceedings, and other documents relating to the contract were within the custody of the president of the opposite party, and that such information is necessary to enable it to plead, is sufficient to justify the granting of an examination.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 68-70; Dec. Dig. § 55.*]

2. CORPORATIONS (§ 661*)—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS—ENGAGED IN LITIGATION.

Sanborn's St. Supp. 1906, § 1770b, subd. 2, prohibits foreign corporations from transacting business or acquiring, holding, or disposing of property in the state before compliance with the statute requiring the filing of a copy of the charter or articles of incorporation with the Secretary of State. Subdivision 10 provides that contracts made by a foreign corporation, affecting its personal liability or relating to property within the state, before it shall have complied with the requirements, shall be wholly void on behalf of it or its assigns, but enforceable against it or them. *Held* that, although a foreign corporation has not filed a copy of its charter or articles of incorporation, it may still have an action to enforce a contract for a subscription to its stock, where it does not appear that the contract was made or to be performed in the state, or that it relates to property within the state, as, in the absence of legislative prohibition, a foreign corporation may by comity maintain actions without compliance with the statute.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2539, 2543, 2544, 2546, 2563-2567; Dec. Dig. § 661.*]

3. DISCOVERY (§ 55*)—SUFFICIENCY OF AFFIDAVIT—JURISDICTION OF ACTION.

An affidavit filed in support of a motion for a discovery, showing that the cause of action in which the discovery was sought was based on a contract of subscription to the moving party's capital stock and the agreement to transfer certain real property therefor, does not disclose a lack of jurisdiction in the court to specifically perform a contract for the transfer of real property outside of the state, though such realty is not located in the state, where it states that the action is brought to enforce the promise and undertakings, or, if specific performance be impossible, to recover damages, as it is obvious that the remedy has not been elected.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 68-70; Dec. Dig. § 55.*]

4. DISCOVERY (§ 54*)—SERVICE OF NOTICE—IRREGULARITY—EFFECT.

A mere irregularity in the service of notice of an examination before issues joined, whereby a person intended to be served as president of a corporation was served as an individual, would not prejudice and should be disregarded.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 67; Dec. Dig. § 54.*]

5. CORPORATIONS (§ 668*)—SERVICE ON CORPORATION—STATUTORY PROVISIONS—SERVING CORPORATE OFFICER.

Under St. 1898, § 2637, subd. 13, which provides that service may be had upon a foreign corporation holding property within the state by service upon an officer who is within the state, service on the president of a corporation which had property in the state was binding, though he was not at the time of serv-

ice in the state on business for such corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2627; Dec. Dig. § 668.*]

6. DISCOVERY (§ 55*)—AFFIDAVIT—SUFFICIENT—KNOWLEDGE OF CAUSE OF ACTION.

While under St. 1898, § 4096, which gives a right to have a discovery before issue joined upon an affidavit stating the general nature and object of the action, and that discovery is sought to enable the party applying for it to plead, where the affidavit affirmatively shows that no cause of action exists, the examination will be denied, such affidavit to be sufficient need neither state facts sufficient to constitute a cause of action nor disclose that the respondent knows that a cause of action exists.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 68-70; Dec. Dig. § 55.*]

7. DISCOVERY (§ 32*)—RIGHT TO HAVE MATTERS WITHIN THE KNOWLEDGE OF THE MOVING PARTY.

Where matters upon which a discovery is sought are obviously within the knowledge of the applicant, it will be denied; but ordinarily, where it appears from a proper affidavit that a cause of action exists in favor of the applicant, and the facts sought to be discovered are not obviously within the knowledge of such party, the right of examination should not be denied.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 46; Dec. Dig. § 32.*]

8. APPEAL AND ERROR (§ 961*)—DISCOVERY—(§ 33*)—DISCRETION OF COURT.

The granting of a discovery under St. 1898, § 4096, is generally in the discretion of the trial court, and its order can only be disturbed for clear abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3839, 3840; Dec. Dig. § 961.*; Discovery, Cent. Dig. § 47; Dec. Dig. § 33.*]

Appeal from Circuit Court, Milwaukee County; J. C. Ludwig, Judge.

Action by the American Food Products Company against the American Milling Company and others. From an order for an examination of an officer before issue joined, defendants appeal. Affirmed.

This is an appeal from an order for the examination under section 4096, Stats., before issue joined, of one A. G. Winter, as an officer of the defendant American Milling Company, a consolidated corporation. The affidavit for examination was made by one W. A. Hayes, in which he alleges that he is one of the attorneys for the plaintiff corporation and makes the affidavit on its behalf; that the general nature and object of this action is to enforce a certain agreement made by the defendants Marsden Company and American Milling Company with said plaintiff for a subscription to \$1,251,000 worth of the total capitalization of \$2,500,000 of the plaintiff corporation, and conveyance to said plaintiff of certain properties of said defendant corporations; that discovery is sought to enable the plaintiff to frame its complaint herein; that, as affiant is informed and verily believes, the plaintiff corporation was duly organized and exists under the laws of the territory of New Mexico and

was organized for the purpose, among other things, of the general manufacture and sale of food products, dairy feed, etc., the purchasing and owning of real estate and other property, and the purchasing and holding of stock in other corporations engaged in similar enterprises; that the defendant Marsden Company is a corporation duly organized and existing under the laws of the state of New Jersey, so this affiant is informed and verily believes, with its principal office in the city of Philadelphia, Pa., and was until a short time ago, as deponent is informed and believes, a so-called holding corporation having and holding a large proportion, if not all, of the stock of the defendant corporation American Milling Company; that the defendant corporation American Milling Company is a corporation duly organized and existing under the laws of the state of New Jersey, engaged in a general manufacture of dairy feeds and owning and holding large and valuable plants to manufacture the same at Peoria, Ill., Lindon, Ind., Owensboro, Ky., and Superior, Wis.; that at all times hereinafter mentioned the defendant A. G. Winter was one of the principal officers of the said defendant corporations Marsden Company and American Milling Company, and, as this affiant is informed and believes, is now the president of said consolidated American Milling Company, defendant herein.

Deponent further alleges upon information and belief that some time in December, 1908, or January or February, 1909, certain proceedings were had by the defendant corporations Marsden Company and American Milling Company, whereby it was attempted to consolidate such corporations and merge the same into the defendant American Milling Company, and said American Milling Company assumed all debts and liabilities of said defendants Marsden Company and American Milling Company; that some time prior to December 14, 1905, negotiations were had between plaintiff and the defendant corporations for the subscription to a certain amount of the capital stock of the plaintiff corporation by said defendant corporations, and pursuant to said negotiations on December 14, 1905, as deponent is informed and believes, a resolution was duly and regularly adopted by the defendant corporation Marsden Company, whereby it was agreed that the said Marsden Company should take stock in the plaintiff corporation to the amount of \$1,251,000 of its total capitalization of \$2,500,000, and in consideration for the issue of such stock by plaintiff to said Marsden Company there should be turned over and conveyed to plaintiff at the appraised value the plants then owned and occupied by the defendant American Milling Company, at Peoria, Ill., Lindon, Ind., and Owensboro, Ky., together with the merchan-

see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

For other cases
see
the
laws of
the
territory of New Mexico and

dise then on hand, accounts outstanding, real estates, etc.; that it was further agreed that certain properties should be acquired by said defendants, or either of them, other than that held by them, and which said new properties when so purchased and acquired should also be conveyed to plaintiff in partial payment for the aforesaid subscription; and that the balance between such appraised value of all such property and said \$1,251,000 should be paid in cash.

Deponent further alleges upon information and belief that said agreement for the subscription by said defendant Marsden Company was duly accepted by the plaintiff corporation, and thereafter stock for such amount, to wit, \$1,251,000, was duly tendered to said Marsden Company, and proper offers and demand made for the compliance by said defendant Marsden Company of its part of said subscription agreement, but that said defendant corporations and each of them have evaded and refused to comply with all such demands and requests; that all of the books and records of said defendant corporations are in their possession and under their control and not in the possession and control of plaintiff; and that such books and records disclose, as deponent verily believes, the transaction of said corporations with reference to said proposed subscription, and the action, if any, taken by the said corporations subsequent to December 14, 1905, with reference to said subscription and agreement. Deponent further alleges upon information and belief that subsequent to December, 1905, certain other properties have been acquired by said defendants, and that the same should be conveyed and assigned to the plaintiff, pursuant to the agreement aforesaid.

Deponent further alleges that this plaintiff has no adequate remedy at law, and that the points upon which discovery is sought are as follows: First. The minutes of the meetings of the defendant corporations from on or about December 14, 1905, and thereafter, which refer in any wise to any proceedings by either of said corporations with reference to the subscription to the capital stock of the plaintiff by the said defendants, or either of them, or any proceedings with reference to the same, and information as to who was present at any of such meetings and what proceedings were had and what record made thereof, and, if no record was made of such proceedings, what discussions were had, motions made or presented with reference to said subject-matter at any of such meetings, and also of all proceedings as to the alleged merger of the defendant corporations, the consideration thereof, and as to the assumption by said alleged merger corporation of all debts and liabilities of said defendant corporation. Second. The description and value, so far as ascertainable, of the property held by the defendant corporations, or either of them, in December, 1905,

at the time of the aforesaid stock subscription, whether held directly by either of them or in trust for them or by any corporation of which the defendant corporations, or either of them, held the stock. Third. What has been done with such property since then, what conveyances, if any, of the same, and to whom and for what consideration and under what arrangement. Fourth. What property in connection with the business of the defendant corporations has been purchased by them, or either of them, directly or indirectly since December, 1905. Fifth. What agreement or options, if any, for the purchase of additional property, have been obtained or entered into by the defendant corporations, or either of them, directly or indirectly, for the purchase of additional property since December, 1905. Sixth. Any and all correspondence, records, documents, papers, contracts, or agreements of the defendant corporations, or either of them, or of any one for them or on their behalf, either directly or indirectly, that in any manner refer to the aforesaid subscription agreement and negotiations leading up to the same, or that in any wise refer to said matter since December, 1905. Seventh. Any and all correspondence, records, documents, papers, contracts, or agreements of the defendant corporations, or either of them, or of any one for them or in their behalf, either directly or indirectly, that in any wise refer to the purchase by the defendants, or either of them, directly or indirectly, of any and all properties or options for purchase of property or agreements to purchase since December, 1905. Eighth. Any and all facts or circumstances that may necessarily or properly be connected with any of the above and foregoing points.

The above affidavit and notice of examination, together with the summons and subpoena, were served upon the defendant A. G. Winter. The notice was as follows: "Notice of Examination Under 4006. (Title omitted.) You will please take notice that A. G. Winter, one of the above-named defendants in the above-entitled action, will be examined otherwise than as a witness on a trial, and his deposition taken at the instance of the adverse party, to wit, the plaintiff herein, by and before Adolph Kanneberg, a court commissioner in and for Milwaukee county, in said state, at his office, 415 Camp Bldg., 82 Wisconsin street, in the city of Milwaukee, in said county, on the 3d day of June, A. D. 1910, at 9 o'clock in the forenoon of that day. Dated Milwaukee, Wis., May 26, A. D. 1910. W. A. Hayes, Attorney for plaintiff."

The subpoena was addressed as follows: "To the defendants above named. Subpoena Under 4006. The State of Wisconsin, Circuit Court, Milwaukee County—ss.: The state of Wisconsin, to A. G. Winter, individually and also as officer of the corporations named as defendants herein."

The return of the officer shows service of the summons on the 27th day of May, 1910, in the city of Milwaukee, upon each of the defendants, namely, Marsden Company, a corporation, American Milling Company, a corporation, American Milling Company, a consolidated corporation, and A. G. Winter; and at the same time and place that he served the summons, the officer further returned that he served upon each of the defendants the notice of examination of Winter before Adolph Kanneberg, a court commissioner in and for Milwaukee county, at his office on the 3d day of June, 1910, at 9 o'clock in the forenoon; also, that he served the subpoena and tendered the legal fees for the attendance of said Winter at the time and place named in the subpoena; also, at the same time and place and in the same manner he served the affidavit for examination. Afterwards a motion was made by the American Milling Company on order to show cause, based upon petition of the American Milling Company, defendant, the affidavit of defendant Winter, and certificate of the Secretary of the State of Wisconsin, praying that the court adjudge that the plaintiff is not entitled to an examination of said Winter, and that the affidavit, notice, and proceeding on the proposed examination and discovery be vacated and denied and the subpoena suppressed and the action be dismissed. The prayer of the petitioner was denied. The defendant American Milling Company further moved on the papers and records in the case to limit the subject of examination of the said Winter in case the prayer of the petitioner be denied.

The order of the court, omitting the formal parts, is as follows: "It is ordered: (1) That the said petition of the defendant be and the same hereby is in all things denied, and the plaintiff is hereby granted leave to pursue said examination either in behalf of an action at law or a suit in equity as it may elect, but said examination shall be limited to matters material to the framing of plaintiff's complaint, and the court reserves the right to restrict said examination when not so limited. The said examination shall commence at 11 o'clock on the 29th day of April, 1912, before the officer and at the place named in the original notice and subpoena issued herein. (2) That the plaintiff recover \$10, costs of this motion, the same to be paid within 20 days after service of a copy of this order upon defendants' attorneys. Dated this 29th day of March, 1912."

Miller, Mack & Fairchild and J. G. Hardgrove, all of Milwaukee, for appellants. W. A. Hayes and Arthur H. Bartelt, both of Milwaukee, for respondent.

KERWIN, J. (after stating the facts as above). This case was here before on appeal by Winter from a former order dismissing a petition filed by him praying that

the examination be suppressed and dismissed. The order from which Winter appealed dismissed the action as to him, and it was held that he was not aggrieved by the balance of the order. *American F. P. Co. v. Winter*, 147 Wis. 464, 133 N. W. 595.

The appellant now makes several contentions for reversal which we shall consider in the order made.

[1] It is first insisted that the affidavit for examination is not sufficient under section 4096, Stats., that the examination should be denied and the action dismissed; and further that the examination should have been denied for the reason that it appears that the plaintiff has all the information required in order to plead. The statute provides that, if the examination shall be taken before issue joined, the notice of taking the same shall be accompanied by an affidavit stating the general nature and object of the action, that discovery is sought to enable the party to plead and the points on which discovery is desired, and such examination shall be limited to the discovery of facts relevant to such points, unless the court or presiding judge shall, before the examination is begun, by order, further limit the subjects to which it shall extend. The statute extends the right of examination to the president and other officers named of a foreign corporation.

It is argued by appellant that when, from the statement made by a party of the nature and object of his action in order to enable him to plead, it appears that he has no cause of action, the examination will be denied under the doctrine laid down in *State v. M. E. R. & L. Co.*, 186 Wis. 179, 116 N. W. 900, 18 L. R. A. (N. S.) 672; *Madison v. Madison G. & E. Co.*, 129 Wis. 249, 108 N. W. 65, 8 L. R. A. (N. S.) 529, 9 Ann. Cas. 819; *Schultz v. Strauss*, 127 Wis. 325, 106 N. W. 1006, 7 Ann. Cas. 528. The rule of these cases may be conceded to be good law, but we think it does not apply here, because it does not appear from the statement made in the affidavit of respondent of the nature and object of the action that no cause of action exists, but, on the contrary, we think the affidavit is sufficient.

We have set out in the statement of the case, substantially, the affidavit upon which discovery is sought in order to enable the respondent to plead, from which it appears that the cause of action is based upon a contract of subscription to the capital stock of the respondent, tender of performance by respondent, and failure to perform by appellant. Upon the face of the affidavit it does not appear that the respondent has no cause of action, unless no power to make the contract existed.

[2] Under this head it is argued that the action cannot be maintained in this state, because respondent has not complied with section 1770b, Stats., and is not authorized to transact business nor to acquire property

within this state. That the privilege accorded to foreign corporations to sue in this state rests on comity, and therefore is subject to such terms as the state may impose, is well established under the rule laid down in *Wyman v. Kimberly-C. Co.*, 93 Wis. 554, 67 N. W. 932; *Chicago T. & T. Co. v. Bashford*, 120 Wis. 281, 97 N. W. 940; *Pozorski v. Gold R. C. Co.*, 142 Wis. 595, 126 N. W. 24; and *Presbyterian M. F. v. Thomas*, 126 Wis. 281, 105 N. W. 801, 110 Am. St. Rep. 919. An examination of the foregoing cases will show that the actions were in contravention of the statutes and public policy of the state, therefore held not maintainable. In the absence of legislative prohibition, foreign corporations may maintain actions in the courts of this state in certain cases without compliance with section 1770b, Stats. *Charter O. L. Ins. Co. v. Sawyer*, 44 Wis. 387; *Chicago T. & T. Co. v. Bashford*, supra. In so far as the record now before us shows, the cause of action sued upon does not come within the prohibition of section 1770b, Stats. Section 1770b, *Sanborn's St. Supp.* 1906, subd. 10: " * * * Every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof or relating to property within this state, before it shall have complied with the provisions of this section, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them."

Subdivision 2 of section 1770b prohibits the transaction of business, or the acquiring, holding, or disposing of any property in the state by certain corporations until the statute respecting filing with the Secretary of State of a copy of its charter, articles of association or incorporation, and all amendments thereto, has been complied with. Conceding for the present, as the certificate of the Secretary of State tends to show, that the respondent failed to file a copy of its charter or articles of incorporation as required by the statute, we find no objection to the maintenance of the present action. Subdivision 10, § 1770b, Stats.; *Catlin & P. Co. v. Schuppert*, 130 Wis. 642, 110 N. W. 818; *Chickering-C. B. Co. v. White*, 127 Wis. 83, 106 N. W. 797. There is nothing in the record showing that the contract was made or to be performed in this state, or that it relates to property within this state; and further it appears that performance had been tendered on the part of the respondent and the action brought for nonperformance by appellant.

[3] Counsel contends that by the present action respondent is either seeking to obtain conveyance to itself of property which the statute forbids it to acquire or hold, or for specific performance of an agreement to convey land situated outside of Wisconsin, which the courts of this state have no jurisdiction of. The affidavit does not support counsel's contention. True, it is alleged that

appellant has property in Wisconsin, Illinois, Indiana, and Kentucky. But the real estate alleged to have been exchanged for respondent's stock is stated in the affidavit to be situate in Peoria, Ill., Lindon, Ind., and Owensboro, Ky. Whether an action could be maintained in this state to enforce specific performance of a contract to convey land in another state, see *Dickson et al. v. Loehr*, 126 Wis. 641, 106 N. W. 793, 4 L. R. A. (N. S.) 986. But it is immaterial whether specific performance can be maintained or not. It is sufficient if some kind of an action can be maintained. The affidavit says the action is brought to enforce the promises and undertakings, or, if specific performance be impossible, to recover damages. Obviously respondent has not yet made its election as to which remedy it will pursue.

[4] It is further argued by counsel that there was no service of the notice of examination upon Winter as officer of the defendant. The objection is more technical than substantial. The return of the officer making the service shows a good service upon Winter as president of defendant corporations. It is perfectly clear that even if there was any irregularity in service, which does not appear, it was not prejudicial, therefore should be disregarded. *Harvey v. Chicago & N. W. Ry. Co.*, 148 Wis. 391, 134 N. W. 839.

[5] It is further urged that the service upon Winter as president was not a good service on defendant, a foreign corporation, since it is claimed he was not in the state as officer or agent of defendant corporation. As to whether Winter was in the state as officer of the corporation is a matter of dispute. But we regard it wholly immaterial whether he was at the time of service in the state on business of defendant corporation or not. It appears from the record that the defendant had property in this state, and that Winter was its president at the time of service and within the state. That is sufficient to make a valid service upon defendant. Section 2637, subd. 13, Stats. This statute provides that service may be made upon such a foreign corporation by service upon an officer thereof, being within the state, when the corporation has property within the state, or the cause of action arose therein.

[6] It is strenuously argued by counsel for appellant that the affidavit for discovery shows that the respondent had all the information necessary in order to plead. This contention is not based solely upon the original affidavit for discovery made by Hayes, but also upon a subsequent affidavit made by Winter, president of defendant, and petition of defendant to dismiss, which affidavit and petition upon information and belief set forth knowledge on the part of one Alfred Von Cotzhausen, of Milwaukee, who, it is alleged, is president of respondent, if re-

section with the original affidavit for discovery. It also appears from the record that Mr. Hayes made a second affidavit tending to meet the allegations made in the Winter affidavit and petition of appellant. But whether these subsequent affidavits respecting the right of the respondent to the examination are material or not we need not consider, because they do not substantially change the situation as shown by the original affidavit of Hayes. The affidavit for discovery set out in the statement of facts, we think, shows sufficiently that the respondent was entitled to discovery upon the points therein specified. All that the statute (section 4096) requires is that the general nature and object of the action be stated, and that discovery is sought in order to enable the party applying for it to plead. The statute does not require that sufficient facts be stated to constitute a cause of action, nor is it even necessary that the respondent should know that a cause of action exists. *Gratz v. Parker*, 137 Wis. 106, 118 N. W. 637. Of course, if the affidavit affirmatively shows that no cause of action exists, the examination will be denied. *Madison v. Madison G. & E. Co.*, 129 Wis. 249, 108 N. W. 65, 8 L. R. A. (N. S.) 529, 9 Ann. Cas. 819; *State v. M. E. R. & L. Co.*, 136 Wis. 179, 116 N. W. 900, 18 L. R. A. (N. S.) 672.

[7, 8] It is also true that, when the matters upon which discovery is sought are obviously within the knowledge of the party applying for the examination, it will be denied. *Badger B. M. Co. v. Daly*, 137 Wis. 601, 119 N. W. 328. But such is not the case here. It cannot be said from the affidavit for discovery or from the whole record that the court below was wrong in refusing to suppress the examination. Ordinarily where it appears that a cause of action exists in favor of the party applying for discovery, and the facts sought to be discovered are not obviously within the knowledge of such party, and the affidavit is in compliance with the statute, the right to examination should not be denied, and the discretion of the trial court respecting such examination will not be interfered with, except in cases of clear abuse. *Badger B. M. Co. v. Daly*, supra; *Ellinger v. Equitable L. A. S.*, 138 Wis. 390, 120 N. W. 235.

The court below was warranted in finding, upon the records presented, that the minutes, proceedings, and other documents relating to the contract between the appellant and respondent were within the custody of Winter, president of the defendant; also, that the information asked for was necessary on the part of the respondent to enable it to

and the property acquired by them in pursuance of the contract, the nature of the respondent's relief, and upon other points specified in the affidavit for discovery in so far as the same shall be relevant to the controversy. The examination is at all times under the supervision of the trial court, and the witness cannot be compelled to answer questions not relevant to the controversy. We find no error in the refusal of the court to dismiss the action or suppress the examination. As before observed, the matter of examination under section 4096, Stats., is very largely in the discretion of the trial court, and the order of the court in proceedings under this statute can only be disturbed for clear abuse of discretion.

The order appealed from is affirmed.

LOEHR v. DICKSON.

(Supreme Court of Wisconsin. Dec. 10, 1912.)

APPEAL AND ERROR (§ 1194*)—DISPOSITION OF CAUSE—EFFECT OF MANDATE.

Where the court, in its opinion on defendant's appeal from a judgment for plaintiff, did not refer to his counterclaim, because of the opinion that the record showed no right to recover thereon, the effect of its mandate, reversing and remanding, with directions to dismiss the complaint, was to deny recovery on the counterclaim.

[Ed. Note.—For other cases, see Appeal and Error. Cent. Dig. §§ 4648-4656, 4660; Dec. Dig. § 1194.*]

On motion by defendant appellant for a judgment on a counterclaim. Motion denied. For former opinion, see 138 N. W. 61.

PER CURIAM. At the close of the testimony in this case the defendant was permitted to interpose a counterclaim, in which he sought to recover damages in the sum of \$2,000 from the plaintiff. This counterclaim was not referred to in the opinion of the court. The appellant now moves the court for judgment on his counterclaim for the amount claimed therein, with interest, and also asks this court to determine that the action is one in equity, and to direct a taxation of costs in the trial court in favor of the appellant as in equitable actions.

The counterclaim was not treated in the opinion filed, because there was no finding of damages by the court or the jury, and because this court was of the opinion that the record did not show that the defendant was entitled to recover. The effect of the mandate in the case was to deny recovery on the counterclaim, and this is the effect which the court intended it should have. For the present we will assume that the trial

For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

court will follow the law in the matter of awarding costs.

The motion of the appellant is denied, with \$10 costs.

BUTLER v. FARMLAND MORTGAGE & DEBENTURE CO. et al. (No. 16,893.)

(Supreme Court of Nebraska. Dec. 18, 1912.)

(Syllabus by the Court.)

ESTOPPEL (§ 22*)—BY DEED.

Stratton v. McDermott, 89 Neb. 622, 131 N. W. 949, Ann. Cas. 1912C, 616, re-examined, reaffirmed, and the case at bar held ruled thereby.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 27-51; Dec. Dig. § 22.*]

Appeal from District Court, Knox County; Welch, Judge.

Action by Mary Butler against the Farmland Mortgage & Debenture Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

M. F. Harrington and W. R. Butler, both of O'Neill, for appellant. Geo. T. Kelly, of Pierce, and Fred H. Free, of Plainview, for appellees.

FAWCETT, J. The land involved is the S. E. $\frac{1}{4}$ of section 30, township 29 N., of range 4 W., in Knox county, Neb. In 1890 one Crittenden, then the owner of the land, executed and delivered to defendant mortgage company a mortgage thereon to secure the sum of \$900, due and payable October 1, 1895. In March, 1896, Crittenden sold and conveyed the land to one Jackson. In the deed Jackson, the grantee, was designated as A. R. Jackson. This deed was duly recorded. In his deed Jackson assumed the Crittenden mortgage. Default having been made upon the mortgage, the loan company, in April 1896, brought suit to foreclose the same and made "A. R. Jackson" a defendant. Jackson being a nonresident, service by publication was had upon him by the name which appeared in his deed of conveyance from Crittenden, viz., A. R. Jackson. A decree of foreclosure was entered, and at the sheriff's sale the loan company was the purchaser. The sale was confirmed, and deed issued to the loan company. In 1901, and after having obtained its sheriff's deed, the defendant loan company entered into a contract with one Stevens for a sale of the land. Stevens assigned his interest in the contract to defendant Cox, and defendant McColley is a tenant under defendant Cox. In view of the conclusion reached in this case, it will not be necessary to again refer to the three last named defendants. In May, 1905, for an alleged consideration of \$25, plaintiff obtained from Jackson a quitclaim

deed to the in the body and the deed in the same suit in the as such grant the mortgage an accounting a judgment is tiff appeals.

The ground claim for rev the mortgage the reason th letters of his service by p wise by such urged that th v. Olsen, 39 N 573, 42 Am. Dowall, 66 N v. McKee, 82 v. Smith, 84 R. A. (N. S.) to the effect person consist surname, the and the surm son's legal na the given or s ignorant of s meaning of s Procedure." l "unless a defe ters of his na Civil Procedu makes an app ment or decre ing upon him."

Defendants taken a deed t A. R. Jackson, that name, an from Jackson ed and which and recorded represented to was Jackson's plaintiff is nov name is other deeds. Defend lied upon by p the case at ba by Stratton v. N. W. 949, Ann. defendants' con sustained. In doctrine of est defendants, was sidered by this in that case w it, of course, h as if it had be the cases now c tiff were all ce court, after suc

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. D

constitute the full name of an individual, and, when a grantee is so named in his title of record, it will not be presumed that he has another name. If he conveys the land in the name by which he holds it of record, he will be estopped as against his grantee to allege that it is not his true name.

"2. A deed was taken in the name of H. Emerson as grantee. It was duly recorded, and the grantee took possession of the land thereunder. There was nothing upon the deed record indicating that the grantee had any other name. In the meantime the county brought an action against H. Emerson and others to foreclose its lien for taxes which were delinquent for several years. The action proceeded to foreclosure and sale, and sheriff's deed issued, which it is stipulated also described him as H. Emerson. Held, that Emerson's grantee is estopped to allege, in an action to quiet his title against the purchaser at said sheriff's sale, that his grantor's true name was not H. Emerson."

No sufficient reason has been assigned for a departure from the doctrine so carefully considered and announced in *Stratton v. McDermott*, and it is reaffirmed.

The judgment of the district court being in harmony therewith, it is affirmed.

LEAR v. FICKWEILER. (No. 16,870.)
(Supreme Court of Nebraska. Dec. 18, 1912.)

(Syllabus by the Court.)

NAMES (§ 6*)—USE OF INITIALS.

Where one takes title to real estate by his initial letters as his first name, subject to a mortgage then existing, the mortgage may be foreclosed and notice given him by publication by such name.

[Ed. Note.—For other cases, see *Names*, Cent. Dig. § 5; Dec. Dig. § 6.*]

Appeal from District Court, Keya Paha County; Westover, Judge.

Action by Charles E. Lear against Willy Fickweiler. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

M. F. Harrington, of O'Neill, for appellant.
Lear & Lear, of Springview, for appellee.

REESE, C. J. This is an action in ejectment, which was commenced on the 5th day of February, 1910, and in which plaintiff claims the possession of the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 23, and the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ and the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 24, all in township 34 N., of range 17 W., in Keya Paha county. Aside from certain averments in the petition, in which it is alleged that a mistake in the description of the land in one of the deeds constituting the chain of title is sought to be corrected

10th day of December, 1901, the defendant took forcible and unlawful possession of the land, and has held such possession without right ever since. Judgment for possession and an accounting of rents and profits is demanded.

The defendant's answer consists of a general denial, and the averments that on the 9th day of April, 1889, he was the owner of the fee title to said land, when he executed a mortgage and note to the Nebraska Mortgage & Investment Company to secure the sum of \$400, bearing interest at the rate of 7 per cent. per annum before maturity, and 10 per cent. thereafter; that for value the mortgage, and note thereby secured, were sold and transferred to W. C. Brown; that on the 19th day of June, 1900, the said Brown commenced suit to foreclose said mortgage making P. H. Bender, the then holder of the legal title, and Mrs. P. H. Bender, who were then nonresidents, parties defendant, the service being had by publication; that a decree of foreclosure was rendered September 10, 1900, finding the amount due the plaintiff in said action to be \$668.48, and ordering the land to be sold to pay the same; that an order of sale was issued, the land sold by the sheriff to William C. Brown for the sum of \$668.48, and a sheriff's deed was issued to the purchaser, which deed was duly recorded; that thereafter Brown sold and conveyed the premises to defendant, and under his said purchase defendant took possession of the land in the year 1901, and has held such possession since said time, the possession being open, peaceable, and exclusive. It is conceded in the answer that by reason of the action to foreclose the mortgage having been brought against "P. H. Bender," instead of against him by his full name, the foreclosure was invalid; but it alleges that by his purchase Brown retained his mortgage lien, and by his deed to defendant he transferred the same to defendant, that Bender abandoned the land, paying no taxes thereon, and defendant's possession was that of mortgagee in possession, which tolled the statute of limitations, that he has paid the taxes thereon since 1896, and that before plaintiff can succeed in this suit he must pay the amount due on the mortgage, as well as the taxes paid by defendant, with interest thereon.

The reply consists of a general denial of all unadmitted averments in the answer, but admits the execution of the note and mortgage, and their transfer to Brown, that Philip H. Bender became the owner of the property in controversy, subject to the mortgage, that Brown procured the foreclosure as alleged, but that the mortgage was barred by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the statute of limitations, that defendant received the conveyance from Brown, and took possession of the land by virtue thereof. There is a special denial of anything being due defendant, or that he is in possession as a mortgagee. This, being covered by the general denial, need not be further noticed. A trial was had to the district court, without a jury, and which resulted in a finding and judgment in favor of plaintiff. Defendant appeals.

It is seldom that an appellate court is called upon to hold counter to the conclusion of the trial court and the counsel upon both sides of the case, but we seem to be compelled to do so in this case. It is made clear by the pleadings that at the time of the foreclosure of the mortgage Bender was the holder of the title to the land, subject to the mortgage, and that in the deed by which he held title he is named as P. H. Bender. In *Stratton v. McDermott*, 89 Neb. 622, 131 N. W. 949, Ann. Cas. 1912C, 616, *Clark v. Hannafeldt*, 91 Neb. 504, 136 N. W. 558, and *Butler v. Farmland Mortgage & Debenture Co.* (decided at the present term of this court) 138 N. W. 1129, we held and decided that where a person accepts and holds title to real estate, being described and referred to in that way, and so records his deed, it is equivalent to a representation that that is his name, and notice by publication may be rightfully given by such name. This cause was tried, appealed, and the brief of appellant filed before those decisions were made, and it is no surprise that neither the court nor counsel adopted that view. Following those decisions, we must hold that the foreclosure was valid, and that by his purchase from Brown defendant became the owner, and plaintiff's action cannot be maintained.

The judgment of the district court is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

S. HIRSCH DISTILLING CO. v. ROACH. (No. 16,899.)

(Supreme Court of Nebraska. Dec. 18, 1912.)

(Syllabus by the Court.)

1. SALES (§ 52*)—ACTION FOR PRICE — BURDEN OF PROOF.

In an action on account of goods sold and delivered, where the purchase and receipt of the goods are denied, the burden is on the plaintiff to prove such sale to the defendant.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 118-144, 1045; Dec. Dig. § 52.*]

2. SALES (§ 53*)—ACTION FOR PRICE—QUESTION FOR JURY.

Where the proof is that the goods were sold to one in charge of a saloon formerly occupied by defendant, and in which the defendant's license was posted up, that the order was signed by the person in charge not as agent or manager, but in his own name, that

the goods were ordered to be shipped to defendant, the order being given without defendant's knowledge or consent, and it is also shown that plaintiff afterward filed a claim for the account in the county court against the estate of the person who gave the order, a question of fact is presented for the decision of the jury as to the person to whom the goods were sold.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 145-151; Dec. Dig. § 53.*]

3. SALES (§ 358*)—ACTION FOR PRICE—EVIDENCE.

That plaintiff had filed the claim against the estate of the person making the order for the goods is a circumstance tending to show that the goods were sold to such person.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1049-1055; Dec. Dig. § 358.*]

Appeal from District Court, Merrick County; Thomas, Judge.

Action by the S. Hirsch Distilling Company against J. J. Roach. Judgment for defendant, and plaintiff appeals. Affirmed.

Wm. Simeral and I. J. Dunn, both of Omaha, for appellant. John C. Martin, of Central City, for appellee.

REESE, C. J. This action was commenced in the county court of Merrick county and was on an account for liquors alleged to have been sold by plaintiff to defendant, a licensed saloon keeper in the city of Grand Island, and delivered at various times during the months of July, September, and December, 1908; the bill amounting to the sum of \$348.14. The answer of defendant consisted of (1) a general denial of all unadmitted allegations of the petition; (2) admitted that he was a licensed saloon keeper in Grand Island during the year 1908; (3) a special denial that plaintiff sold him any portion of the liquors for which the suit was brought; (4) alleged that, notwithstanding he had procured the license as aforesaid, on the 18th day of July, 1908, he ceased to engage in business in Grand Island, and removed to the city of Kearney, and has never since said date been engaged in business in Grand Island. The fifth paragraph of the answer need not be here noticed, except that it is alleged that the liquors, if sold as alleged, were sold to G. A. Mann, who was then engaged in the saloon business in Grand Island. The reply was a general denial, with an averment that no defense was stated in the answer, and an allegation that plaintiff had no knowledge or information at the time of the sale that defendant claimed to have sold his saloon, or that Mann, in charge thereof, was not his agent with authority to purchase, and that plaintiff dealt with Mann as the agent of defendant. After a trial and judgment in the county court, the case was appealed to the district court, where, by stipulation, the pleadings in the county court were made the pleadings in the district court. A jury trial was had, which resulted in a verdict

in favor of defendant, and upon which judgment was rendered; the motion for a new trial being overruled. Plaintiff appeals to this court.

[1, 2] The principal question presented by the brief of appellant is one of fact as to whether Mann should be held to be the agent of defendant in the purchase of the goods described in the account. It is shown that Mr. Mann is deceased, and therefore his testimony could not be had. So far as the contention in this case is concerned, it may be said that the goods as charged in the bill were sold and delivered to some one; plaintiff alleges to defendant; defendant denies the purchase. Plaintiff's salesman testified that on the 21st of July, 1908, he went to the place of business in Grand Island, which defendant had, and so far as the salesman then knew, still occupied as a saloon, and inquired for defendant, but was informed by Mr. Mann, in charge, that defendant was out of town. Upon being asked if any goods were wanted, Mann stated that he could use some and gave the order, signing his own name thereto. The order was headed, "Send to J. J. Roach, Grand Island"; but whether this was by the direction of Mann we are not informed. Defendant testified that he ceased to do business in Grand Island about the 18th of the same month; that he was succeeded in business by G. A. Mann; that he removed to Kearney and shipped his stock of liquors to that place and did not authorize any other person to order liquors to be shipped to him there after that date. It appears that his city liquor license was permitted to remain posted upon the wall of the saloon, and which was observed by plaintiff's agent. There is no evidence of any inquiry having been made by plaintiff's agent, nor any statements made by Mann concerning defendant, except as above stated. The liquors were not paid for, and Mann, who it appears resided in Hastings, died. During the administration of his estate in the county court of Adams county, plaintiff filed a claim against his estate for the identical goods sued for in this case. Whether the bill was ever allowed against the Mann estate is not disclosed by the record before us.

[3] The proof of the filing of the claim is by the certificate of the county judge of Adams county, and the filing is not pleaded as payment nor estoppel, and, as we understand, was offered as a circumstance for the consideration of the jury, tending to prove that plaintiff did not consider or understand that the sale was to defendant, but to Mr. Mann. For this purpose it was competent, relevant, and material, and subject to such inferences and weight as the jury might think it entitled to. There was no explanation given for plaintiff's action in filing the claim, no contention that plaintiff understood Mann and defendant to be in partnership, or

other reason for filing the claim than that the goods were sold to Mann. This, with all the other evidence in the case, was for the consideration of the jury. There was no evidence that Mann was ever the agent of defendant, that he ever assumed to act as such unless in giving the order, or that defendant ever held him out as such, by word or act, unless leaving his license posted in the saloon amounted to such; but, on the contrary, the filing of the claim by the leading officer of plaintiff was to say, in effect, that the goods were sold to Mann and to no other person. For those reasons the case of *Moise v. Weymuller*, 78 Neb. 266, 110 N. W. 554, is not in point.

It is claimed in plaintiff's brief that the certified copy of the claim against the Mann estate was not properly authenticated. This objection, however, was not presented when the evidence was offered; the objection being "Incompetent, irrelevant, immaterial, not a proper defense, and not set up as a defense in the answer." Had the want of proper authentication been presented, it is quite probable that the objection would have been sustained.

We are unable to see that there has been a miscarriage of justice, and the judgment of the district court will have to be affirmed, which is done.

Affirmed.

NORTON v. LINCOLN TRACTION CO. (No. 16,845.)

(Supreme Court of Nebraska. Dec. 18, 1912.)

(Syllabus by the Court.)

NEW TRIAL (§ 75*)—GROUNDS—INADEQUACY OF DAMAGES.

"In an action for personal injuries, a new trial will not be granted on account of smallness of damages." *O'Reilly v. Hoover*, 70 Neb. 357, 97 N. W. 470.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 151, 152; Dec. Dig. § 75.*]

Appeal from District Court, Lancaster County; Cornish, Judge.

Action by Harry L. Norton against the Lincoln Traction Company. From a judgment for defendant, plaintiff appeals. Affirmed.

M. L. Kimmel, of Omaha, and T. J. Doyle and G. L. De Lacy, both of Lincoln, for appellant. C. S. Allen, of Lincoln, for appellee.

ROSE, J. This is an action to recover damages in the sum of \$10,000 for personal injuries caused by the alleged negligence of defendant in running a street car, on which plaintiff was a passenger, rapidly around a curve at Sixteenth and M streets in the city of Lincoln, and throwing him violently to the pavement. The answer was a general denial and a plea of negligence on the part of

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plaintiff. From a judgment on a verdict in favor of plaintiff for \$1, he has appealed.

The controlling question for review is the sufficiency of the evidence to sustain a verdict for \$1 only. Plaintiff was seriously injured. The jury found in his favor. He insists that evidence of his hospital expenses and of other definite items of pecuniary damage amounting to \$220.70 is undisputed; that therefore the verdict is too small to be sustained by the evidence; and that consequently a new trial should be granted. Defendant's answer to this argument is that section 315 of the Code forbids the granting of a new trial on account of the smallness of damages awarded by a jury in an action for personal injuries. The precise question was considered in *O'Reilly v. Hoover*, 70 Neb. 357, 97 N. W. 470, and it was there held: "In an action for personal injuries, a new trial will not be granted on account of smallness of damages." Section 315 of the Code, though repealed in 1911 (Laws 1911, c. 169), was in force when the trial court overruled plaintiff's motion for a new trial in the present action, and is binding on the parties thereto. The judgment below cannot be reversed without overruling the case cited, and it is deemed inadvisable to do so. Adherence to that case leaves the proceedings below without error.

Affirmed.

APPEL MERCANTILE CO. v. BARKER
(GRAND DRY GOODS CO., Garnishee). (No. 16,865.)

(Supreme Court of Nebraska. Dec. 18, 1912.)

(Syllabus by the Court.)

1. STATUTES (§ 116*)—TITLE OF ACT—SUFFICIENCY.

Sections 31 and 32, c. 32, Comp. St. 1911, commonly known as the bulk sales law, are not unconstitutional as legislating upon a subject not clearly expressed in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 152-154; Dec. Dig. § 116.*]

2. STATUTES (§ 107*)—TITLE OF ACT—SEPARATE SUBJECTS OF LEGISLATION.

The act makes all such sales void as to creditors, unless certain specified conditions are complied with. The conditions imposed cannot be considered as separate subjects of legislation, within the meaning of section 11, art. 3, of the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134; Dec. Dig. § 107.*]

3. CONSTITUTIONAL LAW (§ 296*)—DUE PROCESS OF LAW—BULK SALES LAW.

The act does not violate section 3, art. 1, of the Constitution, which provides: "No person shall be deprived of life, liberty or property without due process of law."

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 825-830, 835-846; Dec. Dig. § 296.*]

4. STATUTES (§ 83*)—SPECIAL LEGISLATION.

The act applies to all people of the state who engage in the business designated. The classification is not arbitrary and unreasonable,

so as to make the act special or class legislation, forbidden by the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 92; Dec. Dig. § 83.*]

5. FRAUDULENT CONVEYANCES (§ 182*)—PERSONS SUBJECT—PURCHASER OF STOCK IN BULK.

One who obtains possession of a stock of merchandise pursuant to a purchase thereof in bulk, in violation of the statute, will be held to be a trustee for the benefit of the creditors of his vendor, and liable as garnishee.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 568-577; Dec. Dig. § 182.*]

Appeal from District Court, Lancaster County; Stewart, Judge.

Action by the Appel Mercantile Company against Pearl Barker and the Grand Dry Goods Company, garnishee. Judgment for plaintiff, and the garnishee appeals. Affirmed.

Stewart, Williams & Brown, of Lincoln, for appellant. R. H. Hagelin, of Lincoln, and Baldrige, De Bord & Fradenburg, and McGilton, Gaines & Smith, all of Omaha, for appellee.

SEDGWICK, J. The plaintiff, having a judgment against the defendant, Pearl Barker, in the district court for Lancaster county, and an execution thereon having been returned wholly unsatisfied, caused the appellant, the Grand Dry Goods Company, to be summoned as garnishee. Mr. Dearsdorf, the president and general manager of the company, appeared and answered in the garnishment proceedings. Upon his answer the court ordered the garnishee to pay into court, to be applied upon plaintiff's judgment, the sum of \$831.89. From this order the garnishee has appealed.

It appeared from the answer of Mr. Dearsdorf that a few days before the garnishment proceeding the defendant, Pearl Barker, was carrying on a retail millinery business in Lincoln, and made a contract of exchange of her stock of millinery goods to this appellant for a quarter section of land in Lincoln county. The value of the stock of goods was stated in the exchange as \$2,200, and was in fact something over \$1,000. The appellant took possession of the goods and disposed of them. The land exchanged was not conveyed by the appellant, but the title was held until such time as the defendant, Pearl Barker, should pay her commercial indebtedness. The provisions of the statute, commonly known as the bulk sales law (Comp. St. 1911, c. 32, §§ 31 and 32), were not complied with in making the exchange, and the court held that the transfer of the stock of goods was void as against creditors, and ordered the garnishee to pay the value thereof into court to be applied on the judgment. The garnishee insists that this order is erroneous, because the bulk sales law is unconstitutional for several reasons, and because the garnishee

was entitled to trial by jury, and the summary order of the court was erroneous. The statute in question was before this court in *Lee v. Gillen & Boney*, 90 Neb. 730, 134 N. W. 278, and it was assumed to be constitutional and valid. The question of its constitutionality, however, was not determined or considered, and, the property transferred not being merchandise, within the meaning of the statute, it was held that the statute had no application to the transaction then being considered. It was therefore unnecessary to consider the constitutionality of the act.

[1] 1. The first objection made in this case to the constitutionality of the statute is that the statute is broader than the title; that is, that the subject of legislation is not clearly expressed in the title, as required by section 11, art. 3, of the Constitution. The title of the act is "An act to declare void sales, trades or other disposition of stocks of merchandise or portions thereof in bulk otherwise than in the ordinary and regular course of the seller's business." Laws 1907, c. 62. The act consists of two sections, and is as follows:

"Section 31. The sale, trade or other disposition in bulk of any part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be void as against the creditors of the seller, unless the seller and purchaser, at least five days before the sale, trade or other disposition make a full detailed inventory, showing the quantity and, so far as possible with exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale, trade or other disposition; and unless the purchaser demands and receives from the seller a written list of names and addresses of creditors of the seller, with the amount of indebtedness due or owing to each and certified by the seller, under oath, to be, to the best of his knowledge and belief, a full, accurate and complete list of his creditors and of his indebtedness; and unless the purchaser shall, at least five days before taking possession of such merchandise, or paying therefor, notify personally, or by registered mail, every creditor whose name and address are stated in said list, of the proposed sale, trade or other disposition and of the price, terms and conditions thereof: Provided, that at least five (5) days before the sale, trade or other disposition, the seller may file with the county clerk in the county in which the stock is located, an agreement with all his creditors waiving the inventory and notice above required.

"Section 32. Nothing contained in this act shall apply to sales by executors, administrators, receivers or by any public officer under judicial process."

The purpose of the constitutional provision

in question is to prevent surreptitious legislation. The title of an act of the Legislature must be such as to give reasonable notice to the members of the Legislature, and others interested, of the general subject upon which it is proposed to legislate. Some of the earlier decisions of this court which are cited in the brief construed this constitutional provision very strictly. We do not consider it necessary to go further in that direction than this court has already gone. The presumption in favor of the validity of an act of the Legislature is very strong, and unless the conclusion is unavoidable, that the subject of legislation is not included in the title of the act, the statute will not be considered void for that reason. Some courts, even in recent years, have applied this provision technically and, we think, too strictly. The subject of legislation expressed in the title of our act is, "To declare void sales, transfers or other disposition of merchandise or property thereof in bulk." And the act itself provides that all sales in bulk shall be void, as against the creditors of the seller, under certain circumstances and conditions. The complaint really is that the Legislature did not go so far in declaring sales void as it might have done under the title of the act. The greater includes the less, and this title is ample notice that it was intended to limit the right to make valid sales of merchandise in bulk. The Legislature has not done more in this respect than the title would justify. The fact that it has done less surely will not invalidate the act.

[2] 2. It is said in the brief that the act has more than one subject, and so violates the constitutional provision cited; that the title to declare sales void will not cover a provision regulating valid sales. This objection seems to be without any force. The act declares sales of merchandise in bulk void, with certain specified exceptions. The fact that the act does not go as far as the title, that instead of making all sales, under all circumstances, void, it makes certain sales, under certain circumstances, void, prescribing certain conditions to be complied with in order to make a valid sale, does not make the specified conditions a distinct subject of legislation.

[3] 3. It is said that the act is unconstitutional, because it deprives persons of their property without due process of law, in violation of section 3, art. 1, of the Constitution.

In *Everett Produce Co. v. Smith*, 40 Wash. 566, 82 Pac. 905, 2 L. R. A. (N. S.) 331, 111 Am. St. Rep. 979, 5 Ann. Cas. 798, several cases are reported from different states upon this interesting question. A footnote is appended, from which it appears that the earliest legislation in this country upon the subject of bulk sale of goods was the act of Louisiana, in 1896. This note appears to

have been written in 1905, and it is said that at that time 22 of the states and territories had enacted such legislation. The courts have not been entirely agreed as to the validity of the various statutes. The courts which have held such legislation constitutional appear generally to agree with the Supreme Court of Washington, which used the following language: "It was intended to prevent retail dealers in goods, wares, and merchandise from defrauding their creditors. As such, it is among the undoubted subjects of legislation; and the real question to be considered, therefore, is: Is the act so far an abuse of the power of legislation as to take it out of the rule of due process of law? In our opinion, it is not. It is a general rule that, when the business is a proper subject of police regulation, the Legislature may, in the exercise of that power, adopt such measures as they see fit to correct the existing abuses, so long as the measures adopted have relation to and a tendency to accomplish the desired end, and violate no direct constitutional provision. This act is within the rule. That it has relation to and will tend to prevent the particular frauds aimed at cannot be doubted. Nor is there any direct constitutional provision against the enactment of such laws. Whether the act is more harsh than was necessary, or whether it is not the wisest or best that could have been adopted, are legislative questions, with which the courts have nothing to do. It is enough for the court to know that the act is within the legislative power." *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37, 60 L. R. A. 947, 94 Am. St. Rep. 889. Our statute is new, and if it is found in any respect to be defective, or any of its provisions are harsh and unreasonable, the Legislature will, of course, remedy the matter. It is not necessary in this case to construe the various provisions of the statute. If some of them should be found for any reason to be invalid, that would not necessarily render the whole act unconstitutional.

[4] 4. The statute is not unconstitutional as being special or class legislation. "A law which is uniform in its operation is not rendered invalid merely because of the limited number of persons who will be affected by it. The act in question applies equally to all the people of the state who may engage in the business described. The limitation of

the act to retail dealers is not an arbitrary classification." *Walp v. Mooar*, 76 Conn. 515, 57 Atl. 277.

[5] 5. The final contention of the appellant is that garnishment proceedings will not lie in such a case. This objection has been, we think, well answered by the Supreme Court of Washington, in *Kohn v. Fishbach*, 36 Wash. 69, 78 Pac. 199, 104 Am. St. Rep. 941. The circumstances seem to be similar with those in this case, and the court said: "It is true * * * that he did not at that time have any of the property of the defendant in his possession, and that he was not indebted to him. But, in contemplation of law, he had the property of the defendant in his hands, because, having purchased the property in fraud of law, without complying with the provisions of the law in relation to sales of property in bulk, he stood in the position of a trustee of the property, responsible to the cestui que trust or the creditors for the disposition of such property." In the case at bar the garnishee appears to have protected itself in the possession of this stock of goods. It still holds the title to the land, and its contract provides that the title shall not be conveyed until the creditors are paid.

The judgment of the district court is affirmed.

SMITH v. POTTER et al. (No. 16,314.)
(Supreme Court of Nebraska. Dec. 18, 1912.)

On application for rehearing, or for modification of former opinion (137 N. W. 854). Motion for rehearing denied, and motion to modify sustained.

PER CURIAM. A motion in the alternative, for a rehearing or for a modification of our former opinion (137 N. W. 854), by striking out of the statement in the opinion, "and that Hoagland is not barred by the foreclosure proceedings, which were so far void as to fail to convey title to Wilcox," the latter clause of said statement. Upon a reconsideration of the case it is held that the motion for rehearing be denied, and the motion to modify sustained. The words, "which were so far void as to fail to convey title to Wilcox," are therefore stricken out of our said opinion.

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THIS IS A KEY-NUMBER INDEX

It Supplements the Decennial Digest, the Key-Number Series and
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§ 7 (Wis.) The voluntary abandonment of a known, or presumably known, right, constitutes a waiver thereof, which cannot be displaced by a change of mind, regardless of estoppel.—*Somers v. Germania Nat. Bank of Milwaukee*, 138 N. W. 713.

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§ 11 (Iowa) In a prosecution of a physician for abortion, evidence held insufficient to show that he did not in good faith and in the exercise of his best skill believe that it was necessary to save the patient's life.—*State v. Shoemaker*, 138 N. W. 381.

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I. RIGHT OF ACTION AND DEFENSES.

§ 1 (Mich.) A contract wherein a son, in consideration of a deed from his mother of her dower, agreed to give her one-third of the income, held one on which equity could decree an accounting.—*Holden v. Butler*, 138 N. W. 1071.

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I. GROUNDS AND CONDITIONS PRECEDENT.

§ 1 (Wis.) A cause of action consists of the facts from which plaintiff's primary right and the defendant's corresponding duty have arisen, together with the facts showing defendants' wrong.—*American Can Co. v. Stare*, 138 N. W. 67.

II. NATURE AND FORM.

§ 35 (Wis.) Where a new remedy to meet a new situation is created by statute, the remedy is exclusive and subject to the conditions and

limitations thrown round it by the legislative wisdom.—Clancy v. Board of Fire & Police Com'rs of Milwaukee, 138 N. W. 109.

III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

§ 38 (Wis.) In a suit to collect a note, a complaint alleging that the plaintiff has, as securities for payment of the note, several mortgages and certain pledged personalty which it seeks to subject to the payment of the debt, does not state more than one cause of action.—American Can Co. v. Stare, 138 N. W. 67.

St. 1898, § 3156, which permits a demand for a deficiency judgment in foreclosure actions, does not create an additional cause of action, but merely intended to afford additional relief in the foreclosure action.—Id.

§ 46 (Iowa) In an action to enjoin the enforcement of ordinances of a city relating to wharfage fees and the keeping of certain river craft in the harbor, a supplemental petition for recovery of fees paid under duress, being purely an action at law, should have been stricken for misjoinder on motion.—Keevoet v. City of Dubuque, 138 N. W. 540.

§ 50 (Wis.) Under St. 1898, § 2656a, a joinder of different causes of action is justified where the relief sought involves a contract, transaction, or property which is the subject-matter of the action, and jurisdiction of the parties for the purpose of granting complete relief carries with it the right to unite in the complaint different causes of action for relief, and authorizes the court to grant relief as authorized by section 2883.—Warren Webster & Co. v. Beaumont Hotel Co., 138 N. W. 102.

Under St. 1898, §§ 2656a, 2883, an action by subcontractors to enforce their liens and for a deficiency judgment against the principal contractor and the surety on his bond, liable for debts incurred by the contractor, and an action by the owner on the bond, may properly be joined, so that the court may determine the ultimate rights of all the parties.—Id.

§ 57 (Wis.) Actions by different brokers for commissions on the same sale cannot be consolidated under St. 1898, § 2792.—Schenck v. Sterling Engineering & Const. Co., 138 N. W. 637, 769.

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§ 22 (Iowa) Under Code 1873, §§ 2307, 2310, heirs of person adopting the child of another held not entitled to inherit from such child, and hence the child's natural parents inherited under section 2455.—Baker v. Clower, 138 N. W. 837.

Acts 29th Gen. Assem. cc. 132, 136, relative to inheritance from adopted children, cannot be considered a legislative declaration that the law was the same under previous statutes.—Id.

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I. NATURE AND REQUISITES.

(A) Acquisition of Rights by Prescription in General.

§ 8 (Iowa) Though a highway has been inclosed by cross-fences and occupied by abutting owners for more than 10 years, title to the highway is not acquired by adverse possession.—Ford v. Doolittle, 138 N. W. 397.

(B) Duration and Continuity of Possession.

§ 43 (Mich.) Where a plaintiff, suing in ejectment, showed that she and her predecessors in title took possession of the strip of land in controversy with other premises, regarding the strip as having been conveyed by the deeds, and that such possession continued for over 30 years, the successive possessions could be tacked to acquire title by adverse possession.—Gildea v. Warren, 138 N. W. 232.

§ 45 (Neb.) Service of summons in ejectment arrests the running of limitations in favor of a defendant claiming by adverse possession, though the form of action is subsequently changed to a suit to redeem.—Butler v. Secrist, 138 N. W. 749; Kissinger v. Butler, Id. 750.

§ 45 (Wis.) Where the only possession which the grantee in a deed conveying no title had was the possession of his tenant, ejectment against the tenant interrupted limitations in favor of the grantee.—Illinois Steel Co. v. Treu, 138 N. W. 995.

§ 47 (Wis.) Mere verbal denials by the owner of the right of the adverse occupant, or loose claims of title in himself, or ineffectual protests short of a disturbance of the rights of the adverse claimant, will not interrupt limitations.—Illinois Steel Co. v. Treu, 138 N. W. 995.

§ 57 (Iowa) In partition a defendant claiming the land through an oral transfer, followed by possession for the period prescribed for the statute of limitations, has the burden of proof.—Kerr v. Yager, 138 N. W. 905.

(F) Hostile Character of Possession.

§ 63 (Mich.) Possession taken and maintained under a contract of purchase could not ripen into an adverse holding, however long maintained.—Rodgers v. Beckel, 138 N. W. 202.

AFFIDAVITS.

See Appeal and Error, §§ 547, 1031; Arrest; Criminal Law, §§ 957, 1156; Depositions; Discovery, § 55; Divorce, §§ 168, 226, 227; Mechanics' Liens, § 154; Municipal Corporations, § 502; New Trial, §§ 140, 144; Process, § 96; Taxation, § 642.

§ 7 (Mich.) Under circuit court rule 37 (b), made applicable by chancery rule 15 to chancery cases, an affidavit, which, though not entitled in the cause, is attached to a cover properly entitled therein, is sufficient.—Doane v. Allen, 138 N. W. 228.

AGE.

See Infants, § 56.

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See Waters and Water Courses, § 263.

§ 3 (Neb.) Under Laws 1858, pp. 220, 221 (1 Complete Session Laws, p. 530) §§ 8-11, relat-

ing to county aid to agricultural societies in improving sites for fair grounds, the words "all such real estate and improvements" refer only to real estate purchased and improved by money paid from the county treasury.—*Owen v. Main*, 138 N. W. 154.

Laws 1879, p. 400, § 14, amending the act of 1858 (Laws 1858, p. 219), providing that a county board may pay to a county agricultural society owning a certain quantity of real estate for fair grounds money to be expended by such society in fitting up the fair grounds, made no change with respect to the right of the county to recover the amount of its contribution in case of default.—*Id.*

The purpose of Laws 1858, p. 221 (1 Complete Session Laws, p. 530) § 11, was to allow an agricultural society the use of the funds of the county to a limited extent, in trust, and to prevent the diversion of public funds to private use, if the society failed to carry out the purpose of its organization.—*Id.*

ALIBI.

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ALTERATION OF INSTRUMENTS.

See Principal and Agent, § 171.

§ 27 (Neb.) The consolidation of a note sued on being a settlement of a claim for alteration of a prior note, if the claim was made upon reasonable grounds and in good faith, it is not incumbent upon the plaintiff to establish that the defendant maker altered the prior note after its execution.—*Musser v. Musser*, 138 N. W. 599.

The presumption is that any alterations upon the face of a note were made before it was signed and delivered, and the burden of proving an alteration lies upon the person who asserts it.—*Id.*

§ 28 (Minn.) In an action on a note, where the only issue was whether it was altered before delivery in 1905, evidence of a conversation with defendant's attorney in 1908 in relation to the alteration was inadmissible to show that defendant was mistaken in saying that he first knew of it in 1910, there being no issue of ratification or subsequent acquiescence.—*Bakke v. Melby*, 138 N. W. 950.

§ 29 (Minn.) In an action on a note, evidence held to sustain a finding that an alteration of the date was made before delivery and with the knowledge and consent of the maker.—*Bakke v. Melby*, 138 N. W. 950.

AMBIGUITIES.

See Evidence, §§ 452, 460.

AMENDMENT.

See Appeal and Error, §§ 643, 766, 888, 950; Judgment, § 303; Pleading, §§ 236, 237, 430; Statutes, § 161.

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APPEAL AND ERROR.

See Certiorari; Costs, §§ 255, 256; Courts, § 204; Creditors' Suit, § 47; Criminal Law, §§ 722, 1008-1182; Damages, §§ 130, 132; Divorce, §§ 182, 223, 227, 280; Drains, §§ 14, 36, 82; Exceptions, Bill of; Executors and Administrators, §§ 85, 256; Habeas Corpus, § 113; Infants, § 115; Interest, § 22; Judgment, §§ 663, 872; Justices of the Peace, §§ 141, 146; Mandamus, § 4; Municipal Corporations, §§ 185, 198, 508; New Trial; Wills, § 384.

I. NATURE AND FORM OF REMEDY.

§ 1 (Wis.) The right to appeal is purely statutory; and, unless given, it is withheld.—*Clancy v. Board of Fire & Police Com'rs of Milwaukee*, 138 N. W. 109.

II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

§ 23 (Wis.) Since the Supreme Court acquires no jurisdiction of an appeal from an order unless it be appealable, that question is always involved though not raised by the parties.—*Wisconsin Real Estate Co. v. City of Milwaukee*, 138 N. W. 642.

III. DECISIONS REVIEWABLE.

(E) Nature, Scope, and Effect of Decision.

§ 93 (S.D.) Under Code Civ. Proc. § 462, subds. 1, 2, allowing an appeal from an order affecting a substantial right which in effect determines the action and prevents a judgment from which an appeal might be taken, an order of the circuit court remanding an action of forcible entry and detainer to the justice's court, as not involving a question of title, involves the merits of the action, and is appealable.—*McManus v. Maloy*, 138 N. W. 963.

§ 97 (Wis.) An order requiring the deposit of the amount of a special assessment as a condition precedent to restraining its collection, while not affecting substantial rights, operates as a provisional remedy giving the defendant municipality security, and hence is appealable under St. 1898, § 3069, subd. 3.—*Wisconsin Real Estate Co. v. City of Milwaukee*, 138 N. W. 642.

IV. RIGHT OF REVIEW.

(A) Persons Entitled.

§ 138 (Iowa) Where the last grantee of mortgaged premises, holding under covenants of warranty, was granted judgment over against a prior grantor, who had assumed the mortgage, such grantor having appealed, plaintiff mortgagee could not object to an appeal also taken by such grantee.—*Boice v. Coffeen*, 138 N. W. 857.

§ 150 (Mich.) Where a decree for the distribution of the proceeds of the sale of railroad property at a judicial sale was made on the petition of the receiver and of intervening creditors, the railroad company could not appeal from it, having no interest in the proceeds.—*Gorman v. Patrick Hirsch Co.*, 138 N. W. 1079.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) Issues and Questions in Lower Court.

§ 169 (Iowa) Where an issue is not raised in the pleadings, it cannot be reviewed.—*Cuthbertson v. First Nat. Bank*, 138 N. W. 1090.

§ 173 (Iowa) An objection that an action was prematurely begun is not jurisdictional, and cannot be raised for the first time on ap-

question in the court below as to plaintiff not being the real party in interest, such question cannot be considered on appeal.—Manion v. Brady, 138 N. W. 558.

§ 179 (S.D.) In action for loss of baggage, the only question open to review was whether articles could, under any circumstances, constitute baggage where defendant did not request the submission of the question whether, under the facts, they constituted baggage.—House v. Chicago & N. W. Ry. Co., 138 N. W. 809.

(B) Objections and Motions, and Rulings Thereon.

§ 190 (Mich.) A decree in proceedings by a receiver for a distribution of funds will not be reversed because it made an allowance of claims not filed with the register, where no such objection was made below.—Gorman v. Patrick Hirsch Co., 138 N. W. 1079.

§ 193 (Iowa) Where no objection to the petition was raised in the district court, it could not be objected to on appeal.—Hahn v. Lumpa, 138 N. W. 492.

§ 204 (Iowa) In an action for permanent injuries to a servant, defendant *held* not entitled to object for the first time on appeal to an admission as to plaintiff's life expectancy, because it did not relate to the date of the accident.—Spencer v. Updike Grain Co., 138 N. W. 820.

§ 207 (Minn.) Alleged misconduct of plaintiff's counsel in addressing the jury is not ground for reversal, where it was not directly called to the trial court's attention, and a ruling invoked and an exception taken.—Langdon v. Minneapolis St. Ry. Co., 138 N. W. 790.

§ 215 (Iowa) Error, if any, in an instruction as to the right of parents to the earnings of a minor child, who, before his death, brought an action for injuries to his person and property, *held* cured by failure to object that the mother was not a proper person to emancipate him.—Scott v. O'Leary, 138 N. W. 512.

§ 215 (Mich.) Under Comp. Laws, § 10,247, a defendant need not in the trial court object to a charge because submitting an issue not pleaded or proved, but he may assign his errors on the charge in the Supreme Court.—Totten v. Totten, 138 N. W. 257.

§ 216 (Neb.) The failure to instruct as to the burden of proof will not require a reversal when no such instruction was requested.—Chalupa v. Tri-State Land Co., 138 N. W. 603.

§ 232 (Iowa) One objecting to evidence only on certain grounds waives all other grounds of objection.—Kerr v. Yager, 138 N. W. 905.

§ 232 (Minn.) A defendant is limited on appeal to grounds of objection to an instruction made in the trial court.—Stuhr v. Wright County Telephone Co., 138 N. W. 693.

§ 232 (S.D.) Objection to evidence tending to show estoppel, as not admissible under the pleadings, was insufficient to raise the objection that it was not admissible, because no estoppel had been pleaded.—Harris v. Lyons, 138 N. W. 295.

(C) Exceptions.

§ 261 (Mich.) Unless the court was requested to reprimand counsel for improper argument or to take any other action, the question is not raised for review by merely excepting to the argument.—Good Roads Const. Co. v. Port Huron, St. C. & M. C. Ry. Co., 138 N. W. 320.

§ 263 (Minn.) Error in submitting an issue not within the pleadings was not available, where no exception was taken thereto at the trial.—Johnson v. Scott, 138 N. W. 694.

OF OTHER SURETIES.

§ 380 (Iowa) Where a party's appeal bond has no other surety than one of his attorneys, his appeal will be dismissed.—Collins v. Board of Sup'rs of Pottawattamie County, 138 N. W. 1095.

(D) Writ of Error, Citation, or Notice.

§ 413 (Iowa) That a mortgagor was served outside the state in foreclosure proceedings did not obviate the necessity of serving a notice of appeal on him.—Tukey v. Foster, 138 N. W. 862.

§ 415 (Iowa) Facts *held* to show that a mortgagor and purchasers of part of the mortgaged premises would be prejudicially affected by a reversal of a judgment of foreclosure in rem; and hence they were entitled to notice of appeal, under Code, § 4111.—Tukey v. Foster, 138 N. W. 862.

§ 415 (Iowa) A partner against whom judgment has been entered by default is not a coparty who will be prejudiced by not being served with notice of appeal by his copartner under Code, § 4111.—First Nat. Bank v. Casey, 138 N. W. 897.

§ 417 (Iowa) Under Code, § 319, a notice of appeal is not insufficient because signed by appellant's attorney; the statute not requiring it to be signed in person.—In re Oldfield's Estate, 138 N. W. 846.

(E) Entry, Docketing, and Appearance.

§ 435 (Iowa) Where, in foreclosure proceedings, judgment in rem only was rendered, jurisdiction could not be conferred on the Supreme Court over one who owned a portion of the mortgaged premises, but who did not appeal, by an attempted appearance of counsel.—Tukey v. Foster, 138 N. W. 862.

§ 435 (Wis.) A circuit court *held* to have jurisdiction of an action at law on a contract appealed from a civil court, where the parties, in spite of a defective appeal, appeared and tried the case de novo.—Manufacturers' & Merchants' Inspection Bureau v. Everwear Hosiery Co., 138 N. W. 624.

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

§ 460 (Mich.) Where a defendant appealing from an adverse decree did not give the appeal bond provided for by Pub. Acts 1909, No. 299, as amended by Pub. Acts 1911, No. 160, the decree was not stayed, and complainant could proceed at his peril, and the Supreme Court would not restrain enforcement pending the appeal.—Pinel v. Pinel, 138 N. W. 219.

§ 468 (Mich.) The Supreme Court may permit appellant on a proper showing to file an appeal bond nunc pro tunc in the Supreme Court staying proceedings under the decree appealed from.—Pinel v. Pinel, 138 N. W. 219.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) Matters to be Shown by Record.

§ 501 (Iowa) Neither Code, § 3675, nor any other provision, authorize a preservation of exceptions to instructions by mere certificate of the judge and the reporter that they were taken.—Black v. Miller, 138 N. W. 535.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

§ 547 (Neb.) Affidavits on motion for new trial cannot be considered unless preserved in a bill of exceptions.—Schmidt v. Village of Pappillon, 138 N. W. 725.

(I) Defects, Objections, Amendment, and Correction.

§ 634 (S.D.) That both the bill of exceptions and motion for new trial have been stricken out is no reason for dismissing an appeal regularly taken otherwise, as the case may stand for review on the judgment roll alone.—*Buffalo Pitts Co. v. Deeg*, 138 N. W. 802.

§ 643 (Iowa) A motion to strike appellee's amendment to the abstract, which, though not filed in time, was filed as soon as it was known what points appellant was relying on for a reversal, will be overruled.—*Kerr v. Yager*, 138 N. W. 905.

(J) Conclusiveness and Effect, Impeaching and Contradicting.

§ 668 (Iowa) Recitals in the record on appeal from an order that a party appeared in person on the hearing of the application for such order cannot be contradicted by parol, but must stand as a verity until corrected in the district court.—*Mengel v. Mengel*, 138 N. W. 495.

(K) Questions Presented for Review.

§ 686 (Minn.) To justify the reversal of an order denying a new trial on the ground that a juror was not sworn, such fact should affirmatively appear, and where the question is in doubt the decision of the trial court is final.—*Bakke v. Melby*, 138 N. W. 950.

§ 696 (S.D.) Where the trial court did not certify that the evidence to support a finding was in the record, the sufficiency of such evidence could not be reviewed.—*Smith v. Johnson*, 138 N. W. 18.

XI. ASSIGNMENT OF ERRORS.

§ 724 (S.D.) Specifications of error must reveal the precise question presented to the trial court for determination, but assignments of error are sufficient if, taken in connection with the brief and accompanying argument, they present clearly the question urged on appeal.—*Tuntland v. Noble*, 138 N. W. 291.

§ 725 (S.D.) On an appeal from a judgment sustaining a demurrer to a complaint in a proceeding to contest a local option election, an assignment of error assigning as error the sustaining of the demurrer is sufficient.—*Tuntland v. Noble*, 138 N. W. 291.

§ 743 (Mich.) Where no reference is made to the record, a criticism based on the conduct of counsel will not be considered.—*Bowen v. Chandler*, 138 N. W. 247.

XII. BRIEFS.

§ 766 (Iowa) The question of appellant's brief complying with Supreme Court rule 53 is eliminated by his filing, after the raising of the question, an amended brief fully meeting the requirements.—*Ek v. Phillips Fuel Co.*, 138 N. W. 547.

§ 773 (Mich.) Where appellant perfected his appeal and printed the record, the duty to serve the first brief rested on appellee under Supreme Court rule 41 (90 N. W. v), and appellee's motion to dismiss the appeal for want of prosecution must be denied.—*Pinel v. Pinel*, 138 N. W. 219.

§ 773 (Minn.) Where notice of appeal was served August 10, 1912, and notice of trial was served in due time for the October, 1912, general term of the Supreme Court, but no paper book or points and authorities were served until October 15th, a motion to dismiss the appeal must be granted.—*Melin v. Stuart*, 138 N. W. 281.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

§ 781 (Iowa) An appeal will be dismissed where, pending its disposition, appellant set-

ted the litigation, though he was induced to do so by the fraud of the other party, where he failed to return, or offer to return, the consideration.—*Lake v. Dredge*, 138 N. W. 869.

XVI. REVIEW.**(A) Scope and Extent in General.**

§ 837 (Minn.) In an action for death at a railroad crossing, the court, on defendant's appeal, could not consider grounds of negligence alleged in the complaint, which the trial court refused to submit to the jury.—*Tegels v. Great Northern Ry. Co.*, 138 N. W. 945.

§ 843 (Mich.) The question of error in excluding evidence will not be considered, where the result would not be changed by giving to the excluded evidence all the probative force it is entitled to.—*Steketee v. Newkirk*, 138 N. W. 1034.

§ 843 (Neb.) It is unnecessary to decide whether a general demurrer will lie to a petition so far as it attempted to state a cause of action in favor of one of several joint plaintiffs, where the question of law is presented and determined under other assignments.—*Chalupa v. Tri-State Land Co.*, 138 N. W. 603.

§ 843 (N.D.) Under Const. § 101, providing that every point fairly arising on the record shall be decided, a point arises on the record only when its decision is necessary to the final determination of the cause, and it is properly presented with a fullness rendering it possible to comprehend it.—*Heald v. Strong*, 138 N. W. 1114.

§ 843 (Wis.) Whether the cause of action against a vendor for failure to get timber standing on the land, but previously sold to another, is for fraud or breach of warranty, is immaterial to defendant, and so will not be decided; the complaint stating both causes of action, and the measure of damages adopted, the value of the timber removed, being the lowest applicable to either.—*Darlington v. J. L. Gates Land Co.*, 138 N. W. 72.

(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions.

§ 870 (Mich.) An interlocutory order granting a right to appeal from an order of the probate court, cannot be reviewed on writ of error.—*Apsey v. De Young*, 138 N. W. 1054.

§ 873 (N.D.) Where a motion for a new trial, based on the insufficiency of the evidence, is made and denied after judgment, the Supreme Court will not on appeal from the judgment consider assignments based solely on the insufficiency of the evidence.—*Heald v. Strong*, 138 N. W. 1114.

On appeal from the judgment alone, the sufficiency of the evidence is not brought up for decision by an assignment of error, where the sufficiency of the evidence was not challenged at the trial, but only by a motion for new trial after judgment.—*Id.*

(C) Parties Entitled to Allege Error.

§ 877 (Iowa) Where plaintiff secured a more favorable taxation of costs than he was entitled to, he could not complain thereof, though defendants did not appeal.—*Rice v. Rice*, 138 N. W. 1111.

§ 882 (Iowa) An objection to an instruction, in substance the same as one requested by the party complaining, will not be considered on appeal.—*Braddich v. Phillips Coal Co.*, 138 N. W. 406.

§ 882 (S.D.) One who invites or brings error into a case cannot be heard thereafter to complain of it.—*Daudel v. Wolf*, 138 N. W. 814.

pleadings to the proof only where an amendment does not change substantially the claim or defense.—Peterson v. Lincoln County, 138 N. W. 122.

The power of the Supreme Court to permit an amendment of a pleading to conform to the proofs is, as a rule, only exercised to sustain a judgment, except where it clearly appears that the refusal to permit an amendment would cause a miscarriage of justice.—Id.

• (E) Presumptions.

§ 901 (Wis.) One who assigns error must affirmatively show such error.—Manufacturers' & Merchants' Inspection Bureau v. Everwear Hosiery Co., 138 N. W. 624.

§ 911 (Iowa) Where the order appealed from appears to have been entered by the district court and is properly of record in the proceedings in that court, it will be assumed that the application therefor was heard before the court and not by a judge.—Mengel v. Mengel, 138 N. W. 495.

§ 927 (Neb.) In reviewing a direction of a verdict for plaintiff, the court will assume the existence of every material fact which the evidence for defendant establishes or tends to prove, and all proper inferences from such facts.—Central Nat. Bank v. Ericson, 138 N. W. 563.

§ 930 (Iowa) It will be presumed that the jury followed an instruction authorizing recovery only in the event that such damages were shown by the testimony.—Scott v. O'Leary, 138 N. W. 512.

§ 930 (Iowa) It must always be presumed that the jury followed the instructions.—Downing v. Farmers' Mut. Fire Ins. Co., 138 N. W. 917.

§ 934 (S.D.) It will be presumed, on appeal, in support of a judgment for plaintiff that the jury found certain facts as claimed by plaintiff; such facts being necessary to support the judgment.—Harris v. Lyons, 138 N. W. 295.

§ 939 (Iowa) Papers and documents included in a transcript which is duly certified must be assumed to be a part of the record below, although not specifically identified.—Mengel v. Mengel, 138 N. W. 495.

§ 939 (Iowa) Under Supreme Court rules 30, 31, 32, and Code, § 4118, it is presumed the appellant's abstract, certified to contain all the evidence "material," contains all the evidence necessary for consideration of the errors presented, unless appellee supplies alleged omissions by amended abstract.—Ek v. Phillips Fuel Co., 138 N. W. 547.

(F) Discretion of Lower Court.

§ 947 (Wis.) The rule that where a court has discretion to grant a motion, but denies it on the theory of lack of power, the order must be reversed, does not apply where no sufficient ground is shown for the exercise of the discretion or where the court decides it had no power, and that if it had it would deny the motion.—Katz v. De Wolf, 138 N. W. 1013, 1016.

§ 954 (Mich.) Granting a temporary injunction is not reviewable, in the absence of an abuse of discretion.—Onen v. Herkimer, 138 N. W. 198.

§ 959 (Neb.) Unless the discretion of a court in refusing to permit defendant to amend the answer after trial has been begun is abused, such ruling will not be disturbed.—Kinney v. Chicago, B. & Q. R. Co., 138 N. W. 577.

§ 961 (Wis.) Discretionary action in granting a discovery under St. 1898, § 4096, can

from a mortgage sale in the exercise of the court's discretion will not be reversed unless abuse of discretion is shown.—Butler v. Secrist, 138 N. W. 749; Kissinger v. Butler, Id. 750.

§ 969 (S.D.) The trial court having a wide discretion as to the course of trials and conduct of parties and counsel, its action therein will not be error unless there has been a gross abuse of discretion.—Daudel v. Wolf, 138 N. W. 814.

§ 981 (Mich.) The discretion of the trial judge in refusing a motion for new trial will not be disturbed, unless abused.—Branch v. Klatt, 138 N. W. 263.

§ 984 (Mich.) The allowance by the trial court of solicitor's and receiver's fees in proceedings for the distribution of proceeds of a sale of the property in the hands of the receiver will not be disturbed in the absence of an abuse of its discretion.—Gorman v. Patrick Hirsch Co., 138 N. W. 1079.

§ 985 (N.D.) The discretion of the trial court in granting or refusing extensions of time to prepare a cause to be settled and statement of the case will not be interfered with by the Supreme Court, except in cases of manifest abuse of discretion.—Heald v. Strong, 138 N. W. 1114.

(G) Questions of Fact, Verdicts, and Findings.

§ 996 (Minn.) The rule that findings of the trial judge will not be reversed, unless manifestly against the evidence, applies to inferences from undisputed facts, documentary evidence, depositions, or the report of a referee.—Wunder v. Turner, 138 N. W. 770.

§ 997 (S.D.) Where both parties requested a directed verdict, the decision of the trial judge is conclusive on appeal, unless against the clear preponderance of the evidence.—City of Deadwood v. Hursh, 138 N. W. 1122.

§ 997 (Wis.) Mere negative testimony of a single witness held insufficient to justify the reversal of a verdict directed by the court on the ground that the evidence was insufficient to show gross negligence of defendant's motorman.—Raasch v. Milwaukee Electric Ry. & Light Co., 138 N. W. 608.

§ 999 (Neb.) Where a verdict is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, it will be set aside.—Tyler v. Hoover, 138 N. W. 128.

§ 1001 (Iowa) The Supreme Court will not interfere with a finding in answer to a special interrogatory, which has support in the testimony.—Scott v. O'Leary, 138 N. W. 512.

§ 1001 (Iowa) There being substantial evidence in support of a verdict, the appellate court cannot disturb it as the result of passion or prejudice.—In re Law's Estate, 138 N. W. 531.

§ 1001 (Wis.) A court on appeal held warranted in setting aside a verdict obtained on perjured testimony to further justice.—Loehr v. Dickson, 138 N. W. 61.

§ 1002 (Iowa) A verdict on conflicting evidence is conclusive.—Vernon v. Iowa State Traveling Men's Ass'n, 138 N. W. 696; Depugh v. Brown, Id. 908.

§ 1002 (Iowa) The Supreme Court will not pass upon the weight of conflicting evidence.—Seever v. Cleveland Coal Co., 138 N. W. 795.

§ 1002 (Neb.) Where there is a conflict of evidence upon the material facts, touching the cause of action or defense, in an action at law, a reviewing court will not disturb the verdict.—Tyler v. Hoover, 138 N. W. 128.



§ 1002 (Neb.) Where the evidence is conflicting, but there is sufficient to support the verdict, it will not be disturbed, though the reviewing court might reach a different conclusion.—*Kinney v. Chicago, B. & Q. R. Co.*, 138 N. W. 577.

§ 1002 (Neb.) A verdict on conflicting evidence sufficient to sustain a recovery for either party will not be disturbed.—*Schmidt v. Village of Papillion*, 138 N. W. 725.

§ 1003 (Iowa) The question of the weight or preponderance of evidence cannot be reviewed.—*Brinsmaid v. Order of United Commercial Travelers of America*, 138 N. W. 465.

§ 1003 (Wis.) The Supreme Court cannot set aside a verdict upon the ground that it is against the weight of the evidence, if there is some credible evidence to support it, and the trial court denied a new trial, though it might not have reached the same result as the jury.—*Milwaukee Trust Co. v. City of Milwaukee*, 138 N. W. 707.

§ 1005 (Mich.) The evidence being in sharp conflict, refusal to grant a new trial, on the ground that the verdict was against the weight of evidence, cannot be disturbed on appeal.—*Rice v. City of Pontiac*, 138 N. W. 252.

§ 1005 (Minn.) In an action for injuries to a trackman by being pushed from a moving hand car by a fellow servant, evidence held sufficient to sustain a verdict for plaintiff, after its approval by the trial court.—*Vaneff v. Great Northern Ry. Co.*, 138 N. W. 1027.

§ 1008 (N.D.) Findings of the court on questions of fact have the same weight as a verdict.—*State v. Banks*, 138 N. W. 973.

§ 1009 (Iowa) Where the trial court had the witnesses before it, its findings, even in an equity case, should be given weight.—*Healy v. Hohn*, 138 N. W. 551.

§ 1010 (Mich.) Findings by the trial court are conclusive on appeal, if there was evidence tending to sustain them.—*Powers v. Calhoun County*, 138 N. W. 266.

§ 1010 (Mich.) A finding by the trial court on the facts cannot be reversed, unless there is a total want of evidence to support it or it is contrary to the undisputed evidence.—*Holcomb v. Sayers*, 138 N. W. 1043.

§ 1010 (N.D.) Findings of fact on the trial of a cause at law by the court sustained by substantial evidence will not be disturbed.—*State v. Banks*, 138 N. W. 973.

§ 1010 (Wis.) Findings of fact by the trial court will be sustained, unless the evidence so strongly preponderates against the same as to indicate that they are wrong.—*Vote-Berger Co. v. Carter-Wabeno Telephone Co.*, 138 N. W. 47.

§ 1011 (Neb.) Where there is a conflict of evidence upon the material facts, touching the cause of action or defense in an action at law, a reviewing court will not disturb the findings and judgment of the trial court.—*Tyler v. Hoover*, 138 N. W. 128.

§ 1011 (Neb.) In proceedings to revive a dormant judgment, a finding for defendant on conflicting evidence will not be disturbed.—*Sandwich Mfg. Co. v. Huckfeldt*, 138 N. W. 565.

§ 1012 (Neb.) The findings and judgment of the trial court will be set aside where they are clearly against the weight of evidence.—*Tyler v. Hoover*, 138 N. W. 128.

(H) Harmless Error.

§ 1031 (S.D.) Unless the party moving for a new trial shows that he desires further time to file rebuttal affidavits, it will be presumed that the court properly overruled objection to the counter affidavit without prejudice to the moving party.—*Dandel v. Wolf*, 138 N. W. 814.

§ 1033 (S.D.) Proof of the entire transaction by plaintiff in a claim and delivery proceeding, as a part of his main case, instead of merely

proving ownership, demand and refusal—all that was required in the first instance—was advantageous to defendant.—*Harris v. Lyons*, 138 N. W. 295.

§ 1036 (Minn.) In a proceeding to enforce a mechanic's lien, no prejudice resulted to the owner from the order compelling another lien claimant to intervene, after plaintiff's cause was tried and before entry of judgment, in view of *Rev. Laws 1905, § 3517*.—*Landquist v. Young*, 138 N. W. 28.

§ 1047 (Iowa) Striking out of a part of plaintiff's evidence was not prejudicial where the matter stricken was conceded.—*Vernon v. Iowa State Traveling Men's Ass'n*, 138 N. W. 696.

§ 1048 (Mich.) Defendant's rights are fully protected, where, being asked on cross-examination if he had not offered a certain amount to settle the matter, objection thereto is sustained, and the jury instructed not to consider it, or let it influence them.—*Blankama v. King*, 138 N. W. 236.

§ 1050 (Iowa) Erroneous admission of evidence of reasonable value in action for price tried on the theory that the rights of the parties depended on whether there had been an acceptance held not prejudicial.—*Buckeye Traction Ditcher Co. v. Smith*, 138 N. W. 817.

§ 1050 (Mich.) In an action in assumpsit for the value of an engine which plaintiff had delivered to defendant in exchange for real estate which defendant did not convey, the error in admitting the testimony of a witness giving his understanding as to a conversation between the parties held not reversible.—*Bowen v. Chandler*, 138 N. W. 247.

§ 1050 (Neb.) Any error in the admission of evidence as to decedent being usually a careful man could not affect the verdict, where all the facts as to his actions were before the jury.—*Wilkins v. Water & Light Co. of Nebraska City*, 138 N. W. 754.

§ 1050 (N.D.) The admission of testimony is without prejudice, where the same witness had already covered the matter without objection.—*Heald v. Strong*, 138 N. W. 1114.

§ 1050 (S.D.) Error in admitting evidence held not prejudicial to defendant.—*Harris v. Lyons*, 138 N. W. 295.

§ 1050 (Wis.) The admission of expert testimony as to a cause of an explosion not alleged by the complaint is a prejudice to defendant's substantial right to know what charge of negligence is made against him.—*Brey v. Forrestal*, 138 N. W. 645.

§ 1051 (S.D.) Admission of evidence upon undisputed facts, if error, held harmless.—*Glow-Schaaf Lumber Co. v. Kass*, 138 N. W. 1120.

§ 1053 (Minn.) The admission of evidence, in an action for injuries to an employé from a defective boiler, that the man who sold the boiler said it had been subjected to a test, does not require a reversal, where the court instructed that it was the duty of the defendant, before operating the boiler, to have it inspected by a state boiler inspector.—*Sivertson v. City of Moorehead*, 138 N. W. 674.

§ 1056 (Iowa) Exclusion of evidence of admissions by plaintiff's intestate, regarding his conduct in another accident over a year before the transaction in controversy if erroneous, held not reversible error.—*Scott v. O'Leary*, 138 N. W. 512.

§ 1056 (Iowa) Where jury found that purchaser was not entitled to recover back purchase price, the exclusion of evidence to show the freight paid by him was not prejudicial.—*Buckeye Traction Ditcher Co. v. Smith*, 138 N. W. 817.

§ 1056 (N.D.) The exclusion of evidence as to the possibility of hearing signals of a train just prior to an accident was not prejudicial

§ 1057 (Iowa) Exclusion of evidence of a fact practically admitted was harmless.—In re Law's Estate, 138 N. W. 531.

§ 1058 (Iowa) The exclusion of testimony is not error where it is afterwards admitted.—Unterharscheidt v. Missouri State Life Ins. Co., 138 N. W. 459.

§ 1058 (Iowa) Rejection of testimony, fully covered by subsequent evidence admitted, is not prejudicial.—Vernon v. Iowa State Traveling Men's Ass'n, 138 N. W. 696.

§ 1062 (Iowa) Where the evidence was wholly insufficient to warrant any finding that a township treasurer was negligent in selecting as a depository a bank which failed, failure to submit such issue, if error, was harmless.—School Tp. of Eden in Carroll County v. Stevens, 138 N. W. 927.

§ 1062 (Wis.) It was not error to refuse to incorporate defendant's requested questions in a special charge, where the verdict fully covered all the inquiries suggested by the rejected questions and all the litigated issues.—Monk v. Hurlburt, 138 N. W. 59.

§ 1062 (Wis.) Error in including an improper question in a special interrogatory *held* not prejudicial.—Milwaukee Trust Co. v. City of Milwaukee, 138 N. W. 707.

§ 1064 (Iowa) Error in an instruction that the negligence of the officers and agents of defendant corporation was that of the corporation, and that a foreman's negligence was imputable to it, was not prejudicial to defendant where the foreman's duty related to furnishing a safe place of work, which defendant was bound to perform.—Johnson v. Corn Products Refining Co., 138 N. W. 516.

§ 1064 (Iowa) An instruction as to the skill of a physician, though inaccurate, *held* harmless.—Haradon v. Sloan, 138 N. W. 556.

§ 1064 (Iowa) Erroneous instruction as to measure of damages on one cause of action *held* to require a reversal, where it could not be determined how much was allowed on each cause.—In re Oldfield's Estate, 138 N. W. 846.

§ 1064 (Iowa) In a civil damage action by a minor for the loss of support of his father resulting from his death while intoxicated, defendant *held* not prejudiced by instructions requiring that plaintiff prove that his loss was in consequence of such intoxication.—Lee v. Hederman, 138 N. W. 893.

§ 1064 (Neb.) Where plaintiff was not guilty of contributory negligence, the submission of that question by an erroneous instruction is not prejudicial to defendant.—Mitchell v. Omaha Packing Co., 138 N. W. 739.

§ 1065 (Minn.) In an action to set aside a deed, instructions as to the effect of findings by the jury on questions submitted to them *held* not prejudicial to either party.—McEleney v. Donovan, 138 N. W. 306.

§ 1066 (Iowa) An instruction, if erroneous, *held* harmless as inapplicable to the evidence.—Kennis v. Ogden Coal Co., 138 N. W. 467.

§ 1066 (Iowa) An instruction ignoring contributory negligence of a patient suing for malpractice *held* not to have prejudiced appellant, in absence of evidence as to issue.—Haradon v. Sloan, 138 N. W. 556.

§ 1066 (Iowa) A failure of the jury to read the charge *held* to remove the prejudicial effect of inclusion of a charge on a withdrawn issue which was not read by the court.—Vernon v. Iowa State Traveling Men's Ass'n, 138 N. W. 696.

The inclusion of a withdrawn issue in a written charge *held* not prejudicial where the withdrawal had been repeatedly called to the attention of the jury, was not read by the

negligence, the submission of that question by an erroneous instruction is not prejudicial to defendant.—Beebe v. Scotts Bluff County, 138 N. W. 737.

§ 1066 (Wis.) The refusal of a correct instruction in a proceeding involving a change of grade of a city street and assessing damages *held* not prejudicial to the city.—Milwaukee Trust Co. v. City of Milwaukee, 138 N. W. 707.

§ 1068 (Mich.) Error in an instruction inapplicable to the facts *held* cured by the amount awarded.—Snyder v. Markham, 138 N. W. 234.

§ 1068 (Mich.) In an action for assault and battery with ravishment, an instruction *held* not prejudicial as allowing the jury to credit plaintiff's story in part, and disbelieve it in part.—Totten v. Totten, 138 N. W. 257.

§ 1070 (Wis.) If a special verdict reasonably covers all the material issues, other immaterial answers or answers not covering distinct issues are not reversible error.—Milwaukee Trust Co. v. City of Milwaukee, 138 N. W. 707.

§ 1070 (Wis.) Where the verdict found every essential fact involved, there was no prejudicial error in not incorporating in the verdict certain special questions requested.—Krawiecki v. Kleckhefer Box Co., 138 N. W. 710.

§ 1073 (Iowa) Where the damages allowed for breach of a manufacturer's contract to furnish and deliver machinery for sale was less than the proper measure of damages, there was no prejudice to the manufacturer in awarding the expense of obtaining orders.—Portable Elevator Mfg. Co. v. Bradley, Merriam & Smith, 138 N. W. 915.

(J) Decisions of Intermediate Courts.

§ 1094 (Iowa) A finding of the district court on appeal from a tax assessment that it should be reduced will not be disturbed if supported by evidence.—Reiniger v. Board of Review of Charles City, 138 N. W. 399.

(K) Subsequent Appeals.

§ 1097 (Minn.) A decision on appeal is the law of the case on a subsequent appeal, where the evidence at both trials was in substance the same.—State v. Great Northern Ry. Co., 138 N. W. 671.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(A) Decision in General.

§ 1106 (Wis.) The Supreme Court may, under its control over inferior courts, conferred by Const. art. 7, § 3, remit the record to the trial court to enable appellant to move there for a new trial on the ground of evidence discovered since the taking of the appeal.—Jones v. Providence Washington Ins. Co., 138 N. W. 1005.

(B) Affirmance.

§ 1140 (Iowa) A mere mathematical error in figuring up the amount due can be cured on appeal by ordering a remittitur.—Bradley, Merriam & Smith v. Goetsche, 138 N. W. 823.

(D) Reversal.

§ 1171 (Iowa) Where the verdict for injuries to the person and to a horse and buggy was small, alleged error of the jury in allowing damages for injuries to the harness, which, if allowed, was very small, would not call for a reversal.—Scott v. O'Leary, 138 N. W. 512.

§ 1176 (Neb.) In foreclosure where the trial court failed to credit the proper amounts of rents and profits on the mortgage debt, the Supreme Court will determine such amounts and remand the cause with directions to modify the

decree accordingly.—*Attwood v. Warner*, 138 N. W. 605.

§ 1177 (N.D.) In claim and delivery, where there is no dispute in the evidence as to the value of the property wrongfully disposed of or still held by plaintiff, and no point is made on the trial as to the value of property bailed to defendant, which is seized in the claim and delivery, a new trial need not be ordered, but the judgment may be made to conform to the facts.—*Smith v. Willoughby*, 138 N. W. 7.

§ 1178 (Wis.) Ordinarily, a holding on appeal that a verdict for personal injuries is excessive would result in reversing the judgment and naming a sum which plaintiff might accept and terminate the litigation; but, where the evidence to establish defendant's negligence is unsatisfactory, the cause will be remanded for a new trial.—*Depow v. Chicago & N. W. Ry. Co.*, 138 N. W. 42.

Evidence, in an action for negligence, on the question of defendant's negligence, *held* to be so unsatisfactory as to justify a remand of the cause for a new trial upon determining that the recovery was excessive, instead of merely reducing the recovery.—*Id.*

(F) Mandate and Proceedings in Lower Court.

§ 1194 (Wis.) Where the court, in its opinion on defendant's appeal from a judgment for plaintiff, did not refer to his counterclaim, because the record showed no right to recover thereon, the effect of its mandate, reversing and remanding, with direction to dismiss the complaint, was to deny recovery on the counterclaim.—*Loehr v. Dickson*, 138 N. W. 1123.

§ 1195 (Neb.) The decision of questions presented to the Supreme Court becomes the law of the case, and, for the purposes of the litigation, settles conclusively the points adjudicated.—*Helming v. Forrester*, 138 N. W. 190.

XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

§ 1234 (Wis.) Sureties on an appeal bond, undertaking to pay a judgment if affirmed, are not liable for a judgment rendered by the trial court, on direction of the appellate court that, if the parties elect, a judgment may be entered for \$1,000.—*Lehman v. Amsterdam Coffee Co.*, 138 N. W. 606.

APPEARANCE.

See Appeal and Error, §§ 435, 668; Constitutional Law, § 309; Divorce, § 202; Drains, § 14; Judgment, § 675; Partnership, §§ 204, 219.

APPOINTMENT.

See Jury, § 19.

APPROPRIATION.

See Waters and Water Courses, §§ 19, 32, 135.

APPROVAL.

See Sales, § 23.

ARBITRATION AND AWARD.

See Insurance, § 612.

ARGUMENT OF COUNSEL.

See Appeal and Error, §§ 207, 261; Criminal Law, §§ 699-730, 1056, 1064, 1119; Trial, § 133.

ARMY AND NAVY.

§ 52 (Wis.) The governor of the National Home for Disabled Volunteer Soldiers is not an

"officer" of the United States.—*In re Doe's Estate*, 138 N. W. 97.

An order of the county court requiring the governor of the National Home for Disabled Volunteer Soldiers to appear and submit to an examination on oath touching the property in his possession of an inmate of the home dying intestate is not invalid as conflicting with the acts of Congress and regulations made in pursuance thereof relating to the management of the Home.—*Id.*

ARREST.

See Bail, § 90.

I. IN CIVIL ACTIONS.

§ 27 (Mich.) An affidavit for the issuance of the *capias held* insufficient as not showing that the affiant had personal knowledge of the truth of the facts stated.—*Martin v. Gage*, 138 N. W. 273.

ASSAULT AND BATTERY.

See Appeal and Error, § 1068; Criminal Law, §§ 829, 865; Evidence, § 219; Indictment and Information; Rape, §§ 65, 66; Trial, § 250.

I. CIVIL LIABILITY.

(B) Actions.

§ 38 (Wis.) Where an assault is made on a public street and in the presence of several persons, the injury to plaintiff's feelings resulting from the indignity and public exposure are to be considered by the jury in determining the amount of damages.—*Elwell v. Bosshard*, 138 N. W. 46.

§ 40 (Wis.) A verdict for \$300 for assault and battery *held* not excessive.—*Elwell v. Bosshard*, 138 N. W. 46.

II. CRIMINAL RESPONSIBILITY.

(B) Prosecution and Punishment.

§ 82 (Minn.) In cases of assault, no burden rests on defendant to prove his act was justifiable, because in self-defense; but the jury, to convict, must be satisfied beyond reasonable doubt that the act was not justifiable.—*State v. McGrath*, 138 N. W. 310.

ASSESSMENT.

See Damages, §§ 208-217; Drains, §§ 67-86; Municipal Corporations, §§ 459-537; Taxation, §§ 40, 348-496.

ASSIGNMENT OF ERRORS.

See Appeal and Error, §§ 724-743; Criminal Law, §§ 1130, 1178.

ASSIGNMENTS.

See Assignments for Benefit of Creditors; Banks and Banking; Fraudulent Conveyances; Interest, § 22; Municipal Corporations, § 281; Pleading, § 380; Waters and Water Courses, § 263.

III. RIGHTS AND LIABILITIES OF PARTIES.

§ 108 (Minn.) An assignment of claims of a mortgagor, for threshing done, to the mortgagee of threshing machinery, *held* to import a direction to the mortgagee to pay certain debts due for labor performed in the operation of machinery, and to entitle the holder of a claim for such labor to recover a proportion of the proceeds of the assigned accounts from the mortgagee.—*Meier v. Northwest Thresher Co.*, 138 N. W. 36.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy; Municipal Corporations, § 373.

II. CONSTRUCTION AND OPERATION IN GENERAL.

§ 180 (Iowa) The assignees for benefit of creditors of a contractor for public work took only the cause of action against the municipality that the contractor had, and subject to the equities given subcontractors by Code, § 3102.—*Wackerbarth & Blamer Co. v. Independent School Dist. of Independence*, 138 N. W. 470.

ASSOCIATIONS.

See Building and Loan Associations; Charities; Evidence, § 121; Insurance, §§ 770, 771, 784; Mandamus, § 122.

§ 7 (Iowa) Under the articles of an unincorporated rural telephone association, *held*, that mere conveyance of a farm by warranty deed did not confer the vendor's membership on the purchaser.—*Cantril Telephone Co. v. Fisher*, 138 N. W. 436.

ASSUMPSIT, ACTION OF.

See Appeal and Error, § 1050; Frauds, Statute of, § 130; Use and Occupation; Work and Labor.

ASSUMPTION.

Of risk, see Master and Servant, §§ 203-220, 260, 280, 288; Negligence, § 105.

ATTACHMENT.

See Creditors' Suit, § 39; Execution; Garnishment.

XL WRONGFUL ATTACHMENT.

§ 374 (Iowa) Where there is direct evidence that an attachment was sued out maliciously, and the attachment creditor had no reasonable cause to believe that the grounds for attachment alleged by him were true, it established the preponderance that must be furnished by the party claiming that such attachment was wrongful.—*Welsh v. Haleen*, 138 N. W. 502.

§ 377 (Iowa) Whether exemplary damages shall be allowed for wrongful attachment and the amount thereof rests with the jury.—*Welsh v. Haleen*, 138 N. W. 502.

Where the exemplary damages allowed could not have exceeded \$90, they were not so out of proportion to the actual damages as to justify interference on appeal, although the actual damages were small.—*Id.*

§ 380 (Iowa) An instruction that the jury were not limited to actual compensation, nor required to scrutinize very closely the amount of the verdict, was not erroneous, since it applied only to the exemplary damages allowed, if any.—*Welsh v. Haleen*, 138 N. W. 502.

ATTORNEY AND CLIENT.

See Appeal and Error, §§ 207, 261, 380, 435, 743; Bail, § 17; Constitutional Law, § 208; Counties; Criminal Law, § 641; District and Prosecuting Attorneys; Divorce, §§ 197, 202, 227; Ejectment, § 41; Equity, § 50; Judgment, § 675; Mechanics' Liens, § 310; Municipal Corporations, §§ 488, 489; New Trial, § 144; Partnership, § 204; Trial, § 133; Witnesses, §§ 67, 198, 203.

I. THE OFFICE OF ATTORNEY.

(B) Privileges, Disabilities, and Liabilities.

§ 22 (Iowa) It is improper for an attorney to accept a retainer from a party who expects

to call him as a witness.—*Flood v. Bollmeier*, 138 N. W. 1102.

AUCTIONS AND AUCTIONEERS.

See Replevin, §§ 95, 103.

AUTHORITY.

See Corporations, § 207; Principal and Agent, §§ 121-139.

AUTOMOBILES.

See Evidence, § 471; Garnishment, § 42; Highways, §§ 172, 184, 186; Insurance, §§ 126, 514; Judgment, § 199; Municipal Corporations, §§ 705, 706.

BAGGAGE.

See Carriers, §§ 391-408.

BAIL.

I. IN CIVIL ACTIONS.

§ 17 (Wis.) Judgment was rendered against defendant in a tort action, and he was arrested on an execution issued on the judgment, and to obtain his release deposited a sum of money with the sheriff, on a stipulation by the parties to the action that the deposit should remain 60 days, for plaintiff to file an undertaking on appeal, and if the undertaking was not filed the deposit should be applied on the judgment. Three days before the expiration of the stipulated time, defendant served a copy of his undertaking on plaintiff's attorney and exhibited the original to him, and the attorney expressed satisfaction therewith, but requested that defendant leave the original with him, so that he could show it to his client. Defendant was unable to obtain the original undertaking from the attorney before the expiration of the 60 days, but secured the undertaking and filed it after the stipulated time. *Held*, that plaintiff was estopped to claim that the undertaking was not filed within the stipulated time, and was not entitled to have the money deposited applied on the judgment.—*Donahue v. Gunter*, 138 N. W. 51.

II. IN ORIGINAL PROSECUTIONS.

§ 90 (N.D.) In an action on a bail bond; a finding that the bondsman did not arrest, surrender, deliver, or commit defendant to the custody of the court or the proper officer *held* sustained by the evidence.—*State v. Banks*, 138 N. W. 973.

BAILMENT.

See Banks and Banking; Carriers, §§ 94-177; Embezzlement; Pledges.

§ 35 (N.D.) Where chattels are wrongfully taken from a bailee but replevied by the true owners, the bailee can merely recover damages to his special interest, and not the full value of the articles.—*Smith v. Willoughby*, 138 N. W. 7.

BALLOTS.

See Elections, § 180.

BANKRUPTCY.

See Assignment for Benefit of Creditors.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

§ 151 (Mich.) Under the direct provisions of Bankruptcy Act July 1, 1898, § 47, as amended by Act June 25, 1910, § 8, the trustee, as to property of the bankrupt not in the custody of the bankruptcy court, is vested with the

right and remedies of judgment creditors holding executions returned unsatisfied.—*Crawford v. Mandell*, 138 N. W. 705.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

§ 163 (Minn.) Where a creditor procures judgment against an insolvent, and property is sold under execution and the proceeds paid to the creditor, such sale and payment constitute a "transfer" by the debtor, within Bankr. Act, § 60, subds. "a" and "b," as amended.—*Galbraith v. Whitaker*, 138 N. W. 772.

§ 166 (Minn.) Under Bankr. Act, § 60, subds. "a," "b," as amended where an insolvent suffers a judgment to be entered against him within four months before bankruptcy proceedings, the preference is not voidable, unless the creditor at the time had reasonable cause to believe that its enforcement would effect a preference.—*Galbraith v. Whitaker*, 138 N. W. 772.

Where under Bankr. Act, § 60, subds. "a," "b," as amended an insolvent makes a preferential transfer, such preference is voidable by the trustee, and the amount may be recovered if the creditor had reasonable cause to believe that the transfer would effect a preference.—*Id.*

In determining whether a creditor had reasonable cause to believe a transfer by the debtor would effect a preference, facts sufficient to put an ordinarily prudent man on inquiry charge the creditor with all the knowledge he could have acquired by reasonable diligence.—*Id.*

In Bankr. Act, § 60, subds. "a," "b," as amended relating to preferences, the word "then" held to refer to the time judgment was entered.—*Id.*

(D) Administration of Estate.

§ 252 (Iowa) Where the referee in bankruptcy, after due notice to creditors, approved a settlement of a litigation entered into by the trustee in bankruptcy, the settlement was binding.—*Lake v. Dredge*, 138 N. W. 869.

(E) Actions by or Against Trustee.

§ 303 (Minn.) Evidence held not to conclusively show that defendants, at the time of a transfer by their insolvent debtor of his property, had reasonable cause to believe that such transfer would effect a preference.—*Galbraith v. Whitaker*, 138 N. W. 772.

§ 304 (Minn.) In an action by a trustee in bankruptcy to set aside a transfer by the bankrupt, pleadings and admitted facts held to entitle plaintiff to some relief, even if the transfer be not fraudulent.—*Kanne v. Kanne*, 138 N. W. 25.

BANKS AND BANKING.

See Contracts, §§ 346, 349; Divorce, § 270; Evidence, § 121; Towns, §§ 29, 33.

III. FUNCTIONS AND DEALINGS.

(C) Deposits.

§ 139 (Minn.) Though a bank check operates as a pro tanto assignment of the drawer's funds in the bank, the drawer, as against the payee, may stop payment by notice to the bank before the check is presented.—*Taylor v. First Nat. Bank*, 138 N. W. 783.

§ 154 (Wis.) Proof that a certificate of deposit was paid to another than the depositor without indorsement thereon, unexplained, establishes prima facie a case in favor of the depositor to recover of the bank.—*Somers v. Germania Nat. Bank of Milwaukee*, 138 N. W. 713.

BAR.

See Election of Remedies.

BASTARDS.

See Libel and Slander, §§ 7, 121.

BATTERY.

See Assault and Battery.

BENEFICIAL ASSOCIATIONS.

See Associations; Building and Loan Associations; Charities; Insurance, §§ 693-819.

BENEFITS.

See Drains, §§ 71, 82.

BEQUESTS.

See Wills.

BEST AND SECONDARY EVIDENCE.

See Evidence, §§ 158, 184.

BIAS.

See Witnesses, §§ 140-166.

BIGAMY.

See Indians; Wills, § 55.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILLS AND NOTES.

See Action, § 38; Alteration of Instruments; Banks and Banking; Contracts, §§ 54, 186, 349; Evidence, §§ 84, 444; Executors and Administrators, § 221; Insurance, §§ 137, 665, 668; Mortgages, §§ 87, 291; Principal and Agent, § 171; Witnesses, § 166.

I. REQUISITES AND VALIDITY.

(D) Acceptance.

§ 85 (Minn.) The drawer of a draft on defendant wired, asking if he would honor draft for \$300, and defendant answered, "I will." Held, that the telegrams constituted an agreement on defendant's part to honor the draft.—*Oil Well Supply Co. v. MacMurphy*, 138 N. W. 784.

(E) Consideration.

§ 90 (Mich.) In an action on notes between the original parties, the defendant may show want of consideration.—*Cawthorpe v. Clark*, 138 N. W. 1075.

§ 94 (Mich.) Acceptance of notes in payment of accrued interest on debt of maker's deceased husband and indorsement of interest held sufficient consideration for the notes.—*Cawthorpe v. Clark*, 138 N. W. 1075.

§ 94 (Neb.) A settlement of a disputed claim may constitute a good consideration if the claim is made by the payee in good faith and on reasonable grounds, though he may be mistaken as to its basis.—*Musser v. Musser*, 138 N. W. 599.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(A) Indorsement Before Delivery to or Transfer by Payee.

§ 243 (Minn.) The legal obligation of an indorsing payee is that of indorser only, and cannot be considered or proven to be that of a maker.—*Burwell v. Gaylord*, 138 N. W. 685.

(D) Bona Fide Purchasers.

§ 352 (Mich.) Plaintiff, having taken a check for collection as the payee's banker, held not a purchaser for value without notice.—*Holcomb v. Sayers*, 138 N. W. 1043.

against plaintiff, could not prove that his agreement was conditional, and that the condition had not been performed.—Oil Well Supply Co. v. MacMurphy, 138 N. W. 784.

VIII. ACTIONS.

§ 469 (Minn.) A complaint against an indorser, which fails to allege notice of dishonor, is demurrable.—Burwell v. Gaylord, 138 N. W. 685.

§ 492 (Iowa) Where neither an original note nor a copy thereof was attached to a claim thereon filed against decedent's estate, the burden was on claimant, under Code, § 3640, to prove the genuineness of decedent's signature.—Black v. Miller, 138 N. W. 535.

§ 493 (Mich.) A note negotiable in form imports a consideration.—Cawthorpe v. Clark, 138 N. W. 1075.

Where, in an action on negotiable notes between the original parties, defendant introduces evidence of want of consideration, the burden of proving consideration rests on plaintiff.—Id.

§ 497 (Neb.) Where fraud is shown, the burden is on an indorser to show that he is a bona fide holder.—Central Nat. Bank v. Ericson, 138 N. W. 563.

§ 508 (Mich.) Evidence held to support a finding that one suing on a note as transferee thereof was the owner thereof.—Molby v. Murray, 138 N. W. 1069.

§ 537 (Neb.) A peremptory instruction for plaintiff on the ground that the note was purchased from an innocent holder is erroneous where reasonable men may properly infer that the holder in making the purchase acted for plaintiff, who had actual knowledge of valid defenses.—Central Nat. Bank v. Ericson, 138 N. W. 563.

BOARDS.

See Constitutional Law, §§ 74, 80, 281; District and Prosecuting Attorneys; Drains, §§ 32, 82; Municipal Corporations, §§ 185, 198; Taxation, §§ 490, 496; Waters and Water Courses, § 19.

BONA FIDE PURCHASERS.

See Vendor and Purchaser, §§ 223-244.

BONDS.

See Action, § 50; Appeal and Error, §§ 380, 460, 468, 1234; Bail, §§ 17, 90; Evidence, § 219; Intoxicating Liquors, §§ 82, 87, 88; Jury, § 31; Mechanics' Liens, § 317; Municipal Corporations, § 513; Principal and Surety; Replevin, § 110; Towns, § 33.

BOUNDARIES.

See Dedication; Evidence, § 460.

I. DESCRIPTION.

§ 3 (Iowa) Where there is a conflict between monuments on the ground as a part of the original survey and the field notes and plat as recorded, the survey as ascertained by the monuments is controlling.—Tomlinson v. Golden, 138 N. W. 448.

Stakes held to constitute monuments controlling boundaries between property owners and controlling on a city as to the boundaries of a street.—Id.

§ 20 (Minn.) If a deed bounds land upon a highway, title passes to the center thereof, if there is nothing showing a different intention; but, where a deed makes the external line of the highway the boundary, no title to the highway passes.—Pratt v. Quirk, 138 N. W. 38.

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BREACH OF MARRIAGE PROMISE.

See Limitation of Actions, § 83.

BREAKING.

See Burglary, §§ 9, 32, 41.

BRIEFS.

See Appeal and Error, §§ 766, 773; Criminal Law, §§ 1114, 1130, 1178.

BROKERS.

See Action, § 57; Compromise and Settlement, § 23; Evidence, §§ 271, 471; Limitation of Actions, § 46; Parties; Trial, § 252.

IV. COMPENSATION AND LIEN.

§ 43 (Neb.) An agreement between partners that one of them may find a purchaser for partnership land, and have the proceeds above a certain amount, is not within Comp. St. 1911, c. 73, § 74, relating to contracts with agents or brokers to sell lands.—Majors v. Majors, 138 N. W. 574.

§ 49 (S.D.) A real estate broker, who procured a purchaser on substantially the terms stipulated in the employment contract, was entitled to commission, though he did not actually bring the parties together, and took no part in drawing up the contract between them.—Heimberger v. Rudd, 138 N. W. 374.

§ 52 (Iowa) A broker employed to procure a purchaser who procures a purchaser acceptable to the owner, who makes with him a binding contract providing for the terms of conveyance, is entitled to his commission.—Nagl v. Small, 138 N. W. 849.

A broker employed to procure a purchaser for his principal's farm, who procured a purchaser who entered into a binding contract with the owner, and who paid the first installment of the price, is entitled to his commission.—Id.

§ 52 (S.D.) Where a binding sale contract had been entered into between the owner and a purchaser procured by a broker, the broker's right to a commission was not defeated by the fact that the legal title yet remained in the owner.—Heimberger v. Rudd, 138 N. W. 374.

§ 53 (Iowa) If neither the owner nor the prospective purchaser knew that coal lands about which they were bargaining were the same lands which plaintiff had brought to the prospective purchaser's attention, plaintiff was not the procuring cause of the sale to such purchaser by the owner.—Seevers v. Cleveland Coal Co., 138 N. W. 793.

§ 57 (S.D.) A broker's right to a commission was not defeated by a slight change made in the terms of the sale without his consent.—Heimberger v. Rudd, 138 N. W. 374.

§ 63 (Iowa) A broker employed to find a purchaser on specified terms is entitled to his commission when he produces a purchaser ready, willing, and able to buy on the terms, though the owner refuses to enter into any contract.—Nagl v. Small, 138 N. W. 849.

§ 64 (Iowa) A broker undertaking to sell real estate on specified terms and effect a completed sale is not entitled to his commission though the purchaser proposed by him enters into a contract with the owner which he is subsequently unable to perform.—Nagl v. Small, 138 N. W. 849.

A broker employed to procure a purchaser on specified terms who produces a purchaser who enters into a tentative agreement with the owner as to the terms of sale, but who does not

perform a condition precedent to the taking effect of the contract, is not entitled to his commission.—Id.

V. ACTIONS FOR COMPENSATION.

§ 86 (Wis.) In an action by a real estate broker for his compensation, evidence *held* to support a verdict for plaintiff.—Ahearn v. Borgessier, 138 N. W. 607.

§ 88 (Iowa) Evidence *held* to make it a jury question whether plaintiff, a broker, procured a purchaser for land under an agreement with defendant for compensation.—Seevers v. Cleveland Coal Co., 138 N. W. 793.

Where the price at which a broker, without an exclusive agency, could sell was not fixed, it was error to instruct that it was immaterial that the owner did not know that the prospective purchaser had corresponded with the broker if the broker procured a purchaser able and willing to buy.—Id.

§ 88 (S.D.) Where a real estate broker's employment contract was oral and the evidence conflicting, the question of its terms was for the jury.—Heimberger v. Rudd, 138 N. W. 374.

VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.

§ 105 (Wis.) Where a broker acted for both parties in an exchange of property, his knowledge of the true amount of special taxes on defendant's lots, the amount of which defendant had misrepresented to plaintiff, was not notice of the true amount to plaintiff.—Woteshek v. Neumann, 138 N. W. 1000.

BUILDING AND LOAN ASSOCIATIONS.

See Associations.

§ 15 (Iowa) In absence of statute, an association has no lien or claim upon stock other than that given by articles of incorporation.—Jewell v. Nuhn, 138 N. W. 457.

A provision of articles of incorporation *held* not to give the association a lien for the amount of defalcation upon stock held by a defaulting officer.—Id.

Under a provision of the articles of incorporation, the association *held* not to have a prior claim as against a transferee of stock for unliquidated damages arising from the defalcation by the officer holding the stock.—Id.

BUILDING RESTRICTIONS.

See Covenants, §§ 1-108.

BULK SALES LAW.

See Constitutional Law, § 296; Statutes, §§ 83, 107, 116.

BURGLARY.

See Constitutional Law, § 250; Criminal Law, §§ 388, 406, 412, 413, 511, 780, 1170, 1213; Indictment and Information; Statutes, §§ 118, 159.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 2 (Mich.) Comp. Laws, §§ 11545-11548, defining, grading, and fixing the penalty for various forms of statutory burglary, none of them mentioning the use of explosives, are readily distinguishable from and therefore not repugnant to, Pub. Acts 1907, No. 64, defining burglary with explosives, and prescribing the punishment therefor.—People v. Mire, 138 N. W. 1066.

§ 9 (Iowa) Where a door of a building is so nearly closed that one may not enter without pushing the door further open, such pushing

constitutes a breaking.—State v. Sorenson, 138 N. W. 411.

II. PROSECUTION AND PUNISHMENT.

§ 32 (Iowa) Though the mere entry by accused is not of itself proof of a felonious breaking, it is a circumstance bearing on that question.—State v. Sorenson, 138 N. W. 411.

§ 36 (Iowa) Where the state relied on circumstantial evidence, it was proper to show the condition of the doors and windows of the building burglarized immediately before and immediately after the alleged burglary.—State v. Sorenson, 138 N. W. 411.

§ 41 (Iowa) In a prosecution for burglary, evidence *held* sufficient to warrant a finding that defendant aided and abetted in the commission of the offense.—State v. O'Callaghan, 138 N. W. 402.

§ 41 (Iowa) Evidence *held* to justify the inference that the entry into the building burglarized was accomplished by a breaking.—State v. Sorenson, 138 N. W. 411.

§ 41 (Iowa) Direct proof of "breaking" is not essential to a conviction of burglary, where the only reasonable inference from the circumstances in evidence is that there was an actual "breaking."—State v. O'Brien, 138 N. W. 895.

§ 41 (Neb.) Evidence in a prosecution for breaking and entering a railroad car *held* sufficient to establish the corpus delicti.—Hardin v. State, 138 N. W. 146.

Evidence *held* to sustain a conviction of burglary.—Id.

BY-LAWS.

See Insurance, §§ 56, 693, 756.

CANALS.

See Specific Performance, §§ 29, 43; Waters and Water Courses, §§ 135, 154, 156, 263.

CANCELLATION OF INSTRUMENTS.

See Appeal and Error, § 1065; Deeds, §§ 196, 203, 211; Insurance, §§ 111, 127, 229; Limitation of Actions, § 189; Vendor and Purchaser, § 101.

II. PROCEEDINGS AND RELIEF.

§ 34 (Iowa) A suit to cancel a deed on the ground of fraud in procuring its execution is not barred by laches, where defendant has in no manner been misled to his injury by the delay in suing and no equities have intervened.—Curtis v. Armagast, 138 N. W. 873.

CANDIDATES.

See Elections, §§ 120-147.

CARRIERS.

See Appeal and Error, § 179; Constitutional Law, § 89; Railroads; Street Railroads.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(B) Interstate and International Transportation.

§ 32 (Neb.) In an action by a shipper against a railroad for the cost of constructing grain doors for box cars transporting freight from a point in Nebraska to a point in Missouri, an answer that the Interstate Commerce Commission had made a rule that a carrier could not reimburse shippers for the expenses incurred in attaching grain doors, unless expressly so provided in its tariff, failed to state a defense.—Hanks v. Missouri Pac. Ry. Co., 138 N. W. 750.

In an action for labor and material in constructing grain doors for box cars used in transporting grain from Nebraska to Missouri,

the grain doors were furnished.—*Id.*

§ 35 (Minn.) A contract with a carrier to supply to an interstate shipper a specified number of cars on certain dates is not a violation of Interstate Commerce Act, § 3, unless the contract, if performed, will extend to that shipper an undue performance over other shippers.—*W. H. Ferrell & Co. v. Great Northern Ry. Co.*, 138 N. W. 284.

II. CARRIAGE OF GOODS.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

§ 69 (Minn.) In an action against a carrier for breach of a contract to furnish refrigerator cars, evidence *held* to support a verdict for plaintiff.—*W. H. Ferrell & Co. v. Great Northern Ry. Co.*, 138 N. W. 284.

(D) Transportation and Delivery by Carrier.

§ 94 (Minn.) Evidence *held* to justify the conclusion that a purchaser refused to accept a consignment of potatoes, and that defendant railroad negligently failed to notify plaintiff thereof within 48 hours, as required by a general custom.—*Emerson v. Chicago, B. & Q. R. Co.*, 138 N. W. 1026.

§ 94 (Wis.) Where a bill of lading required the carrier to notify a person named, and the carrier's counsel admitted that it was the carrier's duty to give notice of the arrival of the goods, a finding that it was the carrier's duty to give notice to the person named of the arrival of the goods was justified.—*Uber v. Chicago, M. & St. P. Ry. Co.*, 138 N. W. 57.

Whether a carrier exercised reasonable care in giving notice of the arrival of perishable freight *held* for the jury.—*Id.*

(F) Loss of or Injury to Goods.

§ 121 (Wis.) A shipper who in routing a shipment selected a longer route than he could have taken was not guilty of contributory negligence causing injury to the shipment, where the carrier in the exercise of ordinary care could have transported the shipment without damage.—*Uber v. Chicago, M. & St. P. Ry. Co.*, 138 N. W. 57.

§ 123 (Wis.) The failure of a carrier to exercise reasonable care in giving notice of the arrival of perishable freight *held* the proximate cause of an injury to the freight.—*Uber v. Chicago, M. & St. P. Ry. Co.*, 138 N. W. 57.

§ 132 (Wis.) Where goods were in good condition when received by a carrier for transportation, and were damaged when they reached their destination, the carrier was liable unless it proved that the damage was through some cause for which it was not responsible.—*Uber v. Chicago, M. & St. P. Ry. Co.*, 138 N. W. 57.

(I) Connecting Carriers.

§ 177 (Wis.) The rule that a recovery for loss of or injury to an interstate shipment may be had against the terminal carrier is not abrogated by the Carmack amendment to the Hepburn Act.—*Uber v. Chicago, M. & St. P. Ry. Co.*, 138 N. W. 57.

III. CARRIAGE OF LIVE STOCK.

§ 215 (Mich.) An express company's failure to tie a calf shipped by express in a crate *held* not negligence in an action for loss of the calf by breaking out of the crate.—*Deake v. United States Express Co.*, 138 N. W. 196.

§ 228 (Mich.) In an action for the value of a calf shipped by express which broke out of its crate en route and was lost, evidence as to the disposition of the calf while on plaintiff's farm *held* admissible.—*Deake v. United States Express Co.*, 138 N. W. 196.

verdict for plaintiff *held* sustained by the evidence.—*Kiser v. Chicago, B. & Q. R. Co.*, 138 N. W. 735.

IV. CARRIAGE OF PASSENGERS.

(G) Passengers' Effects.

§ 391 (S.D.) "Baggage," within the rule determining a carrier's liability, defined.—*House v. Chicago & N. W. Ry. Co.*, 138 N. W. 809.

The guns of a hunter, the fishing tackle of a fisherman, while on a hunting expedition, or the cooking utensils of a party bent upon a camping expedition, are "baggage."—*Id.*

The tools of a mechanic, taken by him in his trunk when going on a journey to perform the work of his trade, are "baggage."—*Id.*

Where passengers contemplate a short sojourn at their destination where they, for the time being, will keep house, and take with them, in their trunk, bedding, dishes, and cutlery, these articles are "baggage," if it is customary for people going upon such a journey to take such articles.—*Id.*

Where passengers making a permanent change of abode, take with them, in their trunks household articles such as dishes, cutlery, etc., such articles are "baggage," if it is customary to take them under such circumstances.—*Id.*

§ 406 (S.D.) Under the act of Congress of June 29, 1906, known as the Carmack amendment, amending the interstate commerce act of 1887, a carrier receiving baggage for transportation to a point in another state beyond its own line is liable for its loss occurring upon the lines of a connecting carrier.—*House v. Chicago & N. W. Ry. Co.*, 138 N. W. 809.

§ 408 (S.D.) Pol. Code, § 442, requiring demand in writing before bringing suits against common carriers, *held* to have no application to suits for loss of baggage during interstate transportation in view of section 431.—*House v. Chicago & N. W. Ry. Co.*, 138 N. W. 809.

Whether it is customary for passengers making a permanent change of abode to take with them, in their trunks, household articles, such as dishes, cutlery, etc., thus making such articles baggage, is a question for the jury.—*Id.*

CATTLE GUARDS.

See Railroads, §§ 446, 447.

CAUSE OF ACTION.

See Action.

CERTIFICATE.

See Appeal and Error, § 501; Corporations, § 108; Elections, §§ 120, 125; Taxation, §§ 686, 708; Waters and Water Courses, § 240.

CERTIFICATION.

See Appeal and Error, § 696.

CERTIORARI.

See Criminal Law, § 1006; Taxation, § 496.

I. NATURE AND GROUNDS.

§ 5 (N.D.) Certiorari will not lie, where the party aggrieved has an adequate remedy by appeal.—*State v. Crawford*, 138 N. W. 2.

§ 29 (N.D.) The Supreme Court will not review by certiorari an order permitting claimants of a fund deposited with the clerk of court by a garnishee to intervene; the order being at most erroneous, and not an excess of jurisdiction.—*State v. Crawford*, 138 N. W. 2.

Certiorari will not lie to review alleged errors not going to the jurisdiction of the inferior court.—*Id.*

CHALLENGE.

See Jury, § 97.

CHANCERY.

See Equity.

CHANGE OF GRADE.

See Municipal Corporations, §§ 385, 395, 398, 402.

CHANGE OF VENUE.

See Criminal Law, §§ 115-137; Venue.

CHARACTER.

See Criminal Law, § 776; Witnesses, § 345.

CHARGE.

To jury, see Criminal Law, §§ 761-830, 865, 1172; Homicide, § 840; Trial, §§ 191-296, 337.

CHARITIES.**II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.**

§ 39 (Mich.) A benevolent society organized under Comp. Laws, §§ 8258-8263, *held* a benevolent society, and not a profit-sharing corporation.—German Corporation of Negaunee v. Negaunee German Aid Society, 138 N. W. 345.

§ 40 (Mich.) The constitutional provision prohibiting a benevolent corporation organized under Comp. Laws, §§ 8258-8263, from holding realty for more than 10 years, except when actually occupied by it in the exercise of its franchises, can only be enforced at the instance of the public.—German Corporation of Negaunee v. Negaunee German Aid Society, 138 N. W. 348.

§ 48 (Mich.) A conveyance of property by a benevolent society organized under Comp. Laws, §§ 8258-8263, to all of its members, *held* not within its powers; the conveyance not being for a benevolent purpose.—German Corporation of Negaunee v. Negaunee German Aid Society, 138 N. W. 348.

A conveyance to the members of a benevolent society which purported to be executed by the society *held* to be in legal effect a conveyance by the officers and members to themselves.—Id.

CHARTER.

See Municipal Corporations, §§ 125, 513, 591, 719, 864.

CHATTEL MORTGAGES.

See Evidence, § 427; Pledges, § 11.

I. REQUISITES AND VALIDITY.

(B) Form and Contents of Instruments.

§ 41 (S.D.) Under Civ. Code, §§ 2091, 2092, a chattel mortgage cannot be created by, nor exist in, parol, and a parol agreement to execute such a mortgage cannot itself create a mortgage lien.—Buffalo Pitts Co. v. Deeg, 138 N. W. 802.

III. CONSTRUCTION AND OPERATION.

(C) Property Mortgaged, and Estates and Interests of Parties Therein.

§ 129 (Minn.) A provision of a mortgage for the price of threshing machinery *held* to give the mortgagor an immediate and absolute right to 40 per cent. of the proceeds of its operation, less the expense of collection of accounts assigned to the mortgagee.—Meier v. Northwest Thresher Co., 138 N. W. 36.

CHEAT.

See Fraud.

CHECKS.

See Bills and Notes.

CHILDREN.

See Adoption; Electricity; Explosives; Infants; Parent and Child.

CHOSE IN ACTION.

See Assignments.

CIRCUMSTANTIAL EVIDENCE.

See Criminal Law, § 824.

CITIES.

See Municipal Corporations.

CITIZENS.

See Constitutional Law, §§ 233-250; Indiana.

CIVIL RIGHTS.

See Constitutional Law, §§ 233-250.

CIVIL SERVICE.

See Mandamus, § 77; Municipal Corporations, § 125; Officers, §§ 69, 71.

CLAIM AND DELIVERY.

See Replevin.

CLAIMS.

See Executors and Administrators, §§ 221-256; Municipal Corporations, § 1010; Schools and School Districts, § 112.

CLASS LEGISLATION.

See Constitutional Law, § 208.

CLUBS.

See Associations.

COERCION.

Of jury in criminal prosecutions, see Criminal Law, § 865.

COLLATERAL AGREEMENT.

See Evidence, §§ 441-444.

COLLECTION.

See Executors and Administrators, § 85.

COLLISION.

See Evidence, § 456.

COLOR OF TITLE.

See Adverse Possession.

COMITY.

See Corporations, § 688.

COMMERCE.

See Evidence, § 47.

III. MEANS AND METHODS OF REGULATION.

§ 63 (Iowa) The imposing of wharfage fees by a city on a river which is the boundary between the states is not an interference with interstate commerce.—Keckevoet v. City of Dubuque, 138 N. W. 540.

See Carriers, § 82; Depositions; Evidence, § 47.

COMMISSIONERS.

See Constitutional Law, § 74; Drains, § 79; Municipal Corporations, § 513.

COMMISSIONS.

See Brokers, §§ 43-88; Trusts, § 815.

COMMITTEE.

See Elections, § 147.

COMMON CARRIERS.

See Carriers.

COMMON DRUNKARDS.

See Drunkards.

COMMON LAW.

See Master and Servant, §§ 174, 198; Officers, § 55; Statutes, § 239; Telegraphs and Telephones, § 34.

COMPARATIVE NEGLIGENCE.

See Negligence, § 98.

COMPENSATION.

See Brokers, §§ 43-88; Eminent Domain, §§ 102, 112; Master and Servant, § 72; Trusts, § 815.

COMPETENCY.

See Witnesses, §§ 43-217.
Of experts as witnesses, see Evidence, § 546.

COMPLAINT.

See Indictment and Information.

COMPOSITIONS WITH CREDITORS.

See Compromise and Settlement.

COMPROMISE AND SETTLEMENT.

See Appeal and Error, § 781; Bankruptcy, § 252; Bills and Notes, § 94; Costs, § 299; Divorce, § 227; Municipal Corporations, § 1010.

§ 6 (Neb.) A settlement or compromise is without consideration, unless the claim has some reasonable foundation, and is made in good faith.—*Majors v. Majors*, 138 N. W. 574.

§ 18 (Iowa) A settlement of a pending litigation, induced by the fraud of one of the parties thereto, is voidable only at the election of the other party on returning or offering to return the consideration received thereunder.—*Lake v. Dredge*, 138 N. W. 869.

§ 22 (Neb.) A petition to recover on a settlement or compromise must show consideration for the contract, or it will be subject to general demurrer.—*Majors v. Majors*, 138 N. W. 574.

§ 23 (Mich.) Evidence in an action against a stockbroker by a customer *held* to show a complete settlement, conclusive in the absence of fraud, by transfer of the account to the broker's successor.—*Vanderveen v. Ellis*, 138 N. W. 255.

COMPUTATION.

See Interest, § 39; Limitation of Actions, §§ 43-127.

See Criminal Law, § 448; Evidence, § 471; Pleading, § 9.

CONCLUSIVENESS.

See Judgment, §§ 663-739; Justices of the Peace, § 130.

CONDEMNATION.

See Eminent Domain.

CONDONATION.

See Divorce, § 49.

CONFIDENTIAL RELATIONS.

See Deeds, § 196; Witnesses, §§ 192-217.

CONNECTING CARRIERS.

See Carriers, §§ 177, 406.

CONSENT.

See Justices of the Peace, § 146; Pleading, § 430.

CONSIDERATION.

See Bills and Notes, §§ 90, 94, 493; Compromise and Settlement, §§ 8, 22; Contracts, §§ 54, 75; Deeds, §§ 17, 70; Frauds, Statute of, § 129; Fraudulent Conveyances, §§ 52, 99, 158, 271.

CONSOLIDATION.

See Action, § 57.

CONSTITUTIONAL LAW.

See Appeal and Error, §§ 843, 1106; Charties; Courts, §§ 188, 204; Elections, § 10; Husband and Wife, § 19; Judges, § 3; Licenses, §§ 6, 7; Limitation of Actions, § 4; Statutes, § 107; Street Railroads, § 24.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(B) Judicial Powers and Functions.

§ 74 (Wis.) St. 1898, § 959-46d, added by Laws 1911, c. 586, subsec. 19, provides that hearing before the board of fire and police commissioners for removal of members of the fire and police department shall be on verified charges, and subsections 20 and 21 provide for an action in the circuit court by a member removed to reverse the decision of the board, the inquiry of the court to be confined to a determination as to the reasonableness of the decision of the board, but provides that the court may require a further or additional return and the taking of further and additional testimony. Const. art. 7, § 8, provides that the circuit courts shall have supervisory control over all inferior tribunals, and may issue the necessary writs to carry into effect their orders. *Held*, that the provision authorizing the court to require the board to take further and additional testimony and make return thereof does not give the court the power to make findings, but is simply a mode of review of findings to be made by the board within the purview of the constitutional provisions.—*Clancy v. Board of Fire & Police Com'rs of Milwaukee*, 138 N. W. 109.

(C) Executive Powers and Functions.

§ 80 (Minn.) Rev. Laws 1905, § 5455, amended by Laws 1911, c. 61, authorizing the board of control to transfer the prisoners from the reformatory to the state's prison, and vice versa, is not unconstitutional, as vesting admin-

trative officers with judicial functions.—*State v. Wolfer*, 138 N. W. 315.

§ 80 (Neb.) The Irrigation Act of 1895, creating the state board of irrigation and conferring on it the right to determine priorities, is not unconstitutional as conferring judicial power on executive officers.—*Enterprise Irr. Dist. v. Tri-State Land Co.*, 138 N. W. 171.

V. PERSONAL, CIVIL, AND POLITICAL RIGHTS.

§ 89 (Mich.) Pub. Acts 1909, No. 104, § 4, abolishing defenses of fellow servant, assumed risk and contributory negligence under certain circumstances *held* not unconstitutional as abridging the rights of common carrier railroad companies to freely contract with their employees for freedom against liability for injuries, etc.—*Sonsmith v. Pere Marquette R. Co.*, 138 N. W. 347.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

§ 208 (Minn.) Rev. Laws 1905, § 3517, permitting allowance for attorney's fees as costs on the foreclosure of a mechanic's lien, *held* not class legislation.—*Lindquist v. Young*, 138 N. W. 28.

X. EQUAL PROTECTION OF LAWS.

§ 233 (Wis.) St. 1898, § 1210h—1, enacted in Acts 1909, c. 295, requiring, as a condition precedent to the bringing of an action to enjoin the collection of a special assessment, the payment of the assessment, *held* not in violation of Const. U. S. Amend. 14, § 1.—*Wisconsin Real Estate Co. v. City of Milwaukee*, 138 N. W. 642.

§ 235 (Neb.) An ordinance making it unlawful for any person operating a motor vehicle to carry another on the machine in front of the operator *held* based on reasonable classification.—*In re Wickstrum*, 138 N. W. 733.

§ 241 (Iowa) Ordinance requiring gates at a street crossing at intersection of railroad with street railway *held* not to discriminate against corporations.—*City of Council Bluffs v. Illinois Cent. R. Co.*, 138 N. W. 891.

§ 245 (Mich.) Pub. Acts 1909, No. 104, withdrawing the defenses of fellow servant, assumed risk, and contributory negligence in actions for injuries to servants against common carrier railroad companies, *held* not unconstitutional as depriving them of equal protection of laws because it did not apply to private railroads.—*Sonsmith v. Pere Marquette R. Co.*, 138 N. W. 347.

§ 250 (Mich.) Pub. Acts 1907, No. 64, defining burglary with explosives, and prescribing the penalty, does not deny equal protection to all, though a violation of it might include a violation of another act, prescribing a less penalty; and one might, in the discretion of the prosecuting attorney, be prosecuted under one act, and another under the other act.—*People v. Mire*, 138 N. W. 1066.

XI. DUE PROCESS OF LAW.

§ 272 (Mich.) Pub. Acts 1903, No. 91, as amended by Pub. Acts 1909, No. 124, relating to the probation of persons convicted of crime, *held* not invalid as depriving one convicted of crime and released on probation, and thereafter sentenced, of his liberty without due process of law.—*People v. Dudley*, 138 N. W. 1044.

§ 278 (Iowa) An erroneous decree in partition depriving a party of his interest in land is not necessarily a taking of property without due process of law.—*Rice v. Rice*, 138 N. W. 1111.

§ 281 (Neb.) The Legislature may delegate the duty of formulating rules of procedure before the state board of irrigation, and the fact that the method of procedure is not embodied in the statute does not render due process

lacking in the proceedings of the board.—*Enterprise Irr. Dist. v. Tri-State Land Co.*, 138 N. W. 171.

§ 290 (Minn.) The owners of land to be assessed for the cost of a park improvement are entitled to a hearing de novo upon all objections they might have, in order to constitute due process of law.—*In re Riverside Park*, 138 N. W. 426.

The trial in the district court on an application to confirm an assessment for a park improvement is not such a hearing de novo as the owners are entitled to.—*Id.*

An order confirming an assessment for a park improvement is a final order, and precludes the objectors from having thereafter such a hearing de novo as they are entitled to.—*Id.*

A hearing before the board of park assessors, after notice, served by publication, describing the location of the proposed park, but not describing the property to be assessed, constitutes due process of law.—*Id.*

§ 296 (Neb.) Comp. St. 1911, c. 32, §§ 31, 32, commonly known as the bulk sales law, is not a violation of Const. art. 1, § 3, providing that no person shall be deprived of life, liberty, or property without due process of law.—*Appel Mercantile Co. v. Barker*, 138 N. W. 1133.

§ 301 (Mich.) Pub. Acts 1909, No. 104, abolishing the defenses of fellow servants, assumed risk, and contributory negligence under certain circumstances in action for injuries to servants of common carrier railroad companies, *held* not to deprive such railroads of their property without due process of law.—*Sonsmith v. Pere Marquette R. Co.*, 138 N. W. 347.

§ 309 (Neb.) Where a statute authorizes a proceeding under the police powers of the state affecting property rights and does not expressly provide for notice to the property owner, the right to notice is implied, and where it is given under a procedure authorized by the Legislature, and the party interested has appeared, he is not deprived of his rights without due process of law.—*Enterprise Irr. Dist. v. Tri-State Land Co.*, 138 N. W. 171.

XII. RIGHT TO JUSTICE AND REMEDIES FOR INJURIES.

§ 321 (Wis.) St. 1898, § 1210h—1, enacted in Acts 1909, c. 295, requiring, as a condition precedent to the bringing of an action to enjoin the collection of a special assessment, the payment of the assessment, *held* not in violation of Const. Wis. art. 1, § 1, 9.—*Wisconsin Real Estate Co. v. City of Milwaukee*, 138 N. W. 642.

CONSTRUCTION.

See Contracts, §§ 148-190; Deeds, § 105; Mortgages, §§ 171, 183; Statutes, §§ 181-269; Trial, §§ 295, 296; Wills, §§ 440-634.

CONSTRUCTIVE FRAUD.

See Fraud, § 6.

CONTEMPT.

See Divorce, § 269; Mandamus, § 4.

CONTINUANCE.

See Divorce, § 197; Justices of the Peace, § 146; Mandamus, § 45.

§ 26 (Wis.) Where more than two years had elapsed between the date of issue joined and the date the case was called for trial, it was not error to deny continuance for absence of a witness; no attempt having been made to take her deposition.—*Peerless Mineral Springs Co. v. German American Ins. Co. of New York*, 138 N. W. 1023.

Assignments; Assignments for Benefit of Creditors; Bailment; Bills and Notes; Brokers; Cancellation of Instruments; Carriers, §§ 35, 69; Chattel Mortgages; Compromise and Settlement; Constitutional Law, § 89; Corporations, §§ 388, 406, 661; Counties; Covenants; Creditors' Suit, § 8; Damages, §§ 118, 120; Deeds; Discovery, § 55; Estoppel, § 115; Evidence, §§ 191, 387-460; Exchange of Property; Executors and Administrators, § 221; Fraud, §§ 20, 46; Frauds, Statute of; Infants, §§ 56, 58, 102; Injunction, § 211; Insurance; Interest; Judgment, §§ 663, 675, 704, 707, 721; Liens, § 7; Master and Servant, § 54; Mechanics' Liens, §§ 35, 38, 78, 93, 183, 263, 281, 317; Mortgages; Municipal Corporations, §§ 232, 350-373, 1010; New Trial, § 164; Partnership; Patents; Principal and Surety, § 82; Railroads, § 64; Reformation of Instruments; Release; Sales; Specific Performance; Stipulations; Telegraphs and Telephones, § 34; Trial, §§ 11, 45; Use and Occupation; Vendor and Purchaser; Waters and Water Courses, §§ 158, 158½; Wills, § 58; Work and Labor.

I. REQUISITES AND VALIDITY.

(B) Parties, Proposals, and Acceptance.

§ 22 (Wis.) An offer in writing to supply services was accepted by receiving such service, with silent acquiescence in the agreement as framed.—Manufacturers' & Merchants' Inspection Bureau v. Everwear Hosiery Co., 138 N. W. 624.

§ 28 (Neb.) Evidence held sufficiently clear and satisfactory, establishing a parol contract certain in its provisions.—Moline v. Carlson, 138 N. W. 721.

§ 28 (Wis.) Evidence as to whether reports made under a contract for services of an industrial expert were retained by the officer to whom they were made held inadmissible in an action on the contract, in which the issue was as to the acceptance of such contract.—Manufacturers' & Merchants' Inspection Bureau v. Everwear Hosiery Co., 138 N. W. 624.

(C) Formal Requisites.

§ 34 (S.D.) Where a contract provided that it should not be "binding until all the parties above mentioned have signed the same," it was not binding upon the parties named therein if one of them did not sign it.—Harris v. Lyons, 138 N. W. 295.

One of the parties to a contract held estopped from claiming its invalidity by failure of another person named therein to sign it.—Id.

(D) Consideration.

§ 54 (Iowa) Where notes are given for a debt then incurred, an agreement that they shall also cover a prior indebtedness is invalid because without consideration.—Cuthbertson v. First Nat. Bank, 138 N. W. 1090.

§ 54 (Wis.) There was a sufficient consideration to support a contract by plaintiff to relinquish a homestead entry theretofore made by plaintiff, so that defendant's son might apply to enter the land as a homestead, irrespective of whether defendant or his son actually secured the homestead.—Dohr v. Wolfgang, 138 N. W. 75.

§ 75 (S.D.) An undertaking of a complainant in rape that he would pay costs of a criminal prosecution if the affair was settled by the marriage of his daughter to the accused held without consideration, and insufficient to charge him on such an agreement.—McCook County v. Burstad, 138 N. W. 303.

of the former.—Curtis v. Armagast, 138 N. W. 873.

The conferring of benefits by a parent on a child is presumptively valid, and the presumption of constructive fraud arises only where the child is the dominant person in the relationship.—Id.

§ 99 (S.D.) In an action to reform a contract, evidence held to show mistake on the part of defendant and fraud on the part of plaintiff.—Fotheringham v. Lockhart, 138 N. W. 804.

(F) Legality of Object and of Consideration.

§ 129 (Wis.) A contract employing private detectives to enter a factory, and procure evidence of larceny and embezzlement of employes, compensation to depend upon the apprehension and reporting of guilty persons, held illegal, as violating public policy.—Manufacturers' & Merchants' Inspection Bureau v. Everwear Hosiery Co., 138 N. W. 624.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 148 (Minn.) A telegraphic offer of employment, which does not contain all the terms of the offer, must be considered as though express reference to the substance of the negotiations had been incorporated.—O'Donnell v. Daily News Co. of Minneapolis, 138 N. W. 677.

§ 163 (Iowa) In case of an apparent inconsistency between the written and printed portions of an instrument, the written portions will control.—Low v. Young, Mullarky & Long, 138 N. W. 828.

(B) Parties.

§ 186 (Iowa) Where a party to a contract agreed to pay the adverse party a specified sum and a note on which such adverse party's wife was a surety, and gave a note as collateral, and indorsed it in blank, the rights of the wife paying the note on which she was surety and obtaining the collateral note were under the contract, and she could only recover from the party the extent of his nonperformance to the adverse party.—Bosley v. Lammers, 138 N. W. 703.

(C) Subject-Matter.

§ 190 (Iowa) Contract between lecturer and lyceum bureau, when taken in connection with a letter accompanying it when forwarded for the lecturer's signature, and the interpretation by the acts of the parties, held to entitle the lecturer to payment for 100 engagements each season as a minimum.—Boyl v. Midland Lyceum Bureau, 138 N. W. 384.

III. MODIFICATION AND MERGER.

§ 245 (Iowa) Where a party agrees orally to leave his stepson a 40-acre tract, and subsequently enters into a written contract whereby he conveys to him all his land, consisting of three such tracts, the oral contract is merged in and fulfilled by the written one.—Rageth v. Boliger, 138 N. W. 818.

IV. RESCISSION AND ABANDONMENT.

§ 270 (Wis.) A return of reports made under a contract for services of an industrial expert after a receipt of a bill for services held not to relieve the company to whom they were made from liability.—Manufacturers' & Merchants' Inspection Bureau v. Everwear Hosiery Co., 138 N. W. 624.

V. PERFORMANCE OR BREACH.

§ 277 (Iowa) Where grantor agreed to take up a mortgage on the premises for grantee, if the mortgagee refused to extend the same, the grantee was not required to make demand on the grantor so to do on the date of the maturity of the mortgage, but demand in a reasonable time was sufficient.—*Johnson v. Converse*, 138 N. W. 900.

§ 312 (Iowa) Under a contract between a manufacturer and a jobber for the exclusive sale of machinery within a certain time, *held*, that the manufacturer's refusal to deliver machinery and attachments for which orders were obtained within the term of the contract, to be delivered thereafter, was a breach of the contract.—*Portable Elevator Mfg. Co. v. Bradley, Merriam & Smith*, 138 N. W. 915.

VI. ACTIONS FOR BREACH.

§ 346 (Iowa) Where a person suing for services pleaded only an express agreement, she could not recover on a quantum meruit.—*In re Oldfield's Estate*, 138 N. W. 846.

§ 346 (N.D.) In an action against a bank based on its refusal to pay to plaintiff the proceeds of a loan in cash, as promised, where the complaint alleged a demand for accounting, the exclusion of testimony of a witness for defendant that plaintiff had never asked for any accounting was error.—*Goetz v. Merchants' Bank of Rugby*, 138 N. W. 10.

§ 348 (N.D.) In an action based on defendant's refusal to pay plaintiff the proceeds of a loan in cash as promised by defendant, where the answer puts in issue the allegation of a promise to pay in cash and alleges that the proceeds were to be applied in discharge of indebtedness of plaintiff, the burden was on plaintiff to establish his contention.—*Goetz v. Merchants' Bank of Rugby*, 138 N. W. 10.

§ 349 (N.D.) In action based on refusal of defendant bank to pay to plaintiff the proceeds of a loan in cash, the exclusion of testimony of plaintiff on cross-examination that, since the making of plaintiff's note, plaintiff had drawn checks on the bank which were paid by it, was error.—*Goetz v. Merchants' Bank of Rugby*, 138 N. W. 10.

Exclusion of question to president of the bank whether he had any notes which plaintiff authorized him to deduct from the loan *held* error.—*Id.*

Exclusion of a question whether plaintiff ever asked to have notes discharged by the bank with the proceeds of the loan turned over to him was error.—*Id.*

Exclusion of a note which defendant contended was to be satisfied out of the loan was error.—*Id.*

§ 350 (Neb.) In an action by a correspondence school against a student for the balance of tuition due, evidence *held* insufficient to sustain a judgment for defendant.—*International Text-Book Co. v. Martin*, 138 N. W. 582.

§ 354 (Minn.) A finding that defects and omissions in the performance of a contract to erect a flat building amounted to \$37.25 is not contradictory of a finding of substantial performance; the contract price for the building being \$1,400.—*Lindquist v. Young*, 138 N. W. 28.

CONTRIBUTORY NEGLIGENCE.

See Negligence, §§ 66-98.

CONVENTION.

See Elections, §§ 120, 121, 125, 131, 139.

CONVEYANCES.

See Assignments; Assignments for Benefit of Creditors; Chattel Mortgages; Contracts, §

245; Corporations, § 207; Deeds; Estoppel, §§ 22, 35; Fraudulent Conveyances; Mortgages; Trusts, § 83; Vendor and Purchaser; Witnesses, § 144.

CONVICTS.

See Constitutional Law, § 272.

CORONERS.

See Courts, § 26; Executors and Administrators, §§ 539, 540.

CORPORATIONS.

See Banks and Banking; Building and Loan Associations; Carriers; Discovery, §§ 54, 55; Insurance; Mandamus, § 122; Municipal Corporations; Patents; Railroads; Statutes, § 220; Street Railroads; Telegraphs and Telephones.

IV. CAPITAL, STOCK, AND DIVIDENDS.**(C) Issue of Certificates.**

§ 108 (Iowa) Under Acts 32d Gen. Assem. c. 71, as amended by Acts 33d Gen. Assem. c. 104, § 4, providing the terms on which a corporation may issue shares of stock, an issuance of shares after its passage *held* a representation that the matter required to be done had been done which would support an action to recover money paid for shares in reliance thereon.—*Sykes v. Pure Food Cider Co.*, 138 N. W. 554.

Officers of a corporation authenticating and issuing certificates of stock *held* presumed to have intended to defraud in making untrue representations contained therein.—*Id.*

Officers of a corporation issuing stock certificates containing false representations *held* liable in damages to all who deal with the stock in reliance on the representations, though the officers do not themselves profit from such representations.—*Id.*

V. MEMBERS AND STOCKHOLDERS.**(A) Rights and Liabilities as to Corporation.**

§ 180 (Mich.) Corporate powers should be exercised to accomplish the object for which they were created, and even a majority of the members should not use such powers to subvert the purpose of the incorporation.—*German Corporation of Negaunee v. Negaunee German Aid Society*, 138 N. W. 343.

§ 189 (Mich.) Since a corporation is a legal entity distinct from its members, it may by a proper action recover property owned by it and unlawfully held by its officers and members in control of its affairs.—*German Corporation of Negaunee v. Negaunee German Aid Society*, 138 N. W. 343.

(C) Suing or Defending on Behalf of Corporation.

§ 207 (Mich.) If a society through the wrongful acts of its officers unlawfully conveyed property to its officers and members, who, in turn, conveyed to one who took with knowledge of a want of corporate authority to convey, any new member could recover such property.—*German Corporation of Negaunee v. Negaunee German Aid Society*, 138 N. W. 343.

VI. OFFICERS AND AGENTS.**(B) Authority and Functions.**

§ 298 (Mich.) Under Pub. Acts 1903, No. 232, § 10, to constitute a statutory quorum in order to hold a lawful meeting of stockholders for the transaction of corporate business, a

majority of all the stock must be represented.—*Hill v. Town*, 138 N. W. 334.

The requirements of the presence of a statutory quorum to enable the stockholders of a corporation to legally transact business are mandatory.—*Id.*

(C) **Rights, Duties, and Liabilities as to Corporation and Its Members.**

§ 314 (Mich.) Corporate officers cannot represent the corporation in a transaction in which they were personally interested in order to obtain an advantage at the expense of such corporation.—*German Corporation of Negaunee v. Negaunee German Aid Society*, 138 N. W. 343.

§ 320 (Mich.) Under Comp. Laws, § 9757, and the following sections, the courts have power to entertain petitions of corporate shareholders to compel officers to account for official misconduct in the management of corporate funds, suspend, or remove them, restrain alienation of corporate assets, etc., and to sequester the property and appoint a receiver, and adjudge a dissolution in certain cases.—*Town v. Duplex-Power Car Co.*, 138 N. W. 338.

In a suit by minority stockholders of a corporation for the appointment of a receiver and other relief, *held* proper to appoint a receiver to preserve the assets and enjoin the foreclosure of a corporate mortgage, but improper to enjoin the sale and removal of the corporate products so as to prevent it doing business.—*Id.*

§ 320 (Wis.) The circuit court, on suit by a stockholder against an officer, charging misconduct in commingling of corporate with personal funds, in wrongfully retaining commissions, in failing to account, etc., and demanding defendant's removal from office, the election of a new board of directors, etc., has power without express statutory authority, to appoint a receiver pendente lite.—*Katz v. De Wolf*, 138 N. W. 1013, 1016.

In a suit by one stockholder charging a director with misconduct in the management of the business of the corporation seeking removal from office and an accounting, *held*, that the denial of an application for a receiver of the corporation's property pendente lite was proper.—*Id.*

VII. CORPORATE POWERS AND LIABILITIES.

(A) **Extent and Exercise of Powers in General.**

§ 388 (S.D.) Where a traction company agreed to furnish plaintiff with water as consideration for a deed to land on which it constructed a canal leading to its power plant, it will be estopped to claim, in an action to compel it to furnish the water, that the contract was ultra vires.—*Dorsett v. Black Hills Traction Co.*, 138 N. W. 808.

(B) **Representation of Corporation by Officers and Agents.**

§ 406 (S.D.) Corporation *held* not bound by agreement of its vice president that a debt owed by him individually should be credited on an account for building material sold by the corporation.—*Clow-Schaaf Lumber Co. v. Kass*, 138 N. W. 1120.

(F) **Civil Actions.**

§ 507 (S.D.) Under Code Civ. Proc. § 110, service on an officer of a domestic corporation, who had his residence outside the state, *held* to confer jurisdiction to enter judgment against the corporation.—*Straub v. Lyman Land & Investment Co.*, 138 N. W. 957.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

§ 609 (Mich.) The general jurisdiction of equity over corporations does not extend to

dissolving a corporation, winding up its affairs, and sequestering its property, and equity will not ordinarily sequester corporate property or commit the management of its affairs to a receiver.—*Town v. Duplex-Power Car Co.*, 138 N. W. 338.

XII. FOREIGN CORPORATIONS.

§ 636 (Iowa) Foreign corporations can do business only upon such conditions as the state prescribes or may be prohibited from doing any business, and the court cannot override such legislation on the ground of comity.—*American Fidelity Co. v. Bleakley*, 138 N. W. 508.

§ 661 (Wis.) Under Sanborn's St. Supp. 1906, § 1770, subds. 2, 10, prohibiting the doing of business by foreign corporations in the state except on terms, and the bringing of suits by such corporations, a foreign corporation which has not filed a copy of its articles *held* entitled to maintain an action on a contract not made, or to be performed within the state, for the purchase of its corporate stock.—*American Food Products Co. v. American Milling Co.*, 138 N. W. 1123.

§ 668 (Wis.) Under St. 1898, § 2637, subd. 13, authorizing service upon foreign corporations holding property in the state by service on their officers, a service on the president of a foreign corporation *held* to bind the company, though he was not in the state on its business.—*American Food Products Co. v. American Milling Co.*, 138 N. W. 1123.

CORPUS DELICTI.

See Burglary, § 41.

CORRESPONDENCE.

See Evidence, § 263.

CORROBORATION.

See Criminal Law, §§ 369, 511, 763, 764, 780, 1172; Seduction, §§ 40, 46.

COSTS.

See Appeal and Error, § 877; Constitutional Law, § 208; Contracts, § 75; Divorce, § 269; Equity, §§ 46, 50; Mechanics' Liens, § 310; Replevin, § 124.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

§ 13 (Wis.) Where a defendant in an equitable action did not challenge the form of the action by demurrer or answer, but interposed an equitable counterclaim and asked for equitable relief, and the case was tried as an equitable action, he could not complain that costs were awarded against him on the ground that it was unnecessary to bring a suit in equity to obtain the desired relief.—*Falbe v. Cave*, 138 N. W. 87.

§ 60 (Mich.) Under the circumstances, *held*, that costs would not be awarded to either party.—*German Corporation of Negaunee v. Negaunee German Aid Society*, 138 N. W. 343.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

§ 255 (Iowa) Where appellee did not number the lines or index his amendment to the abstract, the cost of printing it would be taxed to him.—*In re Oldfield's Estate*, 138 N. W. 846.

§ 256 (Wis.) Costs *held* not to be assessed in favor of an appellant for printing the case and briefs, where they are unnecessarily long under Supreme Court rule 44 (108 N. W. viii).—*Loehr v. Dickson*, 138 N. W. 61.

IX. IN CRIMINAL PROSECUTIONS.

§ 299 (S.D.) Under Justices Code, § 117, and Code Cr. Proc. § 145, a county *held* not entitled to recover costs against the complainant in rape, though the affair was settled by the marriage of the accused and the complainant's daughter, where there was no malice or want of probable cause shown in the prosecution.—*McCook County v. Burstad*, 188 N. W. 808.

COUNCIL.

See Municipal Corporations, §§ 112, 121, 488, 489, 511, 537, 591.

COUNTIES.

See Agriculture; Costs, § 299; District and Prosecuting Attorneys; Drains, § 49; Game; Highways, §§ 191, 192; Insane Persons, § 52; Libel and Slander, §§ 10, 48, 50½, 111; Limitation of Actions, § 58; Mandamus, § 95; Physicians and Surgeons, § 5.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

(C) County Expenses and Charges and Statutory Liabilities.

§ 139 (Mich.) To entitle an attorney who assisted the prosecuting attorney in a proceeding to recover for his services against the county, he must either show the express or legally implied obligation of the county to pay him.—*Powers v. Calhoun County*, 138 N. W. 266.

COURTS.

See Appeal and Error; Certiorari; Constitutional Law, § 74; Corporations, §§ 320, 507, 609, 636; Criminal Law, § 167; Discovery, § 55; Divorce, §§ 102, 168, 182, 200, 202, 217, 223; Drains, § 82; Drunkards; Eminent Domain, § 67; Habeas Corpus, § 30; Indians; Infants, § 115; Insurance, § 56; Judges; Judgment, § 17; Justices of the Peace; Mandamus, §§ 4, 26, 53; Mortgages, § 497; Municipal Corporations, § 63; Process, § 96; Taxation, §§ 642, 648.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 26 (Neb.) In an action against the coroner and his surety for the value of personal property sold by the coroner to pay funeral expenses, the district court should adjudicate the whole matter, instead of rendering judgment against the defendants and then sending the coroner to the county court to file claims against the estate.—*Lenderink v. Sawyer*, 138 N. W. 744.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 183 (N.D.) Under Const. § 3, the county courts are not vested with equity powers, but their jurisdiction is restricted to actions at law where the amount involved does not exceed \$1,000.—*Mead v. First Nat. Bank*, 138 N. W. 365.

VI. COURTS OF APPELLATE JURISDICTION.

(A) Grounds of Jurisdiction in General.

§ 204 (N.D.) Under Const. §§ 86, 87, the Supreme Court is given superintending control over inferior courts and may issue any of the writs therein named and such others as may be necessary to the proper exercise of such control.—*State v. District Court of Grand Forks County*, 138 N. W. 988.

The superintending control of the Supreme Court was granted to insure the harmonious

working of the judicial system, to meet emergencies, and for cases where other relief is inadequate or incomplete, and not for review as by appeal.—*Id.*

On application to the Supreme Court for the exercise of its power of superintending control, the question whether the remedy by appeal is adequate or speedy must be determined in the discretion of the Supreme Court.—*Id.*

The primary function of the Supreme Court is the determination of appeals, and its superintending power should be exercised only in case of emergency or when necessary by reason of lack of any other adequate remedy, or when the ends of justice make its exercise imperative.—*Id.*

COVENANTS.

See Landlord and Tenant, § 164; Mortgages, § 491.

I. REQUISITES AND VALIDITY.

(A) Express Covenants.

§ 1 (Mich.) A mutual agreement by the owners of property on a certain street to observe the building restrictions imposed therein upon the lots as to the character of buildings to be erected, etc., was a sufficient consideration to sustain the contract as to those property owners who signed it.—*Erichsen v. Tapert*, 138 N. W. 330.

§ 6 (Mich.) A contract executed by property owners on a certain street imposing restrictive covenants upon the lots *held* not to require that it be signed by all the owners of all the lots described therein before it should become binding upon those owners who did sign it.—*Erichsen v. Tapert*, 138 N. W. 330.

The fact that an instrument executed by property owners imposing restrictions upon property on a street was independent of the deed conveying title was immaterial to the validity of the restriction if supported by a valuable consideration.—*Id.*

II. CONSTRUCTION AND OPERATION.

(D) Covenants Running with the Land.

§ 84 (Mich.) A contract executed by property owners on a street imposing building restrictions upon the property *held* to bind the successors in title of the original signers.—*Erichsen v. Tapert*, 138 N. W. 330.

III. PERFORMANCE OR BREACH.

§ 103 (Mich.) A prior erection, without objection, of a barn on the back of a lot which was subject to a building restriction prohibiting the location of any other than a single dwelling house on each lot, was not a waiver of the restriction so as to permit the erection on the rear of the lot of a store building.—*Erichsen v. Tapert*, 138 N. W. 330.

Under the circumstances, *held*, that it could not be said that the erection of a store building on the rear of a lot contrary to restrictive covenants imposed upon that and adjoining lots would not injure the owners of adjoining lots.—*Id.*

IV. ACTIONS FOR BREACH.

§ 116 (Wis.) A complaint for breach of covenant against incumbrances *held* sufficient to admit evidence of a compliance with requirements necessary to make a special assessment a lien on the land prior to the previous first day of January, and hence to show a breach of the covenant in view of *St. 1898, § 1153*, as amended by *Laws 1909, c. 293*.—*Cady v. Henes*, 138 N. W. 1022.

§ 127 (Iowa) The amount paid by a warrantee to protect his title against an incumbrance is presumptively the measure of damages

for breach of a covenant against incumbrances.—Boice v. Coffeen, 138 N. W. 857.

In a suit to foreclose a mortgage, in which a defendant filed a cross-bill on a covenant against incumbrances, the court held justified in adopting the amount necessary to discharge the incumbrance as the presumptive measure of damages.—Id.

The rule that a warrantee, who has not discharged the incumbrance warranted against, is only entitled to nominal damages is not controlling in equity.—Id.

§ 130 (Iowa) For breach of a covenant of title, recovery cannot, in general, exceed the consideration received by the warrantor.—Boice v. Coffeen, 138 N. W. 857.

§ 130 (Iowa) A grantor of mortgaged premises having conveyed with a warranty held liable over to his grantee in foreclosure proceedings for the amount the latter is required to pay to redeem the portion so conveyed from the mortgage.—Tukey v. Foster, 138 N. W. 862.

CREDIBILITY.

See Witnesses, §§ 345, 349.

CREDITORS.

See Assignments for Benefit of Creditors; Attachment; Bankruptcy; Creditors' Suit; Execution, § 293; Fraudulent Conveyances; Garnishment; Partnership, § 176.

CREDITORS' SUIT.

See Fraudulent Conveyances, § 295.

§ 8 (Neb.) In equity, the interest of a judgment debtor in a judgment against a city may be subjected to the claim of his judgment creditor.—Parsons v. Cathers, 138 N. W. 747.

§ 8 (Neb.) The contract of husband and wife to support his father and furnish him with \$50 per year is a personal contract, and the father's rights thereunder cannot be subjected by a court of equity to the payment of a judgment against him.—Valparaiso State Bank v. Schwartz, 138 N. W. 757.

§ 16 (Neb.) To maintain a creditor's bill, proof of a judgment at law, or the issuance of an execution and of a sheriff's return nulla bona, is sufficient, in the absence of fraud or collusion, to show that plaintiff's remedies at law had been exhausted.—Parsons v. Cathers, 138 N. W. 747.

§ 31 (Mich.) Under chancery rule 30, subd. "b," the right to compel disclosure on "special motion" in case of a failure by defendant in a creditor's bill to answer all interrogatories as required by Comp. Laws 1897, §§ 436, 437, is addressed to the discretionary power of the court.—Crawford v. Mandell, 138 N. W. 705.

§ 39 (Minn.) A complaint in the nature of a creditors' bill, from which it appears that another action is pending against defendant on the same facts, which has not proceeded to judgment, though attachment has been issued but no property has been levied on, is demurrable, in failing to show that plaintiff has exhausted his remedies in the pending action.—Bruce v. Hoidal, 138 N. W. 313.

§ 47 (Neb.) Failure to dismiss a creditor's bill on an answer alleging that plaintiff has possession of unsold collateral security is not reversible error, where plaintiff, before reply, sold the collateral and applied the proceeds in part payment, and no one was prejudiced by the procedure adopted.—Parsons v. Cathers, 138 N. W. 747.

CRIMINAL LAW.

See Abortion; Assault and Battery, § 82; Bail, § 90; Burglary; Costs, § 299; District and Prosecuting Attorneys; Embezzlement; Highways, § 186; Homicide; Indians; Indictment

and Information; Intoxicating Liquors, §§ 236, 239; Parent and Child; Physicians and Surgeons, §§ 5, 6; Rape; Seduction; Sodomy, § 357; Witnesses, §§ 203, 211, 217, 268, 269.

V. VENUE.

(B) Change of Venue.

§ 115 (Mich.) While accused must ordinarily be tried in the county where the offense was committed, the court may, under proper conditions, change the venue.—People v. Swift, 138 N. W. 662.

§ 121 (Mich.) Under Pub. Acts 1909, No. 67, rulings changing the venue are largely within the court's discretion.—People v. Swift, 138 N. W. 662.

§ 126 (Mich.) In ruling on a motion for a change of venue on account of local prejudice, the trial court could consider the fact that the motion was passed upon more than a year after the case was on the calendar for a second trial.—People v. Swift, 138 N. W. 662.

If a fair and impartial jury could in fact be obtained, a motion for change of venue because of local prejudice could be properly denied, even though prejudice in the community was in fact shown to exist.—Id.

§ 134 (Mich.) In ruling on a change of venue because of local prejudice, the court may act in part on its personal knowledge of the alleged prejudice existing.—People v. Swift, 138 N. W. 662.

§ 137 (Mich.) The trial court properly deferred final determination of a motion to change the venue until after the examination of the jurors as to their qualifications.—People v. Swift, 138 N. W. 662.

VII. FORMER JEOPARDY.

§ 162 (Mich.) Pub. Acts 1903, No. 91, as amended by Pub. Acts 1909, No. 124, relating to the probation of persons convicted, is not invalid as permitting placing again in jeopardy, as applied to one twice released on probation and subsequently sentenced for again violating the conditions.—People v. Dudley, 138 N. W. 1044.

§ 167 (Iowa) If, on a trial of the major offense, there can be a conviction of the minor, a former conviction or acquittal of the minor will bar the major, and hence, where accused at one theft stole a watch and a pocketbook, a conviction of simple larceny for the theft of the watch is a bar to a prosecution for larceny from the building, though the conviction was had before a justice of the peace, who did not have jurisdiction over the offense of larceny from the building.—State v. Sampson, 138 N. W. 473.

In a prosecution for larceny, held, that the state could not to invalidate a former conviction of simple larceny set up that the justice before whom it was had was without jurisdiction because the larceny was from a dwelling.—Id.

§ 200 (Iowa) Where accused stole a watch from one of his roommates and a pocketbook from another, he is guilty of only one offense, though the takings were separated by a small fraction of time, so that a conviction of simple larceny of the watch is a bar to a prosecution for larceny from the dwelling house, based on the theft of the pocketbook.—State v. Sampson, 138 N. W. 473.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

§ 284 (Neb.) Where a plea in abatement in a criminal prosecution presents questions of law only, it is proper for the trial court to determine such questions without the intervention of a jury.—Hardin v. State, 138 N. W. 146.

X. EVIDENCE.**(B) Facts in Issue and Relevant to Issues, and Res Gestæ.**

§ 338 (Iowa) The court properly refused to permit a question as to the business of an accomplice's wife before he married her and as to their prior relations.—State v. O'Callaghan, 138 N. W. 402.

§ 351 (Iowa) The flight of accused is a circumstance indicative of guilt only where he has actual knowledge of the accusation against him, and not constructive knowledge.—State v. Sorenson, 138 N. W. 411.

§ 364 (Mich.) In a prosecution for committing an act of gross indecency with a boy, evidence of other indecencies with a dog was admissible; being a part of the "res gestæ".—People v. Swift, 138 N. W. 662.

(C) Other Offenses, and Character of Accused.

§ 369 (Mich.) In a prosecution for committing an act of gross indecency with a boy, evidence of prior acts of the same kind with the boy *held* admissible.—People v. Swift, 138 N. W. 662.

§ 369 (Minn.) In a prosecution for statutory rape, evidence of acts of intercourse immediately prior to the time relied on for conviction, other than the act so relied on, is competent in corroboration.—State v. Schueller, 138 N. W. 987.

(D) Materiality and Competency in General.

§ 388 (Iowa) Testimony as to experiments by pushing in an end of a sliding door of the building burglarized and passing into the building through the opening so made *held* admissible.—State v. Sorenson, 138 N. W. 411.

§ 395 (Neb.) In a prosecution for illegal sale of liquor, receiving in evidence the federal liquor license issued to defendant was not error on the ground that it was obtained from him by stealth.—Nixon v. State, 138 N. W. 136.

§ 396 (Iowa) Part of the testimony at a former trial by a witness, who could not be produced on the second trial, having been introduced by defendant, the state could introduce the remainder; it not being foreign to the matter called out by defendant.—State v. Thomas, 138 N. W. 864.

(F) Admissions, Declarations, and Hearsay.

§ 406 (Neb.) Evidence as to admissions by defendant in a prosecution for breaking and entering a railroad car *held* insufficient to show that the admissions were obtained under threats.—Hardin v. State, 138 N. W. 146.

§ 412 (Iowa) Proof that accused stated before the offense that he was going to the building burglarized to see the manager did not show his innocence, since he could form the intent to commit the crime at the building.—State v. Sorenson, 138 N. W. 411.

§ 413 (Iowa) Evidence that shortly before 10 o'clock on the night of the burglary accused told the witness that he was going down to the building burglarized to see the manager was incompetent as self-serving.—State v. Sorenson, 138 N. W. 411.

(I) Opinion Evidence.

§ 448 (S.D.) The question to prosecutrix in seduction, whether she would have permitted defendant to have intercourse except for his promise of marriage, is not objectionable as calling for her conclusion.—State v. Holter, 138 N. W. 953.

§ 485 (N.D.) In a prosecution for murder hypothetical questions to a physician sworn as an expert, based on the testimony of all the state's

witnesses, and calling for an opinion as to the cause of death, were proper.—State v. Moeller, 138 N. W. 981.

(J) Testimony of Accomplices and Codefendants.

§ 511 (Iowa) Corroboration of an accomplice necessary to sustain a conviction, though required to be something more than mere proof of the commission of the offense or circumstances thereof, need not extend to every material fact on which the accomplice has testified.—State v. O'Callaghan, 138 N. W. 402.

In a prosecution for breaking and entering, facts admitted or not denied by defendant, who took the stand in his own behalf, *held* to sufficiently corroborate the testimony of an accomplice to sustain a conviction.—Id.

§ 511 (Iowa) Under Code, § 5489, evidence, to corroborate an accomplice, must be testimony other than that which comes from the accomplice and must tend to connect accused with the commission of the offense.—State v. Duncan, 138 N. W. 913.

Finding of a revolver, alleged to have been stolen during the commission of the offense charged, in a place where an accomplice stated accused told him he placed it, *held* not corroborative.—Id.

Evidence *held* insufficient to corroborate an accomplice so as to sustain a conviction for burglary.—Id.

(L) Evidence at Preliminary Examination or at Former Trial.

§ 539 (N.D.) Where the exclusion of a question to a witness on cross-examination at a former trial was held error, but the witness answered the same question without objection, there was no error, in a subsequent trial, in permitting the official reporter of the former trial to give the testimony of the witness, who was then outside the jurisdiction of the court.—State v. Moeller, 138 N. W. 981.

XII. TRIAL.**(A) Preliminary Proceedings.**

§ 628 (Iowa) The fact that a witness' surname is improperly spelled on the back of an indictment to which his testimony before the grand jury is attached does not constitute variance sufficient to justify the rejection of the witness, where his identity is readily ascertainable from such testimony and from the name actually written upon the indictment.—State v. O'Brien, 138 N. W. 895.

§ 629 (Iowa) A notice, served on accused, that the state would call as a witness a person who resided on a designated street, and who would testify that she had resided next door to accused during the previous year, was sufficient, within Code, § 5373.—State v. Butler, 138 N. W. 383.

§ 629 (Iowa) A return of service of an additional witness, certifying that same was served upon the defendants "by reading said notice to each of said defendants and delivering them a true copy thereof," *held* to show a complete service upon each defendant.—State v. O'Brien, 138 N. W. 895.

(B) Course and Conduct of Trial in General.

§ 641 (Mich.) Pub. Acts 1903, No. 91, as amended by Pub. Acts 1909, No. 124, relating to probation, is not invalid as denying the benefit of counsel as a matter of right to one brought before the court for sentence after violating the conditions of his probation.—People v. Dudley, 138 N. W. 1044.

(C) Reception of Evidence.

§ 662 (Mich.) One brought before the court for sentence after violating the conditions of his probation, authorized by Pub. Acts 1903,

§ 678 (Minn.) Refusal to require the state, in a prosecution for rape, to elect at the close of the county attorney's statement on which of several acts of intercourse he would rely for conviction, *held* not an abuse of discretion.—State v. Schueller, 138 N. W. 937.

§ 683 (S.D.) Though the state by way of corroboration of prosecutrix's testimony that she was seduced on a certain night gave some evidence of defendant having been at her home that evening, defendant in making the defense that he was not there at that time introduced a new issue, which the state could rebut by further evidence that he was then there.—State v. Holter, 138 N. W. 953.

§ 684 (S.D.) Admitting in rebuttal further evidence that defendant was at prosecutrix's home the evening she claimed he seduced her was not an abuse of discretion, even if it properly belonged to the state's case in chief.—State v. Holter, 138 N. W. 953.

§ 687 (Iowa) Under Code, § 3719, authorizing permission to give further testimony any time before final submission to the jury, it is permissible after the state has commenced its closing argument.—State v. Thomas, 138 N. W. 864.

(E) Arguments and Conduct of Counsel.

§ 699 (Mich.) Discretionary control rests with the trial judge in determining the scope of an argument.—People v. Swift, 138 N. W. 662.

§ 721 (Iowa) Where accused did not testify, it was improper for the county attorney in argument to refer to evidence of dealings between prosecutrix and accused as undisputed.—State v. Hector, 138 N. W. 930.

§ 721½ (Iowa) In a prosecution for seduction, it was improper for the county attorney in argument to refer to the fact that defendant had not produced witnesses to rebut the testimony of two witnesses for the state who had testified favorably to the reputation of prosecutrix for truth and veracity.—State v. Hector, 138 N. W. 930.

§ 722 (Iowa) Where accused during the time prosecutrix testified sat and grinned at her, the argument of the prosecuting attorney that accused while prosecutrix testified grinned at her, and apparently gloated over his conquest, was not ground for reversal.—State v. McKinnon, 138 N. W. 523.

§ 728 (N.D.) Where the assistant state's attorney referred to defendant as a professional abortionist, "a Moloch who kills unborn children for the almighty dollar," etc., the Supreme Court will not reverse for the objectionable language, when not called to the attention of the court till after the argument had ceased.—State v. Moeller, 138 N. W. 981.

§ 730 (Iowa) The sustaining of an objection to a statement of the prosecuting attorney in his closing argument that it was practically admitted that accused had committed the crime sufficiently dealt with the argument.—State v. McKinnon, 138 N. W. 523.

§ 730 (Mich.) A remark by the prosecuting attorney in his opening statement that he expected to prove that accused exercised hypnotic powers over a certain person was not reversible error, though he failed to prove that fact, where the judge cautioned the jury to disregard such statement.—People v. Swift, 138 N. W. 662.

(F) Province of Court and Jury in General.

§ 736 (N.D.) Whether one was an accomplice with defendant, and whether his acts tended to show the guilt of defendant, were for the jury;

tion of right of self-defense by withdrawing from combat *held* not erroneous as assuming that accused was not originally acting in self-defense.—State v. Young, 138 N. W. 871.

§ 761 (S.D.) The court in its instructions may assume facts proved by undisputed evidence.—State v. Shephard, 138 N. W. 294.

§§ 763, 764 (S.D.) A charge in seduction as to what is sufficient to constitute corroborating evidence to connect defendant with the offense *held* merely on the law applicable to the facts, and not to invade the province of the jury.—State v. Holter, 138 N. W. 953.

(G) Necessity, Requisites, and Sufficiency of Instructions.

§ 776 (Iowa) Instruction on the weight to be given to evidence of prior good character *held* correct and not objectionable as charging that evidence of good character could be considered only where circumstantial evidence was relied on.—State v. O'Callaghan, 138 N. W. 402.

§ 780 (Iowa) In a prosecution for breaking and entering a railroad station, an instruction on corroboration of an accomplice *held* error.—State v. Duncan, 138 N. W. 913.

§ 782 (Iowa) An instruction *held* not objectionable as charging that flight was *prima facie* indicative of guilt.—State v. O'Callaghan, 138 N. W. 402.

§ 783 (Mich.) Instruction *held* to sufficiently charge the purpose for which evidence of previous similar acts could be considered.—People v. Swift, 138 N. W. 662.

§ 800 (Iowa) The court in its instructions must define the terms of an indictment, when necessary to its fair understanding by the jury.—State v. McKinnon, 138 N. W. 523.

§ 814 (S.D.) Though the law be as stated in defendant's requested instruction, the court's charge being all he is entitled to under the evidence, he cannot complain that the request is not charged.—State v. Holter, 138 N. W. 953.

§ 823 (Iowa) On a trial for rape, a charge on included offenses *held* not prejudicial, in view of other instructions, though it would have been better to have used the language of Code, § 5377.—State v. Butler, 138 N. W. 383.

(H) Requests for Instructions.

§ 824 (S.D.) An instruction on circumstantial evidence was not required in an embezzlement case, in the absence of a specific request therefor.—State v. Millard, 138 N. W. 366.

§ 829 (Iowa) The refusal of an instruction fully covered by instructions given was not erroneous.—State v. Young, 138 N. W. 871.

§ 829 (Mich.) Requested charge on alibi *held* properly refused; the charge given sufficiently presenting the defense.—People v. Swift, 138 N. W. 662.

§ 829 (Minn.) In a prosecution for assault, it was error to refuse an instruction that the jury, to convict, must be satisfied beyond a reasonable doubt that the defendant's act was not justifiable, as in self-defense; the request not being covered by the statement in the charge that the state must prove beyond a reasonable doubt that the shooting was without justification.—State v. McGrath, 138 N. W. 310.

§ 829 (Neb.) An instruction covered by one already given is not error.—Nixon v. State, 138 N. W. 136.

An instruction that it was sufficient if the jury was satisfied beyond a reasonable doubt that defendant sold what was commonly known as whisky, and that it was intoxicating, was proper, and it was unnecessary to further instruct that a conviction could not be had upon a mere suspicion.—Id.

§ 829 (S.D.) A requested instruction need not be given; it being substantially embodied in the court's charge.—State v. Holter, 138 N. W. 953.

§ 830 (Iowa) Where accused on a trial for rape desired instructions aiding the jury in an understanding of the statute, he must present a proper instruction, and it is not enough to bring the subject to the attention of the court by improper requested instructions.—State v. McKinnon, 138 N. W. 523.

§ 830 (Minn.) A request to charge, which, as presented, did not correctly state the law, held properly refused.—State v. Schueller, 138 N. W. 937.

(J) Custody, Conduct, and Deliberations of Jury.

§ 865 (S.D.) In a prosecution for assault with intent to kill, an instruction after submission of the cause held not coercion of the jury, nor advice that it was the duty of the minority to unite with the majority.—State v. Price, 138 N. W. 14.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 957 (Mich.) Affidavits of jurors cannot be received to impeach a verdict.—People v. Swift, 138 N. W. 662.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

§ 982 (Mich.) Under Pub. Acts 1903, No. 91, as amended by Pub. Acts 1909, No. 124, one convicted of crime and released on probation, and then confined in jail for violating the conditions of the probation, and then released, may be sentenced to jail on a subsequent violation of the conditions.—People v. Dudley, 138 N. W. 1044.

§ 991 (Mich.) Under the indeterminate sentence law, a provision, in a sentence on conviction of the crime punishable under Comp. Laws 1897, § 11,546, that the maximum should be 5 years, instead of 15 years, the maximum penalty provided, held a nullity, which should be rejected as surplusage, after the convict had served out the period fixed in the sentence, so that he was not entitled to his discharge.—Ex parte Evans, 138 N. W. 276.

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) Form of Remedy, Jurisdiction, and Right of Review.

§ 1008 (Mich.) Where, after a conviction and the denial of a new trial, no judgment was rendered, accused could not procure a review by writ of error, but only by certiorari.—People v. Brannen, 138 N. W. 1050.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

§ 1036 (S.D.) Grounds of objection, not presented to the lower court, to evidence admitted, cannot be considered on appeal.—State v. Holter, 138 N. W. 953.

§ 1043 (Iowa) Where defendants so objected as to divert the court's attention from the real defect, complaint of such defect could not be considered on appeal.—State v. O'Brien, 138 N. W. 895.

§ 1055 (Iowa) A motion for new trial on the ground of misconduct of the prosecuting attorney in his closing argument does not go beyond the objections and exceptions taken to the argument.—State v. McKinnon, 138 N. W. 523.

The court on appeal will only consider objections to the improper argument of the prosecuting attorney taken during the trial and exceptions reserved thereto.—Id.

§ 1064 (Iowa) Where accused did not ask for a new trial on the ground that the prosecuting

attorney in his closing argument referred to the failure of accused to testify, and thereby violated Code, § 5484, the question whether it was a violation would not be considered.—State v. McKinnon, 138 N. W. 523.

(D) Record and Proceedings Not in Record.

§ 1114 (Mich.) An explanation of statements in the prosecuting attorney's opening statement cannot be considered where embodied in the briefs, if not contained in the record.—People v. Swift, 138 N. W. 662.

§ 1119 (Iowa) Where accused complained of the closing argument of the prosecuting attorney, which purported to be in response to statements of counsel for accused, and such statements were not in the record, the court would not disturb the action of the trial court overruling objections to the argument.—State v. McKinnon, 138 N. W. 523.

(E) Assignment of Errors and Briefs.

§ 1130 (S.D.) Where the ruling on an objection to a specific question asked a witness is sought to be reviewed on appeal, the statement of facts in the brief must show the question, the grounds thereof, the ruling thereon, and that exception was properly taken, and sufficient of the surrounding evidence to show the connection in which the question was propounded and there must be an assignment of error in the record and brief raising the error.—State v. Shephard, 138 N. W. 294.

(G) Review.

§ 1144 (S.D.) Where the instructions and the evidence are not brought up on an appeal from an order denying a new trial, it will be presumed that the evidence supported the verdict.—State v. Price, 138 N. W. 14.

§ 1150 (Mich.) Under Pub. Acts 1909, No. 67, rulings changing the venue, being largely within the court's discretion, will only be reviewed in case of a clear abuse of discretion.—People v. Swift, 138 N. W. 662.

In absence of mandatory statute, the court's action in ruling on a motion to change the venue will not be disturbed unless there is a palpable abuse of discretion.—Id.

§ 1153 (Iowa) The discretion of the court in permitting on rebuttal evidence which should have been introduced as a part of the main case is not often interfered with.—State v. Sorenson, 138 N. W. 411.

§ 1153 (Iowa) In the absence of an abuse of discretion, reversal will not be granted because of the allowing of a leading question.—State v. Thomas, 138 N. W. 864.

§ 1156 (Mich.) In reviewing an order denying a motion for a new trial based on the ground that the verdict was against the weight of the evidence, the appellate court can only determine whether there was a manifest abuse of discretion in denying the motion, and cannot pass on the credibility of witnesses.—People v. Swift, 138 N. W. 662.

§ 1156 (Neb.) Where misconduct of a bailiff in charge of a trial jury is alleged in a motion for a new trial, and the issue is submitted upon conflicting affidavits, the decision of the district court will not be reversed, unless found to be clearly wrong.—Thrasher v. State, 138 N. W. 120.

§ 1160 (Iowa) Where the jury and trial court believed the witnesses for the state, a verdict cannot be held wrong on appeal because of the character of the state's witnesses.—State v. Young, 138 N. W. 871.

§ 1169 (Iowa) Where, on a trial for rape, the imbecility of prosecutrix was established, the admission of the opinion of witnesses as to her actions was not prejudicial.—State v. McKinnon, 138 N. W. 523.

show the establishment of a highway by user, and the record does not disclose whether a conviction was based on the statutory proceedings or establishment by user, the conviction must be reversed.—State v. Hager, 138 N. W. 935.

§ 1169 (Minn.) Where, in a prosecution for rape on a child under 16, four acts of intercourse were proved, all committed within 4 or 5 weeks, defendant was not prejudiced by the evidence of one of the acts, alleged to have been committed subsequent to that relied on for conviction.—State v. Schneller, 138 N. W. 937.

§ 1170 (Iowa) In a prosecution for burglary, defendant, having denied any agreement to meet an accomplice, held not prejudiced by exclusion of a question as to whether he had an agreement to meet any of the other parties on the evening of the offense.—State v. O'Callaghan, 138 N. W. 402.

Defendant held not prejudiced by the exclusion of a question asked of a confessed accomplice who testified that he had not been promised immunity, but that he hoped to get off easy, whether he had been tried and whether he had pleaded guilty or not guilty.—Id.

Defendant held not prejudiced by the exclusion of a question whether he was in the basement of the building burglarized at any time and with whom.—Id.

§ 1172 (Iowa) Where accused fled immediately after the commission of the crime charged, an instruction to consider flight as a circumstance indicative of guilt if accused knew that the person from whom he ran was an officer was not prejudicial to accused.—State v. Sorenson, 138 N. W. 411.

§ 1172 (Iowa) An instruction in seduction that "if there is evidence" tending to show defendant was on intimate terms with prosecutrix, or demeaned himself as her lover or suitor, or "caressed" her, or manifested apparent affection for her, such facts were proper for consideration on the matter of corroboration is not prejudicial because there was no evidence of caresses.—State v. Thomas, 138 N. W. 864.

§ 1172 (Iowa) An instruction requiring accused's withdrawal from combat to be clearly signified in order to restore his right of self-defense held not prejudicial, where his evidence did not show any withdrawal.—State v. Young, 138 N. W. 871.

§ 1172 (S.D.) The jury having been clearly warranted in finding prosecutrix was chaste prior to her alleged seduction, there being no evidence contrary to her testimony, any error in the charge that, till the contrary is shown, a woman is presumed chaste, was harmless.—State v. Holter, 138 N. W. 953.

§ 1178 (S.D.) Assignments of error not mentioned or discussed by accused in his brief on appeal will be deemed abandoned.—State v. Shephard, 138 N. W. 294.

(H) Determination and Disposition of Cause.

§ 1182 (Iowa) Where no error appears in a short transcript, showing the indictment, the verdict, and the judgment, the judgment will be affirmed.—State v. Fisher, 138 N. W. 448.

XVI. SUCCESSIVE OFFENSES AND HABITUAL CRIMINALS.

§ 1205 (Minn.) Punishment was once deemed compensatory, the sentence being nicely graduated to the nature and circumstances of the offense; while the modern conception takes practically no account of compensation, and considers the offender as a sort of penitential ward, to be restrained as far as necessary for

VI. NATURE AND MEASURE OF PUNISHMENT OF CRIME.

§ 1213 (Mich.) The punishment, imprisonment for not less than 15 years nor more than 30 years, prescribed by Pub. Acts 1907, No. 64, for one who with intent to commit crime breaks and enters a building, and for purpose of committing any crime uses a high explosive, is not cruel and unusual.—People v. Mire, 138 N. W. 1066.

CROPS.

See Agriculture; Damages, §§ 6, 174, 208; Evidence, § 427; Fraud, § 58; Waters and Water Courses, § 263.

CROSS-EXAMINATION.

See Evidence, § 558; Witnesses, §§ 268, 287, 345, 349.

CROSSINGS.

See Railroads, §§ 243, 304-350, 446, 447.

CRUEL AND UNUSUAL PUNISHMENT.

See Criminal Law, § 1213.

CRUELTY.

See Divorce, §§ 49, 130.

CUMULATIVE EVIDENCE.

See New Trial, § 104.

CUSTODY.

Of child, see Divorce, §§ 289, 308.

CUSTOMS AND USAGES.

See Carriers, §§ 94, 408; Evidence, § 387; Master and Servant, §§ 270, 293; Waters and Water Courses, § 158.

DAMAGES.

See Appeal and Error, §§ 843, 1064, 1073, 1171, 1178; Assault and Battery, §§ 38, 40; Attachment; Bailment; Building and Loan Associations; Covenants, §§ 127, 130; Death, § 99; Drains, §§ 36, 57; Eminent Domain, §§ 102, 112, 271, 302; Equity, § 72; Evidence, § 113; Exchange of Property; Execution, § 472; Fraud, § 59; Husband and Wife, § 209; Intoxicating Liquors, § 309; Libel and Slander, §§ 95, 121; Municipal Corporations, §§ 385-402; New Trial, § 75; Rape, § 65; Replevin, § 124; Sales, § 442; Trial, § 250; Vendor and Purchaser, § 351; Waters and Water Courses, § 156.

I. NATURE AND GROUNDS IN GENERAL.

§ 6 (Neb.) Difficulty in determining the amount of damage to growing crops held not ground for denying recovery for willful injury.—Chalupa v. Tri-State Land Co., 138 N. W. 603.

VI. MEASURE OF DAMAGES.

(B) Injuries to Property.

§ 109 (Minn.) A "temporary" injury to realty is one that may be abated or discontinued at any time.—Worden v. Bielenberg, 138 N. W. 314.

§ 110 (Minn.) A "permanent injury" to realty, as distinguished from a temporary or continuing one, is one of such a character and existing under such circumstances as will be presumed to continue indefinitely.—Worden v. Bielenberg, 138 N. W. 314.

§ 112 (Minn.) The measure of damages for injury to and destruction of standing forest

trees by fire is the diminution in the value of the land.—*Reynolds v. Great Northern Ry. Co.*, 138 N. W. 30.

(C) Breach of Contract.

§ 118 (Iowa) Where a contract between a lecturer and a lyceum bureau provided that, where loss was sustained, the lecturer should receive no salary, he met the full requirements of the contract by claiming no salary for an engagement which he failed to fill, and the bureau was not entitled to recover damages sustained by it from such failure.—*Boyl v. Midland Lyceum Bureau*, 138 N. W. 384.

§ 120 (Iowa) A jobber on breach of a manufacturer's contract to furnish and deliver machinery sold by the jobber within a year held entitled to recover as damages the profits which he would have obtained by filling such orders.—*Portable Elevator Mfg. Co. v. Bradley, Merriam & Smith*, 138 N. W. 915.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

§ 130 (Minn.) An award of \$7,500 damages for injuries to plaintiff, who was earning \$35 a month, where the evidence shows the likelihood of her complete recovery, should be reduced to \$5,500.—*Weiss v. Great Northern Ry. Co.*, 138 N. W. 423.

§ 130 (Minn.) In an action for injuries to plaintiff by being thrown from an engine by defendant's low telephone wires across a highway, a verdict allowing plaintiff \$2,450 held not so excessive as to justify reversal on appeal.—*Stuhr v. Wright County Telephone Co.*, 138 N. W. 693.

§ 130 (Wis.) A recovery of \$9,500 for personal injuries held to be at least double what it should be where plaintiff had no visible wounds, bruises, or injuries.—*Depow v. Chicago & N. W. Ry. Co.*, 138 N. W. 42.

§ 132 (Wis.) In an action for injuries, a verdict awarding plaintiff \$7,500, which the court reduced to \$6,000, held not so excessive as to justify reversal on appeal.—*Bertulis v. Illinois Steel Co.*, 138 N. W. 613.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(B) Evidence.

§ 173 (Mich.) In an action for injuries to an extra brakeman, evidence of a computation of the present worth of the amount plaintiff would earn during his expectancy based on his present earning capacity held admissible.—*Sonsmith v. Pere Marquette R. Co.*, 138 N. W. 347.

§ 174 (Iowa) In an action against a street railway company for injuries to plaintiff's crops due to the construction of an embankment, evidence of the value of the crops destroyed was admissible.—*Nelson v. Omaha & C. B. St. Ry. Co.*, 138 N. W. 831.

§ 174 (Minn.) In an action for the destruction of standing forest timber by fire, evidence of the value of the timber is admissible, not as defining the measure of damages, but as being proper to be considered by the jury.—*Reynolds v. Great Northern Ry. Co.*, 138 N. W. 30.

(C) Proceedings for Assessment.

§ 208 (Neb.) In an action for injuries to growing crops, the amount of damage is a question for the jury.—*Chalupa v. Tri-State Land Co.*, 138 N. W. 603.

§ 216 (Wis.) Evidence held not to show that plaintiff sustained any loss of sexual power from the injuries, so that it was error to submit that item of damage.—*Krawiecki v. Kieckhefer Box Co.*, 138 N. W. 710.

§ 217 (Minn.) Instructions in an action for the destruction of standing forest trees and fallen timber by fire held to give plaintiff the benefit

of his contention that he was entitled to recover for the destruction of the fallen timber, as well as for injury to standing trees.—*Reynolds v. Great Northern Ry. Co.*, 138 N. W. 30.

DAMS.

See Waters and Water Courses, §§ 104, 165, 171, 172, 176, 179.

DEAF PERSONS.

See Witnesses, § 43.

DEATH.

See Abatement and Revival; Appeal and Error, §§ 837, 1064; Divorce, § 247; Evidence, §§ 77, 127; Intoxicating Liquors, §§ 87, 309; Limitation of Actions, § 83; Partnership, § 203; Witnesses, § 269.

II. ACTIONS FOR CAUSING DEATH.

(D) Pleading and Evidence.

§ 58 (Minn.) The presumption that a person who was killed by a train while crossing a railroad track at a street intersection exercised due care is not conclusive, but may be overcome by direct evidence, or by facts and circumstances clearly showing a failure to exercise due care.—*Nelson v. Northern Pac. Ry. Co.*, 138 N. W. 419.

§ 68 (Iowa) Where there are no eyewitnesses, testimony as to personal habits of deceased may be shown on the question of care, but the testimony must relate to his general habits and not to particular instances.—*Scott v. O'Leary*, 138 N. W. 512.

§ 75 (Minn.) Effect will be given the evidence tending to overcome the presumption of due care on the part of one who was killed while crossing a railroad track, whether it appeared from the plaintiff's case in chief or from that offered by defendant.—*Nelson v. Northern Pac. Ry. Co.*, 138 N. W. 419.

(E) Damages, Forfeiture, or Fine.

§ 99 (Minn.) In an action for death of a young, unmarried man, who contributed about \$100 a year to the support of his parents, a verdict awarding \$3,250 was not excessive.—*Tegels v. Great Northern Ry. Co.*, 138 N. W. 945.

(F) Trial, Judgment, and Review.

§ 103 (Minn.) Where one is killed by the negligence of another, the question of his due care is always one of fact, unless the undisputed evidence so conclusively rebuts the presumption that fair-minded men could not reasonably draw different conclusions therefrom.—*Tegels v. Great Northern Ry. Co.*, 138 N. W. 945.

DEBTOR AND CREDITOR.

See Assignments for Benefit of Creditors; Attachment; Bankruptcy; Creditors' Suit; Execution, § 293; Fraudulent Conveyances; Garnishment; Partnership, § 176.

DECEDENTS.

See Descent and Distribution; Executors and Administrators.

DECEIT.

See Fraud.

DECLARATIONS.

See Criminal Law, §§ 412, 413; Evidence, § 271.

DEDICATION.

I. NATURE AND REQUISITES.

§ 44 (Wis.) Evidence held to show that a street on which plaintiff's lots abutted did not

extend to a hydraulic canal constructed entirely upon the land of the person from whom the plaintiff acquired title.—*Childs v. Dahlke*, 138 N. W. 277.

DEEDS.

See Account; Adverse Possession, § 45; Appeal and Error, § 1065; Boundaries; Cancellation of Instruments; Covenants, § 6; Ejectment, § 41; Estoppel, §§ 22, 35; Evidence, §§ 121, 184, 460; Execution, § 293; Fraudulent Conveyances; Liens, § 7; Mortgages; Specific Performance, § 43; Vendor and Purchaser, §§ 130, 215, 244; Witnesses, § 140.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances in General.

§ 17 (Mich.) A consideration of \$1 was inadequate as a consideration of a conveyance of mineral rights worth \$500.—*German Corporation of Negaunee v. Negaunee German Aid Society*, 138 N. W. 343.

(D) Delivery.

§ 56 (Mich.) Where a grantor, executing a deed, delivered it to the grantee, who immediately delivered it to a third person to deliver it to the grantee on the death of the grantor, there was a valid delivery sufficient to pass a present estate to the grantee.—*Luscombe v. Peterson*, 138 N. W. 1057.

(E) Validity.

§ 70 (Mich.) If the inadequacy of consideration for a deed is so great as to shock the conscience, it constitutes evidence of fraud.—*German Corporation of Negaunee v. Negaunee German Aid Society*, 138 N. W. 343.

III. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 105 (Neb.) A deed to a partnership in its firm name is not void, but vests an equitable interest in the firm for the benefit of the partnership business and creditors, and of the partners.—*Dineen v. Lanning*, 138 N. W. 759.

IV. PLEADING AND EVIDENCE.

§ 196 (Iowa) One suing to cancel a deed on the ground of the actual fraud of the grantee has the burden of proving the fraud.—*Curtis v. Armagast*, 138 N. W. 873.

A conveyance by a parent to a child of substantially all his estate without a consideration, and without any writing binding the child to support the parent for life, *held* presumptively fraudulent, so that the child, to uphold the deed, must rebut the presumption.—*Id.*

A deed by a mother to a son of substantially all her property without consideration and without a binding promise on the part of the son to support her *held* presumptively fraudulent.—*Id.*

In a suit to set aside a deed executed by a mother to a son, evidence *held* not to overcome the presumption that the conveyance was fraudulent arising from the confidential relations of the parties.—*Id.*

§ 196 (Minn.) In an action to set aside a deed, an instruction that there were no fiduciary relations between the grantor and grantee that would give rise to the presumption that undue influence had been used *held* proper.—*McEleney v. Donovan*, 138 N. W. 806.

The burden is on plaintiffs, seeking to set aside a deed, to prove the incompetency of the grantor and undue influence exercised upon him.—*Id.*

§ 203 (Iowa) The court, in a suit by an heir to set aside his ancestor's voluntary conveyance, may inquire into all the circumstances attending the transaction.—*Curtis v. Armagast*, 138 N. W. 873.

§ 203 (Minn.) In an action to set aside a deed, exclusion of question whether grantor gave any reasons for disinheriting all his children and giving all his property to one, and requiring witness to answer whether the grantor gave any reason why he made the deed, *held* not error.—*McEleney v. Donovan*, 138 N. W. 806.

§ 210 (Iowa) Evidence *held* to show that a deed executed by a mother to her son was not in payment of services rendered by the son and contributions made for her support.—*Curtis v. Armagast*, 138 N. W. 873.

§ 211 (Iowa) Evidence *held* insufficient to show that a deed from plaintiff to her son was procured through fraud and collusion practiced upon her by him and another son.—*Parmenter v. Parmenter*, 138 N. W. 438.

§ 211 (Mich.) In a suit to set aside a deed by a wife to her husband on the ground of undue influence and false representations, evidence *held* not to show undue influence and false representations, based on the husband procuring the conveyance on his promise to reconvey.—*Steketee v. Newkirk*, 138 N. W. 1034.

§ 211 (Minn.) In an action to set aside a deed to the daughter of grantor, evidence *held* to sustain a finding that the grantor was competent and that no undue influence was exerted upon him.—*McEleney v. Donovan*, 138 N. W. 806.

§ 211 (Neb.) In a suit to cancel a deed as procured by undue influence and promise of services never performed, decree for defendant *held* sustained by the evidence.—*Moore v. Britz*, 138 N. W. 562.

DE FACTO OFFICERS.

See Officers, § 77.

DEFAULT.

See Judgment, § 143.

DEFICIENCY.

See Exchange of Property.

DELAY.

See Carriers, § 228; Equity, § 72; Estoppel, § 116.

DELEGATION OF POWER.

See Municipal Corporations, § 591.

DELIVERY.

See Deeds, § 56.

DEMAND.

See Carriers, § 408; Contracts, § 277; Embezzlement, § 11.

DE MINIMIS NON CURAT LEX.

See Frauds, Statute of, § 44.

DEMONSTRATIVE EVIDENCE.

See Evidence, § 191.

DEMURRER.

See Pleading, § 204.

DE NOVO.

See Drains, § 36.

DEPOSITARIES.

See Appeal and Error, § 1062; Towns, § 33.

DEPOSITIONS.

See Continuance; New Trial, § 150; Witnesses.

§ 83 (N.D.) Where notice of the taking of a deposition on October 14th in Michigan was served in North Dakota, on October 10th, a motion to suppress on the ground that sufficient time was not afforded in which to appear and cross-examine the witness was properly overruled.—Robertson Lumber Co. v. Swenson, 138 N. W. 984.

DEPOSITS.

See Banks and Banking; Municipal Corporations, § 537.

DEPOSITS IN COURT.

See Certiorari; Insurance, § 784.

DESCENT AND DISTRIBUTION.

See Adoption; Easements, § 17; Executors and Administrators; Homestead, § 141; Insane Persons, § 52; Limitation of Actions, § 169; Wills.

II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.

(B) Surviving Husband or Wife.

§ 57 (Neb.) Under Comp. St. 1907, c. 23, § 1, where a person dies, leaving a wife and brothers and sisters surviving, but no children or issue of deceased child, his realty descends, subject to the rights of homestead, one-half to the wife and the residue to the same persons as provided for the descent of realty of decedents leaving no surviving spouse.—Whitford v. Kinzel, 138 N. W. 597.

DESCRIPTION.

See Boundaries; Frauds, Statute of, § 110; Taxation, § 686.

DETECTIVES.

See Contracts, § 129.

DEVISES.

See Wills.

DILIGENCE.

See New Trial, § 102.

DIRECTING VERDICT.

See Appeal and Error, § 997; Trial, § 141.

DIRECTORS.

See Corporations, § 320; Insurance, § 56.

DISCHARGE.

See Compromise and Settlement; Master and Servant, § 30; Principal and Surety, § 89.

DISCOVERY.

See Appeal and Error, § 961; Creditors' Suit, § 31.

II. UNDER STATUTORY PROVISIONS.

(A) Interrogatories and Examination of Parties and of Other Persons.

§ 32 (Wis.) A discovery before issue joined *held* warranted, where the matters sought were not obviously within the knowledge of the moving party.—American Food Products Co. v. American Milling Co., 138 N. W. 1123.

§ 33 (Wis.) The granting of a discovery under St. 1898, § 4096, is generally in the discre-

tion of the trial court.—American Food Products Co. v. American Milling Co., 138 N. W. 1123.

§ 54 (Wis.) A mere irregularity in the service of notice of an examination before issues joined, whereby a person intended to be served as president of a corporation was served as an individual, would not prejudice and should be disregarded.—American Food Products Co. v. American Milling Co., 138 N. W. 1123.

§ 55 (Wis.) Under St. 1898, § 4096, providing for the examination of an adverse party before issue joined, an affidavit showing a right of action on a contract of subscription to stock, and that documents relating to the contract were in the hands of the opposite party, *held* to justify an order for a discovery.—American Food Products Co. v. American Milling Co., 138 N. W. 1123.

An affidavit in support of a motion for a discovery *held* not bad as disclosing a lack of jurisdiction, where it stated two separate remedies without making an election, and the court would have had jurisdiction over one.—Id.

Under St. 1898, § 4096, giving a right to have a discovery before issue joined, the affidavit supporting the motion therefor need not disclose a cause of action nor that the respondent knows that a cause of action exists.—Id.

DISCRETION OF COURT.

See Appeal and Error, §§ 947-985; Courts; Creditors' Suit, § 31; Criminal Law, §§ 121, 678, 684, 690, 1150-1156; Discovery, § 33; Divorce, §§ 197, 223; Evidence, § 546; Injunction, § 135; Judgment, § 143; Mandamus, § 77; New Trial, §§ 108, 144; Pleading, §§ 236, 237; Records, § 9; Sales, § 358; Specific Performance, §§ 14, 130; Trial, §§ 18, 27, 28, 29, 351; Trusts, § 315.

DISCRIMINATION.

See Constitutional Law, § 241; Telegraphs and Telephones, § 84.

DISMISSAL AND NONSUIT.

See Appeal and Error, §§ 380, 634, 773, 781; Creditors' Suit, § 47; Divorce, § 270; Infants, § 115; Parties, § 75; Partnership, § 203; Trial, § 388; Venue.

II. INVOLUNTARY.

§ 54 (Iowa) Where plaintiff sued in equity and proved a cause of action at law, but failed to establish a right to equitable relief, it was the duty of the court to either grant plaintiff legal relief, or transfer the cause to the law calendar under Code, § 3492, and not to dismiss the suit.—Fisher v. Trumbauer & Smith, 138 N. W. 528.

DISQUALIFICATION.

See Judges, § 39; Jury, § 108.

DISSOLUTION.

See Corporations, § 609.

DISTRIBUTION.

See Descent and Distribution.

DISTRICT AND PROSECUTING ATTORNEYS.

See Counties; Criminal Law, §§ 699-730.

§ 7 (Mich.) Circumstances *held* to show no implied obligation by a county to pay for the services of an attorney in assisting the prosecuting attorney in a proceeding to which the board of supervisors was a party.—Powers v. Calhoun County, 138 N. W. 266.

DISTRICTS.

See Schools and School Districts.

DITCHES.

See Drains.

DIVISION.

See Municipal Corporations, §§ 40, 63.

DIVORCE.

See Parent and Child; Vendor and Purchaser, § 223.

II. GROUNDS.

§ 31 (Mich.) A husband unable to support his family, who, after an absence of five years, during which he contributed practically nothing to their support, was earning a salary and hoping to have his wife and child with him, was not guilty of "wantonly and cruelly" neglecting to support his family.—*Carson v. Carson*, 138 N. W. 1076.

III. DEFENSES.

§ 49 (Mich.) Where a strong case of cruelty on the part of a husband is made out, a divorce will not be denied on the ground of condonation merely because the wife has made several efforts to get along with the husband.—*Austin v. Austin*, 138 N. W. 215.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(D) Evidence.

§ 130 (Iowa) Evidence held to sustain a divorce decree on the ground of cruel and inhuman treatment.—*Barr v. Barr*, 138 N. W. 379.

§ 130 (Neb.) A decree granting a husband a divorce on the ground of extreme cruelty held sustained by the evidence.—*Cronk v. Cronk*, 138 N. W. 731.

(F) Judgment or Decree.

§ 162 (Mich.) Under Comp. Laws, § 557, authorizing the court to order the recording and enrolling of decrees nunc pro tunc, the court has authority to order the recording and enrolling nunc pro tunc of a decree of divorce.—*Austin v. Austin*, 138 N. W. 237.

§ 168 (Mich.) Failure to file an affidavit of regularity and to enter a formal order pro confesso does not go to the jurisdiction of the court, and cannot be raised collaterally.—*Austin v. Austin*, 138 N. W. 237.

(G) Appeal.

§ 182 (Iowa) Suit money on an appeal to the Supreme Court in a divorce action can be allowed only by the Supreme Court and not by the district court.—*Mengel v. Mengel*, 138 N. W. 495.

(H) Fees and Costs.

§ 197 (Wis.) Under the circumstances, held an abuse of discretion to continue a divorce suit, at the request of the wife's attorney, after reconciliation between the parties, merely for the purpose of compelling payment of an unreasonable attorney's fee.—*Szymanski v. Szymanski*, 138 N. W. 53.

The law favors the reconciliation of marital contentions and the resumption of the marital relation; and counsel in divorce actions should promote reconciliation between the parties when possible, even at the sacrifice of his fees.—*Id.*

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

§ 200 (Iowa) Under Code, § 3177, temporary alimony can be allowed only by the court and not by a judge thereof as such.—*Mengel v. Mengel*, 138 N. W. 495.

§ 200 (Mich.) The jurisdiction of the circuit court in chancery in divorce proceedings is wholly statutory; and the court has no inherent power to decree permanent alimony.—*Austin v. Austin*, 138 N. W. 237.

§ 202 (Mich.) Where defendant, in a suit for divorce, appeared by his solicitor, the court had jurisdiction to award alimony or allowance.—*Austin v. Austin*, 138 N. W. 237.

§ 217 (Iowa) The court has power in an action for divorce to make subsequent changes in orders for temporary alimony.—*Mengel v. Mengel*, 138 N. W. 495.

§ 223 (Iowa) An order in a divorce action allowing suit money will be reversed only where the court was without jurisdiction to make it or abused its discretion with reference to the amount of the allowance.—*Mengel v. Mengel*, 138 N. W. 495.

§ 226 (Iowa) Application for suit money, together with the affidavits attached, held to sufficiently show that it was made by reason of a change of situation, since a previous order granting temporary alimony was made to give the court jurisdiction.—*Mengel v. Mengel*, 138 N. W. 495.

An application for suit money in a divorce action should be treated as a motion within Code, § 3833, authorizing motions to be supported by affidavit, which may be considered as testimony on the hearing.—*Id.*

§ 227 (Iowa) A wife suing for divorce may be allowed suit money with which to resist an appeal taken by the husband from an order allowing temporary alimony.—*Mengel v. Mengel*, 138 N. W. 495.

Allowance to wife for past services of attorney will not be denied where they were necessarily rendered and not paid for in reliance on the husband's liability.—*Id.*

Affidavits presented on an application for suit money, where there had been a number of collateral cases for the enforcement and to defeat the collection of allowances previously made, held to justify an allowance of \$800.—*Id.*

§ 227 (Wis.) An attorney's fee of \$150 for instituting a divorce action, which was compromised by the parties, would be excessive, when claimed by a young attorney, who had only practiced three years; \$75 being ample.—*Szymanski v. Szymanski*, 138 N. W. 53.

The suit money provided in St. 1898, § 2361, providing for orders during the pendency of a divorce action for suit money to enable the wife "to carry on the action," might include reimbursement to the wife of moneys theretofore paid by her for that purpose, or to discharge liabilities incurred by her therefor, if just and equitable.—*Id.*

§ 231 (Mich.) "Permanent alimony" defined.—*Kiplinger v. Kiplinger*, 138 N. W. 230.

§ 231 (Minn.) Alimony in general is awarded as a substitute for marital support; it being wholly statutory and subject to revision under Rev. Laws 1905, §§ 3590, 3592.—*Haskell v. Haskell*, 138 N. W. 787.

§ 231 (Wis.) Payments for support of a wife, whether in a gross sum or at stated intervals, must be regarded as alimony, and not as a final division of the husband's property.—*Lally v. Lally*, 138 N. W. 651.

§ 238 (Minn.) Alimony may be awarded to a wife, though the husband has no present property or income out of which to pay the same.—*Haskell v. Haskell*, 138 N. W. 787.

§ 240 (Iowa) In an action by a wife for divorce, an award of \$5,000 permanent alimony to her held not excessive.—*Barr v. Barr*, 138 N. W. 379.

§ 240 (Mich.) Complainant in a suit for divorce held entitled to an award of permanent alimony of \$3,500.—*Kiplinger v. Kiplinger*, 138 N. W. 230.

§ 243 (Wis.) Judgment in divorce held one for alimony, and not one finally dividing hus-

band's property, within St. 1898, § 2364, authorizing both judgments, and section 2369, authorizing modification of judgments for alimony.—*Lally v. Lally*, 138 N. W. 651.

§ 245 (Minn.) Where a change of financial condition of an applicant for reduction of alimony was not willfully brought about, the application should be determined on the rules originally applicable to the award in the first instance.—*Haskell v. Haskell*, 138 N. W. 787.

Where, in divorce proceedings, defendant had been ordered to pay plaintiff \$5,000 per annum alimony, and, having lost his employment, applied for a change in the decree, and it appeared that one of the children had become self-supporting, it was error not to reduce the amount to \$3,000.—*Id.*

§ 245 (Wis.) A judgment for alimony cannot be changed into one for final division of the husband's estate, or a modification thereof prevented, by a stipulation of the parties that such alimony will be accepted as a final division of the husband's estate.—*Lally v. Lally*, 138 N. W. 651.

§ 247 (Wis.) A judgment for alimony is not a charge on the husband's general estate, and ceases upon his death.—*Lally v. Lally*, 138 N. W. 651.

§ 254 (Wis.) A judgment of final division in a divorce action must fix the number of payments, their time of commencement and termination, and not make them depend upon any contingency, or be defeasible by remarriage.—*Lally v. Lally*, 138 N. W. 651.

§ 269 (Mich.) A defendant who on order to show cause why he should not be adjudged guilty of contempt does not question the form of the order of alimony, the form of the demand made on him, or the validity of any of the items for payment of which the demand was made, waives such objections.—*Lake v. Houghton Circuit Judge*, 138 N. W. 249.

An order for the payment by the husband of necessary court expenses and witnesses' fees as they shall accrue is sufficiently definite to sustain an order for contempt for failure to make such payments.—*Id.*

Under Comp. Laws, §§ 312, 10,891, 10,893, 10,894, the court held authorized to adjudge the husband guilty of contempt for nonpayment of alimony as ordered.—*Id.*

§ 270 (Mich.) Plaintiff being entitled to permanent alimony dismissal of an injunction restraining defendant's withdrawal of funds in a bank intended to secure payment of a decree for alimony held erroneous.—*Kiplinger v. Kiplinger*, 138 N. W. 230.

§ 280 (Minn.) An order denying an application for reduction of alimony on the ground of changed financial condition is appealable.—*Haskell v. Haskell*, 138 N. W. 787.

VI. CUSTODY AND SUPPORT OF CHILDREN.

§ 289 (Mich.) Comp. Laws, § 8631, authorizes the court, granting a decree of divorce, to make a proper order for the custody and maintenance of the minor children of the parties.—*Austin v. Austin*, 138 N. W. 237.

§ 308 (Mich.) Allowance of \$20 a month to the wife for the support of a child four years old was not excessive.—*Austin v. Austin*, 138 N. W. 215.

DOCTORS.

See Physicians and Surgeons.

DOCUMENTS.

See Evidence, § 359.

DONATIONS.

See Gifts.

DORMANT JUDGMENTS.

See Judgment, § 872.

DOWER.

See Account; Liens, § 7.

DRAINS.

See Highways, § 192; Mandamus, § 95; Municipal Corporations, §§ 232, 350, 351, 537, 846, 1010; Names; Waters and Water Courses, §§ 158, 158½, 171, 172.

I. ESTABLISHMENT AND MAINTENANCE.

§ 14 (Iowa) A petition for the establishment of a drainage district, which merely referred to and adopted descriptions in the petition for the establishment of another district covering exactly the same territory was not so defective as to render all subsequent proceedings void under Code Supp. 1907, § 1989a2.—*Kelley v. Drainage Dist. No. 60 in Greene County*, 138 N. W. 841; *Herron v. Same*, *Id.* 846.

That the report of an engineer for the establishment of a drainage district omitted the description of each tract and names of the owners as exacted by Code Supp. 1907, § 1989a2, was not a jurisdictional defect, as to one who appeared and resisted both the establishment of the district and the assessments.—*Id.*

In a proceeding to establish a drainage district, the service of notice of the hearing of the petition and claims for damages prior to the adoption of the plan recommended was not fatal, where the board did in fact approve the plan.—*Id.*

The failure of an owner of lands made a party to the hearing on petition for the establishment of a drainage district to appeal to the district court is waiver of all other remedies under Code Supp. 1907, § 1989a46.—*Id.*

§ 15 (Iowa) A drainage district may be established covering precisely the same territory as one previously organized for the purpose of enlarging the outlet under Code Supp. 1907, § 1989a25.—*Kelley v. Drainage Dist. No. 60 in Greene County*, 138 N. W. 841; *Herron v. Same*, *Id.* 846.

§ 32 (Iowa) A report of an engineer as to the description of drains, elevations, etc., held informal, but sufficient.—*Kelley v. Drainage Dist. No. 60 in Greene County*, 138 N. W. 841; *Herron v. Same*, *Id.* 846.

The board of supervisors in establishing drains is limited to plans recommended by an engineer as practicable, desirable, and likely to be efficient, and, before ordering an improvement, it must conform substantially with the plan recommended by an expert.—*Id.*

§ 36 (Minn.) On appeal from the report of viewers in drainage proceedings, instructions defining the duty of viewers held prejudicial to the landowners, as submitting to the jury the determination of the viewers in the matter of the assessment.—*In re Judicial Ditch No. 14 of Martin County*, 138 N. W. 675.

Appeals from the report of viewers in drainage proceedings bring the matter of damages and benefits before the court for trial de novo, and the amount awarded by the viewers is not proper for consideration by the jury.—*Id.*

§ 49 (S.D.) Under Code Civ. Proc. §§ 713-721, Drainage Act, §§ 713, 721, a materialman who furnished materials to a contractor for a drainage ditch constructed under Laws 1907, c. 134, as amended by Laws 1909, c. 102, held to have no lien against the county.—*John W. Tuthill Lumber Co. v. McMackin*, 138 N. W. 959.

§ 52 (Iowa) Under Code Supp. 1907, § 1989a21, relating to repair of drains, the outlet may be enlarged by widening and deepening.

ing the existing ditch, or excavating another parallel with it.—*Kelley v. Drainage Dist. No. 60 in Greene County, 138 N. W. 841; Herron v. Same, Id. 846.*

§ 57 (Iowa) Where plaintiff had sufficient notice of the establishment of a drainage district and did not claim damages within the time fixed by Code Supp. § 989-a4, as amended by Acts 34th Gen. Assem. c. 88, denial of damages was justified; the statute plainly providing the penalty for such failure, and not permitting equitable excuses.—*Collins v. Board of Sup'rs of Pottawattamie County, 138 N. W. 1095.*

Where a landowner fails to file his claim for damages arising from the construction of a drain, with the board of supervisors as required by statute, such owner cannot maintain a suit in equity to determine the amount of his damages.—*Id.*

II. ASSESSMENTS AND SPECIAL TAXES.

§ 67 (Iowa) The purpose of the law authorizing assessments for drainage improvements is the equitable apportionment of the cost by a personal inspection and consideration of existing conditions.—*White v. Board of Sup'rs of Story County, 138 N. W. 447.*

§ 71 (Iowa) New drains which relieved the main drain in a system by furnishing an additional outlet were of some benefit to all the lands tributary thereto, no matter if it did not touch such lands.—*Kelley v. Drainage Dist. No. 60 in Greene County, 138 N. W. 841; Herron v. Same, Id. 846.*

Even though assessments exceeding benefits might be authorized by the Legislature, such was not its intention in enacting the drainage laws of this state.—*Id.*

§ 72 (Iowa) Slight variances from the method prescribed for the classification and assessment of lands for drainage purposes, unless prejudice result, are immaterial.—*Kelley v. Drainage Dist. No. 60 in Greene County, 138 N. W. 841; Herron v. Same, Id. 846.*

§ 73 (Iowa) Slight changes in construction from the original plan of a drainage improvement, the additional expense being paid by those for whose benefit they were made, gives another owner no ground for complaint.—*Fardal Drainage Dist. No. 72 in Hamilton County v. Board of Sup'rs of Hamilton County, 138 N. W. 443, 444.*

§ 74 (Minn.) A person who, with knowledge of proceedings to establish a public drain benefiting his lands, stands by, knowing that the expense must be assessed against the lands, cannot after three years sue to remove the cloud of the assessment in the proceedings, on the ground that they were without jurisdiction.—*Gieb v. Morrison County, 138 N. W. 24.*

§ 79 (Iowa) Drainage Law, § 12, requires equality in assessments, and that lands receiving the most benefit shall bear the greater burden, but leaves the determination of what is an equitable apportionment of the costs, expenses, and damages, to the commissioners, so that they may charge to certain lands a certain part of the costs of the improvement, in addition to a just proportion of the general costs.—*Fardal Drainage Dist. No. 72 in Hamilton County v. Board of Sup'rs of Hamilton County, 138 N. W. 443, 444.*

§ 82 (Iowa) While the Supreme Court, in reviewing a drainage district assessment, will not lightly interfere with the finding, the district court on appeal and the Supreme Court on further appeal must review the propriety of the particular assessment.—*Pollock v. Board of Sup'rs of Story County, 138 N. W. 415.*

Evidence held to sustain a finding that a drainage district assessment was properly reduced in order to be equitable.—*Id.*

§ 82 (Iowa) Where no appeal is taken from the findings of the board of supervisors over-

ruling objections to the establishment of a drainage district, only those questions which affect the authority of the board to act and those bearing on the assessments are raised by appeal from an order confirming the assessments.—*Kelley v. Drainage Dist. No. 60 in Greene County, 138 N. W. 841; Herron v. Same, Id. 846.*

§ 82 (Iowa) Where a landowner, after appealing from an assessment for benefits from a drain, voluntarily pays his assessment, his protest upon payment did not relieve him from the consequences of payment.—*Collins v. Board of Sup'rs of Pottawattamie County, 138 N. W. 1095.*

The burden is on the party appealing from a drainage assessment to show that it is incorrect or inequitable; and it is not enough to show that it was in excess of benefits, but other assessments on land of like character must be shown.—*Id.*

§ 82 (Minn.) A finding that proceedings to establish a drain, under Laws 1905, c. 230 (Rev. Laws Supp. 1909, §§ 2651-44 to 2651-100), were regular, is not impugned by a finding that proof of publishing or posting required notice is insufficient; the statute not requiring proof thereof to be preserved in the records.—*Gieb v. Morrison County, 138 N. W. 24.*

§ 86 (Iowa) Under Code Supp. 1907, § 1989a-26, property owners who waive in writing all objections to an assessment for a drainage improvement are not liable for the penalty of 1 per cent. on default of payment provided in the latter part of the section.—*Fitchpatrick v. Fowler, 138 N. W. 392.*

DRAMSHOPS.

See Intoxicating Liquors.

DRUNKARDS.

See Jury, § 19; Witnesses, § 211.

§ 3 (Iowa) On an application for the appointment of a permanent guardian for an habitual drunkard under Code, § 3219, the judge of the court may appoint a temporary guardian.—*Holly v. Holly, 138 N. W. 445.*

A judge having appointed a temporary guardian for a person alleged to be an habitual drunkard was authorized to treat an application to vacate such appointment, though addressed to the court, as an application to him for an order authorized by Code, §§ 3531, 3846, to be determined in vacation.—*Id.*

A judge, having appointed a temporary guardian for an alleged habitual drunkard, has authority to vacate such appointment on a preliminary ex parte showing in vacation.—*Id.*

Code, § 3222, held not to apply to the appointment of a temporary guardian for an habitual drunkard.—*Id.*

An alleged habitual drunkard for whom a guardian was sought held a resident of D. county, where he was an inmate of a home for the aged.—*Id.*

The district court of a county in which an alleged habitual drunkard did not reside held without jurisdiction to appoint a guardian of his property.—*Id.*

§ 10 (Neb.) The mere fact that the effect resulting from the use of intoxicating liquor is visible is not sufficient to show that the person is drunk.—*Freeburg v. State, 138 N. W. 143.*

Though one may be under the influence of liquor, he is not necessarily intoxicated, which means loss of normal control of one's bodily and mental faculties.—*Id.*

DUE PROCESS OF LAW.

See Constitutional Law, §§ 272-309.

DURESS.

See Fraud.

EASEMENTS.

See Dedication; Eminent Domain, § 321; Easement, § 88; Highways; Judgment, § 590; Railroads, § 64; Specific Performance, § 29.

I. CREATION, EXISTENCE, AND TERMINATION.

§ 15 (Iowa) Easements by implication are such as must be presumed to have been in the minds of the parties concerned, and the necessity of the use is a material consideration in determining whether an easement is implied.—Kane v. Templin, 138 N. W. 901.

§ 16 (Iowa) Where the owner of two adjoining lots constructed buildings thereon, and arranged them so that a stairway in the building on one of the lots afforded access to the second story of both lots, on a severance of the ownership, the lot having the stairway was burdened with an easement for the use thereof in favor of the owner of the other lot.—Stephens v. Boyd, 138 N. W. 389.

Where the owner of adjoining lots erected buildings thereon, the second stories of which were reached by a common stairway in one of the buildings, the owner of the other, to sustain his right to an easement, need not show that the stairway was a way of necessity.—Id.

§ 17 (Iowa) Where, at the time of a devise of the halves of a building to different devisees, there existed in one of the halves adjoining the dividing wall stairways and a hallway used for the convenience of the occupants of the entire building, the devisee of the other half acquired by implication an easement in the use thereof.—Kane v. Templin, 138 N. W. 901.

§ 17 (Iowa) A tenant of a storeroom on the first floor of a hotel building held not to acquire by implication an easement of right of access to and from the lobby of the hotel.—Julius A. Bauer & Co. v. Chamberlain, 138 N. W. 903.

§ 24 (Iowa) Easements appurtenant pass with the description of the property to which they are appurtenant without specific designation.—Kane v. Templin, 138 N. W. 901.

§ 30 (Iowa) Mere nonuser of an easement of the right to use stairways and a hallway located in a half of a building by the occupants of the other half, while there is no occasion to use it, does not show a permanent abandonment.—Kane v. Templin, 138 N. W. 901.

§ 36 (Iowa) Evidence held not to justify a finding of an abandonment of an easement.—Kane v. Templin, 138 N. W. 901.

EJECTION.

See Railroads, §§ 277, 282.

EJECTMENT.

See Adverse Possession, §§ 48, 45; Eminent Domain, § 268; Judgment, § 684; Trial, § 141.

II. JURISDICTION, PARTIES, PROCESS, AND INCIDENTAL PROCEEDINGS.

§ 41 (Neb.) Where parties entitled to the possession of land execute to their attorneys a quitclaim deed to an undivided half as security for the services to be rendered by the attorneys, such deed does not render it necessary to join the grantees as plaintiffs in an action to recover possession.—Helming v. Forrester, 138 N. W. 190.

§ 46 (Wis.) Under St. 1898, §§ 3073, 3075, providing that in ejectment persons in actual occupancy shall be made defendants, tenants in actual possession at the commencement of an action are necessary parties.—Illinois Steel Co. v. Treu, 138 N. W. 995.

§ 47 (Wis.) Under St. 1898, §§ 3073, 3076, 3079, 3084, 3086, authorizing joinder, with persons in possession, other persons claiming title. Ejectment lies for the recovery of possession only; and in such a case plaintiff may join as defendants with the occupants those claiming title, but need not do so.—Illinois Steel Co. v. Treu, 138 N. W. 995.

§ 49 (Wis.) A tenant made a defendant in ejectment must, under St. 1898, § 2197, notify the landlord thereof.—Illinois Steel Co. v. Treu, 138 N. W. 995.

III. PLEADING AND EVIDENCE.

§ 95 (Minn.) In an action to recover land over which a public highway originally ran, which had been vacated, evidence held to sustain a finding that plaintiff had not proven her allegations as to ownership.—Pratt v. Quirk, 138 N. W. 88.

§ 95 (Minn.) In ejectment, where plaintiff alleged that his intestate died seised of the land, and the defense was adverse possession, a finding that the intestate died so seised held not sustained by the evidence.—Gaston v. May, 138 N. W. 1025.

ELECTION.

See Criminal Law, § 678; Interest, § 22; Pleading, § 369; Wills, § 802.

ELECTION OF REMEDIES.

§ 7 (Minn.) An attempted rescission of a contract for the exchange of automobiles is not a bar to an action for damages for fraud.—Jones v. Magoon, 138 N. W. 686.

ELECTIONS.

See Appeal and Error, § 725; Intoxicating Liquors, § 34; Judges, § 3; Libel and Slander, §§ 10, 48, 50½; United States.

I. RIGHT OF SUFFRAGE AND REGULATION THEREOF IN GENERAL.

§ 10 (Neb.) Statutes as to the exercise of the elective franchise and the nomination of candidates, either at primaries or by conventions or committees, should be construed in the light of Const. art. 1, § 22, guaranteeing free elections.—Morrissey v. Wait, 138 N. W. 186.

VI. NOMINATIONS AND PRIMARY ELECTIONS.

§ 120 (Neb.) Laws 1907, c. 52, §§ 39, 40, providing for the nomination of candidates by a convention or committee, apply to nominations by new parties for general elections, as well as to nominations by old parties, to be filled at special elections, and for offices excepted from the provisions of the act.—Morrissey v. Wait, 138 N. W. 186.

The phrase "certificate of nomination for a new party," as used in Laws 1907, c. 52, § 40, providing for the filing of "certificate of nomination for a new party," construed to mean the necessary certificate when nominated by convention, and not by direct primary.—Id.

§ 121 (Neb.) Under Laws 1907, c. 52, § 45, it is not essential that the 500 electors who must be present at a mass state convention to form a new party shall be the identical 500 electors who must sign an agreement to form such new party and support its nominees at the next election.—Morrissey v. Wait, 138 N. W. 186.

§ 125 (Neb.) Where a new party is formed after the time for holding primary elections, nominations for candidates may be made by mass convention, under Laws 1907, c. 52, § 45, and certificates of nomination may be filed at the time specified in section 40.—Morrissey v. Wait, 138 N. W. 186.

§ 126 (Mich.) Under Primary Election Law, § 41, one enrolled as a member of the Republican party may not be selected as a candidate of the National Progressive party, and votes cast for him may not be counted.—Cook v. Board of Election Com'rs of Cheboygan County, 138 N. W. 1.

§ 126 (Neb.) Comp. St. 1911, c. 26, recognizes the existence of political parties and delegates to the members of each the right to vote at primaries and general elections for candidates of their own party, nominated without interference of members of any other party.—State v. Wait, 138 N. W. 159.

§ 126 (Neb.) The Legislature in providing for the "close primary" has adopted the policy of allowing each political party to select its own candidates.—State v. Wells, 138 N. W. 165.

Any one who has the statutory qualifications to fill an office may be a candidate for election; and if he affiliates with a political party he may become its candidate, or he may become a candidate independently of all parties.—Id.

Under the primary law no political party can be compelled to present as its candidate at a general election one who does not affiliate with the party so presenting him.—Id.

§ 131 (Neb.) The preferential vote of a party at a primary election for a party candidate for President, while morally binding on the delegates to the national convention, has no relation to candidates nominated for presidential electors.—State v. Wait, 138 N. W. 159.

The national convention of a political party, or its national central committee, is the supreme governing body as to national affairs, and has authority to decide which of rival conventions or committees in the state is the regular authorized convention or committee of the party.—Id.

§ 139 (Neb.) Where a new party is formed after the time for holding primary elections, nominations for candidates may be made by mass convention, under Laws 1907, c. 52, § 45.—Morrissey v. Wait, 138 N. W. 186.

§ 147 (Neb.) If a political party at its primary makes no nomination for an office, a vacancy has occurred, within Cobbe's Ann. St. 1911, § 5888, and the proper party committee may fill the vacancy.—State v. Wells, 138 N. W. 165.

VII. BALLOTS.

§ 180 (Neb.) By Comp. St. 1911, c. 26, §§ 125r, 140, every voter has the right, by a single cross, or by one manipulation of the lever of a voting machine, to vote a straight ticket for his party; and the governing body or committee of the party may appeal to the court to enforce the right.—State v. Wait, 138 N. W. 159.

ELECTRICITY.

See Eminent Domain, § 35; Municipal Corporations, § 733.

§ 16 (Neb.) Where the manager of an electric light company is informed that an uninsulated guide wire, strung on poles, close to a telephone distributing pole, has become charged with a heavy current of electricity, a delay of over 36 hours in remedying the defect may constitute gross negligence.—Wilkins v. Water & Light Co. of Nebraska City, 138 N. W. 754.

§ 16 (Wis.) An electric light company held bound to anticipate injury from its wires strung less than two feet above a lumber pile and to use due care to prevent injury to children and others who might be there.—Meyer v. Menominee & Marinette Light & Traction Co., 138 N. W. 1008.

§ 19 (Neb.) Whether an employé of a telephone company is negligent in ascending a telephone pole in proximity to an uninsulated wire of defendant electric light company is a question for the jury, where reasonable minds may dif-

fer as to such act.—Wilkins v. Water & Light Co. of Nebraska City, 138 N. W. 754.

§ 19 (Wis.) Evidence held to warrant a finding that an electric light company knew or should have known that children were likely to be on a lumber pile and be injured by contact with its wires.—Meyer v. Menominee & Marinette Light & Traction Co., 138 N. W. 1008.

In an action against an electric light company whose wires were strung less than two feet above a lumber pile on which children were accustomed to play, evidence held to warrant the jury in finding defendant negligent.—Id.

EMANCIPATION.

See Parent and Child.

EMBEZZLEMENT.

See Criminal Law, § 824.

§ 11 (S.D.) In a trial of a farm manager for embezzling hogs of his employer, the state was not required to prove any demand made upon the defendant for the property.—State v. Millard, 138 N. W. 366.

§ 35 (S.D.) Where an information charging embezzlement described the property as "55 head of red Duroc Jersey hogs," and the witnesses spoke of them as "Duroc Jersey" and as "red hogs," there was no substantial variance, though the prosecuting witness admitted that the hogs were not pure bred Duroc Jersey.—State v. Millard, 138 N. W. 366.

§ 38 (S.D.) Evidence was admissible to show the total number of hogs on the premises where its purpose was to lay the foundation for proof of the number embezzled.—State v. Millard, 138 N. W. 366.

§ 44 (S.D.) Evidence in an embezzlement case held to sustain a finding that defendant was more than 18 years of age.—State v. Millard, 138 N. W. 366.

Evidence in a trial for embezzling hogs held to sustain a conviction.—Id.

§ 48 (S.D.) Where, in a prosecution for embezzling hogs, the court informed the jury that the value of the hogs was material only in fixing the degree of the offense, the submission of the question of value could not have led the jury to believe the action a civil one.—State v. Millard, 138 N. W. 366.

EMINENT DOMAIN.

See Contracts, § 129; Statutes, § 46.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 10 (Mich.) The right of a street railway company to condemn land for its use is conferred by Public Acts 1905, No. 133, conferring on street railways the right of eminent domain.—Detroit United Ry. v. Barnes Paper Co., 138 N. W. 211.

§ 35 (Neb.) The use of water power to generate electricity to supply a city and its inhabitants is a public use, and the ad quod damnum act (Gen. St. 1873, c. 44; Comp. St. 1911, c. 57) should be construed to apply.—Lucas v. Ashland Light, Mill & Power Co., 138 N. W. 761.

§ 67 (Neb.) Whether an undertaking should be regarded as of public utility is largely within the legislative discretion, and, unless it is clearly private, the court will not interfere with its discretion.—Lucas v. Ashland Light, Mill & Power Co., 138 N. W. 761.

II. COMPENSATION.

(B) Taking or Injuring Property as Ground for Compensation.

§ 102 (Iowa) In condemnation proceedings, it is proper to consider the effect which the use of the land taken may have upon the entire

tract.—*Lewis v. Omaha & C. B. S. Ry. Co.*, 138 N. W. 1092.

§ 112 (Iowa) A corporation organized as a "suburban railway company" to operate within and between certain cities and points, with an express reservation of a right to use any power, *held* not precluded from using steam power, so that the possibility of such use was a proper element of damages in condemning a right of way through farm lands.—*Lewis v. Omaha & C. B. S. Ry. Co.*, 138 N. W. 1092.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 243 (Mich.) A decision that a street railway has no authority, under Public Acts 1905, No. 101, to condemn land for an overhead embankment crossing streets and highways is not res adjudicata in a subsequent proceeding by the company to condemn the same land for the same purpose, as authorized by Public Acts 1905, No. 133.—*Detroit United Ry. v. Barnes* Paper Co., 138 N. W. 211.

IV. REMEDIES OF OWNERS OF PROPERTY.

§ 268 (Neb.) If, after the purchase of land near a projected line of street railway and boulevard, the location of the improvement is changed and a part of the purchaser's land taken, and he acquiesces in the appropriation, he cannot regain possession in ejectment, but may recover the value of the land taken.—*Ensign v. Citizens' Interurban Ry. Co.*, 138 N. W. 718.

§ 271 (Neb.) In an action by the owners of riparian lands to enjoin the use of a water power and remove the dam, the court should, if an injunction is refused, allow plaintiff such damages as they are entitled to.—*Lucas v. Ashland Light, Mill & Power Co.*, 138 N. W. 761.

§ 276 (Neb.) Owners of riparian lands injured by flowage, and not included in the original ad quod damnum proceeding, may proceed under section 14 of the ad quod damnum act (Gen. St. 1873, c. 44; Comp. St. 1911, c. 57), but, after the dam has been built and the mill in operation for many years, they cannot abate the dam, or restrain its use till their damages are adjusted.—*Lucas v. Ashland Light, Mill & Power Co.*, 138 N. W. 761.

§ 302 (Neb.) In an action by the owners of riparian land, those whose lands were not included in the ad quod damnum proceeding should be allowed such damages as are caused by the dam, and those whose lands were included should be allowed such damages as were caused above the damage allowed in the original proceeding.—*Lucas v. Ashland Light, Mill & Power Co.*, 138 N. W. 761.

V. TITLE OR RIGHTS ACQUIRED.

§ 318 (Iowa) A notice to the sheriff to call a jury in condemnation proceedings, which stated that the right of way was desired for a "suburban and interurban" line, did not prevent the operation of steam propelled cars or trains upon the right of way without a new condemnation.—*Lewis v. Omaha & C. B. S. Ry. Co.*, 138 N. W. 1092.

§ 321 (Iowa) Where a corporation organized under Code, § 1607, with authority to operate a railway, acquires a right of way by eminent domain under Code, § 1995, such right of way is perpetual while used for railroad purposes.—*Lewis v. Omaha & C. B. S. Ry. Co.*, 138 N. W. 1092.

§ 323 (Neb.) When the right of flowage of private lands has been acquired under the ad quod damnum act for a public purpose, if the use is changed to an entirely different and private purpose, it will amount to an abandonment, but a change to another public use will

not.—*Lucas v. Ashland Light, Mill & Power Co.*, 138 N. W. 761.

EMPLOYÉS.

See Master and Servant.

ENTRY.

See Public Lands, § 139.

ENTRY, WRIT OF.

See Ejectment.

EQUITY.

See Account; Appeal and Error, § 1009; Cancellation of Instruments; Corporations, § 609; Costs, § 13; Courts, § 183; Covenants, § 127; Creditors' Suit; Dismissal and Nonsuit; Drains, § 57; Estoppel, §§ 53-116; Fraudulent Conveyances; Injunction; Interpleader; Judgment, § 777; Liens, § 7; Limitation of Actions, § 102; Mechanics' Liens, § 245; Mortgages, §§ 491, 497, 561; Municipal Corporations, §§ 350, 846; Partition; Partnership, § 176; Quieting Title; Railroads, § 64; Reformation of Instruments; Specific Performance; Steam, § 5; Trial, §§ 3, 11; Trusts.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

§ 39 (Iowa) Equity, having obtained jurisdiction, will award complete relief, though in doing so it is necessary to pass on matters ordinarily cognizable at law.—*Fisher v. Trumbauer & Smith*, 138 N. W. 528.

(B) Remedy at Law and Multiplicity of Suits.

§ 46 (Mich.) Where offset of costs in two actions and payment of the balance was asked, and an offset could not be had, decree for payment of the costs due complainant denied, because such decree would afford no more adequate remedy for their collection than was afforded by the judgment at law therefor.—*Carpenter v. Hood*, 138 N. W. 241.

§ 50 (Mich.) If attorneys, under an agreement with client, became liable for costs accruing to an adverse party, such party had a clear, adequate, legal remedy for their collection under Comp. Laws, § 11,281, and hence equity had no jurisdiction of a suit to offset them against other costs accruing in favor of such client or her attorneys.—*Carpenter v. Hood*, 138 N. W. 241.

(C) Principles and Maxims of Equity.

§ 63 (Wis.) The rule that decrees in equity are enforced only in personam has given way to the paramount rule that equity may in all cases so frame its decrees as to make them effective to do equity, and the forms of equitable relief are as various as the transactions regulated in equity.—*McMillan v. Barber Asphalt Paving Co.*, 138 N. W. 94.

II. LACHES AND STALE DEMANDS.

§ 72 (Wis.) A right may be lost by delay, without any element of actual damage to him against whom it existed.—*Somers v. Germania Nat. Bank of Milwaukee*, 138 N. W. 713.

§ 87 (Mich.) While courts of equity in determining the question of laches in a suit for specific performance generally act in conformity with the statute of limitations, they are not bound to do so, but may declare laches or not on the expiration of a period of time either greater or less than that fixed by the statute of limitations.—*Rodgers v. Beckel*, 138 N. W. 202.

IV. PLEADING.**(E) Demurrer, Exceptions, and Motions.**

§ 228 (Mich.) Under Chancery Rule 9, a demurrer to the bill, in a suit against a husband and wife to foreclose a mortgage executed by her alone to secure her note, interposed by the husband and giving as special reasons that the action is triable at law and is an attempt to deprive him of constitutional rights, is properly overruled.—*People's Savings Bank of Saginaw v. McKay*, 138 N. W. 1055.

ERROR, WRIT OF.

See Appeal and Error.

ESTABLISHMENT.

See Highways, §§ 2, 53; Wills, §§ 329-427.

ESTATES.

See Courts, § 26; Descent and Distribution; Executors and Administrators; Landlord and Tenant, § 70; Tenancy in Common; Wills.

ESTOPPEL.

See Abandonment; Appeal and Error, § 232; Bail, § 17; Contracts, § 34; Corporations, § 388; Drains, § 74; Exchange of Property; Execution, § 245; Highways, § 79; Insurance, §§ 373, 389; Intoxicating Liquors, § 37; Judgment, §§ 682, 739; Landlord and Tenant, §§ 63, 65; Limitation of Actions, § 13; Master and Servant, § 252; Municipal Corporations, §§ 350, 488, 489; Principal and Agent, § 25; Principal and Surety, § 89; Towns, § 29; Vendor and Purchaser, § 244; Waters and Water Courses, § 158.

IL. BY DEED.**(A) Creation and Operation in General.**

§ 22 (Neb.) Where a grantee is named by his initials only, and he conveys the land in the name by which he holds it of record, he is estopped, as against his grantee, to allege that it is not his true name.—*Butler v. Farmland Mortgage & Debenture Co.*, 138 N. W. 1129.

(B) Estates and Rights Subsequently Acquired.

§ 35 (Iowa) Where a father conveyed and devised a lot to his daughter the title not to pass until his death, and she previously conveyed the lot to plaintiff, the title passed to plaintiff, through the daughter, on the father's death.—*Stephens v. Boyd*, 138 N. W. 389.

III. EQUITABLE ESTOPPEL.**(A) Nature and Essentials in General.**

§ 53 (Wis.) There cannot be a waiver without intent to waive, based on knowledge of facts; but the intent and knowledge may be constructive, as well as actual, and conclusive where knowledge does or ought to exist.—*Somers v. Germania Nat. Bank of Milwaukee*, 138 N. W. 713.

§ 54 (S.D.) Where abutting property owners maintained an obstruction in a street for more than 20 years, and it appeared from their muniments of title that they could determine the limits of their land, the failure of the city to object to that occupancy will not raise an estoppel; the defendants having notice of the illegality of their occupancy of the street, and that it was merely permissive.—*City of Deadwood v. Hursh*, 138 N. W. 1122.

§ 54 (Wis.) An existing right, known, or which ought to be known, by the possessor, may be lost by waiver, as well as by estoppel.—*Somers v. Germania Nat. Bank of Milwaukee*, 138 N. W. 713.

There cannot be a waiver, without intent to waive, based on knowledge of facts; but the intent and knowledge may be constructive, as

well as actual, and conclusive where knowledge does or ought to exist.—*Id.*

§ 56 (Wis.) A change of position by one relying on the conduct of another, so that a reversal of such conduct would work prejudice, is essential to estoppel in pais.—*Somers v. Germania Nat. Bank of Milwaukee*, 138 N. W. 713.

(E) Grounds of Estoppel.

§ 88 (Iowa) Plaintiff's admission in derogation of his right to use a stairway in defendant's building as an approach to plaintiff's building held not to estop him to enforce such easement, where defendant did not act on such admission.—*Stephens v. Boyd*, 138 N. W. 389.

§ 93 (Neb.) Appropriators of water rights who, through a period of four years, with full notice of the claims of another appropriator, permitted the latter to spend nearly \$2,000,000 without notice of their claims to a prior appropriation, are estopped, after the substantial completion of the works of the other appropriator, to maintain an action to restrain the diversion of the water.—*Enterprise Irr. Dist. v. Tri-State Land Co.*, 138 N. W. 171.

(E) Pleading, Evidence, Trial, and Review.

§ 115 (Iowa) Notwithstanding the general rule that an estoppel must ordinarily be pleaded, a contract by estoppel may perhaps be proved under a general allegation that the contract was executed.—*Seever v. Cleveland Coal Co.*, 138 N. W. 793.

§ 116 (Wis.) Where one would be expected to make a claim, if it existed, and its enforcement would create a claim over against a third person, and the claimant knows or has reasonable ground to know that the person liable has acted inconsistently with the claim, unreasonable delay in making the facts known to the latter raises a rebuttable presumption of prejudice.—*Somers v. Germania Nat. Bank of Milwaukee*, 138 N. W. 713.

Where one would naturally be expected to make a claim, if it existed, and delay in making the facts known would probably work to the prejudice of the person liable, and the claimant keeps silent, the burden is on him to show that his conduct was not prejudicial.—*Id.*

EVIDENCE.

See Abortion; Adverse Possession, § 57; Affidavits; Alteration of Instruments; Appeal and Error, §§ 204, 216, 232, 668, 695, 843, 873, 888, 901-939, 986, 997, 1001, 1002, 1003, 1005, 1010, 1012, 1033, 1047, 1048, 1050, 1051, 1053, 1056-1058, 1066, 1094, 1097, 1178; Army and Navy; Assault and Battery, § 82; Attachment; Bail, § 90; Bankruptcy, § 303; Banks and Banking; Bills and Notes, §§ 90, 369, 492, 493, 497, 508; Brokers, §§ 86, 88; Burglary, §§ 32, 36, 41; Carriers, §§ 32, 61, 94, 228; Compromise and Settlement, § 23; Constitutional Law, § 74; Contracts, §§ 28, 99, 346, 348, 349, 350; Corporations, § 108; Covenants, §§ 116, 127; Creditors' Suit, § 16; Criminal Law, §§ 338-339, 662-687, 736, 761, 776, 782, 783, 824, 1036, 1130, 1144, 1153, 1156, 1169, 1170, 1172; Damages, §§ 110, 173, 174, 216; Death, §§ 58, 68, 75, 103; Dedication; Deeds, §§ 70, 196, 203, 210, 211; Depositions; Discovery; Divorce, §§ 130, 226; Drains, § 82; Drunkards; Easements, §§ 13, 36; Ejectment, § 95; Electricity; Embezzlement, §§ 11, 38, 44; Estoppel, §§ 115, 116; Execution, § 293; Executors and Administrators, § 221; Explosives; Fraud, §§ 46, 52, 58; Frauds, Statute of, §§ 53, 130, 158; Fraudulent Conveyances, §§ 271, 295; Gas; Highways, §§ 186, 211; Homestead, § 151; Homicide, §§ 151-237; Husband and Wife, § 232; Infants, § 102; Insurance, §§ 646, 685, 688, 819; Intoxicating Liquors, §§ 236, 309, 309; Judgment, §§ 199, 721, 956; Justices of the Peace, §§ 36, 128; Landlord and Ten-

ant, § 281; Libel and Slander, §§ 107, 111; Licenses, § 6; Master and Servant, §§ 80, 107, 265-269; Mechanics' Liens, § 281; Mortgages, §§ 38, 186, 319, 561; Municipal Corporations, §§ 395, 502, 706, 819, 821; Negligence, §§ 125, 136; New Trial, §§ 100-108, 150; Parent and Child; Partnership, §§ 53, 217; Principal and Agent, §§ 21, 22, 121, 122; Principal and Surety, § 162; Railroads, §§ 282, 346, 348; Rape, §§ 43-52; Release, § 57; Replevin, § 71; Sales, §§ 52, 355, 358; Seduction, §§ 40, 46; Specific Performance, §§ 8, 119, 120, 121; Stipulations, § 14; Street Railroads, §§ 113, 114; Taxation, §§ 485, 490, 552½; Theaters and Shows, § 6; Trial, §§ 237, 252, 254, 296, 412; Trusts, § 44; Vendor and Purchaser, §§ 44, 350; Waters and Water Courses, §§ 32, 158½; Wills, §§ 53, 58, 329, 384, 427; Witnesses; Work and Labor.

Reception of, see Criminal Law, §§ 662-687; Trial, §§ 45-96.

I. JUDICIAL NOTICE.

§ 5 (Wis.) There can be no presumption, in the face of common knowledge on the subject, that the cost would be great or the time necessary for installation of a thermostat be so long as to materially interfere with either the comfort or the health of the occupants of the plaintiff's house.—Walbridge v. Berlin Public Service Co., 138 N. W. 44.

§ 23 (S. D.) The rule that the court may take judicial notice of variations in the quantity of land under the system of government surveys has no application to parties to a private contract for the sale of lands.—Smith v. Johnson, 188 N. W. 18.

§ 31 (Minn.) The Supreme Court will take judicial notice of the contents of a home rule charter of a city within the state, and of amendments regularly adopted thereto, certified and deposited as required by law.—A. A. White Townsite Co. v. City of Moorhead, 138 N. W. 939.

§ 47 (S.D.) The courts will take judicial notice of the powers in regulating interstate commerce given to the Interstate Commerce Commission, but will not take judicial notice of a definition by that commission of the term "baggage," nor that it has prescribed what shall be included in that term.—House v. Chicago & N. W. Ry. Co., 138 N. W. 809.

II. PRESUMPTIONS.

§ 77 (Minn.) On an issue as to whether the operatives of defendant's train, by which intestate was killed at a crossing, gave statutory signals, the jury were entitled to consider defendant's failure to produce the fireman as a witness, as bearing on the truth of the engineer's testimony that he gave the signals.—Tegels v. Great Northern Ry. Co., 138 N. W. 945.

§ 84 (Minn.) The execution of a promissory note gives rise to a rebuttable presumption that the payee was not indebted to the maker.—Beneke v. Beneke's Estate, 138 N. W. 689.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) Facts in Issue and Relevant to Issues.

§ 113 (Iowa) Before actual value of furniture can be shown in an action to recover damages for the alleged wrongful levy thereon, it must appear that there is no market value.—Worrall v. Des Moines Retail Grocers' Ass'n, 138 N. W. 481.

§ 113 (Wis.) Courts have adopted as the equivalent of "market value" the phrase "what the property is worth or will sell for as between one who wants to purchase and one

who wants to sell."—Milwaukee Trust Co. v. City of Milwaukee, 138 N. W. 707.

Where there is no regular market for a commodity, a wide range of investigation is permitted in determining its market value, and the rules relating to the admission of evidence are liberally construed, especially where the damages are submitted by a special verdict covering the correct measure of damages.—Id.

(B) Res Gestæ.

§ 121 (Iowa) Declarations of the deceased as to his health, made before and after he joined defendant association, held inadmissible unless part of the res gestæ.—Vernon v. Iowa State Traveling Men's Ass'n, 138 N. W. 696.

§ 121 (Iowa) In a suit by an heir to set aside a deed of his ancestor on the ground of the fraud of the grantee, the declarations of the ancestor at the time and immediately before the execution of the deed are admissible, as part of the res gestæ.—Curtis v. Armagast, 138 N. W. 873.

§ 121 (N.D.) In action against a bank based on refusal to pay plaintiff proceeds of loan, a memorandum by president of defendant bank as to note of plaintiff and testimony as to its contents were admissible as part of the res gestæ.—Goetz v. Merchants' Bank of Rugby, 138 N. W. 10.

§ 127 (Iowa) In an action on an accident insurance policy for the death of the insured from an abrasion alleged to have been received while the insured was taking a bath, testimony of his remark as to the roughness of the attendant and the exhibition of the abrasion upon his return held properly admitted as res gestæ.—Vernon v. Iowa State Traveling Men's Ass'n, 138 N. W. 696.

Declarations of the insured as to present pain in his limb, made during his illness from blood poisoning, held admissible as res gestæ to indicate a probable cause of death.—Id.

V. BEST AND SECONDARY EVIDENCE.

§ 158 (Iowa) Parol testimony is inadmissible to show matters as to the service of notice by publication that should appear of record.—Manton v. Brady, 138 N. W. 558.

§ 184 (Iowa) In a suit to foreclose against grantees of the mortgaged premises, who had, respectively, assumed the same, evidence held to show defendant's possession of a deed, so as to justify the admission of the record.—Boice v. Coffeen, 138 N. W. 857.

VI. DEMONSTRATIVE EVIDENCE.

§ 191 (Iowa) In an action on contract against an infant, the appearance of the infant on the witness stand was proper for consideration in determining whether plaintiff had good reason for supposing him of age.—First Nat. Bank v. Casey, 138 N. W. 897.

VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

§ 219 (Mich.) In an action for assault and battery, including ravishment, evidence that defendant approached a person and asked him if he would go on defendant's bond, if desired, held admissible to indicate guilty knowledge.—Totten v. Totten, 138 N. W. 257.

§ 220 (Iowa) That letters received are not answered is not evidence of acquiescence in the facts stated.—Seever v. Cleveland Coal Co., 138 N. W. 793.

Unanswered letters from plaintiff to defendant written many months after plaintiff had quit defendant's employment, which merely narrated past transactions, were not admissible in an action for salary, etc.—Id.

(B) By Parties or Others Interested in Event.

§ 222 (Iowa) Declarations against interest or admissions of the adverse party are always admissible against him.—*Seevers v. Cleveland Coal Co.*, 138 N. W. 793.

(E) Proof and Effect.

§ 263 (Iowa) Where declarations against interest or admissions are made by the adverse party, all of the correspondence on the subject is admissible in evidence.—*Seevers v. Cleveland Coal Co.*, 138 N. W. 793.

VIII. DECLARATIONS.**(A) Nature, Form, and Incidents in General.**

§ 271 (Iowa) As a rule, self-serving declarations are not admissible.—*Seevers v. Cleveland Coal Co.*, 138 N. W. 793.

A letter written by a party is not admissible for himself, except as a notice or a demand.—*Id.*

Letters written by plaintiff, a broker, to defendant after a sale, which were self-serving, were not admissible.—*Id.*

X. DOCUMENTARY EVIDENCE.**(C) Private Writings and Publications.**

§ 359 (N.D.) Photographic exhibits may be received in evidence when properly verified, and when conditions were the same when they were made as when an accident occurred.—*Sherlock v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 138 N. W. 976.

Photographs taken in June of the scene of a railway accident on December 14th preceding were admissible, where the conditions were the same, except as to snow and the removal of a building on the side of the highway, not affecting the issues of the case.—*Id.*

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.**(A) Contradicting, Varying, or Adding to Terms of Written Instrument.**

§ 387 (Iowa) The record of the council of a city that a resolution for a street improvement was adopted on the council's own motion may not be impeached by a parol showing of a custom of the council indicating the contrary.—*Bailey v. City of Des Moines*, 138 N. W. 853.

§ 408 (Iowa) A county treasurer's receipt of the payment of taxes is a mere receipt and capable of explanation by parol.—*Barthell v. Hermanson*, 138 N. W. 1108.

§ 427 (N.D.) Testimony by a mortgagee of a crop that he told the assignee of the mortgage that it was subject to a rental contract between the mortgagor and mortgagee relative to a lien on the crops for advancements did not vary the terms of the written contract.—*Heald v. Strong*, 138 N. W. 1114.

(B) Invalidating Written Instrument.

§ 437 (Wis.) Parol evidence is competent to show that a writing prima facie valid is a mere cover for an illegal transaction.—*Manufacturers' & Merchants' Inspection Bureau v. Everwear Hosiery Co.*, 138 N. W. 624.

(C) Separate or Subsequent Oral Agreement.

§ 441 (Wis.) Parol evidence of a verbal arrangement held inadmissible to vary or alter the terms of a written agreement purporting to confirm such verbal arrangement.—*Manufacturers' & Merchants' Inspection Bureau v. Everwear Hosiery Co.*, 138 N. W. 624.

§ 442 (Minn.) A written executory order for the shipment of goods held not on its face a complete expression of the contract between the parties, such as to exclude evidence of a

contemporaneous parol warranty of the goods.—*McLoone v. Brusch*, 138 N. W. 35.

§ 442 (Neb.) Where a written order for advertising shows on its face that it does not contain the entire contract, oral warranties by the agent and the use of a sample in procuring the order may be shown by parol.—*National Engraving Co. v. Queen City Laundry*, 138 N. W. 575.

§ 444 (Iowa) Parol evidence was admissible to show that a contract, signed by defendant alone, was not to be binding until signed by his wife, or until defendant was satisfied with an unsecured note.—*Healy v. Hohn*, 138 N. W. 551.

§ 444 (Neb.) In an action between the original parties, it may be shown by parol that a note was delivered on condition that it should be payable only on a certain event.—*Musser v. Musser*, 138 N. W. 599.

(D) Construction or Application of Language of Written Instrument.

§ 450 (S.D.) Parol evidence held admissible to show the intent of the parties in the use of the ambiguous phrase "accepted mortgage" in a sale contract.—*Smith v. Johnson*, 138 N. W. 18.

§ 452 (Wis.) Parol evidence of the facts and circumstances surrounding the execution of a written instrument admissible to explain a latent ambiguity held not objectionable.—*Hammond v. Capitol City Mut. Fire Ins. Co.*, 135 N. W. 92.

§ 455 (Iowa) In action on contract between lecturer and lyceum bureau, a letter which accompanied the contract when forwarded to the lecturer for his signature held admissible to show the meaning of the expressions, "guaranteed number of nights," and "selling in a circuit as a regular number," used in the contract.—*Boyl v. Midland Lyceum Bureau*, 138 N. W. 384.

§ 456 (Mich.) In an action against a street railway company for damage from a collision between a steam road roller and a car, testimony of defendant's superintendent that a certain curve was not a curve within the meaning of a rule of defendant requiring cars to enter curves slowly held admissible.—*Good Roads Const. Co. v. Port Huron, St. C. & M. C. Ry. Co.*, 138 N. W. 320.

§ 460 (Minn.) Evidence of the subsequent acts of parties to deeds giving a highway as a boundary held not admissible on the ground that the deeds were ambiguous.—*Pratt v. Quirk*, 138 N. W. 38.

§ 460 (Wis.) In an action on a policy issued to the members of a firm engaged in a hotel and saloon business, parol evidence held admissible to show an agreement that the policy should cover individual as well as partnership property.—*Hammond v. Capitol City Mut. Fire Ins. Co.*, 138 N. W. 92.

XII. OPINION EVIDENCE.**(A) Conclusions and Opinions of Witnesses in General.**

§ 471 (Iowa) A nonexpert witness who assisted in pulling an automobile off a horse could testify that the machine was in gear and that the brakes were not set.—*Scott v. O'Leary*, 138 N. W. 512.

A nonexpert witness could testify as to plaintiff's bodily appearance and condition after leaving a hospital, where he described nothing more than what he saw.—*Id.*

Testimony regarding buggy and automobile tracks near the scene of a collision was not a conclusion.—*Id.*

Testimony by a mother that she had permitted her minor son to work for himself, collect his own wages, and accumulate property in his own right held not objectionable as a conclusion.—*Id.*

§ 471 (Mich.) A question asked plaintiff in an action for libel as to whether defendant's

published retraction was not full and complete *held* objectionable as calling for a conclusion.—*Gripman v. Kitchel*, 138 N. W. 1041.

§ 471 (Wis.) A question asked a witness as to what was the practice among "reasonably careful" sawmill men as to the guarding of shafts and pulleys was properly excluded as involving the witness' conclusion as to who were "reasonably careful" mill men.—*Graves v. Rib Lake Lumber Co.*, 138 N. W. 86.

§ 471 (Wis.) In an action by a real estate broker, certain evidence of a proposed purchaser that he could and would have paid cash is not incompetent as a conclusion.—*Ahearn v. Born-gesser*, 138 N. W. 607.

§ 474 (Wis.) Witness *held* qualified to testify as to whether a belt in a box factory could be properly guarded.—*Krawiecki v. Kieckhefer Box Co.*, 138 N. W. 710.

§ 478 (Iowa) A nonexpert may give his opinion, on the facts testified to by him, that testator's mind was unsound, if such facts justify an inference of unsoundness.—*In re Law's Estate*, 138 N. W. 531.

§ 478 (Minn.) A witness, who has had business transactions with a person, may, after having detailed them, properly give an opinion concerning the person's mental state.—*McEl-enev v. Donovan*, 138 N. W. 306.

(B) Subjects of Expert Testimony.

§ 513 (Iowa) In an action for injuries to a servant while operating a car puller drum, evidence of witnesses familiar with the operation of a car puller, that if the clutch had been placed on the opposite side it would have been more safe, *held* admissible.—*Spencer v. Updike Grain Co.*, 138 N. W. 820.

(C) Competency of Experts.

§ 546 (Minn.) The opinion of an expert as to the value of a partly frozen carload of potatoes was properly admitted in evidence, within the discretion of the trial court.—*Emerson v. Chicago, B. & Q. R. Co.*, 138 N. W. 1026.

(D) Examination of Experts.

§ 553 (Iowa) A question to experts as to soundness of mind of testator, hypothesizing facts which contestants' testimony tends to show is proper.—*In re Law's Estate*, 138 N. W. 531.

§ 558 (Wis.) An expert who has given his opinion as to the cause of a boiler explosion, and his reasons in support thereof, may be subjected to a fairly exhaustive examination in test of his qualifications and competency.—*Brey v. For-estal*, 138 N. W. 645.

Defendant's cross-examination as to the knowledge and qualification of an expert, after his opinion that a boiler explosion resulted from a cause not alleged in the complaint, *held* not to waive objection to such opinion, or to open the door to redirect examination thereon.—*Id.*

(F) Effect of Opinion Evidence.

§ 571 (Wis.) Expert testimony as to the cause and extent of personal injuries is not absolutely binding on the court.—*Depow v. Chicago & N. W. Ry. Co.*, 138 N. W. 42.

XIV. WEIGHT AND SUFFICIENCY.

§ 601 (Iowa) Evidence in partition that land contiguous to that in question subsequently sold at a price higher than the land in question was appraised at did not conclusively show that such appraisal was too low.—*Rice v. Rice*, 138 N. W. 1111.

EXAMINATION.

See Jury, § 97; Witnesses, §§ 236-287.
Of expert witnesses, see Evidence, §§ 553, 558.

For cases in Dec. Dig. & Am. Dig. Key No. Series & Indexes see same topic and section (4) NUMBER

EXCEPTIONS.

See Appeal and Error, §§ 261, 263, 501; Criminal Law, § 1055; Stipulations, § 14; Trial, §§ 281, 282.

EXCEPTIONS, BILL OF.

See Appeal and Error, §§ 547, 634.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

§ 16 (Mich.) A proposed case, consisting of the entire stenographer's minutes, without effort to reduce the testimony to narrative form, *held* in violation of chancery rule 37 (124 N. W. v), and properly disallowed.—*Southwick v. Hosmer*, 138 N. W. 1052.

EXCESSIVE DAMAGES.

See Damages, §§ 130, 132.

EXCHANGE OF PROPERTY.

See Appeal and Error, § 1050; Brokers, § 105; Election of Remedies; Fraud, §§ 22, 41, 46, 52, 58; Frauds, Statute of, § 130.

§ 4 (Iowa) A contract for exchange of a stock of goods for a farm containing 200 acres at \$60 per acre, or \$12,000, showed that the farm was exchanged at an estimated value per acre, and not for a gross sum, though defendants afterwards agreed to take \$250 less; hence plaintiff could recover damages for a material deficiency in quantity.—*Fisher v. Trumbauer & Smith*, 138 N. W. 528.

§ 8 (Iowa) A party to a contract who based his refusal to perform on the ground that he had never made a contract, and that all he knew about the land involved was what the adverse party had told him, was not estopped from pleading false representations as a ground for rescission.—*Weseman v. Graham*, 138 N. W. 478.

§ 8 (Iowa) On a contract to exchange a farm of "200 acres more or less according to government surveys," a discrepancy of 8.58 acres, while not a compliance, was remediable by allowance of damages.—*Fisher v. Trumbauer & Smith*, 138 N. W. 528.

Where the value of land stated in a contract for the exchange of property was fixed for trading purposes only, plaintiff was entitled to recover only a quantum meruit for a shortage in acreage.—*Id.*

EXECUTION.

See Bankruptcy, § 151; Creditors' Suit, § 16; Judgment, § 872; Justices of the Peace, § 128; Limitation of Actions, § 13; Partnership, § 220.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

§ 172 (Neb.) One not a party to the proceedings in which judgment was entered may enjoin the levy of an execution on his property to collect such judgment.—*Tierney v. Evans*, 138 N. W. 140.

VII. SALE.

(A) Manner, Conduct, Validity, and Confirming or Vacating.

§ 245 (Iowa) The former owner of land, sold under execution, by merely attempting a redemption, not shown to prejudice the execution creditor and the purchaser is not estopped to maintain a suit to set aside the sale.—*Manion v. Brady*, 138 N. W. 558.

(C) Redemption.

§ 293 (Wis.) Where a purchaser at an execution sale sought to defeat the right to redeem on the ground that the person seeking to re-

deem was not the owner, but had previously conveyed the premises to defraud his creditors, but there was no proof that the deed was delivered, the purchaser did not establish facts showing a want of right to redeem.—*Falbe v. Caves*, 138 N. W. 87.

Under St. 1893, § 3007, giving to judgment and mortgage creditors the right to redeem from execution sale within a specified time, the right to redeem is not limited to judgment and mortgage creditors at the time of sale, but extends to judgment and mortgage creditors becoming such after the sale, but within the time within which to redeem.—*Id.*

§ 300 (Wis.) A purchaser at an execution sale who denies the right of another to redeem on the ground that the time for redemption has expired thereby waives any irregularity in the papers showing the right to redeem.—*Falbe v. Caves*, 138 N. W. 87.

St. 1898, § 3015, subd. 4, providing that within three days after making redemption the creditor shall file such evidences of his right in the office of the register of deeds, is for the protection of third persons who may desire to acquire title and to secure an interest in the premises sold, and one making a valid redemption is not defeated by his failure to comply with the statute.—*Id.*

IX. PAYMENT, SATISFACTION, AND DISCHARGE.

§ 349 (Mich.) Execution *held* not to be enjoined and judgment set off against one in favor of the execution debtor in another action under Comp. Laws, § 10,348, where the parties to the two actions were not the same.—*Carpenter v. Hood*, 138 N. W. 241.

XII. WRONGFUL EXECUTION.

§ 472 (Iowa) In an action for wrongful levy on exempt furniture, where there was evidence that there was a regular and well-established market for secondhand furniture and a well-established market price at that place, the proper measure of plaintiff's damages was the secondhand retail value of the property taken.—*Worrall v. Des Moines Retail Grocers' Ass'n*, 138 N. W. 481.

EXECUTIVE POWER.

See Constitutional Law, § 80.

EXECUTOR DE SON TORT.

See Executors and Administrators, §§ 539, 540.

EXECUTORS AND ADMINISTRATORS.

See Descent and Distribution; Municipal Corporations, §§ 488, 489; Trusts; Wills.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(A) In General.

§ 85 (Wis.) Under St. 1893, § 4031, as amended by Laws 1907, c. 593, giving any person aggrieved by an order of the county court the right of appeal, an order directing one to appear and submit to an examination touching any property in his possession belonging to an inmate, made pursuant to a statute providing that, if any person shall neglect to obey the process, he shall be attached and committed to prison, is appealable.—*In re Doe's Estate*, 138 N. W. 97.

V. ALLOWANCES TO SURVIVING WIFE, HUSBAND, OR CHILDREN.

§ 177 (Minn.) Under Rev. Laws 1905, § 3653, the allowance to a widow of the personal wearing apparel and certain household goods from her husband's estate is confined to the articles specified.—*In re Stromberg's Estate*, 138 N. W. 428.

§ 181 (Minn.) The widow of a nonresident decedent is entitled to the statutory allowance out of her husband's property in this state, where he left no other property.—*In re Stromberg's Estate*, 138 N. W. 428.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) Liabilities of Estate.

§ 221 (Iowa) Evidence in action for services rendered to defendant's testator *held* to sufficiently show an express agreement to compensate plaintiff therefor.—*In re Oldfield's Estate*, 138 N. W. 846.

The fact that one is found doing service for another is *prima facie* evidence of an employment.—*Id.*

§ 221 (Mich.) In proceedings by a child to establish a claim against the estate of his deceased father, notes executed by the father for services and delivered to a third person *held* admissible to show what the father considered the services worth.—*Abel v. Roosenraad*, 138 N. W. 325.

Admission of a note, executed by the father for services and delivered to a third person, in support of the child's claim, was not objectionable on the theory that the note was void as a gift for want of delivery.—*Id.*

Where the court permitted counsel to show any statements made by the child at other times, the exclusion of prior claims, not verified, and not presented to or filed with the commissioners, was not erroneous.—*Id.*

§ 221 (Minn.) Evidence *held* to sustain findings that services rendered by decedent's son were rendered while decedent was living with him as a member of the family, and that her estate was not liable.—*Beneke v. Beneke's Estate*, 138 N. W. 689.

(B) Presentation and Allowance.

§ 228 (Iowa) Claimant *held* entitled to refile items withdrawn from a claim seasonably filed within five months after final disposition of a suit for specific performance involving the same matter while the estate remained unsettled.—*Black v. Miller*, 138 N. W. 535.

(C) Disputed Claims.

§ 256 (Mich.) Where, in proceedings to establish a claim against a decedent's estate, claimant appealed from a judgment allowing his claims in part, but the estate did not appeal from the allowance, and it was not claimed that one of the claims allowed was unjust, the court properly allowed such claim to stand as a part of the verdict and judgment in the case.—*Abel v. Roosenraad*, 138 N. W. 325.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

(C) Sale.

§ 388 (Iowa) A purchaser at an executor's or administrator's sale to pay debts is not a purchaser in good faith, but takes only the title held by the deceased.—*Stephens v. Boyd*, 138 N. W. 389.

XIV. EXECUTORS DE SON TORT.

§ 539 (Neb.) A coroner selling personal property of a decedent to pay funeral expenses, at the request of relatives, is at most an executor de son tort; and, since the administrator would be bound to pay the funeral expenses, he cannot complain because the coroner paid them.—*Lenderink v. Sawyer*, 138 N. W. 744.

§ 540 (Neb.) Where a coroner, at the request of a decedent's nephew and son, sold the decedent's personal property to pay funeral expenses, he is entitled to set off the money paid for the funeral expenses against the claim of the decedent's administrator for the value of the property.—*Lenderink v. Sawyer*, 138 N. W. 744.

EXEMPTIONS.

See Fraudulent Conveyances, § 52; Homestead.

EXPERIMENTS.

See Criminal Law, § 388; Trial, § 27.

EXPERT TESTIMONY.

See Criminal Law, § 485; Evidence, §§ 471-571.

EXPLOSIVES.

See Appeal and Error, § 1050; Burglary, § 2; Constitutional Law, § 250; Criminal Law, § 1218; Gas; Statutes, §§ 118, 159.

§ 7 (Minn.) A complaint alleging that defendant left unguarded carbide on his premises near a public street, knowing that children picked up the carbide, poured water upon it, and exploded the same, and that plaintiff's son, five years old, poured water on some of the carbide, and in attempting to light the gas an explosion followed, injuring him, states a cause of action.—*Juntti v. Oliver Iron Mining Co.*, 138 N. W. 873.

§ 8 (Minn.) In an action for injury caused by explosive fuse caps kept by defendant city, evidence held to sustain a finding that the defendant was negligent in storing the caps in the toolhouse without sufficient precautions to prevent children from entering and taking them.—*Vills v. City of Cloquet*, 138 N. W. 33.

In an action for injuries caused by explosive fuse caps, evidence held to present a question for the jury whether the defendant's negligence was the proximate cause of the injury.—*Id.*

EXPRESS COMPANIES.

See Carriers, § 215.

FACTORS.

See Brokers.

FEES.

See Appeal and Error, § 984; Commerce; Divorce, § 197.

FELLOW SERVANTS.

See Master and Servant, §§ 174-198, 294.

FENCES.

See Adverse Possession, § 8; Highways, §§ 79, 159; Railroads, §§ 446, 447.

FERRETS.

See Taxation, § 552½.

FIDUCIARY RELATIONS.

See Contracts, § 99.

FILING.

See Appeal and Error, § 648; Bail, § 17; Corporations, § 661; Divorce, § 168; Drains, § 57; Elections, § 125; Executors and Administrators, § 228; Mechanics' Liens, § 183; New Trial, § 140.

FINDINGS.

See Appeal and Error, §§ 996, 1001, 1008-1012, 1065, 1094; Contracts, § 354; Drains, § 82; Trial, §§ 388-404.

FINES.

See Limitation of Actions, § 4.

FIRE INSURANCE.

See Insurance.

FIRES.

See Damages, §§ 112, 174, 217; Municipal Corporations, § 626.

FLIGHT.

See Criminal Law, §§ 351, 782, 1172.

FLOODS.

See Waters and Water Courses, § 171.

FLOWAGE.

See Waters and Water Courses, §§ 171, 172, 176.

FORCIBLE ENTRY AND DETAINER.

See Appeal and Error, § 93; Injunction, § 26; Justices of the Peace, § 36; Landlord and Tenant, § 291.

FORECLOSURE.

See Mortgages, §§ 491-561; Taxation, §§ 642, 648.

FOREIGN CORPORATIONS.

See Corporations, §§ 636-668.

FORFEITURES.

See Insurance, §§ 755, 756; Intoxicating Liquors, § 250; Vendor and Purchaser, §§ 18, 101.

FORMER JEOPARDY.

See Criminal Law, §§ 162-200.

FORMS OF ACTION.

See Ejectment.

FRANCHISES.

See Street Railroads, § 2.

FRAUD.

See Appeal and Error, § 781; Bankruptcy, § 304; Bills and Notes, § 497; Cancellation of Instruments; Compromise and Settlement, § 18; Contracts, § 99; Corporations, § 108; Deeds, §§ 70, 196, 211; Election of Remedies; Evidence, § 121; Exchange of Property; Frauds, Statute of; Fraudulent Conveyances; Infants, § 56; Insurance, § 373; Malicious Prosecution, § 25; Pleading, § 236; Railroads, § 64; Reformation of Instruments, § 20; Release, §§ 17, 24; Sales, § 392; Specific Performance, § 41; Trial, § 351.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§ 6 (Iowa) Fraud of the plaintiff in connection with the matter sued on cannot be implied from the mere fact that he sued for more than was found due.—*Maine v. Constantine*, 138 N. W. 702.

§ 6 (Iowa) "Constructive fraud" is the fraud which the law infers from the relationship of the parties or the circumstances surrounding them.—*Curtis v. Armagast*, 138 N. W. 873.

§ 20 (Wis.) Fraudulent representations constituting a material inducement to a contract are actionable, although they did not constitute the sole inducement, and although the transaction would have taken place if they had not been made.—*Darlington v. J. L. Gates Land Co.*, 138 N. W. 72.

§ 22 (Wis.) Where defendant misrepresented the amount of the special tax liens against his property in order to facilitate an exchange with plaintiff, plaintiff was entitled to rely on the representation, and was not bound to examine the records to ascertain the fact.—*Woteshek v. Neumann*, 138 N. W. 1000.

II. ACTIONS.

(B) Parties and Pleading.

§ 41 (Mich.) A declaration clearly averring that defendant made certain false and fraudulent representations, that they were believed and relied on by plaintiff, and that as a result defendant wrongfully and fraudulently received a certain sum of money, the property of plaintiff, is sufficient.—*Blanksma v. King*, 138 N. W. 236.

§ 41 (Minn.) Complaint construed, and held to state a cause of action for damages from alleged fraudulent acts of defendant in procuring a loan from plaintiff to an insolvent borrower for defendant's purposes.—*Merchants' & Miners' State Bank of Hibbing v. Chisholm*, 138 N. W. 682.

§ 41 (Neb.) A petition held not to entitle the purchasers of personality to recover from the vendors for fraudulent representations.—*Sherill v. Coad*, 138 N. W. 567.

§ 41 (Wis.) A complaint for fraud, charging that defendant knowingly misrepresented that the special taxes on his land exchanged to plaintiff were only \$200, when, in fact, they were \$458.83, and that plaintiff relied thereon to his damage in making the exchange, held sufficient.—*Woteshek v. Neumann*, 138 N. W. 1000.

§ 46 (Minn.) An allegation in the complaint that plaintiff relied upon and was induced by the representations to enter into the contract is equivalent to an allegation that plaintiff believed the representations to be true, if such an allegation be necessary.—*Jones v. Magoon*, 138 N. W. 686.

(C) Evidence.

§ 52 (Wis.) In an action for fraud arising out of an exchange of property, evidence of the relative value of the two properties held admissible as bearing on the probability of the trade having been made as claimed by defendant.—*Woteshek v. Neumann*, 138 N. W. 1000.

§ 58 (Iowa) In making a sale of land to plaintiff under false representations that it contained 335 acres, evidence held to show that defendant and his agent were guilty of actionable fraud.—*Day v. Merrick*, 138 N. W. 400.

§ 58 (Minn.) In an action for fraud in an automobile exchange, evidence held to support a verdict for plaintiff.—*Jones v. Magoon*, 138 N. W. 686.

§ 58 (Minn.) In an action for false representations by defendant regarding the condition, soil, and previous crop of a farm traded to plaintiff, evidence held to sustain a verdict for plaintiff.—*Schmeisser v. Albinson*, 138 N. W. 775.

§ 58 (Wis.) In an action for fraud, a verdict for plaintiff based on conflicting testimony held not objectionable, as not based on clear and satisfactory testimony.—*Woteshek v. Neumann*, 138 N. W. 1000.

(D) Damages.

§ 59 (Mich.) An instruction on the measure of damages, in an action for damages caused by fraud in inducing plaintiff to purchase right to sell patented articles, held correct.—*Snyder v. Markham*, 138 N. W. 234.

§ 59 (Neb.) The measure of damages for fraudulent representations by a vendor of personality is the difference between its actual value and what would have been its value had it been as represented.—*Sherill v. Coad*, 138 N. W. 567.

(E) Trial, Judgment, and Review.

§ 65 (Minn.) An instruction that representations to the wife of plaintiff would be the same as if made to plaintiff, if plaintiff was a man that was governed by his wife's directions, as the defendant knew or believed, held warranted by the evidence.—*Schmeisser v. Albinson*, 138 N. W. 775.

FRAUDS, STATUTE OF.

V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

§ 44 (Minn.) The doctrine of de minimis cannot be invoked to avoid the operation of the statute of frauds upon a contract which by its terms is not to be performed within one year.—*O'Donnell v. Daily News Co. of Minneapolis*, 138 N. W. 677.

§ 53 (Minn.) A contract for services, which shows that it is not to be performed within one year, is within the statute of frauds; but a contract for one year's services, commencing on the date of the contract is not within the statute.—*O'Donnell v. Daily News Co. of Minneapolis*, 138 N. W. 677.

A contract for a year's employment, in which it was agreed the employé should commence work one week after its date, showed by its terms that the commencement of performance was to begin in the future, bringing it within the statute of frauds.—Id.

The date of the contract will not be presumed to be the date for the commencement of performance, where it affirmatively appears from the contract that a subsequent date is contemplated.—Id.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

§ 56 (Wis.) An oral contract by plaintiff to relinquish his homestead entry so that defendant's son could apply to enter the land as a homestead was not void under the statute of frauds (St. 1898, § 2304), relating to contracts for sale of land or interest in land.—*Dohr v. Wolfgang*, 138 N. W. 75.

§ 68 (Neb.) A settlement between partners or between a partner and the representatives of a deceased partner making division of partnership real estate is not within Comp. St. 1911, c. 32, § 3, and may be oral if upon sufficient consideration.—*Majors v. Majors*, 138 N. W. 574.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

§ 106 (Mich.) Option held not indefinite as to whether it was an option to purchase or to lease, and hence not to be insufficient under the statute of frauds on that ground.—*Hilberg v. Greer*, 138 N. W. 201.

§ 110 (Mich.) A description of real property in a written agreement for its sale as "Building and lot known as No. 20 S. St. Pontiac, Mich." is sufficient under the statute of frauds.—*Hilberg v. Greer*, 138 N. W. 201.

§ 113 (Mich.) An option to purchase real property: "Purchase price to be Five thousand five hundred dollars. Int. 5% easy terms"—is insufficient under the statute of frauds for indefiniteness as to the terms and time of payment.—*Hilberg v. Greer*, 138 N. W. 201.

§ 118 (Minn.) A telegraphic offer of employment and letter explanatory thereof, not containing all the terms of the contract, and a telegraphic acceptance, are not sufficient writings to satisfy the statute of frauds.—*O'Donnell v. Daily News Co. of Minneapolis*, 138 N. W. 677.

IX. OPERATION AND EFFECT OF STATUTE.

§ 129 (Iowa) The satisfaction and release of a pre-existing debt is a sufficient consideration for a conveyance, and amounts to such pay-

300.
§ 130 (Mich.) In assumpsit for the value of an engine which plaintiff delivered to defendant in exchange of real estate, based on the failure of defendant to convey the real estate, evidence of the oral contract for the conveyance of the real estate was admissible.—Bowen v. Chandler, 138 N. W. 247.

§ 139 (Minn.) Where a mortgagor executed a note to the mortgagee under a parol agreement that as a consideration thereof he should be relieved from personal liability for the mortgage debt, the agreement was a fully executed contract, and was not within the statute of frauds.—First Nat. Bank v. Gallagher, 138 N. W. 681.

X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 158 (Minn.) Where the date for the commencement of the performance of a contract is shown by the same evidence which shows the contract, such date must be deemed to appear from the terms of the contract.—O'Donnell v. Daily News Co. of Minneapolis, 138 N. W. 677.

FRAUDULENT CONVEYANCES.

See Execution, § 293; Trial, § 388.

I. TRANSFERS AND TRANSACTIONS INVALID.

(C) Property and Rights Transferred.

§ 52 (Neb.) Where the consideration for a contract of husband and wife to support his father was a conveyance of the father's homestead, on which the father retained a lien to secure performance, his interest will not be subjected to a judgment on a debt incurred after the transfer.—Valparaiso State Bank v. Schwartz, 138 N. W. 757.

If a husband and wife own two town lots as tenants in common and reside on one of them, which is of the full value of the homestead exemption, the husband's interest in the other lot is not exempt, and a transfer to his wife without consideration is fraudulent.—Id.

(E) Consideration.

§ 99 (Iowa) Where the consideration paid for an insolvent's property was inadequate, such fact is a badge of fraud, and, though not sufficient to set aside the transaction, the conveyance will be regarded as fraudulent to the extent of the difference.—Flood v. Bollmeier, 138 N. W. 1102.

(H) Preferences to Creditors.

§ 115 (Iowa) An insolvent debtor may dispose of his property in good faith for the payment of one of his creditors, though others may thereby be defeated in the enforcement of their claims.—Flood v. Bollmeier, 138 N. W. 1102.

(J) Knowledge and Intent of Grantee.

§ 158 (Iowa) Where a garnishee purchased certain real property from an insolvent for a grossly inadequate consideration, he was thereby charged with constructive notice of the insolvent's fraudulent intent to defraud his creditors.—Flood v. Bollmeier, 138 N. W. 1102.

II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

(A) Original Parties.

§ 182 (Neb.) One obtaining possession of merchandise by a purchase in bulk, in violation of Comp. St. 1911, c. 32, §§ 31, 32, is a trustee for the benefit of creditors of his vendor, and liable as garnishee.—Appel Mercantile Co. v. Barker, 138 N. W. 1133.

(G) Evidence.

§ 271 (Iowa) Where property of an insolvent has been conveyed for an inadequate consideration, the burden of repelling the presumption of fraud is on the grantee.—Flood v. Bollmeier, 138 N. W. 1102.

§ 295 (Neb.) Evidence held to sustain a decree upholding a conveyance from a husband to his wife, which was assailed as fraudulent in a creditor's bill.—Parsons v. Cathers, 138 N. W. 747.

FUNERAL EXPENSES.

See Executors and Administrators, §§ 539, 540.

GAME.

§ 6 (S.D.) Under Sess. Laws 1909, c. 240, relating to the compensation of county game wardens, it was not intended that the county commissioners should not have power to reject a voucher for any month exceeding the amount fixed by statute, or to reject or correct any item where, to their knowledge, the service had not been rendered or the expense incurred.—Jenkins v. Hallstrom, 138 N. W. 12.

The word "compensation," as used in Sess. Laws 1909, c. 240, providing that county game wardens shall receive such compensation as the state game warden shall determine not to exceed \$50 per month, includes pay for expenses incurred as well as for services rendered, and such compensation cannot in any one month exceed \$50.—Id.

GARNISHMENT.

See Fraudulent Conveyances, § 182.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

§ 42 (Minn.) Where, under a policy against loss from operation of an automobile, an action is brought by a person injured against the assured, and the insurer takes sole charge of the defense, a judgment against the assured becomes a liability owing unconditionally, which the plaintiff may reach by garnishment.—Patterson v. Adan, 138 N. W. 281.

§ 46 (Minn.) Where a defendant had drawn his pay in advance from a garnishee city before the garnishee summons was served, the garnishee was entitled to discharge, though the city had no right to pay before the end of the month, nor the defendant to receive it.—Melin v. Stuart, 138 N. W. 281.

GAS.

§ 20 (Minn.) In an action for injuries from a gas explosion in plaintiff's cellar, evidence held to present a question of fact whether the gas had escaped from a leak in the pipe supplying a street lamp.—Brantman v. City of Canby, 138 N. W. 671.

GATES.

See Constitutional Law, § 241.

GIFTS.

See Charities; Executors and Administrators, § 221.

I. INTER VIVOS.

§ 16 (Minn.) Where vendors agreed to convey land in consideration of an annual payment for their support and the payment of \$5,000 to their legal heirs at the death of the survivor of the vendors, and gave vendees the right at any time to pay the vendors \$5,000 and obtain a deed, there was no executed gift to the heirs of the vendors.—Kanne v. Kanne, 138 N. W. 25.

GOOD FAITH.

See Compromise and Settlement, § 6; Vendor and Purchaser, §§ 223-244.

GRAND JURY.

See Indictment and Information; Witnesses, § 203.

GROSS INDECENCY.

See Criminal Law, §§ 364, 369.

GUARANTY.

See Insurance, §§ 514, 522.

GUARDIAN AND WARD.

See Drunkards; Infants, § 115; Insane Persons, §§ 35, 37; Jury, § 19; Venue.

GUARDS.

See Master and Servant, § 217.

HABEAS CORPUS.**I. NATURE AND GROUNDS OF REMEDY.**

§ 30 (Minn.) Where a court has jurisdiction of the person and the subject-matter, any judgment, however erroneous, will be sustained as against an attack on habeas corpus.—State v. Wolfer, 138 N. W. 315.

Under Rev. Laws 1905, § 5454, authorizing the court to sentence to the reformatory any person, less than 16 and not more than 30 years of age, who has been convicted of crime punishable by imprisonment in the state's prison, that a conviction and sentence to the reformatory failed to state the age of defendant does not render it subject to attack on habeas corpus.—Id.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 113 (Minn.) As an appeal in habeas corpus is, under Rev. Laws 1905, § 4602, required to be brought in the Supreme Court as if the writ had issued out of such court, errors at the trial will not be considered.—State v. Wolfer, 138 N. W. 315.

HABITUAL CRIMINALS.

See Criminal Law, § 1205.

HARMLESS ERROR.

See Appeal and Error, §§ 1031-1073; Criminal Law, §§ 1169-1172; Homicide, § 340.

HEALTH.

See Evidence, § 121; Insurance, § 373.

HEARING.

See Constitutional Law, § 290.

HEIRS.

See Descent and Distribution.

HIGHWAYS.

See Adverse Possession, § 8; Appeal and Error, § 1066; Assault and Battery, § 38; Boundaries; Criminal Law, § 1169; Dedication; Ejectment, § 95; Estoppel, § 54; Railroads, §§ 440, 447.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(A) Establishment by Prescription, User, or Recognition.

§ 2 (Minn.) Laws 1890, c. 152, is not retroactive, and a highway established by user be-

fore its enactment is limited to the character and extent of the user.—State v. Hager, 138 N. W. 935.

(B) Establishment by Statute or Statutory Proceedings.

§ 53 (Minn.) The description of a public highway in a petition and final order in proceedings to lay out and establish the same *held* so indefinite and uncertain as to render the proceedings a nullity.—State v. Hager, 138 N. W. 935.

(C) Alteration, Vacation, or Abandonment.

§ 79 (Iowa) The erection of fences and gates across a highway *held* not to constitute an abandonment of the highway or create an estoppel against the public to claim it as a highway.—Ford v. Doolittle, 138 N. W. 397.

V. REGULATION AND USE FOR TRAVEL.

(A) Obstructions and Encroachments.

§ 155 (Iowa) The road supervisor of a township may sue to remove an obstruction from a highway, and the question of the right of the township trustees to maintain the action with him is immaterial.—Ford v. Doolittle, 138 N. W. 397.

§ 159 (Iowa) Where a defendant in a suit to remove a fence from a highway had assisted in erecting it and asserted that it would be replaced on its removal, he was properly enjoined from interfering with the highway in a suit for the removal of the obstruction.—Ford v. Doolittle, 138 N. W. 397.

(B) Use of Highway and Law of the Road.

§ 172 (Iowa) The driver of an automobile on a country road is bound to know that people are likely to be traveling on it at all times.—Scott v. O'Leary, 138 N. W. 512.

§ 184 (Iowa) An instruction that one "operating an automobile at an average speed of more than 20 miles per hour is prima facie guilty of negligence," following the wording of Code Supp. 1907, § 1571h, was not error, although the language is obscure.—Scott v. O'Leary, 138 N. W. 512.

§ 186 (Neb.) An information charging that defendant permitted his infant son under 16 years of age to operate his automobile on a highway, and to drive past a team without giving any signals, and to drive his automobile past the team at a rapid speed, will not sustain a conviction, where the evidence showed that defendant himself had control of the automobile.—Corvill v. State, 138 N. W. 572.

(C) Injuries from Defects or Obstructions.

§ 191 (Neb.) The road law of the state does not require a county or municipality to guarantee the safety of its highways, but it must keep them in a reasonably safe condition for public travel.—Beebe v. Scotts Bluff County, 138 N. W. 737.

§ 192 (Neb.) For a county to allow an open ditch nearly a mile in length, from 6 to 8 feet wide, and with a depth of from 26 to 34 inches, to remain for nearly four years in the center of the public road may render it liable for an injury caused thereby.—Beebe v. Scotts Bluff County, 138 N. W. 737.

Where injuries result to a traveler on a highway, caused by a ditch from 6 to 8 feet wide running through the center of such highway and the combined effect of the county's neglect and sudden fright of an ordinarily gentle farm team, the county is liable.—Id.

§ 211 (Minn.) In an action for injuries by plaintiff being thrown from a traction engine operated on a highway, which came in contact with defendant's low wires, evidence *held* to

from a threshing engine by the breaking of a low telephone wire, with which the stack of his engine had collided while traveling a highway, and he did not know that the stack was against the wire when he went forward, he was not negligent as a matter of law.—*Stuhr v. Wright County Telephone Co.*, 138 N. W. 693.

HOMESTEAD.

See Contracts, § 54; Frauds, Statute of, § 56; Fraudulent Conveyances, § 52; Public Lands, § 139; Specific Performance, § 14; Wills, § 58.

I. NATURE, ACQUISITION, AND EXTENT.

(A) Nature, Creation, and Duration of Estate or Right in General.

§ 1 (Neb.) The term "homestead," as used in the statute, means the house and land where the family dwells.—*Meisner v. Hill*, 138 N. W. 583.

"Homestead" is defined as the land and buildings occupied by the owner as a home for himself and family, and protected by law from his creditors.—*Id.*

§ 13 (Neb.) The homestead may be taken in property of either the husband or wife, and if their home is owned by them as tenants in common, and is of the value of the homestead exemption, neither can claim other real estate exempt.—*Valparaiso State Bank v. Schwartz*, 138 N. W. 757.

(C) Acquisition and Establishment.

§ 33 (Iowa) Mere sleeping in a roofless house held not alone sufficient occupancy of the premises to constitute a homestead, though the house was subsequently completed and occupied.—*Gaston v. Horn*, 138 N. W. 925.

(D) Property Constituting Homestead.

§ 66 (Neb.) The homestead is subject to execution sale on judgments against the holder of the title if its value exceeds \$2,000.—*Meisner v. Hill*, 138 N. W. 583.

§ 70 (Neb.) Two adjoining 80-acre tracts, owned, respectively, by husband and wife, each partly under cultivation, operated and rented as a whole, constitute the family homestead; no rights of creditors being involved.—*Whitford v. Kinzel*, 138 N. W. 597.

§ 74 (Neb.) A wife is not, by virtue of the marriage relation alone, entitled to recover rents and profits of a portion of the family homestead owned by the husband, either before or after an attempted conveyance by him.—*Whitford v. Kinzel*, 138 N. W. 597.

III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

§ 141 (Neb.) If the legal title to the homestead is in the husband and there are no claims of creditors, on his death the homestead vests in the widow for life, and, in the absence of a will, his heirs take the homestead subject to the widow's life estate.—*Meisner v. Hill*, 138 N. W. 583.

IV. ABANDONMENT, WAIVER, OR FORFEITURE.

§ 161 (Neb.) One whose mental faculties are so impaired that she cannot form a clear intention to abandon her homestead will not be held to have done so merely because she departed therefrom and remained away a short time till placed in an insane asylum.—*Whitford v. Kinzel*, 138 N. W. 597.

§ 181 (Neb.) All presumptions are in favor of the preservation of the homestead, and the bur-

denance held insufficient to establish the abandonment of a homestead.—*Id.*

HOMICIDE.

See Criminal Law, §§ 485, 865.

VII. EVIDENCE.

(A) Presumptions and Burden of Proof.

§ 151 (Minn.) In cases of homicide, no burden rests on defendant to prove his act was justifiable, because in self-defense; but the jury, to convict, must be satisfied beyond reasonable doubt that the act was not justifiable.—*State v. McGrath*, 138 N. W. 310.

(B) Admissibility in General.

§ 171 (S.D.) Where accused and prosecutor had a difficulty, and accused pulled a revolver and struck prosecutor, who ran into a store and closed the door, and who later opened the door part way, whereupon accused shot at him, testimony of the proprietor of the store as to whether prosecutor could have gone out a back door was properly excluded.—*State v. Shepard*, 138 N. W. 294.

(E) Weight and Sufficiency.

§ 237 (Neb.) Evidence held sufficient to show that accused, convicted of murder, was not insane at the time of the killing.—*Prince v. State*, 138 N. W. 726.

X. APPEAL AND ERROR.

§ 340 (Iowa) An instruction held not erroneous, because it authorized a conviction if accused merely stood by without taking any part, while his codefendant killed deceased, where accused admitted that he was the one who struck deceased.—*State v. Young*, 138 N. W. 871.

XI. SENTENCE AND PUNISHMENT.

§ 354 (Iowa) A sentence of imprisonment on conviction of murder in the second degree reduced to 15 years.—*State v. Baker*, 138 N. W. 841.

HOSTILE POSSESSION.

See Adverse Possession, § 63.

HOUSEBREAKING.

See Burglary.

HUSBAND AND WIFE.

See Bills and Notes, § 94; Contracts, § 186; Creditors' Suit, § 8; Criminal Law, § 338; Deeds, § 211; Descent and Distribution; Divorce; Equity, § 228; Executors and Administrators, §§ 177, 181; Fraud, § 65; Fraudulent Conveyances, §§ 52, 295; Homestead, §§ 13, 70, 74, 141; Principal and Agent, § 121; Specific Performance, §§ 59, 121; Vendor and Purchaser, § 223; Wills, §§ 58, 614, 802; Witnesses, §§ 52, 146, 192.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

§ 19 (N.D.) Const. § 213, providing that a wife's separate property shall not be liable to the debts of the husband, does not render Laws 1907, c. 136, providing that a husband and wife shall be jointly and severally liable for debts for household supplies, etc., unconstitutional.—*Banner Mercantile Co. v. Hendricks*, 138 N. W. 993.

VI. ACTIONS.

§ 209 (Minn.) An unlawful interference with a lawful right to abide in a home selected by

plaintiff and his wife entitles them to recover for damages shown to have approximately resulted therefrom.—*Parks v. Byrne*, 138 N. W. 952.

§ 229 (N.D.) In an action under Laws 1907, c. 136, against a husband and wife for necessities, a complaint alleging that defendants are husband and wife, living together, and that the merchandise consisted of household supplies and clothing, is sufficient to justify a recovery.—*Banner Mercantile Co. v. Hendricks*, 138 N. W. 993.

§ 232 (N.D.) In an action under Laws 1907, c. 136, for recovery against a wife for family necessities, evidence held to sustain judgment for plaintiff.—*Banner Mercantile Co. v. Hendricks*, 138 N. W. 993.

HYPOTHETICAL QUESTIONS.

See Criminal Law, § 485; Evidence, § 553.

IMPEACHMENT.

See New Trial, § 105; Witnesses, §§ 345, 349.

IMPLIED CONTRACTS.

See Use and Occupation; Work and Labor.

IMPLIED EASEMENTS.

See Easements, §§ 15, 17.

IMPRISONMENT.

See Arrest; Bail; Habeas Corpus.

IMPROVEMENTS.

See Constitutional Law, § 290; Drains, §§ 32, 67; Municipal Corporations, §§ 281-537; Tenancy in Common, § 15.

INCOMPETENT PERSONS.

See Insane Persons.

INCONSISTENCY.

See Contracts, § 163.

INCUMBRANCES.

See Covenants, §§ 116, 127.

INDEMNITY.

See Insurance, § 514; Mechanics' Liens, § 317.

INDEPENDENT CONTRACTORS.

See Master and Servant, § 88.

INDETERMINATE SENTENCE.

See Criminal Law, § 991.

INDIANS.

§ 26 (S.D.) An Indian who has taken land in severalty under Dawes Act, and who has voluntarily taken up within the limits of the state his residence separate and apart from any tribe of Indians, and who has adopted the habits of civilized life, is amenable to the general criminal laws of the state, except where the acts of Congress make the laws of the United States applicable.—*State v. Nimrod*, 138 N. W. 377.

§ 38 (S.D.) An Indian amenable to the general criminal laws of the state may be prosecuted in the state courts for bigamy committed within an Indian reservation notwithstanding Act Cong. Feb. 2, 1903, conferring on the Circuit and District Courts of the United States jurisdiction over persons charged with enumerated crimes not including bigamy.—*State v. Nimrod*, 138 N. W. 377.

INDICTMENT AND INFORMATION.

See Criminal Law, §§ 628, 800; Embezzlement, § 35; Highways, § 186; Physicians and Surgeons, § 6.

X. CONVICTION OF OFFENSE INCLUDED IN CHARGE.

§ 191 (Iowa) Where the indictment for rape on a female under the age of 15 years did not allege the use of force and violence, the issue of accused's guilt of assault and battery was not in the case, though the evidence disclosed the exertion of some force.—*State v. Butler*, 138 N. W. 383.

§ 191 (Neb.) Under Laws 1905, c. 184, § 1, a conviction of "burglary" may be had on an indictment charging the breaking and entering of a railroad car.—*Hardin v. State*, 138 N. W. 146.

INDORSEMENT.

See Bills and Notes, § 243.

INFANTS.

See Adoption; Appeal and Error, § 215; Divorce, §§ 289, 308; Evidence, § 191; Highways, § 186; Jury, § 19; Mandamus, § 45; Parent and Child.

IV. CONTRACTS.

§ 56 (Iowa) By the provisions of Code, § 3190, an infant, whether under guardianship or not, cannot disaffirm where, through misrepresentations as to his age, the other party had good reason to believe him capable of contracting.—*First Nat. Bank v. Casey*, 138 N. W. 897.

§ 58 (Iowa) It is no objection to an infant's disaffirmance of a contract by defending an action based thereon that he has not returned the money received under the contract, where it is undisputed that it was no longer in his possession.—*First Nat. Bank v. Casey*, 138 N. W. 897.

VII. ACTIONS.

§ 102 (Iowa) In an action on contract against an infant, evidence held sufficient to go to the jury on the question whether plaintiff had "good reason to believe defendant capable of contracting" under Code, § 3190.—*First Nat. Bank v. Casey*, 138 N. W. 897.

§ 115 (Iowa) An appeal by a minor acting for himself, instead of through his guardian, is irregular, but the court acquires jurisdiction in spite of Code, §§ 3480, 3482, and he affirms his action after majority by resisting a motion to dismiss.—*First Nat. Bank v. Casey*, 138 N. W. 897.

INFERIOR COURTS.

See Courts, § 183.

INFORMATION.

See Indictment and Information.

INHERITANCE.

See Descent and Distribution.

INJUNCTION.

See Abatement and Revival; Action, § 46; Appeal and Error, § 964; Constitutional Law, §§ 233, 321; Corporations, § 320; Divorce, § 270; Eminent Domain, § 271; Execution, § 349; Highways, § 186; Intoxicating Liquors, § 263; Judgment, §§ 675, 704, 707; Justices of the Peace, § 128; Mandamus, § 53; Municipal Corporations, §§ 121, 350, 514, 526, 537, 719, 846; Schools and School Districts, § 111.

for specific performance of a contract to sell real estate may enjoin the prosecution of an action of forcible entry and detainer pending on appeal from justice's court, and enjoin the enforcement of the judgment while the appeal is pending.—*States v. Graves*, 138 N. W. 153.

(B) Property, Conveyances, and Incumbrances.

§ 38 (Mich.) Injunction will lie to prevent forcible dispossession of, and irreparable injury to, one who has long been in peaceable possession and has prima facie right of possession under a lease, till he may be heard and given opportunity to establish his rights.—*Doane v. Allen*, 138 N. W. 228.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) Grounds and Proceedings to Procure.

§ 135 (Mich.) Ordinarily the granting of a temporary injunction rests in the exercise of a sound discretion.—*Onen v. Herkimer*, 138 N. W. 198.

VI. WRIT, ORDER OR DECREE, SERVICE, AND ENFORCEMENT.

§ 211 (Wis.) Where a court declares a contract illegal and enjoins its execution, no rights against the party in whose favor the judgment is made can be founded on an execution of the contract, unless the parties before or after take such steps as are equivalent to the making of a new contract on a new and lawful consideration.—*McMillan v. Barber Asphalt Paving Co.*, 138 N. W. 94.

INNKEEPERS.

See Easements, § 17.

INNUENDO.

See Libel and Slander, §§ 82, 86.

IN PAIS.

See Estoppel, §§ 53-116.

INSANE PERSONS.

See Criminal Law, § 1169; Evidence, §§ 478, 553; Homestead, § 161; Homicide, § 237; Limitation of Actions, § 58; Wills, §§ 329, 384; Witnesses, § 269, 349.

III. GUARDIANSHIP.

§ 35 (Iowa) On an application for the appointment of a permanent guardian for an insane person under Code, § 3219, the judge of the court may appoint a temporary guardian.—*Holly v. Holly*, 138 N. W. 445.

§ 37 (Iowa) Code, § 3222, providing for termination of guardianship on application of ward held not to apply to the appointment of a temporary guardian for a person of unsound mind.—*Holly v. Holly*, 138 N. W. 445.

IV. CUSTODY AND SUPPORT.

§ 52 (S.D.) Under Laws 1895, c. 98 (Pol. Code, § 544), held that, where only one heir was dependent on an insane person's estate, the remainder of the estate not passing to such heir was liable for a county's claim for maintaining the insane person during life in the hospital for the insane.—*Minnehaha County v. Boyce*, 138 N. W. 287.

porations, § 373; Towns, § 29.

INSPECTION.

See Master and Servant, § 103.

INSTRUCTIONS.

To jury, see Criminal Law, §§ 761-830, 865, 1172; Homicide, § 340; Trial, §§ 191-296, 337.

INSURANCE.

See Evidence, §§ 127, 460; Garnishment, § 42; Trial, §§ 254, 260; Witnesses, §§ 192, 211.

II. INSURANCE COMPANIES.

(B) Mutual Companies.

§ 56 (Iowa) Though a by-law of a co-operative insurance association provides that the decision of the directors shall be final, insured may resort to the courts.—*Downing v. Farmers' Mut. Fire Ins. Co.*, 138 N. W. 917.

III. INSURANCE AGENTS AND BROKERS.

(B) Agency for Applicant or Insured.

§ 111 (Iowa) Where an insurance agent issued and delivered a policy at the solicitation of the insured he could not, on notice from insurer to cancel the policy, place the risk with another insurer, without notice to insured.—*Waterloo Lumber Co. v. Des Moines Ins. Co.*, 138 N. W. 504.

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

§ 126 (Iowa) Code Supp. 1907, § 1709, subd. 5, cl. 1, does not authorize an insurance of the owner of an automobile against liabilities imposed by law; such clause being limited to personal injuries to the insured himself.—*American Fidelity Co. v. Bleakley*, 138 N. W. 508.

Code Supp. 1907, § 1709, subd. 5, cl. 2, authorizes only the indemnifying of employers for liability from acts of employes, and prohibits liability insurance not therein authorized.—Id.

§ 127 (Iowa) An insurance agent has no authority to insure property already destroyed, and a policy then issued and intended as a substitute for a subsisting policy by another insurer, but not delivered or brought to the notice of insured, is not valid, and does not cancel the first policy.—*Waterloo Lumber Co. v. Des Moines Ins. Co.*, 138 N. W. 504.

§ 130 (Iowa) The assent of insured obtaining a fire policy from one insurer to a policy from another insurer as a substitute is essential, and, where such assent is not procured until after a loss, the second insurer is not bound.—*Waterloo Lumber Co. v. Des Moines Ins. Co.*, 138 N. W. 504.

§ 136 (Iowa) Insurer held liable on a policy never actually received by insured, where the premium had been paid, the application accepted, and the policy mailed to the agent for delivery prior to the date of the sickness from which he died.—*Unterharnscheidt v. Missouri State Life Ins. Co.*, 138 N. W. 459.

§ 137 (Iowa) Giving a note in payment of first premium on insurance policy held not insufficient as payment merely because made to the maker's order and not indorsed, notwithstanding Code Supp. 1907, § 3060—a184.—*Unterharnscheidt v. Missouri State Life Ins. Co.*, 138 N. W. 459.

Under an insurance application which provided that the policy should not take effect un-

less the premium was paid, payment in cash could be waived and a note accepted in lieu thereof.—Id.

In an application for insurance, answer to question whether premium had been paid in advance *held* not to show conclusively that it had not been paid, but to be open to the construction that it had been paid, although not wholly paid in cash.—Id.

VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

§ 229 (Iowa) Where an insurance agent delivered a policy, and collected the premium and reported the facts to the insurer, mere notice by insurer to the agent that the rate was inadequate, and that the policy must be canceled unless a higher rate was collected, did not invalidate the policy.—*Waterloo Lumber Co. v. Des Moines Ins. Co.*, 138 N. W. 504.

§ 233 (Iowa) An insurer may not relieve itself from liability for loss already incurred by inducing insured to receive the policy of another company issued without authority, and affording no indemnity.—*Waterloo Lumber Co. v. Des Moines Ins. Co.*, 138 N. W. 504.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

§ 373 (Iowa) Condition of health of insured at the time of the issuance or delivery of the policy of insurance *held* not open to consideration in the absence of fraud, in view of Code, § 1812.—*Unterharnscheidt v. Missouri State Life Ins. Co.*, 138 N. W. 459.

§ 389 (Wis.) In an action on a policy, loss payable to a trustee as his interest might appear, defendant *held* estopped to deny liability on the ground that it did not know the nature and character of the trust.—*Peerless Mineral Springs Co. v. German American Ins. Co. of New York*, 138 N. W. 1023.

XII. RISKS AND CAUSES OF LOSS.

(B) Accident and Health Insurance.

§ 451 (Iowa) An accident policy providing for nonliability in case of death or disability resulting from medical or surgical treatment *held* not to contemplate such treatment when necessary to relieve the insured from the results of an accidental injury.—*Vernon v. Iowa State Traveling Men's Ass'n*, 138 N. W. 696.

§ 454 (Iowa) A condition in a policy exempting from liability for death caused wholly or partially from disease or bodily or mental infirmity operates only where the disease or infirmity contributes, either directly or indirectly, to the death.—*Vernon v. Iowa State Traveling Men's Ass'n*, 138 N. W. 696.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(B) Insurance of Property and Titles.

§ 500 (Minn.) Where the coinsurance clause permitted by R. L. 1905, § 1642, as amended by Gen. Laws 1907, c. 446 (Rev. Laws Supp. 1909, § 1642), is attached to a policy, and the insured maintains insurance to the amount required, on a total loss, the insurable value as stated, and not the actual value, is the basis of recovery.—*Oppenheim v. Fireman's Fund Ins. Co.*, 138 N. W. 777.

It is only where a loss on buildings is total that the insurable value as stated in the policy forms the basis of determining the recovery, and where the loss is partial the insured may recover the actual amount thereof.—Id.

§ 504 (Minn.) The term "concurrent insurance" designates insurance placed in other companies covering the same risk, while there is no "coinsurance" unless the insured bears a proportion of the risk.—*Oppenheim v. Fireman's Fund Ins. Co.*, 138 N. W. 777.

(C) Guaranty and Indemnity Insurance.

§ 514 (Minn.) A provision in a policy against loss from the operation of an automobile, that no action shall lie against the insurer, unless brought by the assured for loss or expense actually sustained and paid in money by him after trial of the issue, applies only when the company denies liability and refuses to defend.—*Patterson v. Adan*, 138 N. W. 281.

(D) Life Insurance.

§ 522 (Mich.) An illustration blank, attached to a tontine policy, giving the amount of surplus that would probably be earned by the policy according to past experience, *held* not a guaranty of the amount of the surplus; and hence, at the end of the tontine period, the insured could only recover the amount earned and apportioned by the company.—*O'Brien v. Equitable Life Assur. Society of the United States*, 138 N. W. 1088.

XVIII. ACTIONS ON POLICIES.

§ 612 (Minn.) If an actual partial loss is greater than the insurance, a reference to arbitrators is not a condition precedent to recovery; but if the actual loss is less than the insurance, such reference is a condition precedent.—*Oppenheim v. Fireman's Fund Ins. Co.*, 138 N. W. 777.

§ 646 (Iowa) The burden of showing death by external, violent, and accidental means is on plaintiff.—*Vernon v. Iowa State Traveling Men's Ass'n*, 138 N. W. 696.

Defendant has the burden of showing that death resulted from a cause excepted in an accident policy.—Id.

§ 665 (Iowa) Where it was claimed that notes were given and received as payment of the first premium, evidence *held* to support a finding that the premium was paid.—*Unterharnscheidt v. Missouri State Life Ins. Co.*, 138 N. W. 459.

§ 668 (Iowa) It was a question for the jury whether notes for the amount of the first premium were given and accepted in payment of the premium.—*Unterharnscheidt v. Missouri State Life Ins. Co.*, 138 N. W. 459.

§ 668 (Minn.) Evidence *held* to present a question for the jury whether a loss by fire was total or partial.—*Oppenheim v. Fireman's Fund Ins. Co.*, 138 N. W. 777.

XX. MUTUAL BENEFIT INSURANCE.

(A) Corporations and Associations.

§ 693 (Mich.) In case of a conflict between the constitution of a mutual benefit association and its by-laws, the constitutional provision will govern.—*Roulo v. Schiller Bund*, 138 N. W. 244.

§ 696 (Minn.) Knowledge acquired by an officer of a fraternal insurance society in the performance of the duties of his office, in the absence of fraud, is the knowledge of the society.—*Hendrickson v. Grand Lodge A. O. U. W.*, 138 N. W. 946.

(D) Forfeiture or Suspension.

§ 755 (Minn.) Where a benefit assessment paid by insured while he was working as a substitute bartender was retained by the officers of his local lodge with knowledge of such employment, and additional proofs of loss were requested by defendant's grand recorder, the forfeiture, if any, created by such temporary employment in violation of the by-laws, was waived.—*Hendrickson v. Grand Lodge A. O. U. W.*, 138 N. W. 946.

§ 756 (Mich.) The by-laws of a mutual benefit association *held* not to conflict with a constitutional provision on the forfeiture of a member's right for nonpayment of assessments, and to forfeit his rights therefor, affirmative action on the part of the order was necessary.—*Roulo v. Schiller Bund*, 138 N. W. 244.

(E) Beneficiaries and Benefits.

§ 770 (Wis.) A firemen's relief association organized pursuant to Laws 1885, c. 176 (St. 1898, §§ 1987, 1988), and acts amendatory thereto, had power to designate the class from which a beneficiary could be selected in harmony with such statutes.—*Jones v. Firemen Relief Ass'n of City of Milwaukee*, 138 N. W. 618.

§ 771 (Wis.) Under the constitution of a firemen's relief association, organized pursuant to Laws 1885, c. 176 (St. 1898, §§ 1987, 1988), providing that the insured's mother could be his beneficiary, a designation of a stepmother as the beneficiary was valid, where he was single and was living with her as a member of the same family at the time of his death.—*Jones v. Firemen Relief Ass'n of City of Milwaukee*, 138 N. W. 618.

§ 784 (Wis.) Either the insurer or the beneficiary of a mutual benefit certificate has the right to insist that a change of beneficiary be made conformably to the stipulations of a policy and the rules of the association.—*Faubel v. Eckhart*, 138 N. W. 615.

The association may waive compliance with rules as to the change by issuing a new certificate, naming the new beneficiary, but it does not waive such compliance by interpleading contesting claimants and paying the money into court.—*Id.*

In view of St. 1898, § 1955c, as amended by Laws 1899, c. 101, an agreement for a change of beneficiaries in a certificate of a fraternal insurance association not in compliance with its rules *held* not binding, save as to that portion of the benefit payable to insured's estate.—*Id.*

(F) Actions for Benefits.

§ 819 (Iowa) Evidence, in an action for accident insurance, *held* to raise a fair conflict on the question of whether the insured came to his death by drowning or from an aneurism and a rupture of an artery, and to require the submission of the case to the jury.—*Brinsmaid v. Order of United Commercial Travelers of America*, 138 N. W. 465.

INTENT.

See Abandonment; Estoppel, §§ 53, 54; Evidence, § 450; Fraudulent Conveyances, § 158; Statutes, §§ 181, 184; Wills, §§ 440-506, 608, 629.

INTEREST.

See Bills and Notes, § 94; New Trial, § 162; Replevin, § 124; Vendor and Purchaser, § 351; Witnesses, §§ 140-166.

I. RIGHTS AND LIABILITIES IN GENERAL.

§ 22 (Iowa) A mortgagee having taken assignments of judgments which were a lien on the mortgaged land, releasing them on the record to enable the mortgagor to procure a loan, is entitled to the interest provided for in the judgments.—*Cuthbertson v. First Nat. Bank*, 138 N. W. 1090.

§ 22 (Wis.) Where, on appeal, judgment is reversed, with option to take a judgment of \$1,000, to be entered by the trial court, interest cannot be allowed on the \$1,000 on election made to take such amount.—*Lehman v. Amsterdam Coffee Co.*, 138 N. W. 606.

II. RATE.

§ 37 (S.D.) Under Civ. Code, § 2294, it was error in a vendor's action to enforce specific performance to award him interest on the purchase money in excess of the legal rate.—*Smith v. Johnson*, 138 N. W. 18.

III. TIME AND COMPUTATION.

§ 39 (Iowa) An instruction in an action for personal injuries which directs interest to be computed from the time of the injury on the amount allowed for future pain and suffering is erroneous.—*Staley v. Forest*, 138 N. W. 441.

INTERLOCUTORY INJUNCTION.

See Injunction, §§ 135, 211.

INTERPLEADER.**I. RIGHT TO INTERPLEADER.**

§ 11 (Wis.) The seller of property from whom two persons each claim commissions, may interplead them under St. 1898, § 2610, provided he admits liability to some one for the amount claimed.—*Schenck v. Sterling Engineering & Const. Co.*, 138 N. W. 637, 769.

INTERPRETATION.

See Contracts, §§ 148-190; Deeds, § 105; Wills, §§ 440-634.

INTERROGATORIES.

See Appeal and Error, § 1062; Creditors' Suit, § 31; Depositions.

INTERSTATE COMMERCE.

See Carriers, §§ 32-69, 406, 408; Commerce.

INTERVENTION.

See Appeal and Error, § 1036; Certiorari.

INTER VIVOS.

See Gifts.

INTESTACY.

See Descent and Distribution.

INTOXICATING LIQUORS.

See Abatement and Revival; Appeal and Error, § 725; Criminal Law, §§ 395, 829; Insurance, § 755; Master and Servant, § 174.

III. LOCAL OPTION.

§ 34 (S.D.) Provision of Pol. Code, § 2856, as amended by Laws 1903, c. 166, relative to submission of local option question on separate ballot, *held* mandatory.—*Hughes v. Hill*, 138 N. W. 290.

The submission of the question of selling intoxicating liquors at retail to a vote is governed by the provisions of the special law on that subject, and the general law of elections is applicable only where the special law fails to speak.—*Id.*

The prime object of all local option elections is to discover the wishes of the voters, and, if such wishes can be discovered, the election is effective, unless some positive provision of law has been broken or disregarded in expressing it.—*Id.*

§ 34 (S.D.) Submission at city election of local option question on the same ballot with the question whether a proposed ordinance should be passed *held* not a compliance with the statutory requirement that such question should be submitted on a separate ballot.—*Tuntland v. Noble*, 138 N. W. 291.

Statutory requirement that local option question shall be submitted on a separate ballot *held* mandatory, and noncompliance therewith renders the election on that question void.—*Id.*

§ 37 (S.D.) A person *held* not estopped to contest local option election for invalidity of

the ballots used because of his failure to ascertain the proposed form in advance of the election, and take steps to have errors therein corrected.—*Tuntland v. Noble*, 138 N. W. 291.

IV. LICENSES AND TAXES.

§ 82 (Mich.) A saloon keeper's statutory bond is to be construed in the light of the statute pursuant to which it is given.—*Squires v. Michigan Bonding & Surety Co.*, 138 N. W. 1062.

§ 87 (Mich.) A surety on a saloon keeper's bond, given pursuant to Comp. Laws 1897, § 5398, was liable to a child of a parent killed from an accident due to intoxication from liquor procured from the principal, until it had paid out the full amount called for by the bond, though payments made by it on other judgments in favor of the widow and other children, taken together with the amount paid by the principal, equaled the amount of the bond.—*Squires v. Michigan Bonding & Surety Co.*, 138 N. W. 1062.

§ 88 (Mich.) For damages resulting from a liquor dealer's violation of law, the principal and surety on the dealer's bond may be proceeded against jointly or severally in a statutory action of trespass on the case, and not by a strict action in debt on the bond.—*Squires v. Michigan Bonding & Surety Co.*, 138 N. W. 1062.

VIII. CRIMINAL PROSECUTIONS.

§ 236 (Neb.) In a prosecution for sale of whisky in violation of Comp. St. 1911, c. 50, evidence that the liquor was intoxicating, that it looked like whisky, and tasted like whisky sustains a conviction.—*Nixon v. State*, 138 N. W. 136.

§ 239 (Neb.) In prosecution for an illegal sale of liquor, an instruction that the law provides that all persons who sell spirituous or intoxicating liquors without a license are guilty of a misdemeanor is without error.—*Nixon v. State*, 138 N. W. 136.

An instruction in a prosecution for illegal sale of liquor that, if the jury is satisfied that the liquor was of a kind generally known as whisky, the name is immaterial, if the character of such liquor is shown by the evidence to be intoxicating as alleged, is proper.—*Id.*

IX. SEARCHES, SEIZURES, AND FORFEITURES.

§ 250 (Iowa) Where the evidence in proceedings to condemn and destroy a barrel of beer tended to make out a prima facie case of keeping liquor for illegal sale, under Code, §§ 2413-2416, 2427, held error to take the case from the jury and discharge defendant.—*State v. Johnson*, 138 N. W. 458.

X. ABATEMENT AND INJUNCTION.

§ 263 (Iowa) Where the action to enjoin a liquor nuisance abates by defendant's death, the liquor kept on defendant's premises cannot be adjudged a nuisance, since there can be no intent, which is a necessary element.—*Babbitt v. Corrigan*, 138 N. W. 466.

XI. CIVIL DAMAGE LAWS.

§ 308 (Iowa) Under a statute authorizing a recovery by a child injured in his means of support by any intoxicated person, resulting from selling or giving of liquor to him, plaintiff need not prove that the injury resulted in consequence of the intoxication.—*Lee v. Hederman*, 138 N. W. 893.

§ 309 (Iowa) In a civil damage action a question asking a witness what he knew concerning plaintiff's father being a bootlegger held properly disallowed for immateriality.—*Lee v. Hederman*, 138 N. W. 893.

In a civil damage action for loss of plaintiff's support due to the death of his father while intoxicated, evidence of the father's hab-

its as to the use of intoxicating liquors held admissible on the question of damages.—*Id.*

INTOXICATION.

See Appeal and Error, § 1064; Drunkards.

INVENTION.

See Patents.

INVESTMENT.

See Trusts, §§ 218, 237.

IRRIGATION.

See Constitutional Law, § 80; Waters and Water Courses, §§ 240, 263.

ISSUES.

See Appeal and Error, §§ 160-179, 215, 263.

JEOPARDY.

See Criminal Law, §§ 162-200.

JOINER.

See Action, §§ 38-50.

JOINT-STOCK COMPANIES.

See Associations.

JOINT TENANCY.

See Tenancy in Common.

JUDGES.

See Courts; Divorce, § 200; Drunkards; Justices of the Peace.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 3 (S.D.) Const. art. 5, § 26, gives the Legislature a continuing power to fix the time of judicial elections, and for that purpose to change the terms of judges in office when the Legislature acts, though they are not the first elected under the Constitution.—*State v. Polley*, 138 N. W. 300.

Under Const. art. 5, § 26, Laws 1893, c. 84, and Laws 1901, c. 118, held, that it was immaterial whether the extension of the terms of judges was within the power of the Legislature or not, since the provision as to change of term was merely incidental to the fixing of the time of the judicial election which the Legislature could do, and should only be considered as an existing fact in determining when the election was to be held.—*Id.*

IV. DISQUALIFICATION TO ACT.

§ 39 (S.D.) The Supreme Court must hear a proceeding to prevent the Secretary of State from certifying the names of candidates for the position of judges of such court on the ground of invalidity of the law under which the election is to be held, though the terms of such judges will be affected by the decision.—*State v. Polley*, 138 N. W. 300.

JUDGMENT.

See Action, § 38; Appeal and Error; Bail, § 17; Bankruptcy, §§ 163, 166; Constitutional Law, § 278; Creditors' Suit; Criminal Law, § 1008; Divorce, §§ 162, 243, 245, 247, 254; Eminent Domain, § 243; Equity, § 63; Execution; Fraudulent Conveyances, § 52; Habeas Corpus, § 30; Interest, § 22; Justices of the Peace, §§ 125, 128, 130; Limitation of Actions, § 13; Mortgages, §§ 491, 561; Municipal Corporations, § 513; New Trial, § 164; Partnership, § 219; Pleading, §§ 343, 350; Replevin, §§ 103, 104, 110, 126, 124; Trial, § 251.

I. NATURE AND ESSENTIALS IN GENERAL.

§ 17 (Iowa) Statutes conferring jurisdiction of a nonresident defendant on service by publication only must be strictly complied with to support a judgment.—*Manion v. Brady*, 138 N. W. 558.

IV. BY DEFAULT.

(B) Opening or Setting Aside Default.

§ 143 (N.D.) The vacation of a judgment for plaintiff, where defendant set up that he believed the case was disposed of and had been informed that there would never be any judgment entered, was an abuse of discretion, where notice of trial, notice to produce exhibits, and notices for taxation and retaxation of costs were served on defendant's attorney.—*Wannemacher v. Vance*, 138 N. W. 3.

VI. ON TRIAL OF ISSUES.

(A) Rendition, Form, and Requisites in General.

§ 199 (Minn.) A judgment cannot be ordered notwithstanding the verdict, unless the evidence as a matter of law is practically conclusive against the verdict; it being insufficient that the court on the evidence should have granted a new trial.—*Erwin v. Shell*, 138 N. W. 691.

In an action for injuries to plaintiff in an automobile accident, evidence held to sustain a verdict for plaintiff, and hence that the court erred in rendering judgment for defendant non obstante.—*Id.*

§ 203 (Iowa) Defendant was not entitled to separate judgments on items of counterclaim found in its favor; the trial court having directed the jury to credit such items on the sum found due plaintiff.—*Seever v. Cleveland Coal Co.*, 138 N. W. 793.

VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

§ 303 (Iowa) A judgment may not be amended to show facts differing from its recitals in a collateral proceeding.—*Lansing v. Bever Land Co.*, 138 N. W. 833.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(A) Judgments Operative as Bar.

§ 574 (Neb.) A ruling on a motion during the progress of a cause is not res judicata.—*Butler v. Secrist*, 138 N. W. 749; *Kissinger v. Butler*, *Id.* 750.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

§ 590 (Iowa) A decree reforming a will devising the halves of a building to different devisees, so as to correctly describe one of the halves, does not bar a subsequent suit for the protection of an easement in such half by the devisee of the other half.—*Kane v. Templin*, 138 N. W. 901.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(A) Judgments Conclusive in General.

§ 663 (Wis.) That the trial court erroneously decided that a contract for street paving could be legally entered into did not protect the contractor entering into the contract and performing the work pending appeal resulting in a decision of the Supreme Court adjudging the contract illegal.—*McMillan v. Barber Asphalt Paving Co.*, 138 N. W. 94.

(B) Persons Concluded.

§ 675 (Wis.) Where, in a suit by a taxpayer to enjoin a city from executing a contract, the attorney under a general retainer from the contractor not made a party appeared and par-

ticipated in the defense, a judgment adjudging the contract invalid was binding on the contractor.—*McMillan v. Barber Asphalt Paving Co.*, 138 N. W. 94.

§ 682 (Minn.) In partition, a judgment in a former action between plaintiff's grantor and others, as plaintiffs and certain of the defendants in the then case as defendants, held to estop plaintiff's grantor and those in privity with him from asserting title to the interest claimed by plaintiff.—*White v. Hewitt*, 138 N. W. 421.

§ 684 (Wis.) A judgment in ejectment against a tenant who is made a party does not deprive the landlord, not made a party, of his title, or of his future right of possession.—*Illinois Steel Co. v. Treu*, 138 N. W. 995.

There is no privity between a landlord and tenant, so as to make a judgment against the tenant binding on the landlord.—*Id.*

§ 704 (Iowa) An adjudication enjoining sewer contracts and restraining the enforcement of special assessments therefor in which action the city joined with the holders of assessment certificates as a party defendant, not raising or determining any question between the city and its codefendants, held not conclusive against the assignees of such holders in a subsequent action to enforce such certificates.—*First Nat. Bank v. City of Emmetsburg*, 138 N. W. 451.

§ 707 (Iowa) Where plaintiff claiming an easement in an adjoining lot was not a party to proceedings to sell the lot to pay debts of the deceased owner, a decree ordering a sale was not res judicata of the existence of the easement.—*Stephens v. Boyd*, 138 N. W. 389.

§ 707 (Iowa) Judgment for property owners enjoining performance of a contract for construction of sewers and restraining the enforcement of special assessments therefor is not conclusive in favor of other property owners unless on facts substantially alike, and even then such judgment is not in rem and not conclusive in another action against the city in which the validity of the same assessment is involved.—*First Nat. Bank v. City of Emmetsburg*, 138 N. W. 451.

§ 707 (Wis.) A judgment is, as a general rule, binding only on parties and their privies.—*Illinois Steel Co. v. Treu*, 138 N. W. 995.

(C) Matters Concluded.

§ 720 (Iowa) A judgment of a court having jurisdiction is conclusive as to all points and questions adjudicated.—*Worrall v. Des Moines Retail Grocers' Ass'n*, 138 N. W. 481.

§ 721 (Iowa) A decree against claimant in a suit for specific performance of an oral contract to convey land in consideration of care, on the ground that it was not substantiated by the evidence, held res judicata against claimant's rights to recover reasonable services against decedent's estate.—*Black v. Miller*, 138 N. W. 535.

§ 739 (Minn.) A prior judgment by an owner of horses, leased to a logging contractor, for the price of their services, and to establish a lien against defendant in a second action, does not estop defendant from claiming that plaintiffs acquired no lien on the logs; the judgment being a personal one, and it appearing that the court could not adjudicate such lien.—*McKinnon v. Red River Lumber Co.*, 138 N. W. 781.

XV. LIEN.

§ 752 (Iowa) A judgment lien on land is not a property right, but merely gives to the judgment creditor a lien on the debtor's interest in the land enforceable by levy and sale.—*Hunter v. Citizens' Savings & Trust Co.*, 138 N. W. 475.

§ 777 (Iowa) Code, § 3801, relating to liens of judgments of courts of record on real estate

is applicable to both legal and equitable interests.—*Hunter v. Citizens' Savings & Trust Co.*, 138 N. W. 475.

§ 785 (Iowa) A judgment creditor of a residuary legatee held not to have any lien on land of testatrix as against a purchaser from the executor selling the land under a power contained in the will to pay debts and legacies.—*Hunter v. Citizens' Savings & Trust Co.*, 138 N. W. 475.

XIX. SUSPENSION, ENFORCEMENT, AND REVIVAL.

§ 872 (Neb.) Revivor of a dormant judgment merely reinstates the judgment, and authorizes execution to collect the same.—*Tierney v. Evans*, 138 N. W. 140.

One not a party to an original judgment who fails to appeal upon service of the conditional order of revivor is not made a party to the judgment by the final order of revival.—*Id.*

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

§ 956 (Iowa) An ambiguous decree is subject to explanation by parol.—*Barthell v. Hermanston*, 138 N. W. 1108.

JUDICIAL NOTICE.

See Evidence, §§ 5-47.

JUDICIAL POWER.

See Constitutional Law, § 74.

JUDICIAL SALES.

See Appeal and Error, § 150; Bankruptcy, § 163; Execution, §§ 245-300; Executors and Administrators, § 388; Homestead, § 66; Judgment, §§ 707, 752; Mortgages, § 199; Taxation, §§ 642-686, 708-722.

JURISDICTION.

See Appeal and Error, §§ 23, 173, 435; Certiorari; Constitutional Law, § 74; Corporations, §§ 320, 507, 609; Courts; Criminal Law, § 167; Discovery, § 55; Divorce, §§ 162, 168, 200, 202, 217, 223; Drains, § 74; Drunkards; Equity, § 39; Habeas Corpus, § 30; Indians; Infants, § 115; Judgment, § 17; Justices of the Peace, §§ 36, 125; Mandamus, §§ 26, 53; Mortgages, § 497; Process, § 96; Taxation, §§ 642, 648.

JURY.

See Appeal and Error, §§ 386, 980; Criminal Law, §§ 126, 137, 284, 736-764, 865, 957, 1156; Mandamus, § 45; New Trial, § 54.

II. RIGHT TO TRIAL BY JURY.

§ 19 (Iowa) Code, § 3219, providing for a trial by jury of proceedings for the appointment of a guardian for a person of unsound mind, held not applicable to the appointment of a temporary guardian by a judge or to his action in dissolving such appointment.—*Holly v. Holly*, 138 N. W. 445.

Code, § 3219, providing that either party to a proceeding for the appointment of a guardian for an habitual drunkard may have a trial by jury, has no reference to the appointment of a temporary guardian by the judge of the court or to his action in dissolving such appointment.—*Id.*

§ 19 (S.D.) A proceeding under Pol. Code, §§ 3205-3214, for the removal of dependent or neglected children to homes for dependent children, is a special proceeding governed by the provisions of the charter, and the court may not call a jury under Code Civ. Proc. § 244.—*State v. Taylor*, 138 N. W. 372.

§ 21 (Mich.) One brought before the court for sentence after violating the conditions of his

probation, authorized by Pub. Acts 1903, No. 91, as amended by Pub. Acts 1909, No. 124, is not entitled to a jury trial to determine the question of violation of the conditions.—*People v. Dudley*, 138 N. W. 1044.

§ 31 (Wis.) A joinder of a suit by subcontractors to enforce their liens, and for a deficiency judgment against the principal contractor, and the surety on his bond, and of suit by the owner on the bond, conditioned on the principal contractor paying all indebtedness incurred, does not deprive the principal contractor and the surety of a jury trial granted by St. 1898, § 2843.—*Warren Webster & Co. v. Beaumont Hotel Co.*, 138 N. W. 102.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

§ 97 (Neb.) Where the examination of a juror showed that the defendant was an intimate friend and plaintiff was a stranger, and the record shows that defendant's peremptory challenges were exhausted, a challenge for cause should have been allowed.—*Musser v. Musser*, 138 N. W. 599.

§ 103 (Mich.) A juror is not disqualified because of having formed an opinion from reading newspaper reports of the case, if he states that he has no prejudice and can try the case impartially according to the evidence.—*People v. Swift*, 138 N. W. 662.

JUSTICES OF THE PEACE.

See Criminal Law, § 167; Landlord and Tenant, § 291.

III. CIVIL JURISDICTION AND AUTHORITY.

§ 36 (S.D.) Under Justice's Code, §§ 9, 43, held, that an action of forcible entry and detainer by the assignee or grantee of a lessor by an oral lease involved no title to real property, and was within the jurisdiction of the justice's court.—*McManus v. Maloy*, 133 N. W. 963.

A mere claim by defendant in forcible entry and detainer that he has an estate, and that title is involved is not sufficient to oust the jurisdiction of the justice's court, but it must affirmatively appear in the pleadings or evidence that such title is necessarily in issue.—*Id.*

IV. PROCEDURE IN CIVIL CASES.

§ 125 (Iowa) Justice of the peace held to have jurisdiction to render judgment upon stipulation or consent of parties after the expiration of the three days allowed by Code, § 4522, within which to render judgment after submission for final judgment.—*Worrall v. Des Moines Retail Grocers' Ass'n*, 138 N. W. 481.

§ 128 (Neb.) In an action to restrain proceedings under an execution and to set aside a judgment of a justice of the peace, evidence held to sustain a finding and decree for plaintiff.—*Cusick v. Brodsky*, 138 N. W. 145.

§ 130 (Iowa) The judgment of a justice of the peace is as conclusive on the parties as is the judgment of any other court.—*Worrall v. Des Moines Retail Grocers' Ass'n*, 138 N. W. 481.

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

§ 146 (Neb.) The continuance of a civil suit by a justice of the peace for more than 90 days, in violation of Code Civ. Proc. §§ 960, 961, without the consent of the parties, is a final order, which may be reviewed by proceedings in error in the district court.—*Tongue v. Lloyd*, 138 N. W. 738.

KNOWLEDGE.

See Corporations, § 207; Criminal Law, §§ 134, 351; Discovery, § 62; Drains, § 74; Electricity; Estoppel, §§ 53, 54; Evidence, § 219; Insurance, § 696; Libel and Slander, § 74; Railroads, § 64; Release, §§ 17, 24; Vendor and Purchaser, § 215.

LACHES.

See Cancellation of Instruments; Equity, §§ 72, 87.

LANDLORD AND TENANT.

See Adverse Possession, § 45; Easements, § 17; Ejectment, § 49; Injunction, § 38; Judgment, § 684; Mechanics' Liens, § 78; Principal and Agent, § 171; Taxation, § 76; Use and Occupation; Vendor and Purchaser, § 3; Waters and Water Courses, § 263.

III. LANDLORD'S TITLE AND RE-VERSION.**(B) Estoppel of Tenant.**

§ 63 (S.D.) A tenant cannot question the title of his landlord without surrendering possession, and thereby terminating the tenancy.—McManus v. Maloy, 138 N. W. 963.

§ 65 (S.D.) A tenant cannot question the title of an assignee or grantee of the lessor.—McManus v. Maloy, 138 N. W. 963.

IV. TERMS FOR YEARS.**(A) Nature and Extent.**

§ 70 (S.D.) A tenant while complying with the terms of his lease has an estate in the premises leased, but no title to the property.—McManus v. Maloy, 138 N. W. 963.

VII. PREMISES AND ENJOYMENT AND USE THEREOF.**(A) Description, Extent, and Condition.**

§ 124 (Iowa) A tenant of a storeroom on the first floor of a hotel building held not to acquire any right to have constructed and kept open a door between the storeroom and the hotel lobby.—Julius A. Bauer & Co. v. Chamberlain, 138 N. W. 903.

(E) Injuries from Dangerous or Defective Condition.

§ 164 (Minn.) Where rented premises contained a concealed danger, known to the landlord, but unknown to the tenant, at the time of the lease, the landlord was liable to the tenant or his licensees for injuries sustained without negligence on their part, though the landlord made no covenant to repair.—Ames v. Brandvold, 138 N. W. 786.

In the absence of a landlord's promise to repair, or fraud or concealment as to defects, he is not liable to a tenant or his licensees for injuries sustained by the unsafe condition of the premises.—Id.

A landlord, having promised to repair, is liable to a tenant and his licensees for defects in his premises.—Id.

§ 169 (Minn.) A complaint against a landlord for injuries to a licensee of a tenant by reason of the decayed condition of the timbers of an outhouse, which were concealed, held to state a cause of action.—Ames v. Brandvold, 138 N. W. 786.

§ 170 (Minn.) A landlord, having demised premises with a nuisance upon them, is liable for injuries to a third person, subsequently injured thereby.—Ames v. Brandvold, 138 N. W. 786.

VIII. RENT AND ADVANCES.**(B) Actions.**

§ 231 (Iowa) Evidence held to sustain the court's finding that \$228.25 was owing plaintiff for rent.—Maine v. Constantine, 138 N. W. 702.

(C) Lien.

§ 252 (Iowa) That a lease stipulated for a lien in terms resembling the statutory declaration of the landlord's lien did not make the lien a statutory one, or impair its validity against a purchaser of the property.—Maine v. Constantine, 138 N. W. 702.

§ 254 (Iowa) A landlord's lien for rent under an existing lease held not waived by the execution of a new lease, or the acceptance of subsequent rent.—Maine v. Constantine, 138 N. W. 702.

§ 262 (Iowa) One who had no interest in the property in controversy was not a necessary party to an action to enforce a landlord's lien, though he at one time had an interest while the property was subject to the lien.—Maine v. Constantine, 138 N. W. 702.

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

§ 291 (S.D.) Under Justice's Code, § 44, relating to the maintenance of an action of forcible entry and detainer, held, that such an action was maintainable, not only by the lessor, but by his assignee or grantee.—McManus v. Maloy, 138 N. W. 963.

LARCENY.

See Contracts, § 129; Criminal Law, §§ 167, 200, 395; Embezzlement.

LAW OF THE CASE.

See Appeal and Error, §§ 1097, 1195.

LAW OF THE ROAD.

See Highways, §§ 172-186, 191.

LEADING QUESTIONS.

See Criminal Law, § 1153.

LEASE.

See Landlord and Tenant.

LECTURES.

See Contracts, § 190; Damages, § 118; Evidence, § 455.

LEGACIES.

See Wills.

LEGISLATIVE POWER.

See Municipal Corporations, §§ 63, 76.

LETTERS.

See Evidence, §§ 220, 271, 455.

LIBEL AND SLANDER.

See Evidence, § 471.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

§ 7 (Iowa) Words spoken of and concerning plaintiff to her son, charging her with being a whore and mother of a bastard, are slanderous per se.—Hahn v. Lumpa, 136 N. W. 492.

§ 10 (Minn.) A publication charging by way of insinuation that cause exists for removal of a county commissioner because of favoritism

An article stating that it is easy "to work" the county commissioners is actionable; the word "work," in such connection, meaning to obtain from an official something which the law does not permit, or to turn to some particular course a public official by insidious means.—Id.

§ 10 (Wis.) Words in the nature of an appeal to electors to overthrow at an election the ruling political clique, relating to the fitness for office of those adhering and their conduct in office, imputing to them no crime, employing no degrading or insulting epithets towards them, but only in extravagant language denouncing them as derelict in the duties of their office, unfit, unfaithful, etc., are not libelous.—Arnold v. Ingram, 138 N. W. 111.

§ 19 (Wis.) In libel, words are to be construed according to their plain and natural import.—Arnold v. Ingram, 138 N. W. 111.

§ 21 (Wis.) Where words of a published article refer to all officials, with nothing to show that they point to one officer more than any other officer, they are not actionable as libelous.—Arnold v. Ingram, 138 N. W. 111.

II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.

§ 48 (Wis.) The more specific and serious charges against a candidate for office being true, the others, in the nature of conclusions from the former, must be accorded the protection of the qualified privilege of discussing the demerits of candidates for office.—Arnold v. Ingram, 138 N. W. 111.

Words of a publication as to candidates for office in a county held not reasonably susceptible of any defamatory meaning as regards the county attorney, but to be within the bounds of fair comment.—Id.

§ 50½ (Wis.) Because the paper in which is published an article on candidates for county office, privileged in that county, had some circulation outside the county, there is not such excessive publication as to give a right of recovery.—Arnold v. Ingram, 138 N. W. 111.

IV. ACTIONS.

(A) Right of Action and Defenses.

§ 74 (Wis.) One participates in publication of a libel, so as to make himself liable, by delivering manuscript, with knowledge of its statements, to a newspaper for publication.—Arnold v. Ingram, 138 N. W. 111.

(B) Parties, Preliminary Proceedings, and Pleading.

§ 82 (Wis.) Words of a published article referring to all officials, with nothing therein to show that they point to one officer more than any other may not, by innuendo, be shown to refer to a particular officer.—Arnold v. Ingram, 138 N. W. 111.

§ 86 (Wis.) The libelous meaning attempted to be put on certain words by innuendo, being negatived by the jury, and no other meaning being offered for them, they furnish no support for recovery.—Arnold v. Ingram, 138 N. W. 111.

§ 95 (Iowa) Where matter relied upon in mitigation of damages in an action for slander was not separately pleaded as required by Code, § 3593, it was not available for that purpose.—Hahn v. Lumpa, 138 N. W. 492.

(C) Evidence.

§ 107 (Iowa) In an action for slander, defendant's pecuniary condition is relevant.—Hahn v. Lumpa, 138 N. W. 492.

§ 111 (Mich.) In an action for libel in publishing an article concerning a claim filed by plaintiff before the board of supervisors, evidence of expressions of opinion by supervisors to defendant's reporter, who wrote the article,

(D) Damages.

§ 121 (Iowa) In an action for slander of a chaste woman by calling her a whore and the mother of a bastard, judgment awarding her \$500 damages is not excessive.—Hahn v. Lumpa, 138 N. W. 492.

(E) Trial, Judgment, and Review.

§ 123 (Mich.) Retraction of a libel having been published under Comp. Laws 1897, § 10-425, the question of its completeness was a question of law for the court.—Gripman v. Kitchel, 138 N. W. 1041.

§ 123 (Wis.) Where there is no ambiguity in alleged libelous language, its meaning is for the court to determine.—Arnold v. Ingram, 138 N. W. 111.

Whether the occasion of alleged libelous language was one affording to the writer a qualified privilege or right of fair comment and criticism is a question for the court.—Id.

In libel the question of malice is for the jury.—Id.

The question of the meaning of an alleged libel, when the words are ambiguous or fairly susceptible of a libelous meaning, is for the jury; their inquiry being, How did the persons to whom they were originally published understand them?—Id.

§ 125 (Wis.) The finding negativing bad motive in the publication on an occasion of qualified privilege is equivalent to one of good faith and absence of malice.—Arnold v. Ingram, 138 N. W. 111.

LICENSES.

See Criminal Law, § 395; Landlord and Tenant, §§ 164, 169; Municipal Corporations, § 591; Physicians and Surgeons, §§ 5, 6.

I. FOR OCCUPATIONS AND PRIVILEGES.

§ 5½ (Minn.) Ordinances of the city of St. Paul held not an exercise of its legislative power to license and regulate theaters and shows; but the council retain the power to license and regulate them, including the power to refuse a license in a particular case.—State v. Redington, 138 N. W. 430.

§ 6 (Neb.) Under Comp. St. 1911, c. 13, art. 3, § 48, subd. 9, each city of the first class having more than 5,000 and less than 25,000 inhabitants may levy a tax on every business or occupation carried on within its territorial limits, excepting those enumerated in the proviso clause.—City of Grand Island v. Postal Telegraph Cable Co., 138 N. W. 169.

A city of the first class having more than 5,000 and less than 25,000 inhabitants may enact an ordinance imposing on telegraph companies a license tax of a reasonable sum per annum.—Id.

§ 6 (Wis.) The extraordinary power given to a city of licensing conduct, business or transactions for the purpose of regulating the same, is not to be presumed but must be plainly conferred.—Chain Belt Co. v. City of Milwaukee, 138 N. W. 621; Reliance Laundry & Cleaning Co. v. Same, Id. 623.

A statute giving power to license must be strictly construed; and doubts arising from the language employed must be resolved in favor of the public.—Id.

Licenses for the purpose of regulation, granted under an exercise of the police power must have special legislative authorization.—Id.

Under the charter of Milwaukee, c. 4, § 3, power to license and regulate elevator operators held not to be implied.—Id.

§ 7 (Neb.) Where the ordinance imposes a tax equal in amount on all telegraph companies, it does not violate Const. art. 9, §§ 1, 6, requir-

ing uniformity and equality.—City of Grand Island v. Postal Telegraph Cable Co., 138 N. W. 169.

The amount of an occupation tax is not to be measured by the profits of the business taxed, and if, considered as an incident to local government, it appears *prima facie* reasonable in amount, the courts will not declare the ordinance void, unless it is clearly shown that the license charged is unreasonable or confiscatory.—Id.

§ 7 (Wis.) Laws 1905, c. 490, authorizing the imposition of license fees on transient merchants, etc., did not empower local municipalities to exact fees which were so high as to prohibit or destroy the occupation.—City of Monroe v. Endelman, 138 N. W. 70.

An ordinance of a city of 4,500 population imposing a daily license fee of \$25 on transient merchants under Laws 1905, c. 490, *held* unreasonable and confiscatory.—Id.

Where a municipal corporation had authority to fix per diem fees for transient merchants up to a specified limit, whether the ordinance was within the limits and purposes specified by the delegated power was a judicial question.—Id.

Laws 1905, c. 490, authorizing the imposition of per diem fees on transient merchants, did not authorize the imposition of fees so high that the business, which is a lawful one, could not be carried on at a profit.—Id.

LIENS.

See Action, § 50; Building and Loan Associations; Chattel Mortgages, § 41; Covenants, § 116; Drains, § 49; Evidence, § 427; Fraud, § 22; Judgment, §§ 739, 752-755; Landlord and Tenant, §§ 252-262; Logs and Logging, § 26; Mechanics' Liens; Mortgages, § 171; Municipal Corporations, §§ 373, 519.

§ 7 (Mich.) A contract wherein a son, in consideration of a deed from his mother of her dower, agreed to give her one-third of the income, *held* one on which equity could decree an accounting and a lien for the income.—Holden v. Butler, 138 N. W. 1071.

LIFE ESTATES.

See Homestead, § 141; Wills, §§ 608, 614.

LIFE INSURANCE.

See Insurance.

LIMITATION OF ACTIONS.

See Adverse Possession; Equity, § 87; Municipal Corporations, § 513; Records, § 9; Statutes, § 117; Taxation, § 722; Tenancy in Common, § 15; Wills, § 427.

I. STATUTES OF LIMITATION.

(A) Nature, Validity, and Construction in General.

§ 4 (Wis.) Const. art. 10, § 2, providing that moneys derived by the state from fines shall be set apart for school purposes, does not prohibit the Legislature from applying limitation statutes to bar recovery by the state of the proceeds of fines collected by municipalities.—State v. City and County of Milwaukee, 138 N. W. 1006.

§ 11 (Wis.) Under St. 1898, § 4229, making limitations applicable to actions by the state, and its amendment (Laws 1905, c. 1), fixing the limitation for the recovery of a penalty accruing to the state, the right of the state to recover fines collected by municipalities may be barred by limitations.—State v. City and County of Milwaukee, 138 N. W. 1006.

St. 1898, § 4229, making the limitations prescribed by statute applicable to the state, applies where the state sues as trustee of the

school fund, as well as where it seeks to enforce demands in its proprietary capacity.—Id.

§ 13 (Mich.) A judgment debtor whose solicitor by irregular practice induced the judge to delay granting a petition for leave to issue execution until after ten years from the entry of the decree *held* estopped to plead statute of limitations.—Albert v. Patterson, 138 N. W. 220.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

§ 43 (S.D.) A statute of limitations does not begin to run until an action will lie to enforce the claim.—Minnehaha County v. Boyce, 138 N. W. 287.

§ 46 (Iowa) Where a real estate broker selling land to a purchaser agreed to procure for him a loan at 5 per cent., and to pay any difference if obliged to pay a higher rate, limitations did not begin to run on the promise until the purchaser was compelled to pay additional interest.—Depugh v. Brown, 138 N. W. 908.

§ 50 (Iowa) Where the services sued for were continuous with the exception of one or two brief periods when plaintiff was absent on visits, limitations did not run against any part of the cause of action.—In re Oldfield's Estate, 138 N. W. 846.

§ 55 (Neb.) A cause of action for damages from the overflowing of land through the negligent maintenance of a dam across a ditch emptying into a river arises when the damages are sustained.—Christensen v. Omaha Ice & Cold Storage Co., 138 N. W. 141.

§ 58 (S.D.) Under Laws 1895, c. 98 (Pol. Code, § 544), an action by a county to recover payments by it for an insane person's maintenance, made more than six years before her death, is not barred.—Minnehaha County v. Boyce, 138 N. W. 287.

(D) Death and Administration.

§ 83 (Iowa) The running of limitations against a cause of action for breach of a marriage promise is not suspended by the death of the promisor.—In re Oldfield's Estate, 138 N. W. 846.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

§ 102 (Wis.) The rule that limitations do not run against the trustee of an express trust applies only in equitable actions between the trustee and the cestuis que trustent.—State v. City and County of Milwaukee, 138 N. W. 1006.

(H) Commencement of Action or Other Proceeding.

§ 127 (Minn.) Where an amended complaint states the same cause of action as alleged in the original, the action so pleaded must be treated as instituted at the time of the service of the summons, for the purpose of determining whether limitations had run before service of the amended complaint.—Gilbert v. Gilbert, 138 N. W. 943.

IV. OPERATION AND EFFECT OF BAR BY LIMITATION.

§ 169 (Iowa) A suit by an heir to cancel a conveyance of land located in Iowa is not barred merely because the remedy available in a sister state, where the grantor and grantee resided at the time of the execution of the deed, is barred, notwithstanding Code, § 3452.—Curtis v. Armagast, 138 N. W. 873.

A cause of action for the cancellation of a deed conveying land in Iowa on the ground of the fraud of the grantee, committed in a sister state where the deed was executed, *held* to arise in Iowa, within Code, § 3452.—Id.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 180 (Mich.) Bar of limitations may be raised by demurrer where it appears on the face of the bill.—*Rodgers v. Beckel*, 138 N. W. 202.

§ 180 (Minn.) The statute of limitations is not available on demurrer, unless it clearly appears from the face of the pleading attacked that the statute has run against the cause of action alleged.—*Gilbert v. Gilbert*, 138 N. W. 943.

LIQUOR SELLING.

See Intoxicating Liquors.

LIVE STOCK.

See Carriers, §§ 215-228.

LOAN ASSOCIATIONS.

See Building and Loan Associations.

LOANS.

See Contracts, §§ 346, 348, 349; Fraud, § 41.

LOCAL OPTION.

See Intoxicating Liquors.

LOGS AND LOGGING.

See Appeal and Error, § 843; Judgment, § 739; Master and Servant, § 88; Trial, § 256; Vendor and Purchaser, § 351.

§ 26 (Minn.) The owner of horses, who hires them to a contractor to aid in hauling logs, and performs no "manual labor or other services" in connection with the logs, is not entitled to a lien on the logs, under Rev. Laws 1905, § 3524.—*McKinnon v. Red River Lumber Co.*, 138 N. W. 781.

LUNATICS.

See Insane Persons.

MALICE.

See Libel and Slander, §§ 123, 125.

MALICIOUS PROSECUTION.**II. WANT OF PROBABLE CAUSE.**

§ 25 (Mich.) Where first one party and then the other to litigation was successful in the circuit or Supreme Court, this negated the claim of one party that the rights of the other were of such a doubtful character as to warrant the belief that she and her attorneys were engaged in a fraudulent and malicious attempt to oppress and harass the party setting up such claim by bringing foundationless actions.—*Carpenter v. Hood*, 138 N. W. 241.

MALPRACTICE.

See Physicians and Surgeons, § 18.

MANDAMUS.**I. NATURE AND GROUNDS IN GENERAL.**

§ 1 (Wis.) In harmony with the liberal spirit of the Code, the use of mandamus, in general, should be favored, where permissible at all, as the most expeditious mode of vindicating the right.—*State v. Arnold*, 138 N. W. 78.

§ 4 (N.D.) The Supreme Court, in the exercise of its power of superintending control, will not make permanent an alternative writ of mandamus commanding the district court to vacate an order dismissing contempt proceedings; the remedy by appeal being adequate.—*State v. District Court of Grand Forks County*, 138 N. W. 988.

§ 10 (Mich.) Mandamus is not a writ of right, and is allowed only in furtherance of justice, and is not allowed unless relator shows a clear legal right thereto.—*Cook v. Board of Election Com'rs of Cheboygan County*, 138 N. W. 1.

§ 15 (Iowa) In mandamus to compel a railroad company to comply with an ordinance requiring the erection of gates at a crossing, it is no defense that the ordinance requires an intersecting railway to maintain other gates at such crossing, and it has not complied.—*City of Council Bluffs v. Illinois Cent. R. Co.*, 138 N. W. 891.

II. SUBJECTS AND PURPOSES OF RELIEF.**(A) Acts and Proceedings of Courts, Judges, and Judicial Officers.**

§ 26 (Mich.) Mandamus will not lie to set aside the action of the lower court on account of irregularities in proceedings which were waived in that court, or for defects which are not jurisdictional, or which do not otherwise affect the very right of relator.—*Lake v. Houghton Circuit Judge*, 138 N. W. 249.

§ 45 (S.D.) One instituting a proceeding under Pol. Code, §§ 3205-3214, for the removal of a neglected child to a home for dependent children, may by mandamus compel the court to proceed and try the issues without continuing the proceedings to allow a jury trial.—*State v. Taylor*, 138 N. W. 372.

§ 53 (Neb.) The Supreme Court has jurisdiction by mandamus to compel a judge of the district court to vacate an order of injunction if the district court was entirely without jurisdiction to make the order.—*State v. Graves*, 138 N. W. 153.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 77 (Wis.) Mandamus is a proper remedy where a person has been unlawfully removed from office, regardless of the place having been filled before commencement of the proceedings.—*State v. Arnold*, 138 N. W. 78.

Mandamus in exceptional cases may or may not be used, in the discretion of the court, there being no absolute rule as to its use to obtain possession of an office, except that a claimant, having no prima facie title against one in possession holding by right, at least de facto, cannot avail himself of it.—*Id.*

A person who has been, under the forms of law, dispossessed of an office to which he, at best, had only a de facto right, is not entitled to regain possession by mandamus.—*Id.*

§ 77 (Wis.) Under Civil Service Law (Laws 1895, c. 313) § 4, as amended by Laws 1911, c. 547, § 2, an assessor of the city of Milwaukee, removed by the tax commissioner of the city for cause, cannot compel his reinstatement by mandamus, but he must pursue his remedy before the civil service commission.—*State v. Arnold*, 138 N. W. 85.

§ 95 (Iowa) Where the board of supervisors acted upon an owner's claim for damages from the establishment of a drain and justifiably rejected it, the owner cannot have the correctness of such decision reviewed by mandamus.—*Collins v. Board of Sup'rs of Pottawattamie County*, 138 N. W. 1096.

(C) Acts and Proceedings of Private Corporations and Individuals.

§ 122 (Minn.) Though a writ of mandamus may issue to private domestic corporations and their officers, it will not lie to regulate the affairs of unincorporated societies or associations.—*State v. Cook*, 138 N. W. 432.

§ 132 (Iowa) Mandamus will lie to compel a railroad company to comply with a valid city ordinance requiring it to install and operate gates at a street intersection.—*City of Council Bluffs v. Illinois Cent. R. Co.*, 138 N. W. 891.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 151 (Wis.) In mandamus by officers of a town school district remaining after part of such district had been annexed to a city seeking an adjudication that no joint school district had been formed thereby, *held*, that the city was a proper party defendant.—*State v. Schriener*, 138 N. W. 633.

§ 163 (Minn.) Under Rev. Laws 1905, §§ 4558, 4561-4563, the respondent may demur to the petition and alternative writ in a mandamus case.—*State v. Cook*, 138 N. W. 432.

§ 164 (Mich.) Where in mandamus no issue of fact is made, the respondent's answer must be accepted as true.—*Lake v. Houghton Circuit Judge*, 138 N. W. 249.

MANDATE.

See Appeal and Error, §§ 1194, 1195.

MANSLAUGHTER.

See Homicide.

MARKET VALUE.

See Evidence, § 113.

MARRIAGE.

See Divorce; Husband and Wife; Seduction, §§ 34, 46, 50.

MASTER AND SERVANT.

See Appeal and Error, §§ 204, 1053; Constitutional Law, §§ 89, 245, 301; Contracts, §§ 129, 148; Electricity; Embezzlement, § 11; Evidence, §§ 220, 513; Frauds, Statute of, §§ 53, 118; Insurance, § 126; Negligence, §§ 98, 136, 141; Pleading, § 20; Release, § 57; Trial, §§ 133, 252, 256; Witnesses, § 269; Work and Labor.

I. THE RELATION.

(C) Termination and Discharge.

§ 30 (Mich.) A willful refusal or neglect of a servant to obey the lawful and reasonable orders of his master, or those representing him, justifies his discharge.—*Ernst v. Grand Rapids Engraving Co.*, 138 N. W. 1050.

A servant who refuses to take orders from his foreman, and who uses abusive and obscene language toward him, is guilty of misconduct justifying his discharge, provided he knows at the time that the foreman is his superior.—*Id.*

II. SERVICES AND COMPENSATION.

(A) Performance of Services.

§ 54 (Mich.) The duty of a servant to obey lawful and reasonable orders of his master, or those representing him, is implied from the contract of employment.—*Ernst v. Grand Rapids Engraving Co.*, 138 N. W. 1050.

(B) Wages and Other Remuneration.

§ 72 (Iowa) Mere knowledge by an employer that the employé is doing particular work for the employer does not raise an implied promise to pay additional compensation therefor.—*Seever v. Cleveland Coal Co.*, 138 N. W. 793.

§ 80 (Iowa) In an action on an express agreement of employment, direct evidence of such agreement is not required if the facts and circumstances fairly show such agreement.—*In re Oldfield's Estate*, 138 N. W. 846.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

§ 88 (Mich.) A contractor to cut and deliver timber at fixed prices at designated places is

an independent contractor, where the contract does not reserve to the employer the right to control the details of the work.—*McBride v. Jerry Madden Shingle Co.*, 138 N. W. 1077.

The relation of master and servant exists where the employer retains the right to direct the manner in which the work shall be done as well as the result to be accomplished.—*Id.*

Acts of an overseer of an employer, employing an independent contractor, *held* not to amount to such control of the work as to create the relation of master and servant between an employé of the independent contractor and the employer.—*Id.*

(B) Tools, Machinery, Appliances, and Places for Work.

§§ 101, 102 (Iowa) An employer must furnish his employé a reasonably safe place in which to work, and maintain the same in reasonable repair.—*Murray v. Swanwood Coal Co.*, 138 N. W. 887.

§ 103 (Wis.) It was the nondelegable duty of a master to inspect appliances connected with a crane used in unloading steel billets, and see that they were fit for use.—*Bertulis v. Illinois Steel Co.*, 138 N. W. 613.

§ 118 (Iowa) It was the duty of the operator of a mine to double-timber the roof of a roadway on notification by a miner that the same was necessary to protect the roadway.—*Bradich v. Phillips Coal Co.*, 138 N. W. 406.

§ 119 (Neb.) The erection of a telephone distributing pole about 2½ feet from the poles and wires of an electric light company carrying highly charged insulated wires and uninsulated wires which were not intended to carry electrical currents is not negligence.—*Wilkins v. Water & Light Co. of Nebraska City*, 138 N. W. 754.

§ 129 (Wis.) The causes assigned by a servant injured by a flywheel set up on its face falling over upon him *held* not the proximate cause of the accident.—*Kimball v. Universal Crushed Stone Co.*, 138 N. W. 91.

(C) Methods of Work, Rules, and Orders.

§ 137 (Mich.) A railroad switching crew *held* negligent in restoring to a freight train certain detached cars without notice to the train crew, resulting in injury to plaintiff the head brakeman of the train.—*Sonsmith v. Pere Marquette R. Co.*, 138 N. W. 347.

§ 145 (Mich.) A railroad rule *held* not to require as a matter of law that the head brakeman should place a signal at the rear of the train between the tracks for his protection before going between the first car and the engine to cut off the air.—*Sonsmith v. Pere Marquette R. Co.*, 138 N. W. 347.

(D) Warning and Instructing Servant.

§ 150 (Wis.) A master is not negligent in failing to warn his servant of danger, unless he knows of the danger, and knows that the servant is excusably ignorant thereof.—*Covelli v. Cooper Underwear Co.*, 138 N. W. 40.

§ 154 (Wis.) Warning is unnecessary where the servant is familiar with the work and appliances, or when the dangers are well known to the servant, or are such as he is fully capable of appreciating.—*Budney v. American Candy Co.*, 138 N. W. 609.

§ 154 (Wis.) The master is under no duty to warn of the danger an employé who fully knows and appreciates the situation.—*Van Dinter v. Worden-Allen Co.*, 138 N. W. 1016.

§ 155 (Wis.) A master is not required to give warning of visible and obvious dangers to a servant who possesses the intelligence, understanding, and experience to comprehend and appreciate them.—*Covelli v. Cooper Underwear Co.*, 138 N. W. 40.

(E) Fellow Servants.

§ 174 (Mich.) Under Comp. Laws, §§ 6284, 6285, prohibiting a railroad from employing one addicted to the use of intoxicating liquors, the mere fact that a company had knowledge of or was chargeable with knowledge of the fact that a conductor used liquors *held* insufficient to impose on it liability at common law for injuries to a brakeman.—Wallin v. Arcadia & B. R. Ry. Co., 138 N. W. 270.

§ 180 (Mich.) Fellow Servant Act *held* applicable to street railroads.—Arends v. Grand Rapids Ry. Co., 138 N. W. 195.

§ 180 (Mich.) Pub. Acts 1909, No. 104, § 4, abolishing defense of fellow servant, in action against railroads for injuries to employés under certain circumstances *held* not unconstitutional.—Son-smith v. Pere Marquette R. Co., 138 N. W. 347.

§ 185 (Neb.) Whether an employé is a fellow servant, or representative of a master, is determined by whether he is charged with the performance of a duty properly belonging to the master.—Mitchell v. Omaha Packing Co., 138 N. W. 739.

Where a master directs an employé to perform a duty personal to himself, he is liable for the negligence of that other.—Id.

§ 198 (Mich.) A head brakeman and a switching crew, servants of the same master, *held* fellow servants, so that a railroad company was not liable at common law for injuries to the brakeman by the negligence of the switching crew.—Son-smith v. Pere Marquette R. Co., 138 N. W. 347.

(F) Risks Assumed by Servant.

§ 203 (Wis.) Assumption of risk and absence of contributory negligence may coexist; the former relating to assumption by an employé of a risk already in existence when assumed, and the latter to conduct on his part increasing an existing risk, or creating or contributing proximately to a new one.—Van Dinter v. Worden-Allen Co., 138 N. W. 1016.

§ 204 (Mich.) A brakeman who continued in the service after knowledge of the railway company's breach of statutory duty in employing a conductor addicted to the use of intoxicating liquors did not thereby assume the risk of injury arising from the act of the conductor.—Wallin v. Arcadia & B. R. Ry. Co., 138 N. W. 270.

§ 204 (Mich.) A servant does not assume the risk of injury from the master's violation of a statute.—Son-smith v. Pere Marquette R. Co., 138 N. W. 347.

Pub. Acts 1909, No. 104, § 4, abolishing defense of assumed risk in actions against railroads for injuries to employés under certain circumstances *held* not unconstitutional.—Id.

§ 204 (Wis.) The defense of assumption of risk is not abolished by St. 1898, § 1638—81, providing that one employing another to perform labor in the erection of a building shall not furnish for the performance of such labor hoists which are unsafe.—Van Dinter v. Worden-Allen Co., 138 N. W. 1016.

§ 205 (Iowa) An employé may assume that the employer has furnished him a reasonably safe place in which to work.—Murray v. Swanwood Coal Co., 138 N. W. 887.

§ 206 (Iowa) An employé assumes the risks which are incident to the employment after the employer has furnished him a reasonably safe place in which to work.—Murray v. Swanwood Coal Co., 138 N. W. 887.

§ 217 (Iowa) If an employé did not know of any danger to be anticipated from a pillar near which he was excavating and his work did not apparently undermine the pillar, he could assume that it was safe to work near it.—Johnson v. Corn Products Refining Co., 138 N. W. 516.

§ 217 (Iowa) Servant, injured by reason of a defective machine which he was operating for the first time, *held* not to have assumed the

risk.—Spencer v. Updike Grain Co., 138 N. W. 820.

§ 217 (Neb.) Where a machine is unsafe, because not properly guarded, and an employé, with knowledge thereof, takes charge without objection, and is injured, he assumes the risk.—Bradford v. Bee Bldg. Co., 138 N. W. 734.

§ 217 (Wis.) A person employed in a garage, with knowledge that the character of the work carried on therein makes the floor wet, greasy, and dirty at times, assumes any risk incident to grease becoming attached to his shoes by reason of walking over the floor.—Kassubowski v. Johnson Service Co., 138 N. W. 54.

§ 219 (Wis.) The danger of the tipping up of the ends of two unfastened planks by the operation of a hoisting apparatus where the weight of the article being raised (350 to 400 pounds) and part of that of the apparatus comes on the few inches of the planks extending beyond their support, is so apparent that a carpenter will be held, as matter of law, to have assumed the risk.—Van Dinter v. Worden-Allen Co., 138 N. W. 1016.

§ 220 (Iowa) Where a coal miner was not aware of the danger, and had been assured by his boss that the place was safe, he did not assume the risk of working under a roof not properly supported.—Braddich v. Phillips Coal Co., 138 N. W. 406.

(G) Contributory Negligence of Servant.

§ 228 (Iowa) Where an operator of a coal mine agreed to double-timber the roof when notified by a miner that the same was necessary, and a miner notified the operator that the roof needed double timbering, the miner was not guilty of negligence under Code, § 2491, providing that a miner, neglecting to support the roof under his control, shall be guilty of a misdemeanor.—Braddich v. Phillips Coal Co., 138 N. W. 406.

§ 228 (Mich.) Pub. Acts 1909, No. 104, § 4, abolishing defense of contributory negligence in actions against railroads for injuries to employés under certain circumstances *held* not unconstitutional.—Son-smith v. Pere Marquette R. Co., 138 N. W. 347.

§ 228 (Mich.) Pub. Acts 1909, No. 104, § 2, withholding the defense of contributory negligence from common carrier railroad companies in actions for injuries to an employé, provided the employé's negligence is of a lesser "degree," *held* to mean that the employé's negligence is less than that of the company.—Bruce v. Michigan Cent. R. Co., 138 N. W. 362.

Pub. Acts 1909, No. 104, § 2, *held* to deprive a common carrier railroad company of the right to the defenses of contributory negligence and assumed risk in all cases where the carrier's violation of a protection statute contributed to the employé's injury or death, or where the negligence of the person injured or killed is less than the negligence of the defendant, its officers, agents, or employés.—Id.

§ 228 (Wis.) The defense of contributory negligence is not abolished by St. 1898, § 1638—81, providing that one employing another to perform labor in the erection of a building shall not furnish for the performance of such labor hoists which are unsafe.—Van Dinter v. Worden-Allen Co., 138 N. W. 1016.

§ 235 (Wis.) Where it was no part of the duty of plaintiff to examine the fitness of tongs attached to a derrick, by which steel billets were unloaded from a car, his failure to do so prior to his injury by the fall of one of the billets due to defects in the tongs did not constitute contributory negligence.—Bertulis v. Illinois Steel Co., 138 N. W. 613.

Where crane tongs by which steel billets were unloaded from a car were changed only on orders from the foremen or superintendent, plaintiff and his fellow servants were not negligent in failing to make a substitution of tongs when one set had become defective.—Id.

§ 243 (Mich.) In a suit for injuries to an employé of a common carrier railroad company by movement of an engine while plaintiff was engaged in the cinder pit underneath the same, without notice to him, a rule applicable to the railroad company's car department with reference to protecting cars where car repairers or foremen were under the same *held* inapplicable to plaintiff.—Bruce v. Michigan Cent. R. Co., 138 N. W. 362.

(H) Actions.

§ 252 (Wis.) Notice of injury required by St. 1898, § 4222, *held* in the nature of a statute of limitations, the benefit of which may be lost by estoppel, and irregularity in which may be waived.—Maurer v. Northwestern Iron Co., 138 N. W. 636.

§ 256 (Wis.) An allegation in a complaint for personal injuries as to the giving of statutory notice of injury *held* good as against a demurrer.—Maurer v. Northwestern Iron Co., 138 N. W. 636.

§ 258 (Wis.) Complaints in actions for injuries from the explosion of a boiler *held* not to charge any defect in its original design or construction.—Brey v. Forrester, 138 N. W. 645.

§ 260 (Mich.) A brakeman suing for injuries received in consequence of the act of the conductor in charge of the train need not plead Comp. Laws, §§ 6284, 6285, prohibiting the employment as trainmen of persons using intoxicating liquors as a beverage to avail himself of the statute as a relief from the charge of assumption of risk in continuing in the service after knowledge of the intemperate habits of the conductor.—Wallin v. Arcadia & B. R. Ry. Co., 138 N. W. 270.

§ 262 (Wis.) Where St. 1898, § 4222, requiring notice of injury in the manner required for the service of summons, is treated as a statute of limitations, the defense of a failure to give such notice should be raised by answer, or by special demurrer where the fact appears on the face of the complaint.—Maurer v. Northwestern Iron Co., 138 N. W. 636.

§ 264 (Wis.) In actions for death of an engineer and for injuries to a fireman from the explosion of a boiler, *held*, that the question of a defect in the design and construction of the fire flue was made an issue, and formed one of the grounds of actionable negligence upon which the jury based defendant's liability.—Brey v. Forrester, 138 N. W. 645.

The existence of a certain defect not alleged in the complaint can become a proper subject of investigation only by an amendment to the complaint during the trial or at its close.—Id.

In actions for injuries from explosion of a boiler, testimony of an expert for plaintiffs that it was of a dangerous and obsolete type *held* properly stricken out, as not within the pleadings and issues.—Id.

In action for injuries from the explosion of a boiler, testimony of an expert admitted in support of his opinion, without objection by defendant, *held* not admissible to prove an independent ground of liability not set forth in the pleadings.—Id.

§ 265 (Wis.) A person suing for personal injuries has the burden of showing, to a reasonable certainty, that defendant was negligent, and that such negligence was the proximate cause of the injury; and he does not meet this burden by showing two or more causes, some actionable and some not, and permitting the jury to speculate as to which caused the injury.—Kaszubowski v. Johnson Service Co., 138 N. W. 54.

§ 270 (Iowa) In an action for injuries to a servant while operating a car puller drum, evidence that defendant's superintendent had previously observed the rope becoming tangled on the drum *held* admissible to show that the puller was defective, and on the issue of defendant's

failure to warn.—Spencer v. Updike Grain Co., 138 N. W. 820.

§ 270 (Wis.) In an action for injuries from the breaking of a belt, a question as to whether any factory inspector had suggested that the planet and the belts thereon should be guarded or covered *held* properly excluded.—Krawiecki v. Kieckhefer Box Co., 138 N. W. 710.

Evidence was admissible as to the custom in other woodworking factories of guarding belts under similar conditions.—Id.

§ 276 (Iowa) The evidence must convince an ordinarily reasonable person that the injury resulted proximately from the particular cause alleged, though, if only one probable cause is shown, it may be presumed that it was the operative cause.—Johnson v. Corn Products Refining Co., 138 N. W. 516.

§ 276 (Wis.) The cause of the injury must be established to a reasonable certainty.—Zuwodnick v. Higgins Spring & Axle Co., 138 N. W. 48.

Evidence *held* to warrant a finding that a knife, alleged to have caused the injury, fell from the top of the machine at which plaintiff was working.—Id.

Evidence *held* sufficient to warrant a finding that a scrap of steel which hit plaintiff in the eye, cutting the crystalline lens directly back of and opposite to the place it cut the cornea, without cutting the lids, was caused to be thrown from the floor, near his toe, by the fall of a heavy knife.—Id.

§ 278 (Iowa) Evidence *held* not to show negligence by defendant in failing to properly timber the entry of a mine or in failing to warn plaintiff of the danger of a fall of slate.—Owens v. Norwood White Coal Co., 138 N. W. 483.

§ 278 (Minn.) In an action for injuries to an employé, evidence *held* insufficient to show negligence on the part of defendant in maintaining dangerous premises in which to work.—Strunk v. Wells Bros. Co., 138 N. W. 1030.

§ 278 (Wis.) In an action by a servant for personal injuries by being struck in the eye by a flying iron scrap, alleged to have been knocked upward from the floor by a knife falling from the top of a machine, evidence *held* sufficient to warrant a finding that the knife was placed on the machine by plaintiff's foreman.—Zuwodnick v. Higgins Spring & Axle Co., 138 N. W. 48.

§ 278 (Wis.) In an employé's action for injuries caused by slipping, claimed to be due to grease on his shoes, evidence *held*, insufficient to show that the grease came from the floor of the room in which he was working, or, if it did, that it had been there sufficiently long to show negligence on the part of the employer.—Kaszubowski v. Johnson Service Co., 138 N. W. 54.

§ 278 (Wis.) In an action against a lumber company for death of a sawmill employé, evidence *held* to warrant a finding that the accident resulted from the company's failure to provide a practical guard for a belt and pulley at which plaintiff was working when killed.—Graves v. Rib Lake Lumber Co., 138 N. W. 86.

§ 278 (Wis.) Evidence in action for injuries from a candy machine consisting principally of two brass rollers *held* to show that plaintiff, a boy of 14, was fully informed of the danger therefrom.—Budney v. American Candy Co., 138 N. W. 609.

Evidence in an action for injuries from a candy machine *held* insufficient to sustain a finding that defendant negligently omitted to give plaintiff, a boy of 14, needed instruction and warning.—Id.

§ 278 (Wis.) Evidence in a servant's action for injuries from an alleged defective packing of an engine so that steam leaked, and caused the piston to descend, *held* to show no negligence on the part of the master.—Michalski v. Cudahy Bros. Co., 138 N. W. 1002.

§ 285 (Iowa) Evidence held to make it a jury question whether the injury was caused by sand and dirt falling upon an employé from a pilaster near which he was excavating.—Johnson v. Corn Products Refining Co., 138 N. W. 516.

§ 286 (Iowa) In an action for injuries to a coal miner by the fall of slate from the roof of a roadway from his room and the entry, the question of the negligence of the operator held for the jury.—Braddich v. Phillips Coal Co., 138 N. W. 406.

§ 286 (Iowa) The question of master's negligence in an action for injuries to a miner held for the jury.—Kennis v. Ogden Coal Co., 138 N. W. 467.

§ 286 (Iowa) Evidence held to make it a jury question whether defendant was negligent in failing to furnish an employé a safe place to work, or guarding against any dangerous condition.—Johnson v. Corn Products Refining Co., 138 N. W. 516.

§ 286 (Iowa) Evidence, in an action for injury to a driver of a team in a mine, held to make a question of fact as to negligence in not furnishing a safe place to work.—Ek v. Phillips Fuel Co., 138 N. W. 547.

§ 286 (Iowa) In an action for injuries to a servant by defective machinery, it was not error to submit the issue of negligence in failing to warn.—Spencer v. Updike Grain Co., 138 N. W. 820.

§ 286 (Iowa) Whether an owner of a coal mine was negligent in the construction of the support of the roof of an entry held for the jury.—Murray v. Swanwood Coal Co., 138 N. W. 887.

§ 286 (Wis.) Evidence held to present a question for the jury whether the danger in the performance of the employé's duty was obvious, and whether his knowledge, information, and experience in respect thereto were so limited as to render it necessary that the foreman directing him to perform such duty should have instructed him before setting him at work.—Covelli v. Cooper Underwear Co., 138 N. W. 40.

§ 286 (Wis.) In an employé's action for injuries, claimed to have been caused by the oily, greasy, and filthy condition of the floor of the room in which he was working, evidence held to present a question for the jury whether the floor was reasonably clean and the room adequately lighted.—Kaszubowski v. Johnson Service Co., 138 N. W. 54.

§ 288 (Iowa) An inexperienced laborer, required to lie on a plank laid across two beams, and injured by the plank going off, the blows of riveters causing the plank to creep, did not, as matter of law, assume the risk.—Collier v. McClintic-Marshall Const. Co., 138 N. W. 522.

§ 288 (Iowa) Under the evidence in an action for injury to a driver of a mule team in a coal mine from a protrusion on the rib of entry, the question of assumption of risk was for the jury.—Ek v. Phillips Fuel Co., 138 N. W. 547.

§ 288 (Iowa) Whether an employé assumed a risk held for the jury.—Murray v. Swanwood Coal Co., 138 N. W. 887.

Under Acts 33d Gen. Assem. c. 219, the risk of injury to a driver in a coal mine injured by being caught between the top of the load on his car and cross timbers supporting the roof of an entry held not assumed as a matter of law.—Id.

§ 289 (Iowa) Whether a coal miner, injured by the fall of slate from the roof of the roadway between the room in which he worked and the entry, was guilty of contributory negligence held for the jury.—Braddich v. Phillips Coal Co., 138 N. W. 406.

Marshall Const. Co., 138 N. W. 522.

§ 289 (Iowa) Under the evidence in an action for injury to a driver of a mule team in a coal mine from a protrusion on the rib of entry, the question of contributory negligence was for the jury.—Ek v. Phillips Fuel Co., 138 N. W. 547.

§ 289 (Iowa) Whether a mule driver in a coal mine was guilty of contributory negligence held for the jury.—Murray v. Swanwood Coal Co., 138 N. W. 887.

§ 289 (Mich.) A brakeman injured while attempting to open the coupler of a car held not guilty of contributory negligence, as a matter of law, in selecting a dangerous, rather than a safe, way of preparing the coupling.—Wallin v. Arcadia & B. R. Ry. Co., 138 N. W. 270.

A brakeman who continued in the service after knowledge of the railway company's breach of the statutory duty in employing a conductor addicted to the use of intoxicating liquors was not guilty of contributory negligence as a matter of law.—Id.

§ 289 (Wis.) In an action for injuries from the breaking of a belt, whether plaintiff was guilty of contributory negligence held a jury question.—Krawiecki v. Kieckhefer Box Co., 138 N. W. 710.

§ 293 (Iowa) An instruction in an action for injuries to a miner as to the master's duty in regard to a custom of the miners in using a certain portion of the mine held proper.—Kennis v. Ogden Coal Co., 138 N. W. 467.

§ 294 (Mich.) In an action for injuries to a brakeman alleged to have been caused by the act of the conductor, the refusal to give a charge that plaintiff could recover only because of the company's negligence in employing and continuing to employ the conductor held erroneous.—Wallin v. Arcadia & B. R. Ry. Co., 138 N. W. 270.

§ 296 (Iowa) A requested instruction on the effect of repeated violations of rules held properly refused.—Kennis v. Ogden Coal Co., 138 N. W. 467.

§ 296 (Iowa) The instruction that the defense of contributory negligence involves the element that plaintiff appreciated the full extent of the danger can, notwithstanding the words "full extent," mean nothing more than that plaintiff had full appreciation of the danger.—Collier v. McClintic-Marshall Const. Co., 138 N. W. 522.

§ 297 (Wis.) Where a special verdict found that a servant did not understand a danger, was not warned thereof, and that failure to warn was the proximate cause of the injury, but did not find that the master knew or should have known that the servant was ignorant of the danger, it was insufficient to sustain a judgment for plaintiff.—Covelli v. Cooper Underwear Co., 138 N. W. 40.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(C) Actions.

§ 332 (Minn.) Whether a driver of logs in setting a fire to dry his clothes was acting in the scope of his employment held for the jury.—McLaughlin v. Cloquet Tie & Post Co., 138 N. W. 434.

MATERIALITY.

See Alteration of Instruments.

MAXIMS.

See Equity, § 63.

MEASURE OF DAMAGES.

See Damages, §§ 109-120.

MECHANICS' LIENS.

See Appeal and Error, § 1036; Constitutional Law, § 208; Jury, § 31.

II. RIGHT TO LIEN.

(B) Services Rendered and Materials Furnished.

§ 35 (Minn.) Where the owner of premises contracted with a mechanic for a temporary store or tool house in connection with the work, the mechanic was entitled to a lien for the same.—*Lindquist v. Young*, 138 N. W. 28.

§ 38 (Minn.) Where the owner of premises contracted with a mechanic for personal supervision of the work, the mechanic was entitled to enforce a lien for the same.—*Lindquist v. Young*, 138 N. W. 28.

(C) Agreement or Consent of Owner.

§ 78 (Minn.) A lessor, by giving notice under Rev. Laws 1905, § 3509, may prevent liens from attaching to his interest, though he has given the tenant permission to make alterations, which he has agreed to pay for; the word "authorized," in such section, meaning authorized by contract with or at the instance of the owner.—*Wallinder v. Weiss*, 138 N. W. 417.

(D) Persons Entitled in General.

§ 93 (Mich.) Where a building contract stipulated that the owner, in consideration of performance thereof by the contractor, would pay to the contractor a specified sum when the work was completed and accepted, the contractor, failing to complete the work and to obtain the owner's acceptance, could not enforce a mechanic's lien for a balance claimed to be due.—*Evans v. Woodley*, 138 N. W. 275.

III. PROCEEDINGS TO PERFECT.

§ 154 (N.D.) Where a lien statement is duly signed by the materialman, his omission to sign the affidavit of verification is not fatal to the lien, where he in fact made oath to the truth of the facts stated therein.—*Robertson Lumber Co. v. Swenson*, 138 N. W. 984.

§ 157 (N.D.) Under Laws 1909, c. 158, requiring a separate itemized account of materials, the inclusion of a minor item from another account, through clerical error, does not deprive the plaintiff of the right to a lien.—*Robertson Lumber Co. v. Swenson*, 138 N. W. 984.

Under Rev. Codes 1905, § 6240, the plaintiff is not deprived of his right to a mechanic's lien by a mistake in the lien statement of \$100 in striking a balance between the total credits and the total debits.—*Id.*

IV. OPERATION AND EFFECT.

(B) Property, Estates, and Rights Affected.

§ 183 (N.D.) Rev. Codes 1905, §§ 6237, 6238, and Laws 1909, c. 158, amending section 6237, authorize the filing of a joint mechanic's lien against two or more buildings, and the land on which they stand, where the labor or material is furnished under an entire contract.—*Robertson Lumber Co. v. Swenson*, 138 N. W. 984.

The right to a mechanic's lien is not limited to the building and particular lot on which it stands, and, where two buildings are constructed under a single contract, it is permissible to file a lien statement against both buildings and the four contiguous lots.—*Id.*

VII. ENFORCEMENT.

§ 245 (Wis.) An action to enforce a mechanic's lien is by the express provisions of St. 1898, § 3323, an equitable action, and sections 3321, 3322, 3324, and 3326 do not exclude the right to apply equitable procedure, so far as the circumstances may require to adjudicate

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MISREPRESENTATION.

See Fraud.

MISTAKE.

See Bills and Notes, § 94; Contracts, § 99; Mechanics' Liens, § 157; Reformation of Instruments, § 20; Taxation, § 552½.

MODIFICATION.

See Principal and Surety, § 82.

MONEY RECEIVED.

See Municipal Corporations, § 523.

MORTGAGES.

See Action, § 38; Appeal and Error, §§ 138, 413, 415, 435, 964, 1176; Assignments; Chattel Mortgages; Contracts, § 277; Corporations, § 320; Covenants, §§ 127, 130; Equity, § 228; Evidence, § 184; Frauds, Statute of, § 139; Interest, § 22; Names; Partnership, § 203; Pleading, § 380; Quieting Title, § 37; Trial, § 53; Vendor and Purchaser, §§ 130, 350.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

§ 33 (Wis.) Where a grantor conveyed his premises by deed absolute in form to secure the payment of money previously advanced by the grantee to him and money advanced at the time of the execution of the deed, and the grantee contracted to reconvey on payment of the debt, the transaction established the relation of mortgagor and mortgagee.—Falbe v. Caves, 138 N. W. 87.

§ 38 (Iowa) In an action to declare a deed to be in fact a mortgage, evidence held to warrant a finding that the mortgagee had advanced money to protect his security which has not been repaid.—Cuthbertson v. First Nat. Bank, 138 N. W. 1090.

§ 38 (Mich.) In a suit brought by a person claiming to have purchased land, and that on his request it was deeded to a third person as security for the purchase price advanced by such third person, to have such deed declared a mortgage and a conveyance to complainant decreed, the proof must be sufficient to overcome the presumption that the instrument in question truly represents the transaction in its entirety.—Crane v. Read, 138 N. W. 223.

§ 38 (Mich.) The proof should be clear and convincing before an instrument, purporting to be an absolute conveyance, can be declared to be a mere security.—Dalton v. Mertz, 138 N. W. 1055.

(D) Validity.

§ 87 (Iowa) Whether one executing notes and mortgages securing them was guilty of negligence in executing the mortgages on merely hearing one of them read held properly submitted to the jury.—Depugh v. Brown, 138 N. W. 908.

III. CONSTRUCTION AND OPERATION.

(D) Lien and Priority.

§ 171 (Mich.) Comp. Laws, § 8988, applies to mortgages as well as to deeds, so that a mortgagee who recorded his mortgage could claim a lien on the property as against an unrecorded

him represented the purchase price of the lots covered, and are therefore entitled to priority over the mechanic's lien.—Robertson Lumber Co. v. Swenson, 138 N. W. 984.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 199 (Neb.) Where the mortgagee, without an agreement therefor, takes possession before confirmation of a judicial sale, he becomes liable to the mortgagor or his grantees for the rents and profits he receives, or which the land would have produced if prudently managed.—Attwood v. Warner, 138 N. W. 605.

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

§ 274 (Neb.) A conveyance by a mortgagor to a bona fide purchaser without any reservation vests the purchaser with the right to the rents and profits which he may have applied on the mortgage debt.—Attwood v. Warner, 138 N. W. 605.

§ 283 (Iowa) Where a mortgagor conveys the property to one who assumes the mortgage, the grantee becomes the principal debtor; the grantor's liability being secondary, and the liability of the mortgaged property remaining the same.—Boice v. Coffeen, 138 N. W. 857.

§ 291 (Iowa) Where a mortgagor conveyed the property to one who assumed the mortgage, and who in turn conveyed to another, who also assumed, the latter occupied the same position as his grantor with reference to the mortgage, and became the principal debtor.—Boice v. Coffeen, 138 N. W. 857.

Rights of a prior grantee, who assumed a mortgage and conveyed to M., who also assumed, held not affected by M.'s conveyance to L. with full covenants of warranty.—Id.

Where C., on accepting a conveyance of mortgaged property and assuming a mortgage, put up collaterals which were surrendered to him on his conveying the property to M., who also assumed the mortgage, neither M. nor his grantees could object to the surrender of such collaterals.—Id.

Purchase of a mortgage debt by plaintiff for the benefit of C., who was secondarily liable only, held not to prejudice the rights of a subsequent grantee of the mortgaged premises, so as to entitle him to claim that it operated as a payment of the debt and a satisfaction of the lien.—Id.

That a mortgage note was assigned to plaintiff, without recourse, for the benefit of one secondarily liable did not prevent plaintiff from suing a subsequent grantee of the mortgaged premises, who last assumed the mortgage.—Id.

Collaterals deposited by one who had assumed payment of a mortgage held only secondarily liable on his conveying the property to another, who assumed the mortgage, so that the surrender thereof would not affect the latter or his subsequent grantees.—Id.

VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

§ 309 (Minn.) Mortgagor may be released from his personal liability for payment of the debt by a subsequent parol agreement with the mortgagor, founded on a valuable consideration.—First Nat. Bank v. Gallagher, 138 N. W. 681.

§ 319 (Minn.) An agreement in parol to release a mortgagor from his personal liability must be established by clear and convincing evidence.—First Nat. Bank v. Gallagher, 138 N. W. 681.

X. FORECLOSURE BY ACTION.**(D) Judgment or Decree and Execution.**

§ 491 (Iowa) Equitable relief to a subsequent grantee of mortgaged property, who did not assume the mortgage, but held under warranty, held only awardable against his grantor, who assumed the mortgage and then conveyed with full covenants, and subject to pre-existing equities of the mortgagee and his grantor.—Boice v. Coffeen, 138 N. W. 857.

Where defendant M. assumed a mortgage and then conveyed the property through L. to J., with covenants of warranty, a decree awarding judgment against him in favor of the holder of the debt, and also in favor of J. for the whole amount of the incumbrance, was erroneous.—Id.

§ 497 (Neb.) By actual personal service of summons upon a mortgagor who owns the equity in redemption, in an action to foreclose, the court obtains jurisdiction, and a mistake in the name of defendant not brought to the attention of the court does not deprive the court of jurisdiction, or render the decree subject to collateral attack.—Page v. Bresee, 138 N. W. 138.

(K) Deficiency and Personal Liability.

§ 561 (Mich.) In a suit to recover a decree for a deficiency on mortgage foreclosure it would be presumed, in the absence of evidence to the contrary, that the sale and report were not made until after the decree and files were enrolled in conformity with chancery rule No. 24.—Olmstead v. Meyers, 138 N. W. 274.

MOTIONS.

See Appeal and Error, § 947; Continuance; Depositions; Divorce, § 226; Pleading, §§ 343-369; Trial, §§ 90, 96.

MOTIVE.

See Libel and Slander, § 125.

MOTOR VEHICLES.

See Constitutional Law, § 235; Municipal Corporations, § 703.

MUNICIPAL CORPORATIONS.

See Action, § 46; Appeal and Error, §§ 97, 1066; Assignments for Benefit of Creditors; Boundaries; Commerce; Constitutional Law, §§ 235, 241, 290; Counties; Creditors' Suit, § 8; Estoppel, § 54; Evidence, §§ 31, 387; Garnishment, § 46; Highways, § 191; Intoxicating Liquors, § 34; Judgment, §§ 663, 675, 704, 707; Licenses, §§ 5½, 6, 7; Limitation of Actions, § 4; Mandamus, §§ 15, 77, 132, 151; Nuisance; Pleading, § 127; Railroads, §§ 243, 246, 304; Schools and School Districts; Statutes, §§ 90, 117; Stipulations, § 14; Street Railroads; Towns; Trial, § 260.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.**(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division.**

§ 36 (Wis.) Under St. 1898, § 944, where part of a town school district was annexed to a city, the title to a schoolhouse located on the annexed part vested in the officers of the annexed district, subject to the duty to pay the remaining part its just share of its value, and that the school officers of the remaining part were entitled to the custody and control of the other property.—State v. Schriner, 138 N. W. 833.

§ 40 (Wis.) An ordinance dividing the city of Milwaukee into wards pursuant to Laws 1901,

c. 436, is validated by Laws 1911, c. 661, redistricting the state for legislative purposes, and dividing the county of Milwaukee into assembly and senatorial districts, bounded by ward lines fixed by the ordinance.—State v. City of Milwaukee, 138 N. W. 76.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

§ 63 (Wis.) The general question of the division of a city into wards is a legislative question, and in the absence of any constitutional requirement that a city shall be divided into wards of equal population, or that it shall be divided according to population, a division of a city into wards containing a population running over a minimum of 9,238 to a maximum of 19,517 will not be interfered with by the courts.—State v. City of Milwaukee, 138 N. W. 76.

III. LEGISLATIVE CONTROL OF MUNICIPAL ACTS, RIGHTS, AND LIABILITIES.

§ 76 (Wis.) The Legislature may cure by subsequent legislation defects or irregularities in proceedings of municipal corporations, which it may have dispensed with or made immaterial by prior law, and such ratification or curative effect may result by implication, as well as by direct legislative act.—State v. City of Milwaukee, 138 N. W. 76.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.**(B) Ordinances and By-Laws in General.**

§ 112 (Iowa) Ordinance amending Ordinance No. 376, to compel railroads to erect and operate crossing gates, and complying with Code, § 681, relating to repealing ordinances, held not objectionable as embracing more than one subject, or matters not covered by the title.—City of Council Bluffs v. Illinois Cent. R. Co., 138 N. W. 891.

§ 121 (Iowa) In an action to enjoin the enforcement of ordinances relating to wharfage charges and the keeping of house boats in the harbor, where the city had only attempted to enforce the provision relating to house boats, the question as to the reasonableness of the wharfage charges, under the pleading and evidence, held before the court.—Keckevoet v. City of Dubuque, 138 N. W. 540.

V. OFFICERS, AGENTS, AND EMPLOYEES.**(A) Municipal Officers in General.**

§ 125 (Wis.) By the civil service law, the general intent was to place all municipal officers in the cities referred to, except those especially excepted, under the merit system, both as to appointment and retention.—State v. Arnold, 138 N. W. 78.

The civil service law supersedes all city charter provisions relating to the appointment and removal of assessors inconsistent therewith.—Id.

Under the civil service law, the tax commissioner in the city of Milwaukee is the "head of a principal department," having power to appoint the ward assessors as his "subordinates," and to remove them, notwithstanding pre-existing provisions in the city charter.—Id.

(B) Municipal Departments and Officers Thereof.

§ 135 (Wis.) Under St. 1898, § 959-46d, added by Laws 1911, c. 586, held, that no appeal will lie from the decision of the circuit court on review of the action of the fire and police board removing a policeman.—Clancy v. Board of Fire & Police Com'rs of Milwaukee, 138 N. W. 109.

§ 198 (Wis.) Under St. 1898, § 950-46d, added by Laws 1911, c. 596, *held*, that no appeal will lie from the decision of the circuit court on review of the action of the fire and police board removing a fireman.—*Clancy v. Board of Fire & Police Com'rs of Milwaukee*, 138 N. W. 109.

VII. CONTRACTS IN GENERAL.

§ 232 (Iowa) Contracts under Code, §§ 695, 791, 794, 796, 810, 817, and 819, authorizing cities to contract for the construction of sewers, where the cost thereof is to be paid from a general fund and not from a special assessment, relate to the business powers of the city, as distinguished from its governmental powers, and hence such contracts are binding on the successors of the officers who make them.—*First Nat. Bank v. City of Emmetsburg*, 138 N. W. 451.

IX. PUBLIC IMPROVEMENTS.

(A) Power to Make Improvements or Grant Aid Therefor.

§ 281 (Mich.) Instructions in an action against a city by an assignee of property owners for part of the cost of constructing sidewalks, provided by ordinance to be paid under certain circumstances, in which were involved the questions of the right of an assignee to recover, and necessity of the contractor having his bond to the city approved, *held* to submit the case in a way of which the city could not complain.—*Rice v. City of Pontiac*, 138 N. W. 252.

(C) Contracts.

§ 350 (Iowa) Where a city had the power, as a part of its proprietary or business powers, as distinguished from its public or governmental powers, to construct sewers and contract therefor, irregularities in the exercise of such powers will not relieve it from liability for benefits received thereunder.—*First Nat. Bank v. City of Emmetsburg*, 138 N. W. 451.

A municipality having power, as a part of its proprietary or business powers, to construct sewers and contract therefor, cannot escape liability on a plea of ultra vires where the contract has been fully performed and it has received the benefits thereof, but is estopped from retaining such benefits without liability.—*Id.*

§ 350 (Wis.) The illegality inherent in a contract by a city for a street improvement arising from the fact that the contractor had bought up the opposition of an alderman continues notwithstanding the resignation of the alderman and the subsequent execution of the contract by the remaining state officers.—*McMillan v. Barber Asphalt Paving Co.*, 138 N. W. 94.

The illegality of a street-paving contract arising from the fact that the contractor bought off the opposition of an alderman by a concession is unaffected by the fact that the contractor did not know that the alderman had a private pecuniary interest in obtaining the concession.—*Id.*

Where a taxpayer sued a city to enjoin it from letting a street paving contract, but pending an appeal from an adverse decision the contract was executed and the work performed and the Supreme Court adjudged that the contract was illegal, the contractor was a wrongdoer, and equity would not recognize his right to compensation.—*Id.*

§ 351 (Iowa) On facts stated, *held*, that a city had completely ratified contracts for sewer construction irregularly entered into, and had waived any right to object thereto.—*First Nat. Bank v. City of Emmetsburg*, 138 N. W. 451.

§ 373 (Iowa) Code, § 3102, gives a subcontractor for public work an equitable right to unpaid funds in the hands of the municipality at the filing of the claim, which cannot be defeated by an assignment by the principal contractor, through bankruptcy or otherwise.—

Wackerbarth & Blamer Co. v. Independent School Dist. of Independence, 138 N. W. 470.

Although the distribution of the estate of an insolvent contractor building a schoolhouse, under an assignment for benefit of creditors, would be more equitable, Code, § 3102, giving subcontractors a preferred claim against public corporations for unpaid funds, cannot be ignored.—*Id.*

(D) Damages.

§ 385 (Iowa) The right to damages for change in established grade of a street is wholly statutory.—*Chiesa & Co. v. City of Des Moines*, 138 N. W. 922.

§ 395 (Minn.) Where the excavation in a street next to plaintiff's property to a grade established by the city is a permanent injury, the measure of plaintiff's damages is the diminution in the market value of the property.—*Worden v. Bielenberg*, 138 N. W. 314.

§ 395 (Wis.) Evidence of the reasonable cost of putting the property in substantially the same condition relative to the newly established grade as it was with reference to the former grade is admissible on the measure of damages.—*Milwaukee Trust Co. v. City of Milwaukee*, 138 N. W. 707.

§ 398 (Iowa) Under Code, § 48 (8, 10), defining real property and the liability of a city to the owner on a change of established grade of a street, a tenant for life or for years may recover damages sustained by change in the grade of the street in front of the premises.—*Chiesa & Co. v. City of Des Moines*, 138 N. W. 922.

§ 402 (Wis.) A special interrogatory in proceedings to assess damages from a change of grade as to what was the reasonable cost of putting plaintiff's property in substantially the same condition relative to the new grade as it was before the change *held* improperly included in the special interrogatories; other interrogatories calling for the true measure of damages.—*Milwaukee Trust Co. v. City of Milwaukee*, 138 N. W. 707.

A requested instruction, in proceedings to assess damages for the change of grade of a street, that the jury should not disregard the direct evidence of witnesses who have made measurements as to facts in dispute and find such facts according to the evidence of witnesses, who merely gave their judgment thereon, was correct and should have been given.—*Id.*

(E) Assessments for Benefits and Special Taxes.

§ 459 (Iowa) The word "paving" in Code, § 792, relating to street improvements, and placing a limitation on the amount of the assessment, includes curbing, guttering, and paving, and a city ordering the curbing, guttering, and paving of a street may not make separate assessments therefor.—*Bailey v. City of Des Moines*, 138 N. W. 853.

§ 466 (Iowa) The availability of a pavement for future use in connection with abutting property may be considered in determining whether the amount of the assessment exceeds the benefits.—*Cheney v. City of Ft. Dodge*, 138 N. W. 549.

§§ 488, 489 (Iowa) A city council which did not accept the offer of petitioners for a street improvement to waive the statutory limitation of the amount of an assessment, but made the improvement on its own motion, as authorized by Code, § 793, could not rely on the offer as an estoppel against the assertion by the petitioners of their statutory rights.—*Bailey v. City of Des Moines*, 138 N. W. 853.

The mere fact that an abutting owner on a street improved pursuant to a resolution thereof was the attorney of the city, and as such approved the form of contract for the improvement, did not estop his executrix from denying the right of the city to assess the property in excess of the statutory limitation.—*Id.*

§ 502 (Iowa) A city ordering a street improvement, and seeking to assess the property benefited in excess of the statutory limitation, has the burden of showing some ground entitling it to avoid the limitation.—*Bailey v. City of Des Moines*, 138 N. W. 853.

§ 502 (Minn.) A decision that park assessors did not act on erroneous principles in assessing the property across the street from a proposed park as specially benefited *held* sustained by the evidence.—*In re Riverside Park*, 138 N. W. 426.

It is not error to try an application to confirm an assessment for a park improvement on affidavits, with permission to objectors to apply to offer oral testimony.—*Id.*

§ 508 (Minn.) An order denying a motion of objectors to an assessment for park improvement to vacate a prior order confirming the assessment and grant a new trial is appealable.—*In re Riverside Park*, 138 N. W. 426.

§ 511 (Iowa) Under Code, §§ 824, 839, and Acts 28th Gen. Assem. c. 29, providing that mere irregularities in an assessment shall be brought to the notice of the council, a variance between the improvement as constructed and that planned is not jurisdictional; and objection thereto must first be made to the council as a basis for complaint on appeal.—*Cheney v. City of Ft. Dodge*, 138 N. W. 549.

A property owner suing to vacate a special assessment, who does not claim that the paving rendered the street less convenient to him, cannot, for the first time, raise such objections on appeal from an annulment of the assessment.—*Id.*

§ 513 (Minn.) Where the right to levy assessments for public improvements is given by a city charter to the board of commissioners, with the right of appeal to the district court, an owner of property subject to assessment cannot sue to set aside a contract for the improvement; the prescribed remedy being exclusive.—*A. A. White Townsite Co. v. City of Moorhead*, 138 N. W. 939.

§ 513 (N.D.) An action to set aside a special assessment for paving expense, commenced more than six months from the approval and confirmation of the assessment by the city council, is barred by Rev. Codes 1905, § 2790.—*McKone v. City of Fargo*, 138 N. W. 967.

Sess. Laws 1905, c. 62, § 155, barring an action to set aside a special assessment for paving in six months, is applicable to an assessment made after its enactment, notwithstanding a specific reference in its title to the vacation of assessments made prior to its passage.—*Id.*

§ 513 (Wis.) Where a special improvement bond issued pursuant to St. 1898, §§ 925–190, 925–192, 925–193, was issued to a contractor in a void contract, and he sold the bond to an innocent purchaser, the owner of the property against which the bond was issued, not being entitled to injunctive relief, was entitled to a money judgment against the contractor.—*McMillan v. Barber Asphalt Paving Co.*, 138 N. W. 94.

§ 514 (Wis.) The reassessment statutes (St. 1898, § 1210d, as amended by Laws 1901, cc. 9, 19, and Laws 1903, c. 276, and Laws 1905, c. 501) do not apply to a case where improvement work was done pending a suit by a taxpayer to restrain a city from executing the contract for the work, and where the Supreme Court on appeal adjudged that the contract was illegal.—*McMillan v. Barber Asphalt Paving Co.*, 138 N. W. 94.

§ 519 (Wis.) Under the express provisions of Milwaukee Charter, c. 7, §§ 13, 13a, a special assessment for street improvements is a lien on the land benefited from the time of the issuance of certificates to the contractor for the amounts due from each lot owner.—*Cady v. Henes*, 138 N. W. 1022.

§ 523 (Wis.) No action to recover back a special assessment for a public improvement illegally levied and collected can be maintained against a municipality under St. 1898, § 1104, where it has been paid over by the municipality to the contractor.—*Marine Co. v. City of Milwaukee*, 138 N. W. 640.

No action for money had and received can be maintained against a municipality to recover back the amount of a special assessment for a public improvement illegally levied and collected, where it has been paid by the municipality to the contractor who performed the work in question.—*Id.*

(F) Enforcement of Assessments and Special Taxes.

§ 526 (Wis.) St. 1898, § 1210h—1, enacted in Acts 1900, c. 295, requiring, as a condition precedent to the bringing of an action to enjoin the collection of a special assessment, the payment of the assessment, *held* valid.—*Wisconsin Real Estate Co. v. City of Milwaukee*, 138 N. W. 642.

§ 537 (Wis.) In view of St. 1898, § 1210h, section 1210h—1, which is a part of Acts of 1900, c. 295, which adds sections 1210h—1, 1210h—2, 1210h—3, 1210h—4, requires, as a condition precedent to the maintenance of an action to enjoin the collection of a special assessment, the deposit of the sum with the proper official.—*Wisconsin Real Estate Co. v. City of Milwaukee*, 138 N. W. 642.

As Milwaukee City Charter, c. 8, gives the council jurisdiction over the subject of laying drains, an assessment for the making of drains, though not in compliance with the statutes, is not void for want of jurisdiction, and hence, in an action to enjoin the collection of the same, the amount of the assessment must be deposited under St. 1898, § 1210h—1.—*Id.*

X. POLICE POWER AND REGULATIONS.

(A) Delegation, Extent, and Exercise of Power.

§ 591 (Minn.) Under the charter of the city of St. Paul, the power to license and regulate the exhibition of shows of all kinds is with the common council, and cannot be delegated to the city clerk.—*State v. Redington*, 138 N. W. 430.

§ 626 (Minn.) An ordinance to prevent the spreading of fires, making it unlawful for the owner of a two-story frame dwelling to lease the attic story to persons living independently of those occupying the lower floors, is unreasonable and void, as not including other buildings equally exposed to danger by fire.—*State v. McCormick*, 138 N. W. 1032.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

§ 703 (Neb.) A provision in a general ordinance that it shall be unlawful for any person operating a motor vehicle to carry another on the machine in front of the operator is a valid exercise of the police power.—*In re Wickstrum*, 138 N. W. 733.

§ 705 (Iowa) Where one ran an automobile directly toward a horse and caused it to jump aside, upsetting the vehicle and injuring the driver, the operator was guilty of negligence.—*Staley v. Forest*, 138 N. W. 441.

§ 705 (Neb.) The law does not denounce the use of an automobile on a public highway; and the appellant is not guilty of negligence because he used one on the streets of the city of Lincoln.—*Tyler v. Hoover*, 138 N. W. 128.

The driver of a horse and carriage has no rights in a highway superior to the rights of a driver of an automobile; both having the

right to go upon the public highway, and each being restricted by the corresponding rights of the other, and entitled to regulate his use of the street by the observance towards others of ordinary care, under all the circumstances.—Id.

The restrictions which the law imposes on all modes of travel are such as tend to secure to the general public the largest enjoyment thereof, and must be observed and borne by all alike; and when accidents happen as incidents to reasonable use and reasonable care the law affords no redress.—Id.

If the driver of an automobile sees that a horse driven to a carriage is restive and frightened, he should use ordinary prudence to avoid inflicting an injury, and should reduce the speed of his vehicle, or stop it, if requested, or if he sees that it is necessary; but he is not relieved from exercising ordinary care to prevent injury to those he meets or overtakes.—Id.

That a horse becomes frightened by an automobile does not render the operator of the vehicle liable for resulting injury.—Id.

§ 706 (Minn.) Where there was evidence that the driver of an automobile saw plaintiff's peril in time to have avoided striking him by ordinary care, the proof justified the submission of an issue of willful negligence.—Johnson v. Scott, 138 N. W. 694.

§ 706 (Wis.) In an action for injuries from being struck, while driving a horse and buggy, by a horse and wagon driven by the defendant, evidence held to warrant a finding that the plaintiff was not guilty of contributory negligence.—Ehnert v. Mews, 138 N. W. 998.

(C) Public Buildings, Parks, and Other Public Places and Property.

§ 719 (Iowa) The right of a city to impose wharfage fees does not arise solely out of the expense which it incurs in the maintenance of the wharf.—Keckevoet v. City of Dubuque, 138 N. W. 540.

Ordinances providing wharfage fees are a valid exercise of the police power, but they must be reasonable.—Id.

In an action to enjoin the enforcement of ordinances in relation to wharfage charges, evidence held to show that the ordinances were unreasonable and discriminatory.—Id.

The city of Dubuque has no power under its charter to prohibit house boats to land or remain on any part of the ice harbor of the city of Dubuque.—Id.

XII. TORTS.

(A) Exercise of Governmental and Corporate Powers in General.

§ 733 (Minn.) Where a city maintains a municipal lighting plant, it is not exercising a governmental function, so as to escape responsibility for negligence causing an injury to the person or property of an individual.—Brantman v. City of Canby, 138 N. W. 671.

§ 739 (Mich.) A municipality may not invade or cause the invasion of private property.—Onen v. Herkimer, 138 N. W. 198.

(C) Defects or Obstructions in Streets and Other Public Ways.

§ 809 (Iowa) A property owner may be held liable for negligence in the maintenance of an obstruction on the sidewalk, though permitted by the municipality to maintain it.—Edwards v. Hasel, 138 N. W. 501.

§ 819 (Iowa) Evidence that a property owner maintained a raised cover over a grating in the sidewalk for more than 35 years will warrant a finding that the municipality acquiesced in such maintenance.—Edwards v. Hasel, 138 N. W. 501.

§ 821 (Iowa) In an action against an abutting property owner for injuries caused by the main-

tenance of an obstruction in the sidewalk, evidence held sufficient to take the case to the jury.—Edwards v. Hasel, 138 N. W. 501.

(D) Defects or Obstructions in Sewers, Drains, and Water Courses.

§ 846 (Mich.) A city actually appropriating a narrow strip of land of an individual, and casting on his land the entire sewage of the city, having a population of 5,000, causes irreparable injury, justifying relief in equity.—Onen v. Herkimer, 138 N. W. 198.

Where a city appropriated to its own use a strip of land of an individual, and expended upwards of \$50,000 on a sewage system, notwithstanding notice from the individual that he objected to the appropriation and the disposal of the sewage, equity, at the suit of the individual, would grant him injunctive relief.—Id.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(A) Power to Incur Indebtedness and Expenditures.

§ 864 (Minn.) Moorhead city charter, as amended, construed, and held to authorize the city to construct a pavement and retaining wall along a certain street, though the cost would increase the city's indebtedness beyond the limit prescribed in the original charter.—A. A. White Townsite Co. v. City of Moorhead, 138 N. W. 939.

XIV. CLAIMS AGAINST CORPORATION.

§ 1010 (Iowa) A compromise and an accord and satisfaction entered into by a city and the holder of certificates issued by it in payment of work done under contracts for the construction of sewers is as binding on it as would have been the case had the holders been dealing with a private corporation or individual.—First Nat. Bank v. City of Emmetsburg, 138 N. W. 451.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, §§ 693-819.

MUTUAL INSURANCE COMPANIES.

See Insurance, § 56.

NAMES.

See Criminal Law, § 628; Commerce; Estoppel, § 22; Waters and Water Courses.

§ 3 (Iowa) The middle name is no part of the name, and under Acts 33d Gen. Assem. c. 118, relating to notice to owners of land in a drainage district, a notice to "Emma Forsythe Jones," whose maiden name was "Forsythe," was a sufficient notice to "Emma Jones."—Collins v. Board of Sup'rs of Pottawattamie County, 138 N. W. 1095.

§ 6 (Neb.) Where one takes title to realty by his initial letters as his first name, subject to an existing mortgage, the mortgage may be foreclosed by such name.—Lear v. Fickweiler, 138 N. W. 1130.

NAVY.

See Army and Navy.

NECESSARIES.

See Husband and Wife, §§ 229, 232.

NECESSITY.

See Easements, § 16.

NEGLECT.

See Appeal and Error, §§ 837, 997, 1050, 1064, 1066; Carriers, §§ 121-132, 228; Constitutional Law, §§ 89, 245, 301; Death; Electricity; Explosives; Gas; Highways, §§ 184, 191-213; Landlord and Tenant, §§ 164-170; Master and Servant, §§ 88-297; Municipal Corporations, §§ 705, 706, 733, 809; New Trial, § 108; Physicians and Surgeons, §§ 14, 18; Railroads, §§ 277-447; Release, §§ 15, 16; Street Railroads, §§ 99, 113-118; Trial, §§ 133, 260, 295, 296; Waters and Water Courses, § 172.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) Personal Conduct in General.

§ 1 (Mich.) "Actionable negligence" is the absence of ordinary care.—*Sonsmith v. Pere Marquette R. Co.*, 138 N. W. 347.

§ 4 (Mich.) "Ordinary care" is that care which is exercised by the great mass of mankind.—*Sonsmith v. Pere Marquette R. Co.*, 138 N. W. 347.

III. CONTRIBUTORY NEGLIGENCE.

(A) Persons Injured in General.

§ 66 (Wis.) Plaintiff, in returning to a dangerous position with notice of the situation of certain girders, one of which thereafter fell and hurt him, *held* guilty of contributory negligence.—*Sapienza v. Worden-Allen Co.*, 138 N. W. 611.

§ 80 (N.D.) Where an injury is due to the negligence of both parties, no recovery can be had.—*Sherlock v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 138 N. W. 976.

(D) Comparative Negligence.

§ 98 (Mich.) In an action against a common carrier railroad company for injuries to a servant, actionable negligence on the part of defendant having been proved, and contributing negligence on the part of plaintiff being shown, the question whether plaintiff's negligence was of a lesser degree than that of defendant depended on whether defendant's fault was "greater."—*Sonsmith v. Pere Marquette R. Co.*, 138 N. W. 347.

IV. ACTIONS.

(A) Right of Action, Parties, Preliminary Proceedings, and Pleading.

§ 105 (Neb.) The doctrine of assumption of risk arises from the relation of master and servant, and does not constitute a defense where that relation does not exist between the parties.—*Wilkins v. Water & Light Co. of Nebraska City*, 138 N. W. 754.

(B) Evidence.

§ 125 (Mich.) In an action for personal injuries, evidence of prior similar accidents in the same place, the conditions being shown to remain unchanged, is admissible to prove both notice of the defect and negligence, but evidence of such accidents subsequent to the one in issue is not admissible.—*Branch v. Klatt*, 138 N. W. 263.

(C) Trial, Judgment, and Review.

§ 136 (Minn.) In an action for injuries, an issue of willful negligence, though not alleged, *held* properly submitted under the proof, especially in the absence of an exception.—*Johnson v. Scott*, 138 N. W. 694.

§ 136 (Wis.) In an action for injuries to a servant of the owner of certain premises by the fall of a girder to be used in the construction of an addition to a building, evidence *held* insufficient as matter of law to show actionable negligence.—*Sapienza v. Worden-Allen Co.*, 138 N. W. 611.

§ 140 (Mich.) connection of plaintiffs in instead of the word "direct" and Moorhead, 1
§ 141 (Mich.) injured servant company was the servants jured should of care or degrees of negligence R. Co

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(D) Disqualification

§ 54 (Minn.) counsel were of a juror, an knowledge the ted, but did was not ground Scott, 138 N.

(F) Verdict

§ 75 (Neb.) force at the time a new trial was for personal injury of damages Co., 138 N. W.

(H) Newly

§ 100 (Mich.) ground of new regarded with appear to the dence, and not discovered.—Br

§ 102 (Mich.) for newly discovered been discovered produced at the N. W. 263.

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§ 104 (Minn.) motion for new discovered evidence to have been n lateral facts, w only newly ren 138 N. W. 770.

§ 105 (Minn.) evidence is not extraordinary Moorhead, 138 N.

§ 108 (Mich.) I would not change new trial.—Blanc

§ 108 (Mich.) ered evidence w

evidence is so strong and convincing as to render a different result probable.—Branch v. Klatt, 138 N. W. 263.

Whether newly discovered evidence, offered on a motion for a new trial, is of such a character as to require a new trial and render a different conclusion probable on such new trial, is within the discretion of the trial judge.—Id.

Denial of new trial for newly discovered evidence to show that testimony at the trial as to the presence of railings on a stairway where plaintiff was injured was false *held* not error because such question was not necessarily controlling on the question of negligence.—Id.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 123 (S.D.) The trial court may, for cause, extend the time within which to serve notice of intention to move for new trial.—Buffalo Pitts Co. v. Deeg, 138 N. W. 802.

§ 140 (S.D.) On motion for new trial, failure to serve a counter affidavit within the time required by Code Civ. Proc. § 303, *held* not jurisdictional, and that the trial court might permit it to be filed thereafter, if without prejudice to the moving party.—Dandel v. Wolf, 138 N. W. 814.

§ 144 (S.D.) An affidavit accompanying a motion for new trial which contains no statement of the circumstances under which the court made remarks to appellant's counsel and ejected him from the courtroom, so as to affirmatively show that such action of the court was a gross abuse of discretion, was insufficient.—Dandel v. Wolf, 138 N. W. 814.

§ 150 (Mich.) Depositions taken subsequent to a trial and offered in support of a motion for a new trial to show the falsity of testimony given on the trial were to be considered in like manner as newly discovered evidence presented by affidavit in support of such motion.—Branch v. Klatt, 138 N. W. 263.

§ 162 (Iowa) The court on motion for new trial in an action for personal injuries, on the ground that it erred in directing interest to be computed from the time of the injury on the amount allowed for future pain and suffering, may enter judgment for the amount awarded, excluding the amount of interest allowed under the erroneous instruction.—Staley v. Forest, 138 N. W. 441.

§ 164 (Iowa) Where, by agreement of the parties, the court was authorized in vacation to make entry of proper judgment on motion for a new trial on the ground of errors in the instructions, and the court made findings and entered a correct judgment in place of the erroneous judgment as of its date, the original judgment was set aside, and the corrected judgment was effectual.—Staley v. Forest, 138 N. W. 441.

NEXT OF KIN.

See Descent and Distribution.

NOMINATION.

See Elections, §§ 120-147.

NON OBSTANTE VEREDICTO.

See Judgment, § 199.

NONSUIT.

See Dismissal and Nonsuit.

NONUSER.

See Easements, § 30.

NOTES.

See Bills and Notes.

NOTICE.

See Appeal and Error, §§ 413, 415, 417, 773; Banks and Banking, § 413; Bills and Notes, §§ 352, 369, 469; Brokers, § 105; Carriers, § 94, 123, 177, 215; Constitutional Law, § 309; Criminal Law, § 629; Depositions: Discovery, § 54; Drains, §§ 14, 57, 82; Ejectment, § 49; Electricity; Eminent Domain, § 318; Estoppel, §§ 54, 93; Evidence, § 158; Fraudulent Conveyances, § 158; Insurance, §§ 111, 229; Judgment, § 143; Master and Servant, §§ 252, 262; Mechanics' Liens, § 78; Names; Negligence, §§ 66, 125; New Trial, § 123; Partnership, § 219; Pleading, §§ 127, 377; Process, § 86; Quieting Title, § 37; Sales, § 127; Schools and School Districts, §§ 57, 112; Statutes, § 220; Trial, § 396; Vendor and Purchaser, §§ 18, 101, 229, 232; Waters and Water Courses, § 19.

NUISANCE.

See Abatement and Revival: Intoxicating Liquors, § 263; Landlord and Tenant, § 170.

II. PUBLIC NUISANCES.

(A) Nature of Injury, and Liability Therefor.

§ 66 (S.D.) Under Civ. Code, §§ 2303, 2394, 2399, 20 years' maintenance of an obstruction in a public street will not ripen into a right; the same being the rule at common law, which holds that the right to permit a public nuisance cannot be acquired by prescription.—City of Deadwood v. Hursh, 138 N. W. 1122.

NUNC PRO TUNC.

See Appeal and Error, § 468; Divorce, § 162.

OATH.

See Mechanics' Liens, § 154.

OBJECTIONS.

See Appeal and Error, §§ 190-232; Criminal Law, §§ 1036, 1043, 1055; Trial, §§ 84, 412.

OBSTRUCTIONS.

See Estoppel, § 54; Highways, §§ 155, 159; Nuisance; Railroads, §§ 246, 304; Waters and Water Courses, § 119.

OCCUPANCY.

See Homestead, § 33.

OCCUPATION.

See Use and Occupation.

OFFER.

See Contracts, § 148.

OFFICERS.

See Appeal and Error, § 1062; Army and Navy; Constitutional Law, § 80; Criminal Law, § 1156; District and Prosecuting Attorneys; Game; Highways, § 155; Judges, § 39; Justices of the Peace; Mandamus, § 77; Mechanics' Liens, § 281; Municipal Corporations, §§ 36, 125, 185, 198, 232, 350, 502; Towns, §§ 29, 33; United States.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(F) Term of Office, Vacancies, and Holding Over.

§ 55 (Neb.) At common law a person who, while occupying one office, accepts another incompatible with the first ipso facto vacates the first office; and his title is terminated with-

out any other act or proceeding.—*State v. Wait*, 138 N. W. 159.

Where the incumbent of an office accepts another office, one of the tests of incompatibility between the two offices is whether the nature and duties are such as to render it improper, from considerations of public policy, for the incumbent to retain both.—Id.

§ 58 (Neb.) Where acts or events have rendered an office vacant, the authority having power to fill the vacancy may treat it as vacant and proceed to appoint or elect another to fill it.—*State v. Wait*, 138 N. W. 159.

(G) Resignation, Suspension, or Removal.

§ 69 (Wis.) One who accepts an office under the civil service law submits to its provisions, including those empowering his superior to remove him at pleasure, filing a statement of the reasons, as provided by the law.—*State v. Arnold*, 138 N. W. 85.

§ 71 (Wis.) The power of appointing and removing subordinate officers having been conferred upon their superior, and procedure provided therefor, such procedure is exclusive in case the superior, in good faith, acts within the law.—*State v. Arnold*, 138 N. W. 78.

II. TITLE TO AND POSSESSION OF OFFICE.

§ 77 (Wis.) A de facto officer, in possession of his office, can defend against one who attempts to intrude, but cannot rely upon his de facto character to regain that to which he has no right in fact.—*State v. Arnold*, 138 N. W. 78.

OPINION EVIDENCE.

See Criminal Law, §§ 448, 485; Evidence, §§ 471-571.

OPINIONS.

See Jury, § 103.

OPTIONS.

See Frauds, Statute of, §§ 106, 113; Vendor and Purchaser, §§ 3, 18, 215.

ORDERS.

See Appeal and Error; Army and Navy; Constitutional Law, § 290; Master and Servant, §§ 30, 54.

ORDINANCES.

See Municipal Corporations, §§ 40, 112, 121, 626, 703, 719.

PARDON.

See Constitutional Law, § 272; Criminal Law, §§ 162, 641, 662, 982.

PARENT AND CHILD.

See Account; Adoption; Appeal and Error, §§ 215, 1064; Contracts, §§ 99, 245; Creditors' Suit, § 8; Deeds, §§ 196, 210; Divorce, §§ 289, 308; Estoppel, § 35; Evidence, § 471; Executors and Administrators, § 221; Explosives; Fraudulent Conveyances, § 52; Infants; Insurance, § 771; Intoxicating Liquors, §§ 87, 308, 309; Liens, § 7; Trusts, § 44; Vendor and Purchaser, § 232; Wills, § 58; Witnesses, §§ 139, 140, 159; Work and Labor.

§ 3 (Wis.) Defendant held liable for medical services rendered to his stepchild, though the child's father was alive, and was ordered in a divorce suit to make a monthly payment for the child's support.—*Monk v. Hurlburt*, 138 N. W. 59.

§ 7 (Iowa) Evidence as to the emancipation of decedent, who prior to his death sued to re-

cover for injuries to person and property, held admissible.—*Scott v. O'Leary*, 138 N. W. 512.

§ 17 (Mich.) Where, after his wife obtained a divorce, and was granted the custody of their two minor children, accused failed to pay her a weekly allowance as decreed for the children's support, he was not guilty of desertion and abandonment of his minor children, denounced by Pub. Laws 1907, No. 144.—*People v. Dunston*, 138 N. W. 1047.

PARKS.

See Municipal Corporations, §§ 502, 508.

PAROL EVIDENCE.

See Evidence, §§ 387-460.

PARTIES.

See Appeal and Error, §§ 138, 150, 174, 877-882; Corporations, §§ 189, 661; Ejectment, §§ 41, 46, 47, 49; Execution, §§ 172, 349; Highways, § 155; Interpleader; Judgment, § 872; Landlord and Tenant, § 262; Libel and Slander, § 10; Mandamus, § 151; Mechanics' Liens, § 263; Witnesses, § 146.

III. NEW PARTIES AND CHANGE OF PARTIES.

§ 51 (Wis.) A person sued for broker's commission cannot have another broker, making a similar claim, brought in, and his rights determined under that part of St. 1898, § 2610, authorizing parties without whom a complete determination cannot be had to be brought in.—*Schenck v. Sterling Engineering & Const. Co.*, 138 N. W. 637, 769.

St. 1898, § 2656a, authorizing affirmative relief in favor of a defendant against a person brought in as a party, held not to authorize, in a suit for broker's commissions, the bringing in of another broker claiming commissions on the same sale.—Id.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 75 (Minn.) A party who has neither demurred because of defect of parties nor set up such defect by answer is not entitled to a dismissal of the action on the merits on the ground of defect of parties.—*Kanne v. Kanne*, 138 N. W. 25.

PARTITION.

See Adverse Possession, § 57; Constitutional Law, § 278; Divorce, §§ 243, 245; Evidence, § 601; Judgment, § 682; Vendor and Purchaser, § 44.

II. ACTIONS FOR PARTITION.

(B) Proceedings and Relief.

§ 77 (Iowa) Where plaintiff only asked for partition in kind, he was not entitled to an order that the land be sold.—*Rice v. Rice*, 138 N. W. 1111.

§ 86 (Iowa) Where a stipulation between parties pending appeal in partition provided that each side should retain possession, free of rent, of the land decreed to them, and possession was taken pursuant thereto, plaintiff was not entitled to recover rent from defendants.—*Rice v. Rice*, 138 N. W. 1111.

PARTNERSHIP.

See Appeal and Error, § 415; Associations; Brokers, § 43; Deeds, § 105; Evidence, § 460; Frauds, Statute of, § 68.

I. THE RELATION.

(C) Evidence.

§ 53 (Iowa) In an action for accounting of the profits, evidence held to sustain a finding

that the plaintiff was the partner of the defendant.—*Olson v. Michener*, 138 N. W. 826.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Representation of Firm by Partner.

§ 144 (Iowa) A partner *held* damaged by his copartner's misappropriation of firm funds for his individual debts, so that he could proceed against the copartner's individual creditors.—*Wile, Weill & Co. v. Denison Clothing Co.*, 138 N. W. 1098.

A partner cannot pledge the firm credit or use firm property to pay his individual debts without the consent of the copartner.—*Id.*

(C) Application of Assets to Liabilities.

§ 176 (Iowa) In equity, the property of a firm is a fund for firm creditors; and the separate property of each partner is a fund for the creditors of each partner.—*Firsch-Wickwire Co. v. Denison Clothing Co.*, 138 N. W. 1101.

(D) Actions by or Against Firms or Partners.

§ 203 (Neb.) In a suit to foreclose a mortgage in which a partnership and its members are made parties, and summons is served on the members, and one of them dies, the suit does not abate, but may be prosecuted against the surviving partners.—*Dineen v. Lanning*, 138 N. W. 759.

In a suit to foreclose a mortgage to which a partnership and its members are made parties, the fact that at the entry of the decree plaintiff requests an entry of dismissal as to a member of the firm who died pending the action does not operate as an abatement of the suit.—*Id.*

§ 204 (Iowa) Acts of individual partners in employing counsel, giving testimony, and attending and advising counsel on the trial of an action against the partnership, *held* not a personal appearance, which would charge them on a judgment entered.—*Lansing v. Bever Land Co.*, 138 N. W. 833.

§ 217 (Iowa) Evidence *held* to show that a partner did not ratify his copartner's act in appropriating firm funds for the payment of his individual debts.—*Wile, Weill & Co. v. Denison Clothing Co.*, 138 N. W. 1098.

§ 218 (Iowa) Whether a partner ratified his copartner's act in appropriating firm funds for the payment of his individual debts is a question of fact.—*Wile, Weill & Co. v. Denison Clothing Co.*, 138 N. W. 1098.

§ 219 (Iowa) A partnership is a distinct entity, and a judgment against it is not a judgment against the individuals who compose it.—*Lansing v. Bever Land Co.*, 138 N. W. 833.

An individual partner, who is named as a party with the partnership, is not chargeable on a judgment entered, where he is not served with notice of the suit and does not enter a legal appearance.—*Id.*

§ 219 (Neb.) That a partnership made a party to a suit is not as a separate entity served with summons does not affect the validity of the decree as to the equitable interests of the partners who were served.—*Dineen v. Lanning*, 138 N. W. 759.

§ 220 (Iowa) An execution reciting a judgment against what appears to be a partnership *held* not to warrant levy against individual members, under Code, §§ 3960, 3969, providing the requisites of a writ of execution and of its service.—*Lansing v. Bever Land Co.*, 138 N. W. 833.

VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.

(C) Distribution and Settlement Between Partners and Their Representatives.

§ 302 (Iowa) A partner in an equitable action for an accounting may insist that payments by

the other partner from firm funds shall be applied to firm debts, and that nothing shall be credited on a copartner's debts, save payments by him from his individual funds.—*Firsch-Wickwire Co. v. Denison Clothing Co.*, 138 N. W. 1101.

PASSENGERS.

See Carriers, §§ 391-408.

PATENTS.

X. TITLE, CONVEYANCES, AND CONTRACTS.

(C) Licenses and Contracts.

§ 216 (Minn.) Where a corporation had the right under contract with plaintiff to sell farm implements covered by patents held by him, the articles held by the corporation when such right ceased may be sold by the corporation or its successor in interest.—*Poirier v. Bradford*, 138 N. W. 687.

PAVING.

See Municipal Corporations, §§ 350, 459, 511, 513.

PAYMENT.

See Bills and Notes, § 94; Compromise and Settlement; Constitutional Law, §§ 233, 321; Corporations, § 108; Creditors' Suit, § 8; Deeds, § 210; District and Prosecuting Attorneys; Divorce, §§ 231, 269; Drains, §§ 82, 86; Frauds, Statute of, § 129; Infants, § 50; Insurance, §§ 137, 665, 668; Municipal Corporations, § 526; Partnership, §§ 144, 217, 218, 302; Vendor and Purchaser, § 101.

PENALTIES.

See Drains, § 86; Limitation of Actions, § 11.

PERJURY.

See Abatement and Revival; Appeal and Error, § 1001.

PERSONAL INJURIES.

See Appeal and Error, §§ 204, 1005, 1053, 1056, 1066, 1171, 1178; Constitutional Law, §§ 89, 245, 301; Damages, §§ 130, 132, 173, 216; Electricity; Evidence, §§ 513, 571; Explosives; Garnishment, § 42; Gas; Highways, §§ 191-213; Insurance, § 126; Interest, § 39; Judgment, § 199; Landlord and Tenant, §§ 164-170; Master and Servant, §§ 88-297; Municipal Corporations, §§ 705, 706, 733, 821; Negligence; New Trial, §§ 75, 108, 162; Parent and Child; Railroads, §§ 277-447; Release, §§ 15, 16; Street Railroads, §§ 113-118; Theaters and Shows, § 6; Trial, §§ 252, 256.

PETITION.

See Drains, § 14.

PHOTOGRAPHS.

See Evidence, § 359.

PHYSICIANS AND SURGEONS.

See Abortion; Appeal and Error, §§ 1064, 1066; Criminal Law, § 485; Parent and Child; Witnesses, §§ 211, 217.

§ 5 (Iowa) Under Code, § 2577, a physician who has procured a proper license and recorded it in the county of his residence may practice in any county without further record of his certificate, unless he is an itinerant physician within section 2581.—*State v. Zechman*, 138 N. W. 387.

§ 6 (Iowa) Indictment alleging that defendant practiced without a certificate or license, etc., *held* sufficient without an allegation that P. county, in which it was claimed he failed to file

his license, was the county of his residence.—*State v. Zechman*, 138 N. W. 387.

Defendants *held* not prejudiced by an instruction authorizing a conviction if they publicly professed to cure and heal and devoted themselves to and employed means of curing and healing and of alleviating pain.—*Id.*

One practicing medicine by the methods prescribed by the chiropractic school is within Code, §§ 2579, 2581, requiring physicians to procure a license and imposing a penalty for practicing medicine without such license.—*Id.*

§ 14 (Iowa) Where one undertaking to treat a horse represents himself as a competent veterinarian, he is bound to exercise the skill, care, and learning which characterizes the profession generally in the neighborhood, whether the service is compensated for or not.—*Morrison v. Altig*, 138 N. W. 510.

Where plaintiff did not hold himself out as a competent veterinarian when he treated plaintiff's horse without compensation, he was only bound to perform the service honestly and to the best of his ability.—*Id.*

§ 16 (Iowa) A practicing physician who informs a person employing him that he lacks experience or skill in the service he is asked to perform is charged with no liability on account of his professional incompetency.—*Morrison v. Altig*, 138 N. W. 510.

§ 18 (Iowa) In an action against a veterinary surgeon for malpractice, certain instructions *held* not a sufficient presentation of defendant's defense that he did not hold himself out as a veterinary, but only as a student, and did the work at plaintiff's request without pay.—*Morrison v. Altig*, 138 N. W. 510.

§ 18 (Iowa) An instruction *held* not erroneous, on the ground that it authorized a recovery without proof of damages.—*Haradon v. Sloan*, 138 N. W. 556.

Instructions fixing the measure of skill required by a physician *held* inaccurate.—*Id.*

In an action against a physician for malpractice in setting a broken leg, the question of negligence *held* for the jury.—*Id.*

PLEA.

See Criminal Law, § 284.

PLEADING.

See Action, §§ 46, 50; Appeal and Error, §§ 169, 193, 215, 232, 263, 725, 843, 888, 959, 1050; Bankruptcy, § 304; Bills and Notes, § 469; Carriers, § 32; Compromise and Settlement, § 22; Contracts, § 346; Costs, § 13; Creditors' Suit, § 39; Equity, § 228; Estoppel, § 115; Exchange of Property; Explosives; Fraud, §§ 41, 46; Highways, § 53; Husband and Wife, § 229; Indictment and Information; Interpleader; Justices of the Peace, § 36; Landlord and Tenant, § 169; Limitation of Actions, §§ 127, 180; Mandamus, §§ 163, 164; Master and Servant, §§ 256-264; Mechanics' Liens, § 277; Negligence, § 136; Parties, § 75; Principal and Agent, § 189; Quietening Title, §§ 34, 37; Railroads, § 440; Reformation of Instruments, § 40; Sales, § 434; Specific Performance, § 114; Stipulations, § 14; Trial, §§ 11, 61, 233, 251, 253, 296, 396; Use and Occupation.

I. FORM AND ALLEGATIONS IN GENERAL.

§ 9 (Neb.) Where a petition in an action for personal injuries sets out the facts, it is unnecessary to plead the conclusions to be drawn therefrom.—*Schmidt v. Village of Papillion*, 138 N. W. 725.

§ 20 (Minn.) In an action for injuries to a servant from failure to warn him of a blast of dynamite, the complaint *held* not within the rule that where it alleges in the alternative two

statements, one of which is sufficient to constitute a cause of action and the other not, they neutralize each other.—*Grbic v. Pittsburgh Iron Ore Co.*, 138 N. W. 309.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(C) Traverses or Denials and Admissions.

§ 127 (Minn.) Answer in action for injuries caused by explosive fuse caps *held* to admit that plaintiff had caused due service of notice of the time, place, and circumstances of the accident to be served on the defendant city officers.—*Vills v. City of Cloquet*, 138 N. W. 33.

V. DEMURRER OR EXCEPTION.

§ 204 (Iowa) Where a counterclaim contains two counts presenting a single claim upon two different theories, one of which is good, the insufficiency of the other is immaterial.—*School Tp. of Eden in Carroll County v. Stevens*, 138 N. W. 927.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

§ 236 (Iowa) A court *held* not to have abused its discretion by permitting defendant after the close of the evidence to amend a counterclaim for wrongful attachment by basing it on the attachment bond.—*Welsh v. Haleen*, 138 N. W. 502.

§ 236 (Minn.) Where an instruction authorizing allowance for loss of time was objected to, because such element was not pleaded, it was not an abuse of discretion for the court to permit an amendment of the complaint in that regard.—*Stuhr v. Wright County Telephone Co.*, 138 N. W. 693.

§ 236 (Neb.) Where the original answer pleaded fraud, threats, and intimidation, and that the note was given upon a condition, permission to file an amended answer pleading the condition, but omitting the other plea, was within the court's discretion.—*Musser v. Musser*, 138 N. W. 599.

§ 237 (Wis.) Under St. 1898, § 2830, *held* not error to permit amendment of the complaint after verdict to conform to proof.—*Monk v. Hurlburt*, 138 N. W. 59.

XI. MOTIONS.

§ 343 (Minn.) A motion for judgment on the pleadings is properly denied, though the movant be entitled to partial relief, where the motion does not so limit the recovery sought.—*Kanne v. Kanne*, 138 N. W. 25.

§ 350 (Minn.) On motion for judgment on the pleadings at the trial, every inference which a jury might legitimately draw from the allegations should be drawn in plaintiff's favor, and the complaint sustained, if possible by the most liberal construction.—*Ames v. Brandvold*, 138 N. W. 786.

§ 369 (Mich.) Where the counts of the declaration were good, there was no error because of plaintiff's failure to elect on which count he would rely for a recovery.—*Bowen v. Chandler*, 138 N. W. 247.

XII. ISSUES, PROOF, AND VARIANCE.

§ 377 (S.D.) Where there was nothing in an answer amounting to denial of the allegation in the complaint that a second deed and mortgage taken by defendant were with notice of plaintiff's prior deed, such allegation stood admitted, and need not be proved.—*Hefebower v. Wiley*, 138 N. W. 370.

§ 380 (Mich.) Person suing to have assignment of land contract declared a mortgage *held* not entitled to attack the assignment for want of consideration.—*Dalton v. Mertz*, 138 N. W. 1055.

§ 396 (Iowa) Where defendant's counterclaim is distinctly based upon a written contract to sell articles on commission, he cannot show a subsequent oral agreement that he be paid for work done on the articles.—Bradley, Merriam & Smith v. Goetsche, 138 N. W. 823.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

§ 430 (Wis.) The existence of a certain fact not alleged in the complaint may be litigated by consent of parties without formal amendment of the complaint.—Brey v. Forrestal, 138 N. W. 645.

PLEDGES.

§ 11 (S.D.) A parol agreement to execute a chattel mortgage does not create a pledge where the property gets into the hands of the alleged pledgee unknown to the owner, and not in pursuance of the agreement.—Buffalo Pitts Co. v. Deeg, 138 N. W. 802.

POLICEMEN.

See Municipal Corporations, §§ 185, 198.

POLICE POWER.

See Constitutional Law, § 309; Municipal Corporations, §§ 591, 626, 703, 710.

POLICY.

See Insurance.

POLITICAL RIGHTS.

See Elections.

POSSESSION.

See Adverse Possession; Replevin, § 10.

POWERS.

See Judgment, § 785.

PRACTICE.

See Continuance; Courts; Criminal Law; Equity.

PREFERENCES.

See Bankruptcy, §§ 163, 166, 303; Fraudulent Conveyances, § 115.

PREJUDICE.

See Appeal and Error, §§ 1031-1073; Criminal Law, §§ 1169-1172; Homicide, § 340.

PRELIMINARY INJUNCTION.

See Injunction, §§ 135, 211.

PREMIUMS.

See Insurance, §§ 137, 665, 668.

PRESCRIPTION.

See Adverse Possession; Limitation of Actions; Nuisance.

PRESUMPTIONS.

See Appeal and Error, §§ 901-939, 1031; Criminal Law, § 1144; Evidence, §§ 5, 77, 84.

PRIMARY ELECTIONS.

See Elections, §§ 120-147.

PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Corporations, §§ 298-320, 406, 507, 668; Insurance, §§ 111, 127, 229, 696; Sales, § 358; Vendor and Purchaser, § 244.

I. THE RELATION.

(A) Creation and Existence.

§ 21 (Wis.) The rule that agency cannot be established by declarations of the agent does not affect competency of the agent to testify in respect to his agency.—Somers v. Germania Nat. Bank of Milwaukee, 138 N. W. 713.

§ 22 (Wis.) Agency cannot properly be established by proof of declarations of the pretended agent.—Somers v. Germania Nat. Bank of Milwaukee, 138 N. W. 713.

§ 25 (Neb.) Authority to act as agent may be inferred if the party charged as principal causes third persons to trust and act upon such apparent agency.—Triller v. Sadle, 138 N. W. 728.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

§ 121 (Wis.) The rule that an agent's authority cannot be established by declarations of the agent does not affect competency of the agent to testify in respect to his agency.—Somers v. Germania Nat. Bank of Milwaukee, 138 N. W. 713.

The authority of an agent, when not in writing, or required to be, may be proved by the agent himself; and this rule applies where the wife acts for the husband, or the husband for the wife.—Id.

§ 122 (Wis.) An agent's authority cannot properly be established by proof of declarations of the pretended agent.—Somers v. Germania Nat. Bank of Milwaukee, 138 N. W. 713.

(C) Unauthorized and Wrongful Acts.

§ 152 (S.D.) An agent has no authority to apply his principal's property to liquidate his own indebtedness to a third person.—Clow-Schaaf Lumber Co. v. Kass, 138 N. W. 1120.

(D) Ratification.

§ 170 (Neb.) A principal must disaffirm the unauthorized act of its agent within a reasonable time after such act comes to its knowledge.—Singer Sewing Mach. Co. v. Barger, 138 N. W. 741.

§ 171 (Iowa) Defendant, having completed a sale of land made by his agent by fraudulent representations, held to have thereby made the representations his own.—Day v. Merrick, 138 N. W. 400.

§ 171 (Neb.) Where the name of the principal was signed to a lease by a firm signing as agents, who attempted to collect the money due on the lease and obtained possession of the hay growing on the land leased in replevin brought in the name of their principal, he was bound by what they did.—Triller v. Sadle, 138 N. W. 728.

§ 171 (Neb.) Where, in settlement of a balance due on a sewing machine, a single payment note was given, providing that the machine should remain the property of the seller until payment of the price, and the holder, with notice that it had been altered, replevied the machine under the terms of the altered note, he thereby ratified the alteration.—Singer Sewing Mach. Co. v. Barger, 138 N. W. 741.

Where a note was altered by the agent of the holder, who sold a sewing machine and obtained a note from the purchasers, but without their knowledge, plaintiff bringing replevin under the terms of the altered note cannot recover.—Id.

(F) Actions.

§ 189 (Iowa) A contract by ratification may be proved under a general allegation that the contract was executed.—Seevers v. Cleveland Coal Co., 138 N. W. 793.

PRINCIPAL AND SURETY.

See Action, § 50; Appeal and Error, §§ 380, 1234; Bail; Contracts, § 186; Courts, § 26; Intoxicating Liquors, §§ 87, 88; Jury, § 31; Mechanics' Liens, § 317.

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

§ 82 (Wis.) A building contractor's bond conditioned on the contractor performing the contract, paying debts incurred, and saving the property and the owner harmless from lien imposes on the surety the obligation of paying all indebtedness incurred, and this obligation is not modified by the building contract binding the contractor to furnish all material and labor, and vouchers showing payment therefor.—*Warren Webster & Co. v. Beaumont Hotel Co.*, 138 N. W. 102.

III. DISCHARGE OF SURETY.

§ 89 (Minn.) If a creditor informs a surety that the debt is paid, and the surety thereby suffers damage, the creditor is estopped from thereafter proceeding against the surety.—*Wilkins v. Hanson*, 138 N. W. 418.

IV. REMEDIES OF CREDITORS.

§ 162 (Minn.) Evidence held to present a question for the jury whether a creditor stated to his surety that the debt was settled, whether the surety was thereby induced to take no steps to protect himself, and whether he thereby suffered damage.—*Wilkins v. Hanson*, 138 N. W. 418.

PRIORITIES.

See Mortgages, § 186; Waters and Water Courses, § 19.

PRISONS.

See Constitutional Law, § 80; Habeas Corpus, § 30.

PRIVATE ROADS.

See Easements.

PRIVILEGED COMMUNICATIONS.

See Libel and Slander, §§ 48, 123, 125; Witnesses, §§ 192-217.

PROBATE.

See Wills, §§ 320-427.

PROBATION.

See Jury, § 21.

PROCESS.

See Adverse Possession, § 45; Appeal and Error, § 413; Arrest; Corporations, §§ 507, 668; Execution; Garnishment; Injunction; Judgment, § 17; Limitation of Actions, § 127; Mortgages, § 497; Partnership, § 219; Taxation, § 642.

II. SERVICE.

(C) Publication or Other Notice.

§ 96 (Iowa) An affidavit that personal service cannot be made within the state must be made before publication of the notice.—*Manion v. Brady*, 138 N. W. 558.

Under Code, §§ 3535, 3536, affidavit of service by publication held fatally defective, and to confer no jurisdiction on the trial court.—*Id.*

PROFITS.

See Damages, § 120; Homestead, § 74.

PROHIBITION.

See Intoxicating Liquors.

PROMISSORY NOTES.

See Bills and Notes.

PROPERTY.

See Adverse Possession; Constitutional Law. §§ 272-309; Dedication; Eminent Domain.

PROSECUTING ATTORNEYS.

See District and Prosecuting Attorneys.

PROSTITUTION.

See Libel and Slander, §§ 7, 121.

PROVINCE OF COURT AND JURY.

See Criminal Law, §§ 736-764; Trial, §§ 191, 193.

PROXIMATE CAUSE.

See Master and Servant, §§ 129, 265, 297.

PUBLICATION.

See Process, § 96.

PUBLIC DEBT.

See Municipal Corporations, § 864.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, §§ 281-537.

PUBLIC LANDS.

See Waters and Water Courses, §§ 10, 32.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(M) Conveyances, Contracts, and Exemptions.

§ 139 (Wis.) In view of Act Cong. May 4, 1880, authorizing the relinquishment of a homestead entry, an agreement by plaintiff to relinquish a homestead entry made by him so that defendant's son could make entry of the land held valid, and not contrary to public policy.—*Dohr v. Wolfgang*, 138 N. W. 75.

PUBLIC NUISANCE.

See Nuisance.

PUBLIC POLICY.

See Contracts, § 129; Officers, § 55.

PUBLIC SCHOOLS.

See Schools and School Districts.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads.

PUBLIC USE.

See Dedication; Eminent Domain.

PUBLIC WATER SUPPLY.

See Waters and Water Courses, §§ 240, 263.

PUNISHMENT.

See Criminal Law, §§ 1205, 1213.

QUANTUM MERUIT.

See Contracts, § 346; Exchange of Property; Work and Labor.

QUESTIONS OF LAW AND FACT.

See Criminal Law, §§ 736-764; Trial, §§ 141, 144.

QUIETING TITLE.

See Trial, § 396; Vendor and Purchaser, § 101.

II. PROCEEDINGS AND RELIEF.

§ 34 (Mich.) A bill was not sustainable under Comp. Laws, § 448, as a bill to quiet title, where it did not allege that defendants were setting up a claim to the land in opposition to complainant's claim.—*Rodgers v. Beckel*, 138 N. W. 202.

§ 34 (Neb.) The pleadings and proof in an action to quiet title *held* to sustain a decree for plaintiff.—*Peterson v. Lincoln County*, 138 N. W. 122.

§ 37 (S.D.) In an action to quiet title, an answer *held* to contain nothing amounting to denial of the allegation of the complaint that defendant's deed and mortgage were taken with notice of plaintiff's prior deed.—*Hefebower v. Wiley*, 138 N. W. 370.

QUORUM.

See Corporations, § 298.

RAILROADS.

See Appeal and Error, §§ 150, 837, 1005, 1056; Burglary, § 41; Carriers; Constitutional Law, §§ 89, 241, 301; Criminal Law, §§ 406, 780; Damages, § 173; Death, §§ 58, 75; Eminent Domain, §§ 112, 318, 321; Evidence, §§ 77, 359; Indictment and Information; Mandamus, §§ 15, 132; Master and Servant; Municipal Corporations, § 112; Negligence, §§ 98, 141; Statutes, § 118; Street Railroads.

II. RAILROAD COMPANIES.

§ 18 (Iowa) It is the purpose declared in its articles of incorporation, and not the name assumed by a railroad corporation, that determined the extent of its powers.—*Lewis v. Omaha & C. B. S. Ry. Co.*, 138 N. W. 1092.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

§ 64 (Neb.) Where a suburban landowner, in consideration of the location of an interurban railway and boulevard across his premises, contracts to convey a part of his land for right of way purposes, and thereafter seeks to rescind his contract for fraud or mistake, he must act promptly and make known his intention upon discovery of the facts.—*Ensign v. Citizens' Interurban Ry. Co.*, 138 N. W. 718.

If a landowner, with full knowledge of the facts on which he relies for a rescission of his contract to convey a right of way to an interurban railway, acquiesces in the construction of the improvement, equity may require him to specifically perform his contract.—*Id.*

X. OPERATION.

(B) Statutory, Municipal, and Official Regulations.

§ 243 (Iowa) Ordinance requiring operation of gates at crossings at all hours *held* not invalid, though there were more than two hours of each day when such operation would not ordinarily be necessary.—*City of Council Bluffs v. Illinois Cent. R. Co.*, 138 N. W. 891.

A city ordinance requiring crossing gates *held* authorized by Code, § 769, authorizing cities to require gates, and Code Supp. 1907, § 2033c, making interurban railways in cities subject to the laws governing street railways, and not in conflict with Code Supp. 1907, §§ 2033a, 2033b, regulating crossings at intersections.—*Id.*

Ordinance requiring the maintenance of gates at a street crossing and intersection of railroad with electric line *held* not to require a

watchman, as distinguished from an operator of the gates.—*Id.*

§ 246 (Wis.) A city ordinance prohibiting railroads from obstructing the streets with engines or cars *held* to only prohibit unnecessary stopping on crossings or stops for an unreasonable or unnecessary length of time.—*Depow v. Chicago & N. W. Ry. Co.*, 138 N. W. 42.

(D) Injuries to Licensees or Trespassers in General.

§ 277 (Minn.) Where trespasser was twice ejected from a moving freight train by a brakeman, and was injured, the carrier's duty to such trespasser applied to both ejections.—*Gee v. Great Northern Ry. Co.*, 138 N. W. 684.

§ 282 (Minn.) In an action for injuries to a trespasser by being ejected from a freight train, evidence *held* to sustain a verdict for plaintiff.—*Gee v. Great Northern Ry. Co.*, 138 N. W. 684.

(F) Accidents at Crossings.

§ 304 (Wis.) A railway company has a right to use the street on which its tracks are lawfully laid for legitimate purposes, but has no right to leave its cars standing on the street for an unnecessary and unreasonable length of time.—*Depow v. Chicago & N. W. Ry. Co.*, 138 N. W. 42.

§ 320 (Minn.) If the defendant's engineer discovered plaintiff at a crossing when the engine was 100 or 150 feet from the crossing, and plaintiff was not observing the train, it was his duty to signal.—*Weiss v. Great Northern Ry. Co.*, 138 N. W. 423.

§ 324 (N.D.) The greater the danger in approaching a railroad crossing by reason of weather conditions, the greater the caution necessary to constitute ordinary care.—*Sherlock v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 138 N. W. 976.

§ 327 (N.D.) A driver about to cross a railroad track at a public crossing in the country is charged with knowledge that it is a dangerous place, and he is bound to vigilantly use his senses of sight and hearing, and do all that ordinary care would dictate to avoid injury.—*Sherlock v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 138 N. W. 976.

It is a traveler's duty to look in both directions at a crossing, especially where there are two tracks which render it possible for trains to approach from either direction, or pass each other at the crossing.—*Id.*

The only diversion of attention excusing failure to look and listen at a railroad crossing is where the attention is so irresistibly forced to something else as to deprive the traveler of opportunity to look and listen.—*Id.*

§ 346 (N.D.) Though the law of self-preservation may usually be considered in favor of a traveler, where doubt exists as to his ability to see or hear an approaching train, where no such doubt appears and he did not exercise ordinary care, no such inference is applicable.—*Sherlock v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 138 N. W. 976.

§ 348 (Minn.) In an action for causing the death of a person at a railroad crossing, evidence *held* to justify a verdict of negligence against defendant, and exonerating decedent from contributory negligence.—*Nelson v. Northern Pac. Ry. Co.*, 138 N. W. 419.

§ 348 (N.D.) Where the exercise of ordinary precautions of looking and listening to inform plaintiff of the approach of a train is neglected, and such precautions would have avoided an accident, negligence is conclusively established in the absence of conflicting evidence.—*Sherlock v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 138 N. W. 976.

Evidence *held* not to show exceptional circumstances excusing a party from the rule regarding looking and listening.—*Id.*

Evidence *held* to show that a driver in approaching a railroad track was guilty of con-

tributory negligence in not exercising his senses of sight and hearing, even if no signal was given by the train.—Id.

§ 350 (Minn.) Evidence *held* to take the case to the jury on the question whether the headlight of defendant's engine was lighted, as well as to negligence of defendant and contributory negligence of plaintiff.—Weiss v. Great Northern Ry. Co., 138 N. W. 423.

§ 350 (Minn.) In an action for death in a railroad crossing accident, whether defendant was negligent in failing to give necessary and statutory signals *held* for the jury.—Tegels v. Great Northern Ry. Co., 138 N. W. 945.

In an action for death at a railroad crossing at night, evidence *held* to authorize the submission of decedent's contributory negligence to the jury.—Id.

(G) Injuries to Persons on or near Tracks.

§ 383 (Mich.) In an action for injuries to plaintiff while walking along a railroad track by being struck by the tender of an engine approaching her from the rear, plaintiff *held* guilty of contributory negligence as a matter of law.—Berry v. Harbor Springs Ry. Co., 138 N. W. 1038.

§ 391 (Mich.) In an action for injuries to a pedestrian while walking along a railroad track, facts *held* insufficient to show gross negligence on the part of the engineer.—Berry v. Harbor Springs Ry. Co., 138 N. W. 1038.

(H) Injuries to Animals on or near Tracks.

§ 440 (Neb.) An answer admitting that a railroad company "is now operating" the railroad, and not denying that it was the owner of the road at the time of the accident, does not raise the issue of ownership or of operation at that time.—Kinney v. Chicago, B. & Q. R. Co., 138 N. W. 577.

§ 446 (Mich.) In an action for killing a horse at a highway crossing, in which plaintiff claimed that the right of way fence did not extend to the line of the highway which was opened in 1873, the width of the highway, depending upon user and nonuser, *held* a jury question.—Goretski v. Au Sable & N. W. Ry. Co., 138 N. W. 658.

Whether the railroad cattle guards were properly located as required by law with reference to the highway, and were as near the highway as practicable, *held* a jury question.—Id.

Whether the horse was in the highway when struck by the train *held* a jury question.—Id.

§ 447 (Mich.) Instruction in an action for injuries to stock *held* to have properly submitted the question of the railroad company's duty as to fences and cattle guards at a public highway crossing.—Goretski v. Au Sable & N. W. Ry. Co., 138 N. W. 658.

RAPE.

See Appeal and Error, § 1068; Contracts, § 75; Costs, § 299; Criminal Law, §§ 369, 678, 823, 830, 1169; Evidence, § 219; Indictment and Information; Trial, § 250; Witnesses, §§ 217, 345.

II. PROSECUTION AND PUNISHMENT.

(B) Evidence.

§ 43 (Iowa) Where a state's witness testified to the imbecility of prosecutrix, and that she had not learned to walk at 18 months, and that she had never learned to talk plainly, questions on cross-examination as to when her brothers and sisters learned to walk and talk were properly excluded.—State v. McKinnon, 138 N. W. 523.

§ 51 (Iowa) The state on the trial of accused for rape on an imbecile female in violation of Code, § 4758, need only show that her im-

becility of mind was such that effectual resistance was impossible.—State v. McKinnon, 138 N. W. 523.

§ 52 (Neb.) That a female child of the age of 17 years was pregnant and died from the effects of an abortion is sufficient evidence that some one had had sexual intercourse with her at the age which is prohibited by statute.—Thrasher v. State, 138 N. W. 120.

(C) Trial and Review.

§ 57 (Neb.) Evidence in a prosecution for statutory rape, though largely circumstantial, *held* sufficient to be submitted to the trial jury.—Thrasher v. State, 138 N. W. 120.

§ 59 (Iowa) On a trial for rape of an imbecile female, punishable under Code, § 4758, requested instructions on the subject of resistance *held* properly refused as introducing elements not in the offense.—State v. McKinnon, 138 N. W. 523.

III. CIVIL LIABILITY.

§ 65 (Mich.) The mere fact that plaintiff suing for assault and battery with ravishment did not resist to the utmost did not excuse defendant from his unlawful act if he had intercourse with her without her consent.—Totten v. Totten, 138 N. W. 257.

In a civil action for assault and battery, a charge of ravishment does not change the nature of the action, but is only matter of aggravation bearing on the measure of damages.—Id.

§ 66 (Mich.) In an action for assault and battery, including ravishment, plaintiff may testify that on the day following the assault she told her husband, to show the genuineness of the charge.—Totten v. Totten, 138 N. W. 257.

Where plaintiff suing for assault and battery with ravishment testified that she did not sue to get money out of defendant, but to punish him for what he did, the refusal to charge that the jury finding defendant guilty could give plaintiff such damages as would compensate her for the injuries done, and, when such compensation was awarded, nothing beyond could be given was erroneous.—Id.

RATE.

See Interest, § 37; Telegraphs and Telephones, § 34.

RATIFICATION.

See Partnership, §§ 217, 218; Principal and Agent, §§ 170, 171, 189.

REAL ACTIONS.

See Ejectment; Partition; Quieting Title.

RECEIPTS.

See Evidence, § 408.

RECEIVERS.

See Appeal and Error, §§ 190, 984; Corporations, §§ 320, 609.

RECEPTION OF EVIDENCE.

See Trial, §§ 45-96.

RECORDS.

See Appeal and Error, §§ 501-696, 939; Costs, §§ 255, 256; Criminal Law, §§ 1114, 1119; Divorce, § 162; Drains, § 82; Estoppel, § 22; Evidence, §§ 158, 184, 387; Execution, § 300; Fraud, § 22; Mortgages, § 171; Physicians and Surgeons, §§ 5, 6; Waters and Water Courses, § 19.

§ 9 (Minn.) Under Rev. Laws 1905, § 3395, a person acquiring an interest in land pending proceedings to register title must appear

at once, and on delay of more than six months he was not entitled to answer as a matter of right; section 3396, providing six months' limitation for bringing an action questioning the decree of registration, not being applicable.—In re Brown, 138 N. W. 941.

The trial court *held* not to have abused its discretion in refusing permission to answer in proceedings to register title six months after acquisition of interest pending the proceeding.—*Id.*

REDEMPTION.

See Execution, §§ 245-300; Mortgages, § 497; Taxation, §§ 709, 722.

REDIRECT EXAMINATION.

See Witnesses, § 287.

REFERENCE.

See Appeal and Error, § 906; Bankruptcy, § 252.

REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments; Contracts, § 90.

I. RIGHT OF ACTION AND DEFENSES.

§ 20 (S.D.) A contract is reformation when by the mistake of one party and the fraud of the other there is omitted therefrom property which it was agreed should be transferred.—*Fotheringham v. Lockhart*, 138 N. W. 804.

II. PROCEEDINGS AND RELIEF.

§ 40 (S.D.) Facts *held* to warrant the allowing of an amendment of defendant's pleading on the trial, so as to ask for reformation of a contract.—*Fotheringham v. Lockhart*, 138 N. W. 804.

REGISTRATION.

See Records, § 9.

REHEARING.

See New Trial.

REIMBURSEMENT.

See Towns, § 20.

REINSTATEMENT.

See Judgment, § 872.

RELEASE.

See Compromise and Settlement; Frauds, Statute of, § 129; Mortgages, §§ 309, 319; Trial, §§ 252, 256.

I. REQUISITES AND VALIDITY.

§ 15 (Iowa) The law favors the adjustment of controversies fairly made.—*Owens v. Norwood White Coal Co.*, 138 N. W. 483.

Settlements for personal injuries made with persons who are poor and without the aid of counsel should be closely scrutinized.—*Id.*

§ 16 (Iowa) A settlement by one injured from negligence will be sustained though he was mistaken as to the nature and extent of his injuries.—*Owens v. Norwood White Coal Co.*, 138 N. W. 483.

§ 17 (Iowa) Where one, with knowledge of the mental incapacity of another, procures from the latter a release of a claim for damages, he is guilty of fraud.—See *v. Carbon Block Coal Co.*, 138 N. W. 825.

§ 24 (Iowa) Where a release of a claim for damages is procured by fraud, the consideration need not be returned or tendered back as a condition to the maintenance of an action for the damages.—See *v. Carbon Block Coal Co.*, 138 N. W. 825.

Where one, without knowledge of the mental incapacity of another, procures from the latter a release of his claim for damages, the latter, having no knowledge of the release until after the institution of the suit, need not tender or return the consideration received.—*Id.*

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 57 (Iowa) Evidence *held* not to show an employe's mental capacity when he signed a release, or that such capacity was impaired.—*Owens v. Norwood White Coal Co.*, 138 N. W. 483.

Evidence *held* not to show any false statement by defendant's agent as to what the attending physician told the agent as to how long plaintiff would be in bed.—*Id.*

RELEVANCY.

See Evidence, §§ 113-127.

REMAINDERS.

See Wills, §§ 608, 614.

REMEDY AT LAW.

See Equity, §§ 46, 50.

REMITTITUR.

See Appeal and Error, § 1140.

REMOVAL.

See Officers, § 69.

REMOVAL OF CAUSES.

See Venue.

RENT.

See Homestead, § 74; Landlord and Tenant, §§ 231, 254; Partition.

REPAIRS.

See Landlord and Tenant, § 164; Master and Servant, §§ 101, 102.

REPEAL.

See Statutes, § 159.

REPLEVIN.

See Appeal and Error, §§ 1033, 1177; Bailment; Principal and Agent, § 171.

I. RIGHT OF ACTION AND DEFENSES.

§ 10 (S.D.) Replevin will not lie, unless the defendant is in actual or constructive possession of the goods.—*Fotheringham v. Lockhart*, 138 N. W. 804.

IV. PLEADING AND EVIDENCE.

§ 71 (S.D.) In claim and delivery proceedings for horses agreed to be exchanged for machinery under a contract which was signed by plaintiff, R., and defendant, evidence that when the machinery was purchased it was stated that plaintiff was the purchaser, and that R. did not receive any consideration for signing the contract, *held* not admissible.—*Harris v. Lyons*, 138 N. W. 235.

VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§ 95 (N.D.) In claim and delivery, where plaintiff purchased the greater part of the property seized at a public auction sale thereof before trial, the verdict for defendant should specifically describe the several articles of property and the value of each.—*Smith v. Willoughby*, 138 N. W. 7.

§ 103 (N.D.) In claim and delivery under Rev. Codes 1905, §§ 7036, 7075, where plaintiff sold the property seized at public auction before trial but himself purchased the greater part thereof, the judgment for defendant should be in the alternative.—*Smith v. Willoughby*, 138 N. W. 7.

§ 104 (N.D.) In claim and delivery, a judgment in the alternative need describe the items of property and the value of each item only upon demand therefor at the trial.—*Smith v. Willoughby*, 138 N. W. 7.

§ 110 (Neb.) Where the property is delivered to plaintiff under bond, and judgment of return of the property to defendant is rendered, it must be returned within a reasonable time in substantially the same condition as when taken.—*Wallace v. Cox*, 138 N. W. 578.

VII. LIABILITIES ON BONDS AND UNDERTAKINGS.

§ 120 (Neb.) Where judgment is rendered for defendant, and the replevied property is not redelivered within a reasonable time, and when tendered is greatly diminished in value, defendant may refuse to accept the property, and sue on the replevin bond.—*Wallace v. Cox*, 138 N. W. 578.

§ 124 (Neb.) Where defendant recovering judgment refuses to receive back the property because diminished in value, the measure of damages in an action on the bond is the value of the property as found in the replevin action plus the costs, with interest.—*Wallace v. Cox*, 138 N. W. 578.

REPORT.

See Drains, §§ 14, 32.

REQUESTS.

For instructions, see Criminal Law, §§ 824-830; Trial, §§ 256, 260.

RESCISSION.

See Cancellation of Instruments; Contracts, § 270; Election of Remedies; Exchange of Property; Sales, §§ 23, 120-127; Vendor and Purchaser, § 101.

RES GESTÆ.

See Criminal Law, § 364; Evidence, §§ 121-127.

RES JUDICATA.

See Judgment, §§ 574, 707, 721.

RESTRICTIONS.

See Covenants, §§ 1-103.

RESULTING TRUSTS.

See Trusts, § 83.

RETAINER.

See Attorney and Client.

RETRACTION.

See Libel and Slander, § 123.

REVENUE.

See Taxation.

REVERSAL.

See Appeal and Error, §§ 1171-1178.

REVIEW.

See Appeal and Error; Certiorari.

REVIVAL.

See Judgment, § 872.

RIGHT OF WAY.

See Easements; Railroads, § 64.

RIPARIAN RIGHTS.

See Waters and Water Courses, § 154.

RISKS.

See Insurance, §§ 451, 454; Negligence, § 105. Assumption of, see Master and Servant, §§ 203-220, 260, 280, 288.

ROADS.

See Highways.

ROBBERY.

See Statutes, § 159.

RULE IN SHELLEY'S CASE.

See Wills, § 608.

RULES.

See Constitutional Law, § 281; Evidence, § 450; Master and Servant, §§ 145, 243, 296.

RULES OF COURT.

See Affidavits; Appeal and Error, §§ 766, 773, 939; Costs, § 256; Creditors' Suit, § 31; Equity, § 228; Exceptions, Bill of.

SALES.

See Appeal and Error, §§ 984, 1050, 1056, 1073; Brokers; Carriers, § 94; Chattel Mortgages, § 129; Constitutional Law, § 296; Contracts, § 312; Creditors' Suit, § 47; Damages, § 120; Deeds; Evidence, §§ 442, 450; Execution, §§ 245-300; Executors and Administrators, §§ 388, 539, 540; Fraud, §§ 41, 59; Fraudulent Conveyances, § 182; Homestead, § 66; Husband and Wife, § 229; Intoxicating Liquors; Municipal Corporations, § 513; Partition; Patents; Pleading, § 396; Trial, § 233; Vendor and Purchaser.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 23 (Neb.) An order for goods sent to a wholesale house, providing in express terms that it is subject to the approval of the home office, does not become a binding contract until it is approved.—*Crowder v. Tolerton & Warfield Co.*, 138 N. W. 151.

Where a person making an order for goods containing a provision that it is subject to the approval of the home office of the seller on being notified of its nonacceptance demands repayment of the money forwarded, he rescinds his order, and cannot maintain an action for damages for its nonacceptance.—*Id.*

§ 52 (Neb.) In an action for goods sold where the purchase and receipt are denied, the burden is on plaintiff to prove the sale.—*S. Hirsch Distilling Co. v. Roach*, 138 N. W. 1131.

§ 53 (Neb.) A question as to whom the goods were sold, *held* for the jury.—*S. Hirsch Distilling Co. v. Roach*, 138 N. W. 1131.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(C) Rescission by Buyer.

§ 120 (Neb.) A sale of personality with a warranty of its fitness for a prescribed use may be treated as a sale upon condition subsequent, and in case of breach of warranty

the property may be restored and the sale rescinded.—*Sherrill v. Coad*, 138 N. W. 567.

§ 124 (Neb.) To entitle a vendee to a rescission, he must show a return or offer to return the property.—*Sherrill v. Coad*, 138 N. W. 567.

§ 127 (Neb.) To entitle a vendee to a rescission, he must show notice of his election to rescind.—*Sherrill v. Coad*, 138 N. W. 567.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

§ 166 (Neb.) Independently of express contract, a purchaser by sample may refuse to receive the goods if they fail to correspond to the sample.—*National Engraving Co. v. Queen City Laundry*, 138 N. W. 575.

§ 168½ (Iowa) Under a contract for the purchase of a machine, "terms cash on trial," the purchaser was not bound to accept and pay for the machine if it did not do the work for which it was wanted, but the sale was conditional only on its ability to do the work.—*Buckeye Traction Ditcher Co. v. Smith*, 138 N. W. 817.

An instruction that purchaser of machine subject to trial would be presumed to have accepted it, unless he rejected it within a reasonable time, was proper.—*Id.*

§ 168½ (S.D.) If the parties to a contract for the sale of machinery agreed that the purchaser of the machinery should test it before closing the contract, the trial thereof should be a fair test, in good faith, in the manner provided by the contract.—*Harris v. Lyons*, 138 N. W. 295.

§ 182 (Mich.) Whether the acts of a buyer of an engine done after delivery thereof amounted to an acceptance *held* under the evidence for the jury.—*Bowen v. Chandler*, 138 N. W. 247.

VI. WARRANTIES.

§ 262½ (S.D.) Where a contract for the sale of a heating plant contained written warranties, there could be no implied warranties.—*Sheafe v. Zastrow*, 138 N. W. 16.

VII. REMEDIES OF SELLER.

(E) Actions for Price or Value.

§ 355 (Iowa) Exclusion of evidence to show that property purchased was not to be paid for until tested *held* proper where there was no question as to that fact.—*Buckeye Traction Ditcher Co. v. Smith*, 138 N. W. 817.

§ 358 (Iowa) Exclusion of evidence that seller's agent said purchaser need not keep machine, unless it worked, *held* proper, where the evidence showed an acceptance of the machine.—*Buckeye Traction Ditcher Co. v. Smith*, 138 N. W. 817.

§ 358 (Iowa) Where, in an action for the price of vanilla extract for use in the manufacture of ice cream, the buyer pleaded the worthlessness of the extract, the court could, within its discretion, permit the seller to show the extent of his sales of such extract to customers.—*Boerner Fry Co. v. Mucci*, 138 N. W. 866.

§ 358 (Neb.) In an action for the price of goods sold where defendant denies purchasing them, that plaintiff had filed a claim for the same goods against the estate of one deceased is a circumstance tending to show sale to the decedent.—*S. Hirsch Distilling Co. v. Roach*, 138 N. W. 1131.

§ 364 (Iowa) In an action for goods sold, defended on the ground that the sale was by sample, and that the goods did not comply with the sample, instructions submitting the case on the theory of the sale by sample and noncompliance therewith *held* sufficient as against the buyer's objections.—*Boerner Fry Co. v. Mucci*, 138 N. W. 866.

VIII. REMEDIES OF BUYER.

(A) Recovery of Price.

§ 392 (Mich.) Where, upon discovering part of the fraud by which plaintiff was induced to buy the right to sell a patented article, plaintiff offered to rescind and return the property received, but defendant said he would not do it, any other tender back of consideration by plaintiff was not necessary to entitle him to sue for the value of the property received by defendant.—*Snyder v. Markham*, 138 N. W. 234.

(D) Actions and Counterclaims for Breach of Warranty.

§ 434 (Neb.) A petition *held* not to entitle the purchasers of personality to recover from the vendors for breach of warranty.—*Sherrill v. Coad*, 138 N. W. 567.

§ 435 (S.D.) Where the counterclaim in an action for the price of a heating plant alleged damages because the plant was not as warranted and set out the contract price, it was not insufficient in failing to specifically allege that such price was the value of the plant.—*Sheafe v. Zastrow*, 138 N. W. 16.

§ 442 (Iowa) A buyer who, when sued for goods, showed a sale by sample and noncompliance therewith and his rescission therefor, defeated any recovery by the seller; and, in the absence of consequential damages from the seller's breach the defeat of the seller's action measures the injury.—*Boerner Fry Co. v. Mucci*, 138 N. W. 866.

§ 442 (Neb.) The measure of damages for breach of warranty, where there is no rescission of the contract, is the difference between its actual value and what would have been its value as warranted.—*Sherrill v. Coad*, 138 N. W. 567.

§ 445 (S.D.) Where, in an action for the price of a heating plant sold under express warranty, there was evidence to support the allegation of defendant's counterclaim that the heating plant was of no value whatever, and it appeared that he had paid the part of the purchase price which he sought to recover back, it was error to direct a verdict for plaintiff.—*Sheafe v. Zastrow*, 138 N. W. 16.

SAMPLE.

See Sales, §§ 166, 364, 442.

SATISFACTION.

See Compromise and Settlement.

SCHOOLS AND SCHOOL DISTRICTS.

See Contracts, § 350; Limitation of Actions, § 4; Mandamus, § 151; Municipal Corporations, § 36.

II. PUBLIC SCHOOLS.

(B) Creation, Alteration, Existence, and Dissolution of Districts.

§ 33 (Wis.) Under St. 1898, § 422, as amended by Laws 1901, c. 304, *held*, that annexation by city of part of the territory of a school district of a town created no joint district, but left the part of the district remaining in the town a separate district, and the part annexed an integral part of the city's school district.—*State v. Schriner*, 138 N. W. 633.

St. 1898, § 415, relates only to cases where a town is divided, and each division thereof remains under a town government, and has no application to a case where a part of a town is annexed to and becomes merged in a city government.—*Id.*

§ 41 (Wis.) It is within the power of the Legislature to provide for a fair and equitable disposition or division of public property in the case of the division or annexation of territory.—*State v. Schriner*, 138 N. W. 633.

(C) Government, Officers, and District Meetings.

§ 57 (Iowa) Under Code 1897, § 2757, personal notice is required on each member, and notice by mail to a director of a school corporation is not sufficient where it does not reach the member to be notified, even if the member entitled is temporarily out of the state, so that a meeting of the board without such actual notice to every member thereof was invalid, and any action nugatory.—*Barclay v. School Tp. of Wapsinonoc*, 138 N. W. 395.

(E) District Debt, Securities, and Taxation.

§ 111 (Iowa) A taxpayer cannot enjoin the sale of a schoolhouse ordered by vote of the electors at a meeting where the proposition is rightly before them, on the ground that, having been built from taxes, he can insist that it be devoted to school purposes.—*Barclay v. School Tp. of Wapsinonoc*, 138 N. W. 395.

(F) Claims Against District, and Actions.

§ 112 (Iowa) Under Code, § 3102, it is sufficient when filing a claim by a subcontractor against a school district to file it with the treasurer, and give notice to the secretary and president of such filing.—*Wackerbarth & Blamer Co. v. Independent School Dist. of Independence*, 138 N. W. 470.

SECONDARY EVIDENCE.

See Evidence, §§ 158, 184.

SEDUCTION.

See Criminal Law, §§ 448, 683, 684, 721½, 763, 764, 1172; Witnesses, § 288.

II. CRIMINAL RESPONSIBILITY.

§ 33 (Iowa) Where accused, by false promise, protestations of love, or other artifice, persuaded prosecutrix to yield, when but for some or all of these she would not have yielded, he is guilty of seduction.—*State v. Price*, 138 N. W. 520.

§ 34 (Iowa) That prosecutrix yielded under a promise of marriage "if anything happened" did not prevent a conviction.—*State v. Price*, 138 N. W. 520.

§ 40 (S.D.) Testimony of prosecutrix in seduction to her acts of intercourse with defendant subsequent to the alleged seduction is admissible for purpose of corroboration.—*State v. Holter*, 138 N. W. 953.

Evidence that prosecutrix in seduction was enceinte is admissible as proof of intercourse, a fact necessary to be established.—*Id.*

§ 46 (Iowa) Evidence in seduction held sufficient corroboration.—*State v. Thomas*, 138 N. W. 864.

§ 46 (S.D.) Under the Code provision as to corroboration of prosecutrix as to seduction under promise of marriage, there must be testimony other than hers only as to proving defendant was the guilty party.—*State v. Holter*, 138 N. W. 953.

§ 49 (Iowa) Whether prosecutrix yielded in consequence of accused's false promise and protestations of love, or other artifice, held for the jury.—*State v. Price*, 138 N. W. 520.

§ 50 (Iowa) Where prosecutrix testified that they became engaged, and that he solicited her, assuring her that it was not wrong, as they were to marry, and that he would marry her if anything happened, instructions permitting a conviction if the acts were procured by seductive arts were not erroneous.—*State v. Price*, 138 N. W. 520.

§ 50 (Iowa) In a prosecution for seduction, an instruction as to the extent of the seductive

arts, deception, etc., used necessary to sustain a conviction held proper.—*State v. Hector*, 138 N. W. 930.

SELF-DEFENSE.

See Criminal Law, §§ 761, 829, 1172.

SELF-SERVING DECLARATIONS.

See Criminal Law, § 413; Evidence, § 271.

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See Criminal Law, §§ 982, 991; Habeas Corpus, § 30; Homicide, § 354.

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See Contracts, §§ 22, 28, 270, 346; Executors and Administrators, § 221; Use and Occupation; Work and Labor.

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See Easements.

SET-OFF AND COUNTERCLAIM.

See Appeal and Error, § 1194; Costs, § 13; Equity, §§ 46, 50; Judgment, § 203; Pleading, §§ 204, 396; Sales, §§ 435, 445; Trial, §§ 3, 233.

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SEWERS.

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See Appeal and Error, § 417; Bills and Notes, § 492; Contracts, § 84; Covenants; Evidence, § 444.

SOCIETIES.

See Agriculture; Associations; Corporations, § 207.

SODOMY.

See Criminal Law, §§ 364, 369.

§ 1 (Mich.) Time is not of the essence of the offense defined by Pub. Acts 1903, No. 198, providing that any male who commits any act of gross indecency with another male person shall be guilty of a felony.—*People v. Swift*, 138 N. W. 662.

SPECIAL LAWS.

See Statutes, §§ 83, 90.

SPECIFIC PERFORMANCE.

See Equity, § 87; Executors and Administrators, § 228; Injunction, § 26; Interest, § 37; Judgment, § 721; Railroads, § 64.

I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

§ 1 (Iowa) The remedy of specific performance is, in its last analysis, a matter of equity rather than a strict right.—Healy v. Hohn, 138 N. W. 551.

§ 8 (Iowa) Though a decree for specific performance rests in the sound discretion of the chancellor, it will be ordered as a matter of course if the evidence is sufficient and there are no equitable considerations against it.—Black v. Miller, 138 N. W. 535.

§ 14 (Iowa) Where a contract for the sale of land was signed only by the vendor and included his homestead, specific performance might properly be refused in the discretion of the court.—Healy v. Hohn, 138 N. W. 551.

II. CONTRACTS ENFORCEABLE.

§ 29 (S.D.) A contract to give plaintiff a right to water from a canal in the nature of a perpetual easement held sufficiently definite in describing the right involved, to be specifically enforced.—Dorsett v. Black Hills Traction Co., 138 N. W. 808.

§ 41 (Neb.) A parol contract will be enforced in equity where one party has wholly and the other partly performed it, and its nonfulfillment would amount to a fraud upon the party who has fully performed it.—Moline v. Carlson, 138 N. W. 721.

§ 43 (S.D.) Under an oral contract to furnish water in consideration for a deed to a strip of land on which to build a canal, the delivery of the deed, the completing of the canal, and the conveying of water therein was such part performance as to justify specific performance.—Dorsett v. Black Hills Traction Co., 138 N. W. 808.

§ 59 (Iowa) Where it was agreed that a contract for the sale of land should not be binding until signed by defendant's wife, specific performance will not be awarded where the signature of the wife was not obtained.—Healy v. Hohn, 138 N. W. 551.

III. GOOD FAITH AND DILIGENCE.

§ 96 (S.D.) The fact that a deed tendered described the land by lots while the sale contract described it by sectional subdivisions did not render the tender insufficient, where the two descriptions identified the same land.—Smith v. Johnson, 138 N. W. 18.

IV. PROCEEDINGS AND RELIEF.

§ 105 (Mich.) Where a vendee takes and retains possession and pays the price, mere delay in suing for specific performance, in the absence of special conditions will not defeat the remedy.—Rodgers v. Beckel, 138 N. W. 202.

§ 114 (Mich.) A bill for specific performance of a land contract held demurrable for failure to state that defendant held title to the premises.—Rodgers v. Beckel, 138 N. W. 202.

§ 119 (S.D.) Burden held upon vendor in his action to enforce specific performance to prove that the purchaser understood the words, "more or less," in a sale contract, to refer to land described by lots, and not by sections, where the sale contract described it by sectional subdivisions, and the actual acreage was about 6 per cent. less than that mentioned in the contract.—Smith v. Johnson, 138 N. W. 18.

§ 120 (Minn.) In a suit for specific performance of an alleged oral contract to divide the profits of an invention, evidence of the scope and character of prior art patents was properly excluded.—Wunder v. Turner, 138 N. W. 770.

§ 120 (S.D.) In a vendor's action to enforce specific performance of a sale contract, it was

improper to permit him to testify as to the amount of his loss from not having obtained any use or profits of the land.—Smith v. Johnson, 138 N. W. 18.

§ 121 (Iowa) Evidence held sufficient to support a finding that it was mutually agreed that the contract of sale should not be binding until signed by defendant's wife.—Healy v. Hohn, 138 N. W. 551.

§ 121 (Minn.) In a suit for specific performance, evidence held to sustain a finding that the contract was not in fact made.—Wunder v. Turner, 138 N. W. 770.

§ 121 (S.D.) Evidence in a vendor's action to enforce the specific performance of a sale contract, providing that the land shall be paid for in cash or by accepted mortgage, held to sustain a finding that the term "accepted mortgage" was intended by the parties to refer to a mortgage then on the land.—Smith v. Johnson, 138 N. W. 18.

§ 130 (Wis.) Grant of certain relief to defendant on granting specific performance held not an abuse of the court's discretion.—Stack v. Hickey, 138 N. W. 1011.

SPEED.

See Street Railroads, §§ 81, 93.

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STATUTES.

See Frauds, Statute of; Limitation of Actions.

For statutes relating to particular subjects, see the various specific topics.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§ 46 (Mich.) The reference in Public Acts 1905, No. 133, conferring on street railroads the power of eminent domain, to the provisions of another statute, making it and the procedure indicated by it applicable in proceedings by a street railway company to condemn land, does not invalidate the legislation.—Detroit United Ry. v. Barnes Paper Co., 138 N. W. 211.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

§ 83 (Neb.) Comp. St. 1911, c. 32, §§ 31, 32, known as the bulk sales law, applies to all the people of the state engaged in the business designated, so that the classification is not arbitrary, so as to make the act special legislation.—Appel Mercantile Co. v. Barker, 138 N. W. 1135.

§ 90 (Wis.) Const. art. 4, § 31, prohibiting the amendment of a city charter by special or private law, does not make Laws 1911, c. 651, redistricting the state for legislative purposes, a special or private law, though it recognizes and validates the wards as fixed by an ordinance adopted pursuant to Laws 1901, c. 436.—State v. City of Milwaukee, 138 N. W. 76.

III. SUBJECTS AND TITLES OF ACTS.

§ 107 (Neb.) Laws 1907, c. 62, making all sales in bulk void as to creditors, unless specified conditions are complied with, does not render the conditions imposed separate subjects of

legislation within Const. art. 3, § 11.—Appel Mercantile Co. v. Barker, 138 N. W. 1133.

§ 116 (Neb.) Comp. St. 1911, c. 32, §§ 31, 32, commonly known as the bulk sales law, are not unconstitutional as legislating on a subject not clearly expressed in the title.—Appel Mercantile Co. v. Barker, 138 N. W. 1133.

§ 117 (N.D.) Sess. Laws 1905, c. 62, entitled "An act for the organization and government of cities, and to provide for the limitation of actions to vacate special assessments heretofore made," is not unconstitutional as to the limitations concerning future assessments.—McKone v. City of Fargo, 138 N. W. 967.

§ 118 (Mich.) The object of Pub. Acts 1907, No. 64, is expressed in its title, "An act defining the crime of burglary with explosives and providing the punishment therefor."—People v. Mire, 138 N. W. 1066.

§ 118 (Neb.) Laws 1905, c. 184, § 1, relating to burglary, enumerating among others railroad cars, is fairly within the title mentioning "buildings of all characters."—Hardin v. State, 138 N. W. 146.

§ 123 (Neb.) The title of Gen. St. 1873, c. 44 (Comp. St. 1911, c. 57), "An act relating to mills and mill dams," is sufficiently broad to admit of legislation in regard to mills of all kinds that are of public utility, and that have machinery to be propelled by water.—Lucas v. Ashland Light, Mill & Power Co., 138 N. W. 761.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§ 159 (Mich.) If the earlier act (Comp. Laws, § 11506), as to bank, safe, and vault robbery, be inconsistent with, and repugnant to, Pub. Acts 1907, No. 64, defining burglary with explosives, and prescribing the punishment therefor, as covering identically the same offense, and prescribing different punishments, the earlier statute in that respect is repealed.—People v. Mire, 138 N. W. 1066.

§ 159 (Wis.) Repeals of written law by implication are not favored, and two enactments should be reconciled, if practicable, and, if not, the earlier should give way to the later, in harmony with the presumed legislative intent.—State v. Arnold, 138 N. W. 78.

§ 161 (Mich.) Where two acts of the same Legislature amend the same section of a statute, and each provides that the section shall be amended "to read as follows," the later act repeals the former, leaving the section to stand as last amended.—Detroit United Ry. v. Barnes Paper Co., 138 N. W. 211.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 181 (Neb.) Where a statute is clear and unambiguous, it must be interpreted in its ordinary sense, even if it lead to an injustice; but, if doubtful or obscure, an interpretation which will avoid a forfeiture and promote justice will be adopted.—Owen v. Main, 138 N. W. 154.

§ 181 (S.D.) Effect will be given to the intent and purpose existing in the legislative mind.—State v. Polley, 138 N. W. 300.

§ 181 (Wis.) All rules for statutory construction are subservient to the one that the legislative intent must prevail, if it can reasonably be discovered in the language used.—State v. Arnold, 138 N. W. 78.

Where the general intention in the passage of a law is plain, the enactment, in case of uncertainty, should be liberally construed to effect such intent.—Id.

§ 184 (S.D.) The legislative intent in enacting a statute which created a new and original liability must be ascertained by considering the language of the statute and its general purpose as expressed therein.—Minnehaha County v. Boyce, 138 N. W. 287.

§ 208 (Mich.) In determining the meaning which the Legislature intended a word to bear, the context must be considered as well as the lexicographical meaning of the word.—German Corporation of Negaunee v. Negaunee German Aid Society, 138 N. W. 343.

§ 219 (Wis.) The general understanding by all administrators having to do with applying a legislative enactment for a long term of years is strong, and sometimes conclusive, evidence of the true meaning.—State v. Arnold, 138 N. W. 78.

§ 220 (S.D.) The amendment of Code Civ. Proc. § 110, by Laws 1911, c. 226, providing that service on a domestic corporation might be had by notice to an officer residing outside of the state, held not binding on the courts as a construction of the former statute as inadequate to authorize such notice.—Straub v. Lyman Land & Investment Co., 138 N. W. 957.

§ 225 (Mich.) When acts are *pari materia*, though enacted at different times and not referring to each other, they are to be taken and construed together, as explanatory of and supplemental to each other, and sustained, if possible, to produce a consistent and harmonious system.—People v. Mire, 138 N. W. 1066.

§ 228 (Iowa) A statutory exception to a general statutory provision extends only so far as its language fairly warrants, notwithstanding Code 1897, § 3446, requiring the Code to be liberally construed.—Baker v. Clowser, 138 N. W. 837.

(B) Particular Classes of Statutes.

§ 239 (Iowa) The rule that a statute in derogation of the common law must be strictly construed has been abrogated by Code, § 3446, requiring such a statute to be liberally construed with a view to promote its objects.—Chiesa & Co. v. City of Des Moines, 138 N. W. 922.

§ 245 (Iowa) The burden of special assessments should not be increased by implications not clearly necessary.—Fitchpatrick v. Fowler, 138 N. W. 392.

(D) Retroactive Operation.

§ 269 (Iowa) The Legislature cannot prescribe or indicate the construction of a previous statute under which rights have already vested.—Baker v. Clowser, 138 N. W. 837.

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STAY.

See Appeal and Error, §§ 460, 463.

STEAM.

§ 5 (Wis.) A rule of a heating company requiring the installation of a "thermostat," i. e., an automatic regulator of heat, was reasonable, and, where it appeared that there was no entire contract with the heating company to furnish heat for the season and that the Railroad Commission was to be appealed to as to whether a thermostat should be put in, equity could not be called upon to prevent the heating company from disconnecting its pipes on the plaintiff's refusal to install a thermostat.—Walbridge v. Berlin Public Service Co., 138 N. W. 44.

STIPULATIONS.

See Divorce, § 245; Partition.

§ 14 (Mich.) In an action by a city to compel a street railway to put in certain pavements.

where an agreement was entered into between the city and the street railroad by which the proceedings were suspended until a date certain, for the purpose of testing macadam pavements, instead of that demanded by the city, held, that both parties contemplated determination of their rights upon the petition and answer in the same manner as if the macadam pavement had not been constructed.—City of Detroit v. Detroit United Ry., 138 N. W. 215.

§ 14 (Wis.) Stipulation that evidence in one of two cases tried together shall be considered in the other case preserves an exception to the evidence in the other case.—Brey v. Forrestal, 138 N. W. 645.

STOCK.

See Corporations, §§ 108, 661.

STOCKHOLDERS.

See Corporations, §§ 180-207, 298, 320.

STREET RAILROADS.

See Appeal and Error, § 997; Constitutional Law, § 241; Damages, § 174; Eminent Domain, §§ 10, 243, 268; Evidence, § 456; Master and Servant, § 180; Statutes, § 46; Stipulations, § 14; Vendor and Purchaser, § 229; Waters and Water Courses, § 171.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 2 (Iowa) Properly speaking, "street railways" under the statute are only such as are authorized to occupy and use the streets of a city or town under franchise from the municipality.—*Lewis v. Omaha & O. B. S. Ry. Co.*, 138 N. W. 1092.

§ 24 (Mich.) A municipality, in the exercise of its police powers, reserved to it to maintain its streets in a safe condition for the public use, is the judge of the necessity for repairing pavement and repaving its streets, and its right to do so cannot be surrendered; and it may impose reasonable requirements upon street railways for the protection of the public.—*City of Detroit v. Detroit United Ry.*, 138 N. W. 215.

The requirement of a municipality that a street railroad company put in a pavement between the rails similar to that on the balance of the paved street and to cut the ties projecting beyond the stringers was not unreasonable.—*Id.*

II. REGULATION AND OPERATION.

§ 81 (Minn.) A motorman of a street car is bound to assume the probable presence of pedestrians and vehicles at street crossings, in the built-up portions of a city, to give warning of the approach of a car, and to limit the speed to that prescribed by law.—*Langdon v. Minneapolis St. Ry. Co.*, 138 N. W. 790.

§ 93 (Mich.) A motorman running at proper speed held entitled to assume that pedestrians having time to cross safely will do so, and that others will not attempt to cross, but, when advised of a pedestrian's peril, he must use all means within his control to avert injury.—*Gradyzewski v. Detroit United Ry.*, 138 N. W. 225.

§ 99 (Mich.) The engineer of a steam road roller which was struck by defendant's interurban street car at a public highway crossing held guilty of contributory negligence in attempting to cross the track as he did without sending some one ahead to warn of its approach in view of Pub. Acts 1903, No. 71.—*Good Roads Const. Co. v. Port Huron, St. C. & M. C. Ry. Co.*, 138 N. W. 320.

§ 113 (Mich.) In an action for damage to a steam road roller struck at a crossing by an interurban street car, evidence as to changes in the premises after the accident was immaterial, unless perhaps a view of the premises had been ordered.—*Good Roads Const. Co. v. Port Huron, St. C. & M. C. Ry. Co.*, 138 N. W. 320.

Evidence of the street car being stopped to avoid collision on prior occasions at the same crossing, and that plaintiff's outfit had also caused a street car to stop on the crossing on another occasion, was not admissible.—*Id.*

§ 114 (Mich.) In a pedestrian's action for injuries caused by being struck by a street car, evidence on the question of defendant's negligence held to justify the direction of a verdict for defendant.—*Gradyzewski v. Detroit United Ry.*, 138 N. W. 225.

§ 114 (Minn.) In an action for injuries from a collision between defendant's street car and plaintiff's carriage, evidence held to sustain a verdict that defendant was chargeable with actionable negligence.—*Langdon v. Minneapolis St. Ry. Co.*, 138 N. W. 790.

§ 114 (Wis.) In an action for death of plaintiff's intestate in a collision with a street car, evidence held insufficient to show gross negligence on the part of the motorman.—*Raasch v.*

Milwaukee Electric Ry. & Light Co., 138 N. W. 608.

§ 117 (Minn.) Where, in an action for injuries to a collision with a street car, it appeared that, though the motorman discovered a carriage coming toward the track on a run, he made no effort to stop the car until the time of collision, the court did not err in submitting the question of willful injury to the jury.—*Langdon v. Minneapolis St. Ry. Co.*, 138 N. W. 790.

§ 118 (Mich.) Instruction on gross negligence in an action against a street car company for damage from a collision between a steam road roller and interurban car held not erroneous.—*Good Roads Const. Co. v. Port Huron, St. C. & M. C. Ry. Co.*, 138 N. W. 320.

STREETS.

See Highways; Municipal Corporations, §§ 350, 385, 395, 398, 402, 459, 488, 489, 502, 511, 513, 519, 703-706, 809-821, 864.

STRIKING OUT.

See Trial, §§ 90, 96.

SUIT.

See Action.

SUPPORT.

See Divorce, §§ 31, 308; Insane Persons, § 52

SUPREME COURTS.

See Courts, § 204.

SURETYSHIP.

See Principal and Surety.

SURFACE WATERS.

See Waters and Water Courses, § 119.

SURRENDER.

See Cancellation of Instruments.

SURVEYS.

See Boundaries; Evidence, § 23.

TACKING.

See Adverse Possession, § 43.

TAXATION.

See Appeal and Error, §§ 97, 1094; Brokers, § 105; Constitutional Law, §§ 233, 290, 321; Covenants, § 116; Drains, §§ 67-86; Evidence, § 408; Licenses; Mandamus, § 77; Municipal Corporations, §§ 459-537; Schools and School Districts, § 111.

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

§ 40 (Iowa) Acts 32d Gen. Assem. c. 60, does not affect the general rule which requires all assessments to be as nearly equal as the facts will justify.—*Reiniger v. Board of Review of Charles City*, 138 N. W. 399.

III. LIABILITY OF PERSONS AND PROPERTY.

(A) Private Persons and Property in General.

§ 76 (Iowa) A written instrument being construed as a lease, and not a contract for the sale of real property, held not assessable to the lessor as moneys and credits.—*Bissell v. Board of Review of Town of Dunlap*, 138 N. W. 830.

V. LEVY AND ASSESSMENT.

(C) Mode of Assessment in General.

§ 348 (Wis.) The value of property for assessment purposes was the full value which

and ordinarily be obtained for it at private sale, and hence was not affected by facts not stated thereto, such as poor management.—*State v. Thompson*, 138 N. W. 625.

Review, Correction, or Setting Aside of Assessment.

485 (Wis.) An assessor's valuation laid before a board of review is presumptively correct.—*State v. Thompson*, 138 N. W. 628.

490 (Wis.) A decision of the board of review as to an assessor's valuation is presumptively correct.—*State v. Thompson*, 138 N. W. 8.

496 (Wis.) On certiorari to review the confirmation of an assessment by the board of review, only jurisdictional matters can be reached, and the board's action cannot be disturbed where there is reasonable ground for belief that it was the result of honest judgment.—*State v. Thompson*, 138 N. W. 628.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

A) Collectors and Proceedings for Collection in General.

552½ (Iowa) Where tax ferrets settle with a taxpayer for the amount he should pay on property omitted from taxation, and in so doing take into account the taxes already assessed, the county is bound thereby.—*Barthell v. Hermanson*, 138 N. W. 1108.

A county may not repudiate a settlement between tax ferrets and taxpayers unless it tenders back to the taxpayers the amount received from them under the settlement.—*Id.*

Evidence held to support a finding that a settlement for taxes on omitted property included taxes properly assessed.—*Id.*

Where a mutual mistake was made in a settlement of taxes entered into between tax ferrets and taxpayers, who paid the taxes under the settlement, the county, retaining the money paid, was bound by the settlement as interpreted by the taxpayers.—*Id.*

IX. SALE OF LAND FOR NONPAYMENT OF TAX.

642 (Neb.) In an action to foreclose a tax lien against unknown heirs, a substantial compliance with Code Civ. Proc. § 83, an order of court for service by publication and a legal publication of summons confers jurisdiction to render a decree of foreclosure.—*Page v. Bresee*, 138 N. W. 138.

In an action by a county against unknown heirs to foreclose a tax lien, the affidavit for service by publication provided by Code Civ. Proc. § 83, may be made by the county attorney.—*Id.*

648 (Neb.) Where the court has obtained jurisdiction, mere informalities of procedure will not subject the decree of foreclosure upon a tax lien to collateral attack.—*Page v. Bresee*, 138 N. W. 138.

686 (Wis.) In view of St. 1898, § 1047, description of the land in tax certificates held sufficient in an action thereon.—*Corry v. Scudder*, 138 N. W. 68.

X. REDEMPTION FROM TAX SALE.

708 (Wis.) Under the direct provisions of St. 1898, § 1181, plaintiff, in an action on tax certificates, may include in one action all of the certificates he holds upon the same tract of land.—*Corry v. Scudder*, 138 N. W. 68.

709 (Neb.) Before suing to redeem from a tax sale and treasurer's deed, all taxes subsequent to the sale must be paid, and if paid by the purchaser the amount so paid with interest should be included in the decree allowing redemption.—*Lazure v. Maverick Loan & Trust Co.*, 138 N. W. 563.

722 (Neb.) Under the revenue laws barring the right of redemption from decree foreclosing a tax lien after two years from the confirmation of sale, the fact that plaintiff, seeking to redeem, also prays for a decree quieting title, does not of itself toll the statute.—*Page v. Bresee*, 138 N. W. 138.

TELEGRAPHS AND TELEPHONES.

See Associations; Damages, § 130; Electricity; Licenses, §§ 6, 7.

II. REGULATION AND OPERATION.

34 (Wis.) A contract between a telephone company and patron, providing for a discriminatory rate for telephone service, held not invalid at common law, where the discrimination is not unjust.—*People's Telephone Co. v. Lewis*, 138 N. W. 100.

A contract for telephone service at a rate lower than the public rate, executed prior to the passage of Laws 1907, c. 499, § 1797m91, held not invalid for its discrimination, under St. 1898, § 1791a, where its discrimination was not of an unjust character.—*Id.*

TENANCY IN COMMON.

See Homestead, § 13.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS.

15 (Iowa) Where a cotenant in possession made no notorious assertion of right to the entire property, and the tenant out of possession did not know that improvements on the land were being made under a hostile claim, limitations did not run in favor of the tenant in possession.—*Baker v. Clowser*, 138 N. W. 837.

TENDER.

See Release, § 24; Sales, § 392; Specific Performance, § 96.

TESTAMENTARY CAPACITY.

See Wills, §§ 53, 55, 330.

THEATERS AND SHOWS.

See Licenses, § 5½; Municipal Corporations, § 591.

6 (Mich.) In an action against the proprietor of a theater for injuries claimed to have been sustained through his failure to light a stairway and provide railings, evidence held to support a verdict for defendant and a special finding that the stairway was provided with railings at the time of the accident.—*Branch v. Klatt*, 138 N. W. 263.

THERMOSTAT.

See Steam, § 5.

THREATS.

See Criminal Law, § 406; Pleading, § 236.

TIME.

See Appeal and Error, §§ 173, 643, 773, 985; Bail, § 17; Bankruptcy, § 166; Carriers, § 32; Continuance; Contracts, § 277; Criminal Law, § 126; Depositions; Drains, § 57; Elections, § 125; Electricity; Frauds, Statute of, §§ 53, 158; Interest, § 39; Judges, § 3; Justices of the Peace, § 125; Limitation of Actions, § 127; New Trial, §§ 123, 140; Pleading, § 236; Principal and Agent, § 170; Replevin, §§ 110, 120; Sales, § 168½; Vendor and Purchaser, § 350; Waters and Water Courses, §§ 135, 240.

TITLE.

See Adverse Possession; Covenants, § 130; Justices of the Peace, § 36; Landlord and Tenant, §§ 63, 65, 70; Officers, § 77; Statutes, §§ 116, 118; Vendor and Purchaser, §§ 130, 133, 215, 223; Waters and Water Courses, § 154.

TORTS.

See Account Stated; Assault and Battery, §§ 38, 40; Bail, § 17; Death; Fraud; Libel and Slander; Malicious Prosecution; Municipal Corporations, §§ 733-846; Negligence; Nuisance; Rape, §§ 65, 66.

TOWNS.

See Counties; Mandamus, § 151; Municipal Corporations; Schools and School Districts, § 33; Street Railroads, § 2.

II. GOVERNMENT AND OFFICERS.

§ 29 (Iowa) Township treasurer *held* entitled to reimbursement for individual money paid on warrants while the public funds were tied up in a bank which was closed and was subsequently found to be wholly insolvent.—School Tp. of Eden in Carroll County v. Stevens, 138 N. W. 927.

Township treasurer *held* not estopped to claim reimbursement for individual money paid on warrants while the public funds were tied up in an insolvent bank, by the fact that he had rendered annual statements treating such funds as moneys on hand.—Id.

§ 33 (Iowa) Township treasurer *held* not liable on his bond for money deposited in a bank which failed, where he was not negligent in selecting the depository; Code, § 2768, impliedly authorizing such deposit.—School Tp. of Eden in Carroll County v. Stevens, 138 N. W. 927.

TRESPASS.

See Railroads, §§ 277, 282.

TRESPASS TO TRY TITLE.

See Ejectment.

TRIAL.

See Appeal and Error, §§ 169-263, 837, 882, 927, 930, 934, 1048, 1053, 1062-1070; Assault and Battery, §§ 38, 82; Attachment; Bills and Notes, § 537; Brokers, § 88; Carriers, §§ 94, 408; Continuance; Costs; Criminal Law, §§ 126, 134, 137, 234, 628-865, 1036-1064, 1150-1156; Damages, §§ 208, 217; Death, § 103; Deeds, § 196; Discovery, § 33; Dismissal and Nonsuit; Drains, § 36; Electricity; Embezzlement, § 48; Evidence, §§ 77, 546; Explosives; Fraud, §§ 59, 65; Gas; Habeas Corpus, § 113; Highways, § 184; Homicide, § 340; Infants, § 102; Insurance, §§ 668, 819; Interest, § 39; Intoxicating Liquors, §§ 239, 250; Judgment, § 199; Jury; Libel and Slander, §§ 123, 125; Master and Servant, §§ 285-297, 332; Mortgages, § 87; Municipal Corporations, §§ 281, 402, 706, 821; Negligence, §§ 136, 140, 141; New Trial; Partnership, § 218; Physicians and Surgeons, §§ 6, 18; Principal and Surety, § 162; Railroads, §§ 350, 383, 446, 447; Rape, §§ 57, 59, 66; Replevin, § 95; Sales, §§ 53, 168½, 182, 364, 445; Seduction, §§ 49, 50; Stipulations; Street Railroads, §§ 114, 117, 118; Venue; Wills, §§ 329, 330, 384; Witnesses.

I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

§ 3 (Iowa) Where a suit was begun and might have been maintained on the equity side of the court, defendants could not insist on the trial of their counterclaim at law.—Fisher v. Trumbauer & Smith, 138 N. W. 528.

II. DOCKETS, LISTS, AND CALENDARS.

§ 11 (Iowa) Where, in an action for damages for breach of contract, defendant admitted the execution of the contract, but denied that it became binding, and filed a cross-petition pleading fraudulent representations by plaintiff, and asking for the cancellation of the contract, the court properly transferred the cause to the equity docket.—Weseman v. Graham, 138 N. W. 478.

§ 11 (Iowa) Where no grounds of equitable relief are alleged, and no motion is made to transfer at or before answer, the right to a trial at law is waived under Code, § 3434.—Fisher v. Trumbauer & Smith, 138 N. W. 528.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

§ 18 (S.D.) The conduct of trials in the relations of the parties and counsel to the court and each other is within the discretion of the trial judge. It is necessary that the court should have power to preserve order during a trial to enforce obedience to its orders.—Daudel v. Wolf, 138 N. W. 814.

§ 27 (Iowa) Allowing experiments in the presence of the jury is within the discretion of the trial court.—Boerner Fry Co. v. Mucci, 138 N. W. 866.

In an action for the price of vanilla extract for use in the manufacture of ice cream, the refusal of the court to permit the jury to taste the ice cream manufactured by the buyer to determine whether it had a soapy taste, as claimed by the buyer, *held* within the trial court's discretion.—Id.

§ 28 (Mich.) The question of granting a view of the scene of a collision between a steam road roller and an interurban street car rests in the sound discretion of the trial court.—Good Roads Const. Co. v. Port Huron, St. C. & M. C. Ry. Co., 138 N. W. 320.

§ 29 (S.D.) Action of trial judge as to counsel who persisted in repeating questions after objection thereto had been sustained *held* not an abuse of discretion preventing a fair trial.—Daudel v. Wolf, 138 N. W. 814.

IV. RECEPTION OF EVIDENCE.

(A) Introduction, Offer, and Admission of Evidence in General.

§ 45 (Wis.) In an action on a contract to supply an industrial expert, testimony of an official of the defendant as to whether he retained the reports furnished *held* properly refused, where no time was fixed with reference to any of the questions.—Manufacturers' & Merchants' Inspection Bureau v. Everwear Hosiery Co., 138 N. W. 624.

§ 53 (Iowa) In a suit to foreclose a deed to M., in which he assumed the mortgage, having been introduced on a cross-bill by C., was in the case for all purposes and available to plaintiff.—Boice v. Coffeen, 138 N. W. 857.

(B) Order of Proof, Rebuttal, and Re-opening Case.

§ 61 (S.D.) Plaintiff *held* only bound to prove, in the first instance, ownership, demand, and refusal, and not the whole transaction as set out in answer and reply.—Harris v. Lyons, 138 N. W. 295.

(C) Objections, Motions to Strike Out, and Exceptions.

§ 84 (Minn.) A general objection that certain documents prepared by or under the direction of defendant's servant, whose negligence was alleged to have caused the accident, were immaterial, incompetent, and not impeaching, did not include or present to the trial court an objection subsequently made that the documents were privileged.—Langdon v. Minneapolis St. Ry. Co., 138 N. W. 790.

§ 90 (Mich.) A party who desires to have a part of an answer stricken out must make a motion therefor.—Bowen v. Chandler, 138 N. W. 247.

§ 96 (Iowa) Motion to strike out the entire answer of a witness as immaterial was properly denied, where a part of the answer was material and competent.—Lee v. Hederman, 138 N. W. 893.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

§ 133 (Mich.) In an action for injuries to a railroad employé, improper argument by the plaintiff's counsel with reference to the degrees of negligence of plaintiff and defendant's employes *held* cured by the court's charge.—Bruce v. Michigan Cent. R. Co., 138 N. W. 362.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

§ 141 (Neb.) In ejectment, where the undisputed evidence clearly establishes the right of possession in one of the parties, it is not error to direct the verdict.—Helming v. Forrester, 138 N. W. 190.

§ 144 (Iowa) Where plaintiff, if entitled to recover at all, is entitled to recover a specified per cent. on a specified amount, the court properly fixed the amount of the recovery, where the jury found for plaintiff.—Depugh v. Brown, 138 N. W. 908.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

§ 191 (Iowa) It was improper for the court to assume the genuineness of decedent's signature to a note filed as a claim against his estate in his instructions, where the genuineness of the note was denied.—Black v. Miller, 138 N. W. 535.

§ 193 (Mich.) Where the court left the jury to find the value of the services rendered decedent, the inadvertent remark of the court in its instructions that the jury should figure interest on a specified sum and add it up and announce the verdict was not ground for reversal, as suggesting the verdict.—Abel v. Roosenraad, 138 N. W. 325.

(B) Necessity and Subject-Matter.

§ 202 (Iowa) If the court attempts to instruct upon an issue, it should give a proper instruction.—SeEVERS v. Cleveland Coal Co., 138 N. W. 793.

(C) Form, Requisites, and Sufficiency.

§ 233 (Iowa) The court should state the issues instead of copying the pleadings as a part of the instructions.—Black v. Miller, 138 N. W. 535.

§ 233 (Iowa) Where, in an action for goods sold, the buyer pleaded a sale by sample and noncompliance therewith and a counterclaim for damages resting on the same breach, he could not complain of the instructions because they did not separate the allegations of the defense and of the counterclaim.—Boerner Fry Co. v. Mucci, 138 N. W. 866.

§ 237 (Minn.) An instruction that plaintiff is entitled to recover upon establishing the cause alleged by a fair preponderance of the evidence is correct.—Schmeisser v. Albinson, 138 N. W. 775.

(D) Applicability to Pleadings and Evidence.

§ 250 (Mich.) In an action for assault and battery with ravishment, a charge on damages to plaintiff's good name *held* erroneous.—Totten v. Totten, 138 N. W. 257.

§ 251 (Iowa) Refusal of an instruction on former adjudication *held* error.—Worrall v. Des Moines Retail Grocers' Ass'n, 138 N. W. 481.

§ 251 (Iowa) An instruction presenting a defense not pleaded was properly refused.—Vernon v. Iowa State Traveling Men's Ass'n, 138 N. W. 696.

§ 251 (Iowa) Instruction in action for services to allow the reasonable value thereof not exceeding the entire amount claimed, which amounted to \$5 a week for the whole time, where there were several periods of a month or more during which plaintiff performed no services, *held* erroneous as authorizing recovery of more than claimed.—In re Oldfield's Estate, 138 N. W. 840.

§ 251 (Iowa) Instructions which adopt the theory of a party in his testimony on the trial are proper, though such testimony is inconsistent with his pleadings.—Boerner Fry Co. v. Mucci, 138 N. W. 866.

§ 252 (Iowa) Instruction authorizing the jury to disregard a release executed by an employé if he did not have sufficient mental capacity to understand it was erroneous where there was no evidence as to such capacity.—Owens v. Norwood White Coal Co., 138 N. W. 483.

§ 252 (Iowa) In an action against the owner of the leased property for damages for personal injuries caused by the maintenance of an obstruction in the sidewalk, an instruction *held* not unsupported by the evidence.—Edwards v. Hasel, 138 N. W. 501.

§ 252 (Iowa) Where defendant proved that he did not hold himself out as a veterinarian, but treated plaintiff's horse without pay as a student, an instruction requiring defendant to exercise the skill, learning, and prudence ordinarily employed by members of the profession practicing in similar localities *held* error.—Morrison v. Altig, 138 N. W. 510.

§ 252 (Iowa) Where there was no evidence that the usual commission or the reasonable value of a broker's services was 5 per cent. of the price, and there was no express agreement as to compensation, it was error to instruct that the measure of recovery was 5 per cent.—SeEVERS v. Cleveland Coal Co., 138 N. W. 793.

§ 252 (Neb.) In an action by a correspondence school for the balance of tuition due, evidence *held* insufficient to show facts authorizing an instruction that, if the cost to plaintiff of fulfilling its contract was more than the balance due, the verdict should be for defendant.—International Text-Book Co. v. Martin, 138 N. W. 582.

§ 253 (Iowa) A requested instruction, excluding material matters which the jury has a right to consider in any view of the case, is properly refused.—Braddich v. Phillips Coal Co., 138 N. W. 406.

§ 253 (Iowa) It was proper for the court in charging the jury to ignore a count dismissed during the trial.—Hahn v. Lumpa, 138 N. W. 492.

§ 254 (Iowa) In an action on a policy insuring against loss of live stock by lightning, an instruction permitting the jury to consider their own observation and experience as to whether the loss was from lightning *held* erroneous.—Downing v. Farmers' Mut. Fire Ins. Co., 138 N. W. 917.

The court on request must instruct that the case should be tried on the evidence and not on information that one or more of the jurors may have outside the record.—Id.

(E) Requests or Prayers.

§ 256 (Iowa) An instruction *held* sufficient in the absence of a request for a more specific one.—Haradon v. Sloan, 138 N. W. 556.

§ 256 (Iowa) Instructions *held* to sufficiently submit the issues whether an employé sustaining a personal injury possessed mental capacity to make a release of his claim, in the absence of a request for further instructions.—See *v. Carbon Block Coal Co.*, 138 N. W. 825.

§ 256 (Mich.) Where a party requested instructions, the opposite party, desiring more elaborate instructions on the subjects submitted, must request such instructions.—*Totten v. Totten*, 138 N. W. 257.

§ 256 (Minn.) In an action for the destruction of standing forest timber, where an instruction improperly limited plaintiff's recovery, it was plaintiff's duty to request an addition to the instruction.—*Reynolds v. Great Northern Ry. Co.*, 138 N. W. 30.

§ 256 (Minn.) In the absence of exception to the charge or request for further instruction, it was not error to ignore in the instructions an issue of assault in self-defense raised by the answer.—*Gee v. Great Northern Ry. Co.*, 138 N. W. 684.

§ 260 (Iowa) The nongiving of a requested instruction, substantially given in the court's charge, is not ground for complaint.—*In re Law's Estate*, 138 N. W. 531.

§ 260 (Iowa) Instructions requested were properly refused where covered by others given.—*Vernon v. Iowa State Traveling Men's Ass'n*, 138 N. W. 696.

A refusal of an instruction that plaintiff could not recover if insured's death was due to an operation to relieve a sore or boil on his limb *held* not prejudicial where the court correctly instructed on plaintiff's contention that the death was caused by blood poisoning from an abrasion accidentally received.—*Id.*

§ 260 (Iowa) It is not error to refuse requested instructions fairly included in the instructions given.—*Boerner Fry Co. v. Mucci*, 138 N. W. 866.

§ 260 (Minn.) Where alleged contributory negligence of a pedestrian, struck while crossing a street by defendant's automobile, was fully covered by instructions given, it was not error to refuse to charge that he was negligent, if he failed to look before starting to cross and while crossing the street.—*Johnson v. Scott*, 138 N. W. 694.

(F) Objections and Exceptions.

§ 281 (Wis.) A general exception to the entire charge, much of which was concededly good, was insufficient.—*Elwell v. Bosshard*, 138 N. W. 46.

§ 282 (Wis.) A general exception to the refusal to charge several distinct requests embraced in separate and distinct propositions, some of which should not have been given, was insufficient.—*Elwell v. Bosshard*, 138 N. W. 46.

(G) Construction and Operation.

§ 295 (Iowa) The jury being instructed that plaintiff must prove he did not contribute to his injuries by his own negligence, they will be held to have understood that the word "contributed" was used in the sense of "caused," in the further instructions as to determining whether defendant's negligence, if any, was the proximate cause of or contributed to plaintiff's injuries.—*Collier v. McClintic-Marshall Const. Co.*, 138 N. W. 522.

§ 296 (Iowa) An instruction *held* not erroneous, in view of another instruction.—*Welsh v. Haleen*, 138 N. W. 502.

§ 296 (Iowa) Where the grounds of negligence stated in the pleadings as copied into the instructions and not supported by the evidence were eliminated from the jury's consideration by the instructions, there was no prejudicial error in copying the pleadings into the instructions.—*Johnson v. Corn Products Refining Co.*, 138 N. W. 516.

§ 296 (Neb.) The judgment will not be reversed for an instruction not based on the evidence, where the jury has been properly instructed on the point in issue.—*Kinney v. Chicago, B. & Q. R. Co.*, 138 N. W. 577.

IX. VERDICT.

(A) General Verdict.

§ 337 (Iowa) The jury must follow an instruction whether it is right or wrong.—*Seever v. Cleveland Coal Co.*, 138 N. W. 793.

(B) Special Interrogatories and Findings.

§ 351 (Wis.) Where, in an action for fraud, there was but a single issue, and defendant made no request for a special verdict until after the close of the testimony, it was not an abuse of the trial court's discretion to refuse it under St. 1898, § 2568, as amended by Laws 1903, c. 390, § 1.—*Woteshek v. Neumann*, 138 N. W. 1000.

§ 365 (Wis.) In construing a special verdict, its substance, and not its form, is considered.—*Milwaukee Trust Co. v. City of Milwaukee*, 138 N. W. 707.

X. TRIAL BY COURT.

(B) Findings of Fact and Conclusions of Law.

§ 388 (Minn.) Where one of the ultimate facts to be determined is whether a contract was a fraudulent conveyance, it is improper to dismiss the case on the merits without making findings of fact.—*Kanne v. Kanne*, 138 N. W. 25.

§ 395 (Minn.) Request to find evidentiary facts *held* properly refused.—*Wunder v. Turner*, 138 N. W. 770.

§ 396 (S.D.) A finding in an action to quiet title that defendant took a conveyance without notice of any previous conveyance is erroneous, where the answer of the defendant admitted by failure to deny an allegation in the complaint that the defendant took such conveyance with notice.—*Heflebower v. Wiley*, 138 N. W. 370.

§ 404 (Neb.) Where an action at law is tried by the court, findings of fact have the same force as a verdict.—*National Engraving Co. v. Queen City Laundry*, 138 N. W. 575.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

§ 412 (Iowa) Defendant, by introducing letters written by its president in response to letters from plaintiff, improperly admitted, did not waive the objection to the incompetency of plaintiff's letters.—*Seever v. Cleveland Coal Co.*, 138 N. W. 793.

§ 412 (Wis.) Where persistent objections were made to evidence admitted, the objections were not waived by subsequent examinations.—*Brey v. Forrestal*, 138 N. W. 645.

TRUST DEEDS.

See Mortgages.

TRUSTEE.

See Bankruptcy, §§ 151, 166, 252-304.

TRUSTEE PROCESS.

See Garnishment.

TRUSTS.

See Fraudulent Conveyances, § 182; Insurance, § 389; Limitation of Actions, § 102; Wills, § 634.

I. CREATION, EXISTENCE, AND VALIDITY.

(A) Express Trusts.

§ 44 (Iowa) Evidence *held* insufficient to show that a son held personality left by his father in

trust for his mother.—*Parmenter v. Parmenter*, 138 N. W. 438.

§ 44 (Iowa) Evidence held to show that a mother obtaining the legal title to land acquired the title free from any trust in favor of a son.—*Curtis v. Armagast*, 138 N. W. 873.

(B) Resulting Trusts.

§ 83 (Mich.) Under Comp. Laws, § 8835, one claiming to have purchased land and having it conveyed to a third person to secure him for advancing the purchase price held not entitled to have the property conveyed to him.—*Crane v. Read*, 138 N. W. 223.

IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

§ 218 (Mich.) Where a trustee with power to sell and reinvest made an investment at the request of an adult beneficiary who knew that her estate was used to raise the money for the investment, and the investment was made for her benefit, the amount must be allowed as a credit in the trustee's account.—*In re Fidelity & Deposit Co. of Maryland*, 138 N. W. 205.

§ 237 (Mich.) Where a trustee under a will with power to sell and reinvest invested a part of the trust funds in a business at the request of an infant beneficiary, who, for 2½ years after attaining full age, failed to question the investment, the investment must be allowed as a credit in the account of the trustee.—*In re Fidelity & Deposit Co. of Maryland*, 138 N. W. 205.

VI. ACCOUNTING AND COMPENSATION OF TRUSTEE.

§ 315 (Mich.) Where a trustee for 6½ years made no demand for compensation for her services, and the trustee was a relative of the beneficiary, and the relationship between the parties was intimate, the disallowance of a claim for compensation was within the court's discretion.—*In re Fidelity & Deposit Co. of Maryland*, 138 N. W. 205.

ULTRA VIRES.

See Corporations, § 388; Municipal Corporations, § 350.

UNITED STATES.

See Army and Navy; Indians; Patents; Public Lands, § 139.

I. GOVERNMENT AND OFFICERS.

§ 25 (Neb.) Persons nominated at a primary election for presidential electors are nominated, not to vote for any particular candidate then known, but to vote, if elected, for the persons who may subsequently be nominated by the national convention of the party as candidates for President and Vice President.—*State v. Wait*, 138 N. W. 159.

Where the nominees of a party for presidential electors accept the nomination of another party having a different candidate for President and espousing different principles, for the same position, they forfeit the right to remain upon the ticket of the first party as effectually as if they had resigned therefrom.—*Id.*

USE AND OCCUPATION.

§ 1 (Iowa) The rule with reference to the rendition of services to a relative living in a family has no application to a claim for use and occupation of decedent's land.—*Black v. Miller*, 138 N. W. 535.

§ 8 (Iowa) A defense that the use and occupation of certain land belonging to defendant was to be gratuitous was unavailable unless pleaded.—*Black v. Miller*, 138 N. W. 535.

§ 9 (Iowa) In a suit for use and occupation of land under an arrangement with decedent, it was sufficient for the administrator to show that the occupant entered and used the land for his own benefit with decedent's assent.—*Black v. Miller*, 138 N. W. 535.

USER.

See Highways, § 2.

VACANCY.

See Elections, § 147; Officers, §§ 55, 58.

VACATION.

See Judgment, § 143.

VALUE.

See Embezzlement, § 48; Evidence, § 113.

VARIANCE.

See Criminal Law, § 628; Embezzlement, § 35; Municipal Corporations, § 511.

VENDOR AND PURCHASER.

See Adverse Possession, § 45; Appeal and Error, § 843; Associations; Brokers; Charities; Corporations, § 207; Deeds; Evidence, § 23; Exchange of Property; Fraud, § 58; Frauds, Statute of, §§ 110, 129; Fraudulent Conveyances, §§ 158, 295; Gifts; Injunction, § 26; Interest, § 37; Interpleader; Principal and Agent, § 171; Sales; Schools and School Districts, § 111; Specific Performance, §§ 14, 59, 105, 114, 119, 120, 121; Taxation, §§ 642-686, 708-722.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 3 (Iowa) A contract held a mere option, and not a contract of sale.—*Low v. Young, Mullarky & Long*, 138 N. W. 828.

§ 3 (Iowa) Written instrument construed, and held a lease, and not a contract for the sale of real property.—*Bissell v. Board of Review of Town of Dunlap*, 138 N. W. 830.

§ 3 (S.D.) A contract binding one party to sell certain land upon certain terms, and binding the other party to purchase same upon such terms, was a contract of sale, and not an option.—*Heimberger v. Rudd*, 138 N. W. 374.

§ 18 (Iowa) Plaintiff's rights under an option held forfeited by failure to comply with its terms, notwithstanding defendants, after breach, served notice of forfeiture provided by Code, § 4299, on contracts for sale of realty.—*Low v. Young, Mullarky & Long*, 138 N. W. 828.

§ 44 (Iowa) In partition, evidence held sufficient to warrant a finding that a parol conveyance was made to defendant's grantor in consideration for past services, and an agreement to pay the taxes on the land.—*Kerr v. Yager*, 138 N. W. 905.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(B) Rescission by Vendor.

§ 101 (Iowa) Notice of forfeiture, served upon the vendee, held to call upon him to fulfill the terms of his contract and make payments to the parties as specified therein, and not to exact payment of the entire amount to the vendor.—*Gaston v. Horn*, 138 N. W. 925.

A vendor's notice of forfeiture, which declared an intention to forfeit a contract, and the reasons therefor, was sufficient, though no forfeiture was expressly declared.—*Id.*

In a suit to quiet title against a vendor, defendant's cross-petition for cancellation of the contract was a sufficient declaration of forfeiture.—*Id.*

IV. PERFORMANCE OF CONTRACT.

§ 130 (Wis.) Where a vendor tendered title under foreclosure of a first mortgage, leaving outstanding a sheriff's deed, executed on foreclosure of a second mortgage, such deed, being a claim under judicial sale and not showing its invalidity on its face, constituted a cloud, and rendered the vendor's title unmarketable.—Stack v. Hickey, 138 N. W. 1011.

(A) Title and Estate of Vendor.

§ 133 (Wis.) Under a contract to convey a good title by warranty deed, the purchaser is not bound to accept a title which will require litigation to determine whether it is good.—Stack v. Hickey, 138 N. W. 1011.

V. RIGHTS AND LIABILITIES OF PARTIES.**(B) As to Third Persons in General.**

§ 215 (Mich.) Where plaintiff, who had an option, induced defendant to purchase at a price in excess of the option price, it being agreed that defendant should pay the amount demanded by the owner, and defendant paid the owner the option price, plaintiff could not recover the difference.—McGough v. Hopkins, 138 N. W. 210.

§ 215 (Mich.) A grantee who accepted a deed with knowledge of the facts which made the deed to its grantor invalid did not receive title.—German Corporation of Negaunee v. Negaunee German Aid Society, 138 N. W. 343.

(C) Bona Fide Purchasers.

§ 223 (Mich.) A wife took title to premises granted her by a decree of divorce, subject to the outstanding equities against it.—Holden v. Butler, 138 N. W. 1071.

§ 229 (Neb.) A purchaser of land near a projected line of street railway and boulevard is not charged with notice that by a subsequent change of the projected route a part of his purchase may be taken for the public improvement.—Ensign v. Citizens' Interurban Ry. Co., 138 N. W. 718.

§ 232 (Mich.) Where a mother conveyed her dower interest to a son for one-third of the income from the land and continued to reside upon the premises, it was sufficient notice to prevent the son's wife successfully claiming the rights of a bona fide purchaser without notice of the mother's interest.—Holden v. Butler, 138 N. W. 1071.

§ 244 (Minn.) An unrecorded quitclaim deed to plaintiff, construed with a contract entered into at the same time, held to constitute plaintiff the agent of the grantor to conduct litigation, sell the property, and divide the proceeds, and not to make plaintiff a bona fide purchaser, or give him a title prevailing against the subsequent estoppel of the grantor by judgment.—White v. Hewitt, 138 N. W. 421.

VII. REMEDIES OF PURCHASER.**(B) Actions for Breach of Contract.**

§ 350 (Wis.) In an action to recover damages resulting from the defendant's concealing himself, so that the plaintiff could not redeem from a judgment of foreclosure, evidence held insufficient to sustain findings that the plaintiff made a reasonable effort to make or tender payment, and that the defendant so concealed himself.—Loehr v. Dickson, 138 N. W. 61.

Evidence held insufficient to sustain a finding that the defendant on or about the day upon which the time for redemption expired extended the time of redemption for a few days.—Id.

§ 350 (Wis.) A verdict in an action involving the value of property for an amount greater than the value of the whole property given by any one witness, but less than the amount obtained by taking parts of the testimony of the different witnesses, held supported by the evi-

dence.—Darlington v. J. L. Gates Land Co., 138 N. W. 72.

§ 351 (Wis.) Interest held recoverable on damages sustained by a purchaser from his failure to receive timber on the land purchased which the vendor had previously sold.—Darlington v. J. L. Gates Land Co., 138 N. W. 72.

VENUE.

See Criminal Law, §§ 115-137, 1150.

III. CHANGE OF VENUE OR PLACE OF TRIAL.

§ 36 (Iowa) Code, § 3504, relating to change of venue, held not applicable to special proceeding for the appointment of a guardian, so that, where such proceeding is instituted in the wrong county, it must be dismissed, and cannot be transferred.—Holly v. Holly, 138 N. W. 445.

VERDICT.

See Appeal and Error, §§ 997-1008, 1070; New Trial, § 75; Trial, §§ 337-365.

VERIFICATION.

See Mechanics' Liens, § 154.

VESTED REMAINDERS.

See Wills, § 629.

VIEW.

See Trial, § 28.

VIEWERS.

See Drains, § 36.

VILLAGES.

See Municipal Corporations.

VOTERS.

See Elections.

WAIVER.

See Abandonment; Appeal and Error, § 232; Covenants, § 103; Criminal Law, § 1178; Drains, §§ 14, 86; Estoppel; Evidence, § 558; Execution, § 300; Insurance, §§ 137, 755, 784; Landlord and Tenant, § 234; Mandamus, § 26; Municipal Corporations, § 351; Trial, § 412.

WARDS.

See Municipal Corporations, §§ 40, 63.

WARNING.

See Master and Servant, §§ 150-155, 297; Street Railroads, §§ 81, 99.

WARRANT.

See Towns, § 29.

WARRANTY.

See Covenants, §§ 127, 130; Evidence, § 442; Sales, §§ 120, 262½, 434-445.

WATERS AND WATER COURSES.

See Corporations, § 388; Drains; Eminent Domain, §§ 35, 271, 276, 302, 323; Estoppel, § 93; Limitation of Actions, § 55; Municipal Corporations, § 719; Statutes, § 123.

I. APPROPRIATION OF RIGHTS IN PUBLIC LANDS.

§ 19 (Neb.) In determining priorities of appropriation under the Irrigation Act of 1895, the transcript of posted and recorded notices transmitted by the county clerk to the state board of irrigation constitutes the "claims" for

adjudication.—*Enterprise Irr. Dist. v. Tri-State Land Co.*, 138 N. W. 171.

In determining priorities under Irrigation Act of 1895, §§ 15-27, the board of irrigation, though it might recognize and determine existing conditions and limitations, is without power to impose new ones.—*Id.*

The posting and recording of notices of "claims" to the waters of the state under Laws 1889, c. 68, is a public record, of which all parties interested are bound to take notice.—*Id.*

§ 32 (Neb.) Evidence *held* to show that the right of a land company to an appropriation of water as successor in interest of the original appropriators was not lost by lack of diligence, nonuser, or abandonment.—*Enterprise Irr. Dist. v. Tri-State Land Co.*, 138 N. W. 171.

V. SURFACE WATERS.

§ 119 (Iowa) Defendant *held* not entitled to obstruct the flow of a natural waterway, and set the water back onto plaintiffs' land.—*Schlader v. Strever*, 138 N. W. 1105.

VI. APPROPRIATION AND PRESCRIPTION.

§ 135 (Neb.) Before the 1911 amendment (Laws 1911, c. 153, § 17) to Laws 1895, c. 69, § 18, and under Irrigation Act of 1889, one who has constructed a canal to carry water for hire to be used on the lands of others, and is ready and willing to furnish the water, has made the only application to a beneficial use that he can make, and his right continues till all lands along the canal use it, provided formerly that the water be applied within a reasonable time, and now within the time limited by statute.—*Enterprise Irr. Dist. v. Tri-State Land Co.*, 138 N. W. 171.

VII. CONVEYANCES AND CONTRACTS.

§ 154 (Wis.) The title in fee of an owner of lots abutting a street which does not extend to a hydraulic canal does not extend to the canal, and he is not entitled to any rights as a riparian owner on such canal.—*Childs v. Dahlke*, 138 N. W. 277.

§ 156 (Wis.) A grantee of lots having a right to water power *held* entitled only to have proper connections made, and not damages for the shortening of a canal, etc., after a flood.—*Childs v. Dahlke*, 138 N. W. 277.

§ 158 (Iowa) Plaintiffs' ancestor having constructed a drain through the land of defendant's grantor pursuant to a drainage agreement, defendant *held* estopped to obstruct the same, or deprive plaintiffs of the beneficial use thereof.—*Schlader v. Strever*, 138 N. W. 1105.

Plaintiffs' contract right to the discharge of surface water through a drain over defendant's land *held* not limited to the system as it originally existed, but subject to extension in accordance with the usages of good husbandry.—*Id.*

Under Code Supp. 1907, § 1989a53, where drainage is not wholly on the owner's land, but is carried into or discharged on land of an adjoining owner with the consent of the latter, the original owner is not liable for damages.—*Id.*

§ 158½ (Iowa) Evidence *held* to warrant a finding of the making of a contract for the drainage of plaintiffs' land through that of defendant's grantor.—*Schlader v. Strever*, 138 N. W. 1105.

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

§ 164 (Mich.) That a dam owner entitled under a grant to maintain an eight-foot head of water maintained only seven feet for 20 years

would not preclude him from afterwards maintaining the greater head as against the grantor.—*Tebbel v. Spencer Electric Light & Power Co.*, 138 N. W. 1073.

§ 165 (Mich.) Grant by an upper dam owner to a lower owner of right to maintain an eight-foot head of water requires the grantor to bear all the consequences, without regard to how far back the water is set.—*Tebbel v. Spencer Electric Light & Power Co.*, 138 N. W. 1073.

Grant of right to maintain a "dam to a height as to have at no time a head of water at said dam of more than eight feet," etc., does not permit maintenance of a dam eight feet high, if the water flows over the crest at a depth of two or more inches.—*Id.*

§ 171 (Iowa) A street railway company has no right to so construct and maintain its embankments for track purposes as to flood the land above it.—*Nelson v. Omaha & C. B. St. Ry. Co.*, 138 N. W. 831.

§ 171 (Neb.) It is the duty of one who controls a ditch maintained to lower the waters of a lake or pond to a navigable river to maintain a dam at the outlet of the ditch sufficient to prevent the flood waters of the river from overflowing the lands of other persons.—*Christensen v. Omaha Ice & Cold Storage Co.*, 138 N. W. 141.

§ 172 (Neb.) Where a dam across the outlet of a ditch emptying into a river is negligently constructed, and farm lands are overflowed and crops and personal property thereon are injured, the person or corporation having the control of the ditch and dam is liable.—*Christensen v. Omaha Ice & Cold Storage Co.*, 138 N. W. 141.

§ 176 (Neb.) That a ditch emptying into a river and dam crossing its mouth are situated on lands owned by other than the defendant is no defense to an action for flowage from the negligent maintenance of the dam, where defendant freely controls the dam in the prosecution of his private business.—*Christensen v. Omaha Ice & Cold Storage Co.*, 138 N. W. 141.

§ 179 (Mich.) As between rival dam owners, *held* that, in measuring a head of water in a stream, it will be assumed the usual method was adopted; that is, by measuring the vertical distance from the water in the flume or place from which it is drawn to the tailwater.—*Tebbel v. Spencer Electric Light & Power Co.*, 138 N. W. 1073.

IX. PUBLIC WATER SUPPLY.

(B) Irrigation and Other Agricultural Purposes.

§ 240 (Neb.) The limitation of 30 days within which to issue a certificate by the board of irrigation under the Irrigation Act of 1895, § 21, is merely directory; such certificate not being an adjudication, but merely evidence thereof.—*Enterprise Irr. Dist. v. Tri-State Land Co.*, 138 N. W. 171.

§ 263 (Neb.) Where the owner of an irrigation canal, in refusing to furnish water, made no objection that the holders of the water right had assigned it to the claimant, the canal owner cannot, in an action for damages from such refusal, defend on that ground.—*Chalupa v. Tri-State Land Co.*, 138 N. W. 603.

Where rent is payable in kind, the landlords and tenant are owners in common of the crops and can maintain a joint action for damages from failure to furnish water for irrigation.—*Id.*

Where landlord and tenant, suing for failure of a water company to furnish water for irrigation, have recognized their lease, and the tenant has farmed the land, it is not a defense to the water company that the lease was voidable because of informalities in its execution.—*Id.*

WAYS.

See Easements; Highways.

WHARVES.

See Commerce; Municipal Corporations, §§ 121, 719.

WILLS.

See Charities; Descent and Distribution; Evidence, § 553; Executors and Administrators; Judgment, §§ 590, 785; Trusts; Witnesses, § 199.

II. TESTAMENTARY CAPACITY.

§ 53 (Iowa) Evidence that testator's widow, named as one of his executors, could not read, and that his son, one of the main devisees, named as the other executor, was addicted to drink, as well as evidence of the character and habits of all the other children and heirs, is admissible on a will contest as bearing on the state of testator's mind.—*In re Law's Estate*, 138 N. W. 531.

§ 55 (Iowa) Evidence on a contest of a will held to support a finding of lack of testamentary capacity.—*In re Law's Estate*, 138 N. W. 531.

III. CONTRACTS TO DEVISE OR BEQUEATH.

§ 58 (Neb.) Where it is sought to establish an oral agreement to make a certain will and to set aside conflicting provisions in the will made, the proof must be convincing to overcome the presumption of good faith of the testator.—*Labs v. Labs*, 138 N. W. 561.

§ 58 (Neb.) Where a husband and wife adopt an infant and jointly orally agree that, if the child will remain with them during their lives, they will leave him all of the estate of which they died seised, the statute as to homesteads cannot be pleaded by the heirs as a defense to a suit to enforce the contract.—*Moline v. Carlson*, 138 N. W. 721.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(I) Hearing or Trial.

§ 329 (Iowa) Instruction as to weight to be given opinions of experts and nonexperts who have testified to unsoundness of testator's mind held proper.—*In re Law's Estate*, 138 N. W. 531.

§ 330 (Iowa) An instruction on testamentary capacity using the words "full and intelligent" knowledge of his act, and "full" knowledge of his property, etc., held not to call for too high a degree of capacity.—*In re Law's Estate*, 138 N. W. 531.

(K) Review.

§ 384 (Iowa) Nongiving of requested instruction that opinions of nonexperts that testator's mind was sound need not be based on detailed facts given by them was harmless; the court having admitted such testimony and directed the consideration of all testimony adduced.—*In re Law's Estate*, 138 N. W. 531.

(M) Operation and Effect.

§ 427 (Iowa) Under Code, §§ 3296, 3447, making the probating of a will conclusive proof of its due execution until set aside, and authorizing an action to set aside to be brought within five years, the admission of a will to probate without contest effects a prima facie establishment of the instrument, but does not cut off the right of contest within such period.—*Kelly v. Kelly*, 138 N. W. 851.

VI. CONSTRUCTION.

(A) General Rules.

§ 440 (Wis.) A testator's intent must be gathered from the entire will under the facts and circumstances surrounding him.—*In re Reynolds' Will*, 138 N. W. 1019.

§ 441 (Wis.) In construing a will, the intention must be gathered from the instrument as a whole, read in the light of the circumstances which surrounded testator.—*Flint v. Wisconsin Trust Co.*, 138 N. W. 629.

§ 450 (Iowa) The court in construing a will must give effect to every part thereof, and carry out the evident intention of the testator.—*Boekemeier v. Boekemeier*, 138 N. W. 493.

(B) Designation of Devisees and Legatees and Their Respective Shares.

§ 506 (Wis.) The word "heirs" in a will, unless the context shows a contrary intention, must be construed as meaning all those who in case of intestacy would be entitled by law to inherit on the death of the testator or ancestor named.—*Flint v. Wisconsin Trust Co.*, 138 N. W. 629.

Before a court can say that the word "heirs," as used in a will, is not used in its primary, technical meaning, it should clearly appear that testator intended to say something different from what he did say.—*Id.*

A will construed, and the word "heirs" held to be used in its technical sense as meaning persons entitled to inherit on the death of the testator.—*Id.*

(E) Nature of Estates and Interests Created.

§ 603 (Iowa) A devise to one and to the heirs of his own body creates in the devisee a conditional fee; and on his death, without issue, the estate reverts to testator's heirs.—*Sagers v. Sagers*, 138 N. W. 911.

§ 608 (Iowa) A will held to create only a life estate, and the rule in *Shelley's Case* not controlling a clearly shown intent of the testator.—*Williams v. Williams*, 138 N. W. 480.

§ 608 (Iowa) A devise to one and the heirs of his own body is not within the rule in *Shelley's Case*.—*Sagers v. Sagers*, 138 N. W. 911. To bring a will within the rule in *Shelley's Case* the limitations to heirs must be by way of remainder; and it does not apply to a devise to one of his heirs, or the heirs of his body.—*Id.*

§ 614 (Iowa) Where testator in one paragraph of his will gave to his wife all his property, and declared in subsequent paragraphs that, after her death, designated children should receive legacies, and the residue should be divided equally between his children, the wife acquired only a life estate with remainder to the children.—*Boekemeier v. Boekemeier*, 138 N. W. 493.

(F) Vested or Contingent Estates and Interests.

§ 629 (Wis.) The rule of law which favors vested estates is a rule of construction that may have controlling weight in a doubtful case, but cannot defeat the intent of the testator where reasonably clear.—*Flint v. Wisconsin Trust Co.*, 138 N. W. 629.

§ 634 (Wis.) A bequest to residuary legatees subject to a trust for ten years, free from conditions which might defeat the gift when the trust expired, vested a present title.—*In re Reynolds' Will*, 138 N. W. 1019.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(A) Nature of Title and Rights in General.

§ 740 (Wis.) Where the whole residuum is disposed of, and no part is left to become intestate, a stipulation of the legatees for a distribution contrary thereto must be disregarded.—*In re Reynolds' Will*, 138 N. W. 1019.

(D) Election.

§ 802 (Wis.) Where a will bequeathes the residue in certain percentages to the widow and

others, and the widow renounces the provisions of the will, the portion of the residue to which she would have been entitled went to the other residuary legatees generally, without restriction of a particular part thereof to each one.—In re Reynolds' Will, 138 N. W. 1019.

A widow's renunciation will not disturb the disposition of other property, where it does not necessarily interfere therewith.—Id.

Where testator, after making specified bequests, gave the "residue" to his widow and others to be divided between them according to specified percentages, and the widow renounced the will, the "residue" consisted of what remained after deducting the debts and the widow's legal share.—Id.

WITNESSES.

See Affidavits; Attorney and Client; Continuance; Criminal Law, §§ 511, 628, 629, 662, 1156, 1160; Depositions; Evidence, § 191; Rape, § 43.

II. COMPETENCY.

(A) Capacity and Qualifications in General.

§ 43 (Iowa) A witness, otherwise competent to testify, is not rendered incompetent because she is deaf.—State v. Butler, 138 N. W. 383.

§ 52 (Minn.) Admissions against interest are admissible against the one making them, though the spouse of such person is a party; such admissions not being within Rev. Laws 1905, § 4660.—Kanne v. Kanne, 138 N. W. 25.

§ 67 (Iowa) The relation of attorney and client does not render the attorney incompetent to testify.—Flood v. Bollmeier, 138 N. W. 1102.

(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

§ 139 (Iowa) A son who was not a party to a suit could testify as to conversations with his deceased father relative to transactions with another son.—Kerr v. Yager, 138 N. W. 905.

§ 140 (Minn.) A child of the grantee in a deed sought to be set aside is not an interested party, and is not prohibited from testifying to conversations between the deceased grantor and his son.—McEleney v. Donovan, 138 N. W. 306.

§ 144 (Iowa) The grantor of a party in an action involving land cannot testify to personal transactions or communications between himself and his deceased father, from whom he claimed an oral conveyance of land under Code, § 4604.—Kerr v. Yager, 138 N. W. 905.

§ 146 (Iowa) A wife can testify as to transactions between her husband and his deceased grantor, in which she took no part, in an action in which neither she nor her husband was a party.—Kerr v. Yager, 138 N. W. 905.

§ 159 (Iowa) Testimony of the mother of a deceased minor to the effect that she had emancipated him *held* not incompetent as relating to personal transactions with one deceased.—Scott v. O'Leary, 138 N. W. 512.

§ 166 (Mich.) Under Comp. Laws 1897, § 10212, as amended by Pub. Acts 1903, No. 30, the maker of a note, when sued by a transferee of an assignee of the administrator of the deceased payee, may not testify to matters equally within the knowledge of the deceased payee.—Molby v. Murray, 138 N. W. 1069.

(D) Confidential Relations and Privileged Communications.

§ 192 (Iowa) Declarations of an insured, made to his wife before and after he took out a policy, as to his health, *held* privileged.—Vernon

v. Iowa State Traveling Men's Ass'n, 138 N. W. 696.

§ 198 (Mich.) Though confidential communications between attorney and client cannot be disclosed by the attorney, without the consent of the client, or after his death of the personal representative, an attorney may testify when not stating any communications between himself and client.—Steketee v. Newkirk, 138 N. W. 1034.

§ 199 (Mich.) A letter written by a beneficiary under a will to the testamentary trustee is not a privileged communication between client and attorney, where there is no evidence of such relation.—Steketee v. Newkirk, 138 N. W. 1034.

§ 203 (Iowa) Prosecutrix having testified that she was not asked as to certain matters before the grand jury, defendant was entitled to prove the contrary by the county attorney, who conducted the grand jury investigation and acted as the clerk of the grand jury, notwithstanding Code, § 4608, prohibiting disclosure of communications by an attorney.—State v. Hector, 138 N. W. 930.

§ 211 (Iowa) In an action on an insurance policy, it was not error to exclude the testimony of insured's attending physician as to his last sickness upon the statutory objection being made thereto.—Unterharscheidt v. Missouri State Life Ins. Co., 138 N. W. 459.

§ 211 (Mich.) The testimony of a physician as to the general health and mental condition of a patient *held* competent, where it was not information "necessary to enable him to prescribe" within Comp. Laws, § 10181, prohibiting a physician from disclosing such information acquired in attending any patient.—Steketee v. Newkirk, 138 N. W. 1034.

§ 211 (Neb.) A doctor who dressed the wound of defendant accused of drunkenness was incompetent to testify as to defendant's condition under Code Civ. Proc. § 333, providing that no physician shall disclose any confidential communication intrusted to him in his professional capacity.—Freeburg v. State, 138 N. W. 143.

§ 217 (Neb.) In a trial for statutory rape, where the female child died from the effects of an abortion, evidence by the physicians who attended her and were present at the time of the miscarriage, as to what they discovered upon an examination of the patient, is not prohibited by law.—Thrasher v. State, 138 N. W. 120.

III. EXAMINATION.

(A) Taking Testimony in General.

§ 236 (Mich.) The exclusion of a question as to how many times a witness had seen persons stumbling at the place where the accident occurred *held* not erroneous, as it included accidents before and after the one in issue.—Branch v. Klatt, 138 N. W. 263.

§ 237 (Mich.) Exclusion of a question as to how many times witness had seen persons stumbling at the place where the accident occurred *held* not erroneous because the question improperly assumed as a fact that such accidents had occurred.—Branch v. Klatt, 138 N. W. 263.

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§ 269 (Iowa) Where a state's witness testified to the imbecility of prosecutrix, and that she had not learned to walk at 18 months, and

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